

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 818 OF 2017**

**LIBERTY NELSON MOSHI.....APPLICANT**

**VERSUS**

**THE COMMISSIONER FOR LANDS AND ATTORNEY  
GENERAL.....RESPONDENTS**

*Date of last order: 5/6/2018*

*Date of ruling: 22/6/2018*

**R U L I N G**

**MGONYA, J.**

By a Chamber Summons made under **Order XXI Rule 20 (1) (a) and (2)** and **Section 95 of the Civil Procedure Code Cap. 33 [R. E. 2002]**; The Applicant **LIBERTY NELSON MOSHA** is moving the Court to grant an Order for, compel the presence and appearance of the Principal Secretary, Treasury in person to appear to show cause as to why he has been acting and acted in total disobedience and contempt of the Order of the Court and against the Certificate served upon him.

When the Application was called on for hearing, Mr. Mzalau who represented the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, raised a preliminary Objection notice of which he had filed earlier.

The Preliminary Objection consists of two points of Objection namely:-

- 1. The Application is bad in Law for want of proper citation of enabling provision of the law;***
- 2. The prayer sought by the Applicant is untenable in law.***

In prosecuting the points of law raised, Mr. Mashiba learned Principal State Attorney contended that the Court has not been properly moved since the execution has already be done and Certificate has been issued. On such stance Mr. Mashiba was of the view that the Provision of **Order XXI Rule 20 (1) (a) and (2)** are not enabling law to move the Court on the order sought.

The learned Principal State Attorney proceeded to attack the provision of **Section 95 of Civil Procedure Code** which has been cited by the Applicant on the effect that, the said provision is used where there is no any specific law to move the Court for an order sought.

Mr. Mashiba was of the view that, the enabling provisions could have been **Section 68 (e) of CPC**. On the consequence of citing wrong provision, the learned Principal State Attorney referred the Court, the case of Court of Appeal of Tanzania in the Case of ***EDWARD BACHWA AND 3 OTHERS VS. ATTORNEY GENERAL AND ANOTHER*** Civil Application No. 128 of 2006.

Regarding to second limb of point of preliminary objection, the learned Principal State Attorney contended that the prayer sought is untenable in law since the Principal Secretary Treasury was not a party to **Land Case No. 153 of 2010**.

In view of submission Mr. Mashiba invited the Court to struck out the Application as was observed in the case of ***OYSTERBAY PROPERTIES LTD KAHAMA MINING CO. LTD VS. KINONDONI MUNICIPAL COUNCIL AND 5 OTHERS*** in Civil Revision no. 4 of 2011.

On his part, Mr. Bakuza, learned Counsel who represented the Applicant, conceded that there was an error in citing of the provision of law.

The learned Counsel contended that such error cannot drive the Court to struck out the Application since the provision **Section**

**95 of CPC** cited empowered the Court to make necessary orders for the interest of justice.

Mr. Bakuza was of the view, that on such error, the Court can order rectification so that the Application to include a proper citation without need to strike out the Application. The Learned Counsel maintained that the said error is minor and not fatal to deny the continuation of the present Application.

Responding the 2<sup>nd</sup> leg of point of objection, the learned Counsel submitted the second point of objection goes to the merits hence the same goes contrary to the principle governing the preliminary objection.

Based on the above submission, Mr. Bakuza prayed for the Court to proceed with the Application for the interest of justice.

Without any flicker of doubt as correctly contended by Mr. Mashiba learned Principal State Attorney and at any rate not resisted by Mr. Bakuza, indeed of course on my part, I joined hands and share the same line of reasoning that the Court has not been properly moved.

Suffice to say clearly the provisions cited by the Applicant do not clothe this Court with jurisdiction to grant the relief sought in this Application.

The provisions of **Order XXI Rule 20 (1) (a) and (2) of CPC** recognize an Application for a Notice to show cause against execution but not neither for disobedience nor contempt of the order of the Court.

Since it is the duty of a party and not that of the Court to correct his pleading and or documents relied on, if it were otherwise I would not avoid being reproached with putting aside my mantle of impartiality. The duty is for the Applicants to cite the proper provisions of law to move the Court for the Order sought.

Now the crucial issue at this stage left for determination is whether the error in citing the proper provision is curable under the provision of **Section 95 of the Civil Procedure Code Cap. 33 [R. E. 2002]** as purportedly propounded by Mr. Bakuza learned Counsel.

Let it be and it is just a kind of guidance to Mr. Bakuza learned Counsel that, an error to cite the correct provision is not a technical one but a fundamental matter which goes to the root of the matter. Once the Application is based on wrong legal foundation, it is bound to collapse.

Worse still the error in citing a wrong and inapplicable provision in support of the Application is not a technically falling

even within the scope and purview of **Article 107 A (2) (e) of the Constitution of United Republic of Tanzania [1977]**. It is of course and indeed a matter which goes to the very root of the matter. In view of this I find hard to follow the line of reasoning adopted by Mr. Bakuza who purportedly to solicit this Court to proceed with the Application on merits or to order for rectification without strike out.

It was very interesting submission but unconvincing from the learned Counsel for the Applicant who purportedly to establish that the error of citing proper provision according to his views was one minor and not fatal to deny the continuation of the Application.

It is unconvincing since if a party cites the wrong provision of the law the matter becomes incompetent as the Court will not have been properly moved. And once the Application is based on wrong legal foundation it is bound to collapse.

For both propositions the jurisprudence of the Highest Court of Land which as a matter of precedent is binding to this Court, the same is teeming with number of unbroken chain of authorities which propounded that wrong citation of a law renders an Application incompetent and the Court has no option than to struck out the Application.

I feel also duty bound to remind the learned Counsel for the Applicant that, **Section 95 of the Civil Procedure Code** which is *Pari material* with **Section 15 of the Indian Code of Civil Procedure** provides for inherent powers which has to be exercised by the Court in a very exceptional circumstances for which the Code lays down no procedure.

According to Mulla, **Code of the Civil Procedure Vol 1 (1st Edition) at page 942**, the learned prominent author says:

***"The inherent powers are to be exercised by the Court in very exceptional circumstances for which the code lays down no procedure."***

In view of the above passage, I am not persuaded with the strange argument advanced by Mr. Bakuza that the Court should not struck out the Application rather should make necessary orders for the interest of justice pursuant to **Section 95**.

All in all therefore, at this juncture, I am settled in my mind that, Mr. Mashiba's contention that the Application is bad in law for want of proper citation of enabling provision of the law is well founded.

Consequently, the 1<sup>st</sup> leg of the preliminary Objection is sustained and **the Application is struck out with costs**.

In view of this, I find no pressing need to canvass the second ground of the preliminary objection since for that would be a vain exercise.

It is so ordered.



**L. E. MGONYA**

**JUDGE**

**22/6/2018**

**COURT:** Ruling delivered in the presence of Advocate Avid Bakuza for Decree Holder, Advocate Evarist Mashiba for 1<sup>st</sup> and 2<sup>nd</sup> Judgment Debtors and Ms. Emmy B/C in my chamber today 22<sup>nd</sup> June, 2018.



**L. E. MGONYA**

**JUDGE**

**22/6/2018**