IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS LAND APPLICATION NO. 333 OF 2017

NDORO KILI MERU MOUNTAIN

LODGE AND CAMPSITE LTD.....APPLICANT

VERSUS

TWIGA BANCORP LIMITED.....1ST RESPONDENT

THOMAS BARNABA MMBANDO.....2ND RESPONDENT

RULING

13/2/2018 & 29/3/2018

MZUNA, J.:

The respondents in this application have raised two preliminary objections on points of law to wit;

1. *That the affidavit in support of the application is incurably defective as it contains defective verification clause which does not show the place and date where it was verified which is contrary to order VI Rule 15(3) of the Civil Procedure Code Cap 33 R.E. 2002.*
2. *That the applicant's application is fatally defective for citing wrong and inapplicable provision of the law.*

Pursuant to the order of this court the preliminary objections was argued by way of written submissions.

Submitting in support of the preliminary objections Mr. Godfrey Ngassa, the learned counsel for the respondents argued that the application is defective as it does not show the place where it was verified contrary to Order VI Rule 15 (3) of the Civil Procedure Code Cap 33 R.E. 2002 hence contravenes the mandatory requirement of the law as the wording of provision cited above uses the word "shall" which means is mandatory. He therefore, prays for the court to strike out the applicant's affidavit in support of the application with costs.

With regard to the issue of citing wrong and inapplicable provision of the law, he argued that the provisions of the law cited are not applicable to the context of the applicant's application. It is argued that Rule 1 of Order XXXVII of the Civil Procedure Code contains two sub paragraphs that is to say (a) and (b). He added that it is not the duty of the court to guess or figure out which of the two sub paragraphs is the applicable one to the applicant's application. In support of his argument he cited the case of **Athony J. Tesha Vs. Anita Tesha, Civil Appeal No. 10 of 2003** (unreported).

Basing on the referred judicial authorities the respondents, prayed that the preliminary objection raised be upheld and as a consequence thereof, the applicant's application be struck out with costs.

In reply thereto, the learned counsel for the applicant strongly resisted the respondents' submission and argued that the preliminary objection raised does not fall under the definition of preliminary objection as stated in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors Ltd** (1969) E.A 696 whereby it was stated that the preliminary objection must consist of point of law based on ascertained facts and not evidence. That, if objection is sustained, that should dispose of the matter, it is therefore argued that the preliminary objections raised neither brings the application to end nor disposes of the application but may lead to a strike out of the application with a view to refile another application hence wastage of the precious time of the court.

He added that the provisions cited in the Chamber Summons are proper and has nothing wrong and the cited provisions does not prejudice the respondent in any way as the applicant has not even been heard.

It is further argued that the non-disclosure of the place of verification though mistakenly omitted is not fatal as the same can be amended if at all it prejudices the respondent. He supported his argument with the case of **Mengi and 3 Others Vs. Farida Said Nyamachumbe & Another,** Civil Appeal No. 45 of 2003 (unreported) cited with approval in **AAR Insurance (T) Ltd Vs. Beatus Kisusi,** Civil Appel No. 67 of 2015 (unreported) whereby the Court of Appeal was able to overlook the non compliance of the rule of procedure because the omission did not prejudice the respondent. He argued that the significance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for such allegation. He therefore submits that the preliminary objection raised by the respondents is misconceived and ought to be overruled with costs.

I have considered the submission for and against the preliminary objections. After my close perusal of the record, the second preliminary objection can suffice to dispose of the raised preliminary objection. It touches on the issue of wrong citation of the provision of the law. I have been referred to the case of **Athony J. Tesha vs. Anita Tesha (supra)** where it was held that:-

"This court has said a number of times that wrong citation of an enabling provision of the law or non citation renders an application incompetent. The mere citation of section 5 without indicating the sub section and the paragraph is tantamount to non citation..."

The above cited case fits squarely within the ambit of the case under consideration. There is non citation of the applicable law so to speak. The consequences thereof is to render the application 'incompetent'. That holding applies *mutatis mutandis* to the case under discussion.

Similarly, in the case of **Thomas David Kirumbuyo and Another vs. Tanzania Telecommunications Co. Ltd,** Civil Application No. 62 of 2010 (CAT), unreported, it was held citing with approval the case of **Edward Bachwa and 3 Others vs Attorney General,** Civil Application No. 128 of 2006 (unreported) that:-

"Wrong citation of the law, section, subsection and or paragraphs of the law or non-citation of the law will not move the court to do what it is asked and renders the application incompetent."

As well submitted by Mr. Godfrey Ngassa, the learned counsel for the respondent, Rule 1 of Order XXXVII of the Civil Procedure Code contains two sub paragraphs namely (a) and (b). Merely saying Rule 1 without further

elaboration leaves the court in a dilemma and therefore not properly moved. The application is incompetent.

The applicant's advocate admits that indeed there is wrong citation of the applicable law. The defect is not technical as the learned counsel wanted to impress the court. I say so because in a similar case of **China Henan International Co-Operation Group Versus Salvand K.A. Rwegasira,** Civil Reference No. 22 of 2005 (CAT) unreported, it was held that:

> *"...In this case, as already indicated the circumstances are such that we can hardly glean any element of technicalities involved. The role of rules of procedure in the administration of justice is fundamental. As stated by Collins M.R. in* ***Re Coles and Ravenshear*** *(1907) 1 KB 1 rules of procedure are intended to be that of handmaids rather than mistresses. That is, their function is to facilitate the administration of justice.* ***Here, the omission in citing the proper provision of the rule relating to a reference and worse still the error in citing a wrong and inapplicable rule in support of the application is not in our view, a technicality falling within the scope and purview of Article 107A (2)(e) of the Constitution. It is a matter which goes to the very root of the matter. We reject (the) contention that the error was technical..."***
>
> (Emphasis mine).

In view of the above cited case laws, the defect to cite the applicable law renders the application incompetent and therefore proceed to strike it out with costs.

M. G. MZUNA,

JUDGE. 29/3/2018