IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO 38 OF 2020

(Arising from Miscellaneous Commercial Cause No. 51 of 2011)

BETWEEN

ST. JOHN UNIVERSITY OF TANZANIA ..... APPLICANT

Versus

JEFFERY INDUSTRY SAINI LIMITED.....1st RESPONDENT

ST JOHN UNIVERSITY OF TANZANIA- ST. MARKS COLLEGE TEACHING CENTRE.....2nd RESPONDENT

Last Order: 30th July, 2020

Date of Ruling: 27th Aug, 2020

RULING

FIKIRINI, J.

This ruling is a result of preliminary point of objection raised by the counsel for the 1st respondent, one Mr. Anindumi Jona Semu to the effect that, the application was bad in law for non- citation of the proper enabling provision.

At the hearing Mr. Khalifa Kiango and David Pallangyo learned counsels appeared for the applicant, the 1st respondent enjoyed the legal service of Mr. Anindumi Jonas Semu learned advocate, while the 2nd respondent was not represented.

Parties consented for the matter to be argued by way of written submissions under the following filing schedule: the 1st respondent to file written submission by or on 17th June 2020, reply by the applicant by or on 24th June 2020, and rejoinder if any by or on 1st July 2020. This was to be followed by the ruling scheduled on 27th July, 2020. This date changed to 27th August, 2020 due to the tight schedule of the trial Judge.

The background of this ruling on objection proceedings was the existence of the Commercial Case No. 51 of 2011, involving the 1st respondent and the 2nd respondent. In that case the Court entered decision in favour of the 1st respondent. Following a successful decree by the decree holder (the 1st respondent), the decree holder proceeded to execute the decree by attaching the bank account No. 01J1082426400 at CRDB Bank Dodoma Branch, by way of *Garnishee Order Nisi* to the account, which is owned by the applicant, St. John's University of Tanzania. The applicant, suggesting not being a part to the Commercial Case No. 51 of 2011, moved this Court by way of Miscellaneous Commercial Application No. 38. of 2020, requesting the Court to investigate and examine whether the applicant was a party to the Commercial Case No. 51 of 2011 or not. Opposing the application, the

1st respondent/ decree holder raised a preliminary point of objection to the effect that, the application was bad in law, for non- citation of, or for not citing a proper enabling provision, hence this ruling.

The essence of Mr. Semu's submission was that, the application brought under Order XX1 rule 57 and 59 of the Civil Procedure Code, Cap 33 R.E. 2019 (the CPC), has not specified which specific sub-rule of rule 57 was to be applied between sub-rule (1) and (2) of Order XX1 of the CPC. Additionally, he submitted that, Order XX1 rule 59 cited by the applicant was wrongly cited, it did not apply to the application making the Court not properly moved with the proper enabling provision. Supporting his position, he cited the case of **Edward Bachwa & 3 Others v Attorney General & Another, Civil Application No. 128 of 2006** where it was held that:

> *"The answer is found in un broken chain of authorities to the effect that wrong citation of the law, section, sub-section and or paragraphs of the law will not move the court to do what it is asked and renders the application incompetent."*

Concluding his submission, the counsel submitted that, the applicant did not properly move the Court which rendersthe whole application incompetent.

The applicant, before submitting on the substantive matters, she submitted that, the 1st respondent's written submission was filed out of time, owing to the Court order, that the submissions in support of the objection be filed on or before 17th June 2020. The submissions filed were served on the applicant on 22nd June, 2020, five (5) days after the date in which they supposed to be filed, leaving the applicant with single day to reply to the submission.

Turning back to the raised point of objection, the applicant strongly opposed the objection submitting that, both rule 1 and 2 of rule 57 of the Order XXI dealt with the investigation on claims and objection emanating from execution matters, the fact which was not disputed, that Order XXI rule 57 of the CPC, give power to the Court to investigate the claims and objection to the attachment of property. The mere assertion that the application did not specify sub rules of Order XXI rule 57 cannot result into non-citation of the law as long as both sub-rules of the Order XXI rule 57 give power to the Court to grant the applied orders in the application before the Court.

The application before the Court involved the attachment of the applicant's bank account, and it did not involve the attachment of the property which could be subjected to sale in which the Court can be asked to postpone it pending the investigation. There was no confusion which arose by non-citing of the specific sub-rule which could have prejudiced the parties.

Elaborating further, the applicant's submission was directed on the overriding objective principle, that the just, expeditious, proportionate and affordable resolution of civil disputes governed by the CPC, was what the principle aimed to facilitate. The applicant maintained that there was no dispute on the cited provisions, the only issues was non-citation of the specific rules that it was either rule 1 or 2 of Order XXI rule 57 of the CPC. Thus the cited provisions of the law relied on were correct for the Court to apply and provide for the remedy pleaded. The mere non-citation of the minor thing like specific rule did not amount to wrong citation of the law and that the mistake was so minor, as it did not affect the foundation of the substantive justice. With the overriding objectives principle, if the objection is sustained, the outcome would be to strike out the application which doesnot bar the applicant from filing a fresh application soon thereafter.

Furthering, her submission, the applicant prayed for this Court to invoke overriding objective principle which enjoins the Court to do away with unnecessary technicalities and decide the case justly. To buttress her position, the case of **Alliance One Tobacco Tanzania Limited and Other v Mwajuma Hamisi and Other, Miscellaneous Application No. 803 of 2018,** was cited, that while dealing with objection on wrong citation it was held that:

> *"It is current law of the land that court should uphold the overriding objective principle and disregard minor*

irregularities and unnecessary technicalities so as to abide with the need to achieve substantive justice."

Disputing the case of **Edward Bachwa** (supra) cited by the 1st respondent, the applicant submitted that, the case was distinguishable from the matters before this Court based on the following reasons: *first*, it involved the citation of non-existent law as it cited as Tanzania Court of Appeal Rules, 1971, which did not exist in our jurisdiction while this application the applicant cited the proper applicable law, and *second*, it involved wholly the citation of non-applicable provision to support the prayers sought by the applicant.

Submitting on Order XX1 rule 59 of the CPC, the applicant submitted that, 1st respondent did not state any reason as to why the mentioned rule did not apply to this application, but merely submitted that, the rule was not applicable. Since the 1st respondent was the one who raised the objection, then she was obliged to prove and state the reason as to why she argued that, the said rule was not applicable. Mere stating does not suffice for the objection to be sustained. Order XX1 Rule 59 gives the Court power of investigation pursuant to rule 57 of the said Order, and from the investigation, the Court can order the release of the property from attachment. This was a fit case before this Court as the applicant was praying for investigation, if the applicant was a party in Commercial Case No. 51 of 2011 and if her bank account was liable for attachment. If the Court finds that the applicant

was not a party to the case, then she prayed for the Court to invoke its power under Order XX1 rule 59 and uplift the attachment to the bank account by way of *Garnishee Order Nisi*. The cited rule was thus applicable as it gave the way forward after the investigation by the Court has been done.

Urging the Court to overrule the objection raised, the applicant contended that, prolonging the application by upholding this unnecessary objection will vitiate justice because as of now the applicant cannot withdraw any amount from this account. And this causes a lot of difficulties in the applicant's running of its daily business, as she cannot pay her workers, and given the fact that, the government has ordered all universities to be opened by the 1st of June, 2020, his would worsen the applicant's condition. On that regard the applicant prayed for the Court to dismiss the objection with costs.

The 1st respondent's counsel did not file a rejoinder submission.

In determining the merits and demerits of this preliminary point of objection two issues will be taken into account. **One,** *is whether the omission of specific sub-rules (1) and (2) in the application at hand rendered the whole application incompetent.* **Two,** *whether the provision of Order XX1 rule 59 was wrongly cited by the applicant and made the whole application incompetent.*

The applicant prefaced her submission by pointing out that the 1st applicant had failed to comply with the Court order. The first point of call will therefore be determining that: ***whether the Court orders issued on the 10th June, 2020 were compiled with by the 1st respondent and if not what are the consequences?***

It is clear from the Court record that the Court gave the filing schedule. The 1st respondent was present in Court through her counsel Mr. Uforo Mangesho, when it was ordered that the applicant to file her written submission supporting the preliminary point of objection which she has raised by or on 17th June 2020. Perusing from the Court record, the written submission in support of the objection was filed on 17th June, 2020, as exhibited by the receipt of payment number 920169000069839, issued. The date which the Court will considers in course of checking the timeliness of the filing of a document is that of when the filing was done and not service on the other party. Having said so, it does not mean the service on the other party should not be protected. The service upon the other party must be within the reasonable time so as to afford the other party ample time for her to file her reply written submission timely. In the present instance the applicant stated to have been served on 22nd June, 2020 leaving, the applicant with only a single day to reply to the submission. While such practice is highly discouraged, but proof of the allegation is equally necessary. The applicant aside from raising the complaint has not furnished this Court with any proof that the service was

effected on the applicant on 22nd June, 2020. The only evidence in Court record is the receipt which as pointed out above exhibited timely filing of the written submission as ordered by the Court on 10th June, 2020.

Coming to the submissions for and against the objection raised, it is indeed correct that the Court has to be properly moved. In order for the applicant to achieve what was being applied, the Court before which the application has been presented must be properly moved. And this is done by citing proper provision of the law which includes section, subsection and/or paragraphs otherwise wrong citation of the law, section, sub-sections and/or paragraphs or non-citation of the law giving the Court mandate to act on the application renders such application being incompetent before the Court. The submission by Mr. Semu and the reference to the **Edward Bachwa's** case (supra) therefore cannot be faulted.

The above stance nonetheless, this Court still considered that it was properly moved. **One,** the provision is under the subtitle "Investigation of Claims and Objections" and its marginal notes have been coined and read as follows:

> *"investigation of claims to, and objections to, attachment of, attached property and postponement of sale."*

The provision and its sub-rules for being in relation to investigation of claims, objection to the attachment and postponement of sale, although in the present

application there was no application of sub-rule 2 of Order XXI rule 57 of the CPC, but that did not render the application incompetent. The Court before which the application is placed, can still be able to attend to the application, since the application it was asked to attend to, is also covered in that main rule.

Two, with the advent of the amendment made to section 3A and 3B to the Civil Procedure Code, Cap. 33 R.E. 2002 under the Written Laws Miscellaneous Amendments (No.3) Act, 2018 (Amendments Act 2018) and Rule 4 of the High Court (Commercial Division) Procedure Rules, 2012 as Amended by GN. No. 107 of 2019, the position I entirely subscribe to, introduction of overriding principle, with its objective of enhancing, just, efficient and timely disposal of proceedings before the Court, should in my view be given opportunity to thrive.

Agreeing with the applicant's counsel that the main task of the objective principle is to uphold and disregard minor irregularities and unnecessary technicalities so as to abide with the need to achieve substantive justice and for the interest of justice I find the preliminary point of objection raised devoid of merits for the reasons given above.

In short the preliminary point of objection is overruled and the applicant is granted leave to amend the application by specifically mentioning the specific sub-rules under rule 57 of Order XX1 of the CPC. It is so ordered

P. S. FIKIRINI

JUDGE

27th AUGUST, 2020