IN THE HIGH COURT OF TANZANIA

THE CORRUPTION AND ECONOMIC CRIMES DIVISION

IRINGA SUB-REGISTRY

MISC. ECONOMIC CAUSE NO. 6 OF 2018

(Originating from Iringa District Court, Economic Crime Case No. 01 of 2018)

THOMAS FRANCIS MSUNGU

VERSUS

REPUBLIC

RULING

Thomas Francis Msungu, the applicant filed an application pursuant to section 29(4)(d) of the Economic and Organized Crimes Control Act, Cap 200 RE 2002 (EOCCA) using a chamber summons supported by an affidavit sworn by himself. The applicant sought reliefs are that the Court be pleased to grant him bail. The applicant faces charges at the Iringa District Court, in Economic Crime Case No. 01 of 2018.

The applicant was unrepresented and appeared in person while the Respondent Republic was represented by Ms. Blandina Manyanda, Learned State Attorney. Before the Court for determination is a preliminary objection registered by the Respondent Republic challenging the competency of the application. The contention being that the chamber summons and the affidavit are defective by reason of the applicants failure to endorse where his name is in the area showing the person who has drawn and filed the chamber summons and the affidavit. That the said anomaly contravenes the context of section 44(2) of the Advocates Act, Cap 341 RE 2002.

At the same time, the Court invited the parties to address it on whether the Court has been properly moved by the applicants citation of section 29(4)(d) of EOCCA only and leaving section 36(1) of EOCCA.

On the issue of contravening section 44(2) the Respondent Republic contended that the provision requires that all documents be endorsed and authorities should not accept documents which have not been endorsed, that failure to endorse rendered the application defective and thus incompetent and prayed that the application should consequently be struck out. On the issue of failure to cite section 36(1) of EOCCA to move the Court, the learned State Attorney contended that this was fatal because by only citing section 29(4)(d) it means the Court has not been properly moved and thus rendering the application incompetent and the remedy being to strike it out.

The applicant being unrepresented had not much to say, stating his understanding of the law is limited, and with regard to only citing section 29(4)(d) to move the Court to hear and determine the application, the applicant submitted that he was assisted by the Prison officers to file the application and he believed that everything is in order and requested the Court to assist him so that he gets justice.

We start by stating that, we do not need to spend much time on this issue, but we find that the preliminary objection is a point of law and that since it arises from clear implications out of the pleadings and may dispose of the application that it embraces the principles enshrined in the Court of Appeal holdings in ***Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors*** **Ltd.** (1969) EA 696.

On the preliminary objection raised by the respondents, looking at the chamber summons and the affidavit, there is no doubt that the name of the applicant under drawn and filed has no endorsement. But we find that reading through the said provision, it is clear that section 44(2) of the Advocates Act has to be read together with section 43 of the

Advocates Act, and we find that the applicant being the person written as the one who has drawn and filed, the section does not strictly apply to him. Even if we were to argue that Section 44(2) does not link with Section 43 of the Advocates Act, the issue for consideration will be whether section 44(2) of the Advocates Act is couched in mandatory terms. Whilst we are aware that in accordance with Section 53(2) of the Interpretation of Laws Act, Cap 1 RE 2002, states that were a section uses the word 'shall" it means, it must be performed. But it is also a reality that, case law has established that this is not the case in all matters. In the case of ***Attorney General and another vs National Bank of Commerce***, Civil Appeal No. 35 of 2009, the Court of Appeal sitting in Mwanza, where in that case the argument was in terms of a provision which included a statement saying:"*any forms prescribed shall be used.*" and the Court considered "*whether this meant it is mandatory, and if so, whether its omission is necessarily fatal*".

The Court was of the view that section 53(2) of Cap 1 should not be considered in isolation from section 2(2) of Cap 1. The Court adopted the holding with regard to this issue in Criminal Appeal No. 118 of 2010, ***Bahati Makecja vs. R*** (unreported), where they had considered the ramifications of the word "shall" in section 293(2) of the Criminal Procedure Act, read along with section 53(2)and section 2(2)(a) and (b) of the Interpretation of Laws Act, and concluded that the word "shall" in the CPA was not imperative, but relative to the provisions of section 388 of the CPA and stated that: "*what this decision means is that:*

(i) Section 53(2) of the Interpretation of Laws Act should always be read in conjunction with section 2(2) of the Act

(ii) Section 53(2) of the Act only applies where a particular Act or written law does not provide to the contrary or if by its contents, its application (i.e section 53 (2) would defeat the purpose of the particular written law or would be in consistent with such law".

Taking this in consideration therefore, and reading section 53(2) of Cap 1 with section 2(2) of Cap 1 which states:

"*The provisions of this Act shall apply to and in relation to every written law, and every public document whether the law or public document was enacted, passed, made or issued before or after the commencement of this Act unless in relation to a particular written law or document:*

(a) Express provision to the contrary is made in an Act

(b) In the case of an Act the intent and object of the Act or something in the subject or content of the Act is inconsistent with such application or,

(c) In the case of subsidiary legislation the intent and object of the Act under which that subsidiary legislation is made is inconsistent with such application".

Therefore taking all this in context it is clear that the word "shall" in section 44(2) of the Advocates Act has to be interpreted in the light of whether non compliance in endorsing the relevant documents hinders the better performance of duties of the Court in effect hinders substantial justice. We find that this may not be the case in all circumstances such as the present one related to failure to endorse where the applicant name can be seen and in light of the provisions of section 43 of the Advocates Act, Cap 341 RE 2002. Therefore we find this objection fails, the omission we find being curable in a situation like the present case.

On the issue of the applicants only citing section 29(4)(d) of EOCCA Cap 200 RE 2002 to move the Court to hear and determine the application. The cited provision states;

"*(4) After the accused has been addressed as required by subsection (3) the magistrate shall, before ordering that he be held in remand prison where bail is not petitioned for or is not granted, explain to the accused person his right if he wishes, to petition for bail and for the purposes of this section the power to hear bail applications and grant bail–*

(d) in all cases where the value of any property involved in the offence charged is ten million shillings or more at any stage before commencement of the trial before the Court is hereby vested in the High Court"

Section 36(1) of the EOCCA Cap 200 RE 2002 which reads:

"*After a person is charged but before he is convicted by the Court, the Court may on its own motion or upon an application made by the accused person, subject to the following provisions of this section, admit the accused person to bail*".

At this juncture, our issue for determination is non citation of proper section to move the Court to consider and determine the main substance of an application before the Court- that is grant of bail. In ***DPP vs Li Ling LIng***, Criminal Appeal no 508 of 2015 (unreported) the Court of Appeal (at pg. 11) stated:

"*It is the position of the law that in an economic crime case, matters of bail are governed by ss. 29 and 36 of the Act. Whereas s.29 empowers the courts to entertain bail applications, s.36 provides for the manner in which such power should be exercised. In principle therefore, the two sections must be applied together when an application for bail is under consideration*". The Court of Appeal then considered and adopted the holding in the case of *Edward D. Kambuga* (1990) TLR 84, where this Court stated as follows:-

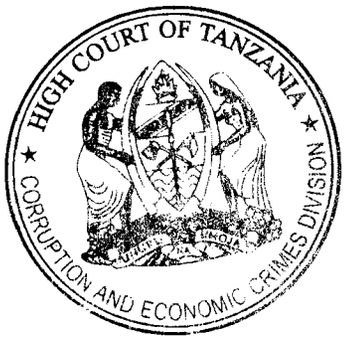
"*We agree with Mr. N.D. who argued for the Republic that sections 29 and 35 [now 36] serve different purposes. Section 29 provides the powers to grant bail in economic case whereas section 35 lays down the extent to which that power should be exercised. The two sections should therefore be read and applied in tandem. They cannot be separated..*"

The Court of Appeal in ***DPP vs Li Ling Ling*** (supra) went on: "*Section 36 of the Act which provides for the right to bail also lays down the conditions governing grant of bail.*"

From the holdings above, it leaves no doubt that when applying to be granted bail, for persons charged with economic offences it is necessary to cite the two provisions. This being the case what is the consequence of failure to cite both provisions?. There are various cases which have considered this. In this Ruling, our concern is non citation of a relevant provision, we find pertinent to be guided by the decision in Civil Application No. 3 of 2015, ***Elly Peter Sanya vs. Ester Nelson*** (unreported) Court of Appeal Mbeya, held: "*In our jurisprudence, it is equally settled law that non-citation of the relevant provisions in the notice of motion renders the proceeding incompetent* ***(Robert Leskar vs Shibesh Abebe****, Civil Application No.4 OF 2006 (unreported).*

There is no dispute that section 36(1) is important, it goes without saying then that failure to cite it is fundamental since the cited section 29(4)(d) of EOCCA though very relevant cannot stand alone to move the Court to determine an application for bail arising from charges grounded on economic offences. Whilst we also understand the importance of having regard to addressing substantive justice it is also important to understand that rules and procedures are there for a purpose, to bring consistency and certainty. Therefore failure to cite section 36(1) of the Act together with the cited provision we find in our particular circumstances a failure by the applicant to properly move the Court, rendering the application incompetent.

In the premises, the application is struck out. Ordered.



Winfrida B. Korosso
Judge
4th July 2018