

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 38 OF 2023

BETWEEN

ALEX CHUMA KAPAMA.....APPLICANT

VERSUS

REGISTERED TRUSTEES OF JUMUIYA YA MAENDELEO

(KIJITONYAMA DEVELOPMENT COMMUNITY) KIJICO.....1ST RESPONDENT

KIONDO ATHUMANI MAHANYU.....2ND RESPONDENT

CHARLES RAJABU IRIGO.....3RD RESPONDENT

JOYCE JOSEPH NDESAMBURO.....4TH RESPONDENT

RULING

22/11/2023 & 5/12/2023

KAGOMBA, J.

Following the application for enlargement of time to apply for leave to file for judicial review filed by the applicant herein, the respondent filed a notice of preliminary objection on point of law on the following effects;

- 1. That, the application is incompetent for wrong citation of the applicable provision of law.*
- 2. That, the application is incompetent for non-citation of the applicable provision of law.*

3. *That, the application is incompetent for being supported with an affidavit having a defective jurat of attestation.*
4. *That, the application is misconceived hence incompetent as the suit cannot be maintained against the 2nd, 3^d and 4th respondents who are not public bodies.*
5. *That, the application is incompetent before the court as it is filed prematurely contrary to regulation 15 of Kijitonyama Development Community, 2021 which prohibits members from taking matters to court before exhausting the internal mechanisms for dispute settlement.*
6. *That, the suit is misconceived hence incompetent as the applicant ought to have filed an appeal and or revision against dismissal of miscellaneous civil application No. 48 of 2023 by the District Court of Kinondoni at Kinondoni for the claims in this application have already been determined on merit thus the claims are resjudicata*

During hearing of the preliminary objection, the respondents were represented by Andrew Miraa, learned Advocate while Paul Patience Hyera, also learned Advocate, appeared for the applicant.

Arguing on the 1st and 2nd points of objection combined, Mr. Miraa contended that the provision of section 95 of the Civil Procedure Code, [Cap

33 R.E 2019] (hereinafter the "CPC") and section 2(3) of the Judicature and Application of Laws Act, [Cap 356 R.E 2019] used to move the court were not the right enabling provisions. It is his contention that since the application is intended to seek extension of time apply for leave to file for judicial review, the enabling provisions should be rule 8 of the Law Reforms (Fatal Accident and Miscellaneous provisions) Rules, GN No. 324 of 2014 (hereinafter "GN 324 of 2014") and section 14(1) of the Law of Limitation Act, [Cap 89 R.E 2019]. It is his further contention that once a matter is lodged under wrong provisions of the law, it should be struck out. He cited the case of **Valerian Moses Bandungi vs Gozbert Cleophace and Another**, Misc. Land Application No. 89 of 2021, High Court at Bukoba, for this contention.

While citing the case of **Shaku Haaji Othman Juma vs AG and Another** (2000) TLR 49, he argued further that section 95 of CPC would be applicable if there was no any other specific provision of the law to cater for this type of application.

With regard to the third point of objection, Mr. Miraa submitted that the application is supported with the affidavit which has no signature of the deponent in the jurat of attestation, hence it becomes void. He referred to the case of **Tanzania Railways Corporation and Another vs Ruben Kiengu**, Misc Labour Application No. 4 of 2021 and the case of **Mohamed**

I. A. Abduhussein vs Ita Kempampu Ltd (2005), both being decisions of this court, to urge the court to strike out the application for being supported with a defective affidavit.

On the fourth point of objection, the learned Advocate contended that the application is incompetent and the same should be struck out for being preferred against the 2nd, 3rd and 4th respondents who are not public bodies and have no public duty capable of being challenged through judicial review. He referred to the provisions of rule 5 and 6 of GN No. 324 of 2014 and the cases of **Felix Msele vs Minister of Labour and 3 Others**, [2002] T.L.R 437 and **Regional Services Limited vs Secretary General Tender Board and Another**, (2001) T.L.R 184 on the precincts of judicial review.

Arguing for the fifth point of objection, the learned advocate submitted that the applicant has not exhausted the remedies provided under regulation 15(iii) of the Kijitonyama Development Community regulations, 2021 (hereinafter "KDC Regulations"). He added that the said regulation requires any aggrieved member of Kijitonyama Development Community (hereinafter "KDC") to bring the same to the Disciplinary and Ethics Committee of the before taking his grievances to the court. His contention is, by skipping this procedure, the application is rendered premature and should be struck out.

As for the sixth, and last, point of objection, Mr. Miraa submitted that, this matter is *res judicata* under section 9 of the CPC. He contends that the applicant initially filed Misc Application No. 48 of 2023 at the District Court of Kinondoni at Kinondoni having the same substance as the matter he intends to file for judicial review. It is therefore his argument that this matter should be dismissed. It is his further submission that the applicant had a remedy of filing an appeal against the decision of the District Court of Kinondoni, if was not satisfied with it.

Replying to the above submissions, Mr. Hyera started with clarifying the position of the law stated in the case of **James Burchard Rugemalila vs The Republic and Another**, Criminal Application No. 59/19 of 2017, CAT, Dar es salaam that for a notice of preliminary objection to be tenable, it should show the nature and scope of the objection by specifying the provision of the law infringed. On this premise, he contended that it is only the 5th point of objection which should be entertained by this court.

Without prejudice to the above, Mr. Hyera made specific replies to all the points of objection as argued by his counterpart. As for the first and second points of objection, he contended that non-citation or wrong citation of the provisions of law is not fatal, provided that the court has jurisdiction to grant the prayers sought. He relied on the holding of the Court of Appeal

in **The Director General LAPF Pension Fund vs Pascal Ngalo**, Civil Application No. 76 of 2018, CAT, Mwanza.

Replying to the third point of objection, the learned advocate urged the court to apply the overriding objective principle to correct the error arguing that the applicant signed other places save for a part of the jurat, adding that such an omission cannot render the whole affidavit invalid.

On the fourth point of objection, Mr. Hyra was of the view that the same was misconceived considering that the application before the court is for extension of time and is not the main application. To him, the objection is premature as it questions the validity of suing the 2nd, 3rd and 4th respondents at this stage. He, however, argued that what should be considered is the effect of the impugned decision to the public. He referred to the case of **Alhaj A. J. Mangula vs BAKWATA** (1997) TLR 50 for a contention that an order of *certiorari* could lie against private bodies, provided such body discharges public functions.

As for the fifth point of objection, Mr. Hyera argued that the same is also premature because the application is for extension of time. He added that the matter which the applicant intends to pursue is based on the administration and constitution of the community which do not fall under the purview of the KDC's Disciplinary and Ethics Committee.

Mr. Hyera countered the sixth point of objection by contending that the same is also premature because the application before the court is for extension of time. He added that the matter could be considered *res judicata* if it involved the same court having same jurisdiction, involving the same parties and if it was decided on merit. In the end, he prayed for all the preliminary points of objection to be dismissed for lacking merits.

Given opportunity to rejoin, Mr. Miraa contended that the notice of preliminary objection filed has stated the nature and scope of the objections raised. He prayed the court to consider the same accordingly.

He went on to distinguish the case of **The Director General LAPF Pension Fund** (supra) saying that the circumstance in the instant matter is different with the circumstances in that case, owing to the fact that the instant application is not made under any proper provision of the law.

Regarding the invocation of the overriding principle, he was of the view that the same cannot be applied where there is non-observance of mandatory provisions of law.

On suing the 2nd, 3rd and 4th respondents, he rejoined that these natural persons are not private bodies in view of the decision in **Alhaj Mangula** (supra).

Learned Advocate was emphatic on the need for the application to comply with regulation 15(iii) of the KDC Regulations, which bars **any** matter to be preferred to the court prior to passing through KDC' Disciplinary and Ethics Committee.

He was equally emphatic that the application contravened section 9 of CPC as the same dispute was before the District Court. He added that it is unnecessarily for the court to be the same, since the law refers to "any court with competent jurisdiction".

For the above reasons, Mr. Miraa prayed for the application to be struck out, with costs.

Basing on the submissions made by counsel for both sides, the issue before the court is whether the preliminary objection raised by the respondents is meritorious.

Before deciding on the merits of the objections, I find it compelling to determine whether the raised points of objection befit a preliminary objection at all, as per Mr. Hyera's lamentation.

Looking at the notice of the preliminary objection, it appears to me that the filed notice of preliminary objection shows sufficiently clear the nature and scope of each point of objection raised. In short, I don't see how the applicant will be prejudiced in arguing any of objections raised as it is.

As regards the case of **James Rugemalira** (Supra) referred to this court by counsel for the applicant, the principle of law stated therein has its legal basis in rule 107 of the Court of Appeal Rules, 2009 (as amended). The said rules are inapplicable to this court. For these reasons the contention by Mr. Hyera is disregarded.

In determining the merits of the preliminary objection, I prefer to start with the fifth point of objection that challenges the application for being premature before this court. The contention is simply that the applicant was supposed to exhaust internal mechanism for dispute settlement, as provided under regulation 15(iii) of KDC Regulations, before coming to this court.

I have read regulation 15(iii) of the KDC Regulations, from the attachments to the pleadings. The said regulation speaks loudly on the prohibition for any member to take any disputes to court before presenting the same to the Disciplinary and Ethics Committee of KDC. It provides;

*"(iii) Mwanajumuiya yeyote hataruhusiwa kupeleka **shauri lolote** mahakamani kabla ya kuwasilisha shauri hilo kwenye kamati ya Nidhamu na Maadili."* [Emphasis added]

Literary translated as; No any member of the community shall be allowed to lodge **any dispute** in court before taking that matter to the Disciplinary and Ethics Committee.

Obviously, the above regulation speaks for itself. It is incapable of being given any interpretation other than the applicant was mandatorily required to take this dispute to the Disciplinary and Ethics Committee before coming to court.

In his reply submission, the counsel for the applicant contended that what the applicant intends to pursue, if granted time extension, cannot be dealt with by the said Committee. He sees nothing disciplinary nor ethical in the matter that eventually seeks to question the administration and the constitution of KDC. On this argument, the learned counsel has obviously misconstrued regulation 15(iii) forecited. The words "***shauri lolote***" or "any dispute" means any dispute that concerns the community, inclusive of the application which the applicant intends to eventually file in court.

Inspired by the decision of the Court of Appeal in **Salim O. Kobora vs TANESCO and 2 Others**, Civil Appeal No. 55 of 2014, CAT, Dar es Salaam, I am of a firm position that since the KDC Regulations provide for a specific forum for resolving disputes concerning that community, being a forum of first instance, the applicant is obligated to resort to it first prior to seeking recourse to court. In **Salim O. Kobora** (supra) it was held that;

"....where a certain law provides for a specific forum to first deal with a certain dispute, a resort to it first is

imperative before one seeks recourse to court. Where that is not observed, the attendant court's decision is rendered a nullity."

I am mindful of Mr. Hyera's other contention that this point of objection is premature for being raised at this stage when the applicant is seeking nothing but extension of time. Essentially, I find this contention immaterial because the law is settled that a preliminary objection can be raised at any time provided the same is on a point of law and emanates from the pleadings. In **Zaidi Baraka and 2 Others vs Exim Bank (Tanzania) Limited**, Civil Appeal No. 194 of 2016, CAT, Dar es Salaam, it was held that;

"There is consistent judicial pronouncements that a point of law can be taken into cognizance and adjudicated upon at any stage of proceedings provided that the facts admitted or proved on the record enable the court to determine the point of law in question."

Basing on the above position of law, it is my considered view that this court is not precluded from determining the preliminary objection. Besides, it would be illogical to ignore this objection, at this stage, while it is trite that judicial review, which the applicant would eventually seek, cannot lie if he has not exhausted domestic remedies.

For all the above reasons, I find merit in the fifth point of the preliminary objection, which suffices to dispose of this application. I therefore conserve energy by not labouring on the remaining points which I consider to be inconsequential.

In the final analysis, the application is incompetent for being prematurely filed in this court, and is accordingly struck out. Since the parties appear to be from the same community, I make no order as to costs.

Order accordingly.

Dated at Dodoma and delivered this 5th day of December, 2023.




ABDI S. KAGOMBA
JUDGE