

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MOSHI

MISC. LABOUR APPLICATION NO. 05 OF 2023

(Arising from Labour Execution No. 16 of 2020)

VICTOR MICHAEL TESHA APPLICANT

VERSUS

TANGANYIKA COFFEE CURING CO. LTD RESPONDENT

RULING

27/11/2023 & 15/12/2023

SIMFUKWE, J.

The applicant filed this application under **Order XXI Rule 95(1) and section 95 of the Civil Procedure Code, Cap 33 R.E 2019** seeking for the following orders:

1. That, this Honourable Court be pleased to order the respondent to deliver possession of Plot No. 18, Block 8, with C.T No. 11293, located within Moshi Municipality by surrendering the Certificate of title to the

applicant/purchaser and refrain from obstructing the applicant in entering possession of the said land.

2. Costs of this application to be provided for.
3. Any other order that the Honourable Court may deem fit and just to grant.

The application is supported by an affidavit sworn by the applicant Victor Michael Tesha. It was opposed by the counter affidavit of one Peter Haygaru the Managing Director of the respondent which was filed together with notice of the following preliminary objections:

1. That, the application is fatally defective as the jurisdiction of the court is not obtained.
2. That, the application is incompetent as the prayer in chamber summons is not buttressed in the affidavit supporting the application.
3. That, the application is fatally incompetent as based on fatally defective affidavit.
4. That, the application is res subjudice to Land Case No. 02 of 2023 pending before this honourable court.

The preliminary objections were argued by way of written submissions. Mr. Elikunda Kipoko learned counsel argued the preliminary objection for the

respondent, while Mr. Wilbard John Massawe contested the objections for the applicant.

On the first preliminary objection that the application is fatally defective as the jurisdiction of the court is not obtained; Mr. Kipoko submitted that, the applicant has cited **Order XXI, Rule 95 (1) and section 95 of the Civil Procedure Code**, (supra) as the only enabling provisions to obtain the jurisdiction of this court. He quoted **Order XXI rule 95(1) of the CPC** which provides that:

"Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the court complaining of such resistance or obstructing."

He submitted that, the quoted provision provides for complaints only to be lodged and nothing more. That, under subrule 2, upon sufficient grounds the court will issue summons to the respondent, thus, the person resisting or obstructing possession. Mr. Kipoko was of the view that the cited provision does not confer jurisdiction to this court to grant the relief sought. He proposed that the applicant should have cited **Order XXI Rule 96 of the CPC** which provides that:

"Where the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the court may also, at the instance of the applicant, order the judgment debtor, or any person acting at his instigation, to be detained as a civil prisoner for a term which may extend to thirty days."

The learned counsel elaborated that, this application suffers a clear defect of non-citation which is fatal and the only remedy is for the application to be struck out with costs. He elaborated further that, it is trite law that wrong citation or failure to cite proper provision of law renders the application incompetent as it was held in the case of **China Henan International Co-operation Group v. Salvand Rwegasira [2006] TLR 220**.

On the second preliminary objection that the application is incompetent as the prayer in the chamber summons is not buttressed in the affidavit supporting the application; Mr. Kipoko averred that, it is clear that in his chamber summons the applicant speaks of Plot 18 Block B, with **CT No. 11293** while at paragraph 4 of the supporting affidavit the property cited is Plot 18 Block B with **CT No. 12254**. He submitted that; those are two distinct

properties. It was submitted further that, since the property prayed for in the chamber summons is not supported in the affidavit, it is as good as to say that the prayer is not supported in the affidavit. Since the affidavit is the only evidence in support of the prayer, then the application is baseless as there is no evidence in support of the prayer.

In support of the objection that the application is fatally incompetent as based on fatally defective affidavit; Mr. Kipoko stated that, in the verification clause, the applicant has verified as the head of legal services of the 2nd respondent while there is no second respondent in this matter.

Lastly, the learned counsel dropped the last preliminary objection as the said land case had been struck out.

In his submission in opposition to the preliminary objections; Mr. Wilbard submitted inter alia that, if he understood the learned counsel for the respondent, he is insinuating that the correct provision should be **Order XXI rule 96 of the CPC**. He was of the view that the objection is misconceived and a bad attempt to mislead this court. He said so because an application for vacant possession by a purchaser of a property sold in satisfaction of a decree cannot be made in any way other than **Order XXI rule 95 (1) of the CPC**. Thus, **Order XXI rule 96** preferred as an alternative is inapplicable. The learned counsel went on to explain that, the said provision

rather provides what the court must do if it is satisfied that the judgment debtor or whoever is in possession of the suit property is resisting delivery of the property in question. He compared the scenario in this case to the case of **Edward Balandya v. National Bank of Commerce Ltd**, Misc. Application Number 10 of 2022, HC, Commercial Division (unreported). He stated further that, assuming for the sake of argument that was the correct position of the law, which he argued against, still the omission would not go to the root of the matter at hand warranting the consequences cited. He averred that the decision in **China Henan International Holding** relied upon by the respondent's counsel is now a dead law and thus of no assistance to his argument.

The learned counsel contended that the current position is that, provided that the respective Court has the power to grant the prayers being sought, then incorrect provision will not render the application incompetent and instead, if the need arises, the litigant will be allowed to insert the correct provision as provided under **rule 48 of the Court of Appeal Rules, 2009** (as amended from time to time), paragraph 2. That, the aim is to facilitate expeditious settlement of disputes justly without undue regard to technical and fanciful omissions in dictates of **section 3A and 3B of the Civil Procedure Code** which requires courts and tribunals to entertain matters without being tied to

technicalities. He implored this court to dismiss the preliminary objection. In the alternative, the learned counsel prayed that if the court finds that the correct provision is **Order XXI rule 96**, it should permit hand insertion of such provision and allow the application to be heard on merit.

In countering the second preliminary objection, Mr. Wilbard made reference to the case of **The Principal Secretary, Ministry of Defence and National Service v. Duram P. Valambhia [1992} TLR 387** (CA) in which His Lordship Nyalali CJ (as he then was) observed that:

"(ii) A notice of motion and the accompanying affidavit are in the very nature of things complementary to each other, and it would be wrong and indeed unrealistic to look at them in isolation. The proper thing to do is to look at both of them and if on the basis of that it is clear what relief is being sought then, the Court should proceed to consider and determine the matter, regard being had to the objection, if any, raised by the opposite party.

(iii) An oral address can take care of the inadequacy in the notice of motion by referring specifically to the relief sought."

From the foregoing, the learned counsel concluded that: **One**, reading the application at hand, as a whole, variation on the Certificate of Title does not vitiate the application, if there was any because Plot numbers and Block

Number are well indicated and the Respondent is very much aware of what property is being referred to; **Two**, if they were incorrectly referred to as argued, the applicant can cure that by correcting the details at the date of hearing as stated by the Court of Appeal in the case of **Duram P. Valambhia** (supra) that “***oral address can take care of the inadequacy.***” Mr. Wilbard invited this court to hold so and dismiss the objection at hand for being bereft of merit.

On the third preliminary objection that the verification clause is defective, Mr. Wilbard agreed that there is such clerical omission. However, he argued that the omission is curable under **section 3A and 3B of the CPC**. He buttressed his argument with the case of **Sanyou Service Station Ltd v. BP Tanzania Ltd** (now Puma Energy T. Ltd) (Civil Application 185 of 2018 [2019] TZCA 144 (20 May 2019) Tanzlii, in which the Court of Appeal permitted amendment of an application to cure defective verification clause which left some paragraphs unverified. On that account, Mr. Wilbard urged this court to ignore the obvious clerical error and consider it as no longer part of the verification clause and order the hearing of this application to proceed on merit.

In his rejoinder Mr. Kipoko strongly submitted that, since jurisdiction is creature of statutes as provided by enabling provision, then non citation of the provision conferring jurisdiction is fatal to the application. He asserted

that, the position has been held by this court in many cases. He rejoined further that rule 48 of the Court of Appeal Rules does not empower this court to insert or rectify otherwise a fatal application which suffers non citation. That, the rule empowers the Court of Appeal. Hence, the jurisdiction of the court has not been obtained and the application is fatally incompetent and should be struck out with costs.

On the second preliminary objection, it was re-joined that, it is clear that the applicant in his chamber summons speaks of Plot 18, Block "B", with **CT No. 11293** while in the supporting affidavit to wit paragraph four the property cited is Plot 18, Block "B", with **CT No. 12254**. Mr. Kipoko reiterated that those are two distinct properties and the applicant has not disputed of referring to two distinct properties. It was insisted that, the property cited in the chamber summons carries the day. That, since the chamber summons can only be entertained if the same is supported in the affidavit, then, the application is incompetent as the property in the chamber summons is not evidenced in the supporting affidavit. The evidence in support of the prayers is to be found in the supporting affidavit, short of that the application is incompetent.

Concerning the argument that the property number can be orally addressed during the hearing, Mr. Kipoko was of the opinion that the same is grossly

misleading. That, it must be noted that, the hearing of this application will be done by submission basing on the facts in the affidavit and that submissions are not evidence.

On the last preliminary objection that the application is fatally incompetent as based on fatally defective affidavit, Mr. Kipoko stressed that it is apparent that Victor Michael Tesha is the applicant and not head of legal services of the 2nd respondent, who does not exist in this case. He was of the view that the applicant has not replied to the objection. Hence, it is a concession which should lead to striking out of this application.

Having keenly considered submissions of both parties, the affidavit and counter affidavit, the issue for determination is ***whether the raised preliminary objections have merit.***

On the outset, my quick scrutiny of the submissions of both parties, points out that the learned counsel for the applicant conceded to almost all the raised preliminary objections. However, he was of the view that the errors can be rectified upon leave of this court being granted by hand insertion of the correct provision and orally. Respectfully, to the learned counsel for the applicant, if that was that was allowed in law, parties or their counsels would be negligent in complying to the law miserably.

Starting with the preliminary objection in respect of wrong citation of the enabling provision; I agree with the learned counsel for the respondent that jurisdiction of the court is a creature of statutes. It is through enabling provisions that the court can be in a position to determine whether it has jurisdiction to determine what is being sought by the applicant or not. In the case of **Majura Magafu & Another vs The Managing Editor Majira Newspaper & Another (Civil Application No.203 of 2015)**, at page 8-9 the Court of Appeal while facing the ssenario like in the instant case, had this to say:

*"Based on the foregoing, we are of the firm view that this matter is not properly before us on account of non-citation of proper enabling provisions contrary to the mandatory requirement under Rule 48 (1) of the Rules. It is settled that non-citation of enabling provisions of the law renders the application incompetent: see, for example, **National Bank of Commerce v. Sadrudin Meghji [1998] TLR 503; Almas Iddie Mwinyi v. National Bank of Commerce and Mrs. Ngeme Mbita [2001] TLR 83; Harish Ambaram Jina (By His Attorney Ajar Patel) v. Abdulrazak Jussa Suleiman [2004] TLR 343 and China***

***Henan International Cooperation Group v. Salvand K.A.
Rwegasira [2006] TLR 220.***

In the final analysis, we strike out this matter for its incompetence. We make no order as to costs as the outcome of this matter has been predicated upon a point of law raised by the Court on its own motion.”

Mr. Wilbard for the applicant implored this court to cure the anomaly by applying the overriding objective principle as provided under **section 3A and 3B of the CPC**. Also, he cited the case of **Alliance One Tobacco (T) Ltd** (supra) which was distinguished by Mr. Kipoko that it does not condone non citation. Rule 48 of the Court of Appeal Rules cited by Mr. Wilbard, was contested by Mr. Kipoko for not being applicable to this court. Sincerely, the position as set forth by the Court of Appeal does not condone non citation nor wrong citation. What is condoned is a situation where a proper provision of the law is cited together with irrelevant provision(s). The same was cemented in the case of **Joseph Shumbusho v. Mary Grace Tigerwa and 2 Others**, (Civil Appeal 183 of 2016) [06th October 2020] Tanzlii, at page 14 where the Court supported what they said in the case of **MIC Tanzania Limited and 3 Others v. Golden Globe International Services Limited, Civil Application No1/16 of 2017** (unreported), in which it was held that:

*".... The first point of objection is, to us, easily disposable and, for that matter, it need not unnecessarily detain us. Granted that section 4(1) (2) are inapplicable to the situation at hand but, as correctly formulated by Mr. Kapinga, the same are mere surplusage which should simply be ignored **so long as the enabling provision has been cited**. We are, therefore, fully satisfied that the Court is properly seized of the matter with the citation of the enabling section 4(3) of AJA."*Emphasis added

At page 15 last paragraph and 16 of the case of **Joseph Shumbusho** (supra), the Court concluded that:

*"To date we still hold the same position of the law that the citation of the superfluous provisions of the law in the chamber application does not make the application incompetent. **Given the fact that the respondents had cited section 49 of the Probate and Administration Act which deals with revocation and removal of the administrator** the citation of the inapplicable provision of the law did not make the respondent's application incompetent."* Emphasis added

Guided by the above cited case laws, I agree with Mr. Kipoko that the learned counsel for the applicant is misleading this court. The cases which I have cited were decided by the Court of Appeal after the alleged amendment of **rule 48**

of the Court of Appeal Rules which the learned counsel relied upon. For that reason, I concur with the learned counsel for the respondent that this application is incompetent for non citation of the enabling provision.

On the second preliminary objection which concerns contradiction of the Plot number of the landed property sought to be handed over to the applicant; as I have already said, the learned counsel for the applicant conceded to the defect. However, he believed that the same can be rectified orally in the course of hearing. With due respect to the learned counsel, in law life is not that much easy. As a matter of practice, he could have sought leave of the court to amend the application/affidavit if the adverse party had not raised that particular preliminary objection. After the preliminary objection is in place, the avenue of rectifying the error is not there except after striking out the incompetent application. That is the position as it was held by the Court of Appeal in the case of **Meet Singh Bhachu vs Gurmit Singh Bhachu, Civil Application No. 144/02 of 2018** (unreported), that:

*"We have given this small but thought-provoking point due consideration in line with the learned arguments, and it seems to us settled that one cannot withdraw an incompetent appeal or application. This is because **it has been the practice of this Court, which appeals to logic, that once a preliminary objection has been***

raised, it must be heard first, and the other party is precluded from doing anything to pre-empt it.” (Emphasis added)

In addition, contradiction in respect of description of the landed property is fatal and contrary to **Order VII rule 3 of the CPC** as it was well established in the case of **Martin Fredrick Rajabu v. Ilemela Municipal Council and Another, Civil Appeal No. 197 of 2019**, Court of Appeal of Tanzania at Mwanza at page 13 where it was stated that:

"From what was pleaded by the appellant, it is glaring that the description of the suit property was not given because neither the size nor neighbouring owners of pieces of land among others, were stated in the plaint. This was not proper and we agree with the learned trial judge and Mr. Mrisha that, it was incumbent on the appellant to state in the plaint the description of the suit property which is in terms of the dictates of Order 7 Rule 3 of the Civil Procedure Code [Cap 33 R.E 2019]."

Order VII rule 3 of the CPC provides that:

"Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it and, in case such property can be identified by a title number under the Land Registration Act, the plaint shall specify such title number."

I am of considered opinion that although the instant matter is a Miscellaneous application, description of the property which the applicant seeks to take possession, is of utmost importance. Otherwise, the court cannot finally issue an executable order against the respondent. Thus, the second limb of objection has merit.

Regarding the third preliminary objection which is in respect of a defective verification clause, without further ado, I agree with Mr. Wilbard and it is obvious that the same is occasioned by "copy and paste" error. I am convinced that, the defect is not fatal if there were no other anomalies in the application at hand.

That said and done, I hereby uphold the first and second preliminary objections and find this application incompetent before the court. Consequently, the application is struck out with costs.

It is so ordered.

Dated and delivered at Moshi this 15th day of December 2023.



X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

15/12/2023

