IN THE HIGH COURT OF TANZANIA

AT TABORA.

MISC. LAND APPLICATION No. 15 OF 2015

1. DIRECTOR KAHAMA TOWN COUNCIL.....1ST APPLICANT
2. THE CHAIRMAN. KAHAMA TOWN COUNCIL.....2ND APPLICANT

Versus:

VUMILIA PRODUCERS AND SHOPPING
CENTRE CO. LTD.....RESPONDENT

RULING

10 &21/09/2014

Utamwa. J

This is a ruling on two issues. The first issue relates to a preliminary objection (PO) raised by the respondent. VUMILIA PRODUCERS AND SHOPPING CENTRE CO. LTD against the application filed by the two applicants. the DIRECTOR . KAHAMA TOWN COUNCIL and the CHAIRMAN. KAHAMA TOWN COUNCIL (first and second respondent respectively). The second issuewas raised by the court *suo-motu*(hereinafter called the court's issue) and orally argued by the parties upon an invitation by the court to doso.

The application was preferred by way of chamber summons supported by an affidavit under sections (ss.) 43 of the Land Disputes Courts Act. Cap. 216 R. E. 2002, 79 of the Civil Procedure Code. Cap. 33 R. E. 2002 and Order XLIII rule II of Cap. 33. In the application the applicants are seeking the following orders:

1. That this honourable court be pleased to make revision of the decision of the District Land and Housing Tribunal (DLHT) for Shinyangain Misc. Land Application No. 25 of 2015 dated 20th February, 2015.
2. Costs of this application be provided for.
3. Any other equitable relief (s) that this court may deem fit to grant.

The PO was footed on a single point of law that the application is misconceived because if the applicants were aggrieved by the DLHT decision they ought to have preferred an appeal to the High Court instead of filing the current application. On the other hand the court's issue was whether or not the application was competent for being preferred under ss. 43 of Cap. 216 and 79 of Cap.33 without specifying the enabling sub-sections of thoseprovisions of the law. The issue followed the fact that the court had suspected that the omission to specify the sub-section was fatal to the application as per the law.

In his submissions in chief supporting the PO Mr.Mtaki learned counsel for the respondent argued that it is the law that where there is a right of appeal. a party aggrieved by a decision must resort to the appeal and not to revision.A revision is exercisable only where there is no right of appeal and is not an alternative to an appeal. He cited decisions of the Court of Appeal of Tanzania (CAT) in **Transport Equipments v. Valambya [1995] TLR 161** and **Alais Pro-Chemie v. Wella A.G. [1996] TLR 269** to support the contention. The learned counsel further argued that Regulation 24 of the Land Disputes Court Regulations, Government Notice (GN) No. 174 of 2003 provides that a party aggrieved by the decision of the DLHT has the right to appeal to the High Court. The applicants thus wrongly filed this application instead of exercising that right of appeal.

Regarding the court's issue the learned counsel for the respondent contended that the application was also incompetent for incomplete citation of the enabling laws. He submitted that s. 43 of the Cap. 216 has two sub-sections but the applicant did not specify under which sub-section the application was

based. He further submitted that the applicant would have cited s. 43 (1) (b) of the Act as the proper enabling law, but he did not do so. The learned counsel also argued that the applicant committed the same act by not specifying the sub-section of s. 79 of Cap. 33 which contains two sub-sections.He also submitted that the application is liable to be struck out. He thus urged this court to strike it out.

In his replying submissions against the PO Mr.Magala learned counsel for the applicants argued that the applicants could not appeal against the decision of the DLHT since the same did not finally determine the case. According to s. 47 of Cap. 33 as amended by the Written Law (Miscellaneous Amendments) Act No. 25 of 2002 such orders are not appealable.

The learned counsel also argued that s. 43 (1) (b) of Cap. 216 empowers this court to entertain revisions against orders made by DLHT in case of any error. The order at issue was erroneous, hence revisable by this court under such provisions of the law. He cited the errors in the order as being the following: that it offended s. 14 (1) (b) of the Local Government Urban Authorities Act. Cap. 288 R. E. 2002 which requires suits against the Local Governments to in their own names. He supported the argument by the case of **DonatusMkumbo and another v. the District Executive Director of Bariadi District Council, High Court Civil Case No. 14 of 2009, at Tabora**. The other error according to the learned counsel was that, the order by the DLHT granted an application which was erroneously filed without any existing main suit. He also cited the case of**Calico Textile Industries Limited v. Zenon Investments, Registrar of Titles and NBC Holding Corporation [1999] TLR. 100** (HC) to support the contention.He mentioned the third error as failure by the DLHT to give the applicant the right to be heard as required by the Constitution and Order XXXVII of Cap. 33.

Regarding the court's issue the learned counsel for the applicant contended that the omission to specify the sub-section under s. 43 of Cap. 216 is

not fatal in law since the whole of s. 43 gives this court both supervisory and revisional powers. He also argued that the failure to specify the sub-section under s. 79 of Cap. 33 was equally not fatal to the application for the same reasons. He cited the decision of this court in **Arusha City Council v. HM Tires and Services Centre Ltd. HC Civil Revision No. 10 of 2013 at Arusha** and argued that in this case. the court exercised its revisional powers though no chamber summons was filed in court. He thus contended that though the case did not decide an issue similar to the one at hand. that case is relevant in the matter under discussion.

In his rejoinder submissions the learned counsel for the respondent argued that Cap. 33 does not apply in appeals from DLHT to this court unless there is a lacuna in Cap. 216 which is not the case. He cited regulation 24 of the GN No. 174 of 2002 to cement the point. He also distinguished the **Arusha City Council** case from this case and reiterated his submissions in chief.

As hinted earlier the two issues to be determined here are these:

1. Whether or not it was proper for the applicants to apply for revision amid the existence of their right of appeal.
2. Whether or not the application is competent for being preferred under ss. 43 of Cap. 216 and 79 of Cap. 33 without specifying the enabling sub-sections of the respective statutes.

As my adjudicating plan I will first test the second issue and if need will arise I will test the first. This strategy follows my understanding that the first issue depends on the second issue being answered affirmatively since it is through this second issue that the court will assess if it has properly been moved in this same application. This is an important issue to be decided before this court determines whether or not the applicants have the right to file this application for revision in the existence of their right of appeal.

Regarding the second issue. I am settled in mind that the law is currently settled that where an enabling law of an application is a sub-section of a statute,

then failure to specify that sub-section of the provisions of the law under which an application is preferred is fatal to the application. This omission amounts to non-citation of enabling provisions of the law and renders an application incompetent as precisely maintained by the learned counsel for the respondent. There are many precedents supporting that stance. see for example: **Chama cha Walimu Tanzania v. The Attorney General, CAT Civil Application No. 151 of 2008, at Dar es Salaam** (unreported). **M/S Ilabila Industries Ltd. & 2 others v. Tanzania Investment Bank & another CAT, Civ. Application No. 159 of 2004, at Dar es Salaam** (unreported)and**Ingoma Holding Limited v. Kagera Co-Operative Union (1990) Ltd and Jackem Auction Mart & Brokers Ltd, CAT Civil Appl. No. 166 of 2005, at Dar es Salaam** (unreported).

The law further commands that, wrong or non-citation of enabling law in applications is not a mere procedural slip: it is fatal and goes to the root of the matter. There is again a heap of precedents to that effect; see the CAT decisions in the **Chama Cha Walimu Tanzania** case(supra).**NaibuKatibuMkuu (CCM) v. Mohamed Ibrahim Versii and sons, Zanzibar CAT Civil Application No. 3 of 2003** (unreported) and **Almas IddieMwinyi v. National Bank of Commerce Civil Application No. 88 of 1999** (unreported). See also the decisions by this court in the cases of **Said SalimBakhresa and Co. Ltd v. Master of MV. Denler Trade Ltd, London C/O Mr.Denler Premier Dar es salaam, High Court Commercial Court Case No. 46 of 2004, at Dar es salaam** (unreported) and **Ernest A. Mwakasala and another v. Kinondoni Municipal Trade Officer and two others, Misc. Civil Case No. 96 of 2005, at Dar es salaam** (unreported) which I made recently. This rule applies in all applications before all courts of law.

Moreover, I am of the settled view that the rationale for this rule against wrong or non-citation of enabling lawsin applications is that, it assists the court

to determine whether it has jurisdiction to entertain the matter and whether the person moving the court is entitled under the law, to the sought orders before the court tests the merits of the matter. Moreover, the rule is intended to relieve the court from the torment of perusing the bulky existing sections and sub-sections of statutes in search of provisions serving the purposes just mentioned herein above. For this understanding the CAT once made useful remarks in **Bahadir Sharif Rashid and 2 others v. Mansour Sharif Rashid and another, CAT Civil Application No. 127 of 2006, at Dar es Salaam** (Unreported), and I quote the same for a readymade reference;

> "The court should not be made to go on a fishing expedition pouring over sections, rules and the like in order to ascertain whether or not it has jurisdiction to make the particular order"

In my view therefore, this rule against wrong or non-citation of enabling law cannot be relaxed by courts of law.

In indeed the learned counsel for the applicants seemingly acknowledges the importance of specifying a sub-section of the enabling law since in his arguments regarding the PO raised by the respondent he argued that s. 43 (1) (b) of Cap. 216 also empowers this court to entertain revisions against orders made by a DLHT in case of any error. That may be true yes, but he could not rely upon such sub-sub section of the statute by merely citing it in his submissions without first citing the same in the chamber summons as an enabling law for moving this court. This was thus an afterthought that could not be of any use to the applicants.

The applicants cannot thus argue that failure to specify the enabling sub-section of the law is not fatal. They cannot also rely upon the **Arusha City Council** case for the following grounds: the case is distinguishable as rightly argued by the learned counsel for the respondent since it did not decide any issue similar to the one at hand and it did not revise any decision of the DLHT

made under Cap. 216. but of a Resident Magistrates' Court. Again. even if it would be taken that the case decided on an issue similar to the one under discussion the same could not be useful to the applicants since it was decided by another Judge of this court. the decision of whom does not bind me, especially where there are contrary decisions by the CAT. It must be born in mind that decisions by the CAT. being the highest court in the hierarch of our court system. are binding to tribunals and courts subordinate to it including this court. irrespective of the correctness of such decisions. see **JumuiyayaWafanyakazi Tanzania v. Kiwanda Cha Uchapishaji cha Taifa [1988] TLR. 146.** This stance is by virtue of the common law doctrine of *stare decisis* which is applicable in our jurisdiction too.

But in citing the **Arusha City Council** case I understood the learned counsel for the applicant as trying to rely upon the general revisional powers of this court which may be exercised even by this court *suo-motu* following complaints against injustice through any means including mere letters. That may be a correct position of the law yes in some circumstances. However. my view is that. such a course must be left to the discretional powers of this court in calling for the records of lower court. inspecting them and making any order it finds it just to make according to the circumstances of the case. That course cannot apply where a party to court proceedings moves the court for specific orders the way the applicants in the matter at hand did. Where the party moves the court by an application (chamber summons) seeking specific orders. he must follow the rule I discussed above by properly citing the specific enabling sub-section of the law as underscored by the CAT through the precedents cited herein above. I underlined this particular view on when this court may *suo-motu* make revisional orders without any chamber application and what it should do where a party to court proceedings moves it for specific revisional orders through a chamber summons. see **SalehеOmaryNyikoand two others v. the Director of Public Prosecution. HC Criminal Revision No. 3 of 2013. at Dar**

es salaam (unreported). This one was criminal revisional matter but by parity of reasons the principle applies *mutatis mutandis* in civil revisional matters since this court has revisional jurisdiction for the sake of doing justice in both kinds of proceedings.

My further view is that.while it is a basic principle of law that courts should not permit procedural technicalities to defeat justice (as instructed under article 107A (2) (e) of the Constitution of the United Republic·of Tanzania. 1977. Cap. 2, R. E. 2002), it is the duty of parties coming to courts, especially those ably represented by learned counsel like the applicants in the matter at hand, to comply with the procedure set by the law. otherwise there will be no need of having procedural rules. The CAT in **ZuberiMussa v. MS. Shinyanga Town Council, Civil Appeal No. 16 of 1999, at Mwanza** held to the effect that the provisions of article 107A (2) (e) of Cap. 2 do not encourage unfounded breach of procedural rules: instead they underscore the conformity with the law.

For the above grounds. I determine the second issue negatively to the effect that the application is incompetent for being preferred under ss. 43 of Cap. 216 and 79 of Cap.33 without specifying the enabling sub-sections of the respective statutes. The remedy of an incompetent application in law is none other than a striking out of the same.

Having made the finding above. I am not obliged to test the first issue since its examination depended much on the second issue being determined affirmatively. Again. the finding in respect of the second issue suffices to dispose of the entire matter. Testing the first issue will thus amount to a superfluous exercise of kicking a dead horse or toiling for an academic exercise which is not the objective of the adjudication process.

I therefore. strike out the application. I also order the applicants to pay costs for the application. This order follows the understanding that it is settled law of this land now that: costs follow event unless the court records reasons for

not following that general rule. see s. 30 of Cap. 33 and the CAT decision in the case of **Njoro Furniture Mart Ltd v. Tanzania Electric Supply Co Ltd [1995]TLR 205**. In the matter at hand. I lack reasons for supporting my departure from that general rule and the counsel for the plaintiffs did not suggest one. It is accordingly ordered.

JHK. UTAMWA

JUDGE

21/9/2015

21/9/2015

CORAM: Hon. Utamwa. J.
For Applicants: Mr. Mtaki advocate for Mr. Magala advocate.
For Respondent:Mr. Mtaki advocate.
BC: M/s. DottoKwilabya.
Court: Ruling delivered in the presence of Mr.Mtaki learned counsel for the respondent who also holds briefs for Mr.Magala learned counsel for the applicants. in chambers this 21st day of September. 2015.

J.H.K. UTAMWA

JUDGE.

21/9/2015