

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

MISC.LAND APPLICATION NO.345 OF 2021
(Originated from Land Appeal No. 79 of 2020)

GIDION FARES OPANDA.....APPLICANT

VERSUS

MOHAMED OMARY MASOUD..... RESPONDENT

RULING

Date of last order: 9/8/2021

Date of Ruling: 13/8/2021

DR.T. MWENEGOHA, J:

The applicant, Gideon Fares Opanda moved this court under section 47 (2) (3) of the Land Disputes Court Act, Cap 216 R. E 2019 (henceforth the Act) under Certificate of Extreme Urgency. The application is supported by the affidavit of the applicant himself. Upon filing his counter affidavit, the respondent filed the notice of preliminary objection that,

1. The application is incompetent, unmaintainable, bad in law and misconceived for contravening section 47 of the Dispute Courts Act, Cap 216 R.E 2019.
2. The Chamber application is defective for failure to attach copies of judgment and decree against which contrary to rule 49 (3) of Court of Appeal Rules, cap 141 R.E 2019.

3. The chamber application is defective for failure to cite where it arises from or originates from.
4. The application does not reflect any point of law.

The application was argued orally, whereby during hearing the applicant appeared in person and the respondent was represented by Advocate Peter Bana.

Mr. Bana began by abandoning the 4th objection and proceeded to submit on the remaining objections. Submitting in support of the first objection, it was Mr. Bana's contention that section 42 of the Dispute Courts Act, Cap 216 R.E 2019 (herein the Act) deals with the appeal from High Court to the Court of Appeal. He added that the applicant moved this Court under section 47(2) of the Act which is for second appeal not for the 1st appeal, while this appeal originated from Ward Tribunal. He submitted that the High Court was a second appellate court; to him the applicant was supposed to move the Court under section 47 (3) of the Act.

On the second ground of appeal, he submitted that the chamber application is defective for failure to attach the copies of judgment contrary to rule 49(3) of the Court of Appeal Rules, cap 141 R. E 2019. He also cited section 47 of the Act which states that the procedure for appeal to Court of Appeal under (this section) shall be governed by Court of Appeal rules. He concluded that this application is incompetent and defective.

On the third ground of appeal, Mr. Bana submitted that the chamber application is defective for failure to indicate where it arises or originate from. He submitted that the purpose of citing where the application arise from is

to assist the Court once making decision to go back and see what has been complained about. He therefore prayed for this application be dismissed with costs.

In reply to the 1st point of objection the applicant submitted that section 47 (3) of the Act is very clear that it is about certificate; that for the court to issue certificate that indicate there is a point of law; and that is what he submitted in chamber summons in the second prayer.

Regarding the respondent's submission on section 47 (2), the applicant conceded and prayed to abandon ground one in respect of leave. He added that the Court should consider second prayer which is very specific and that the Court has been moved under section 47 (3) as it originated from Ward Tribunal.

On the second ground, the applicant submitted that this is the High Court and not Court of Appeal and thus Court of Appeal Rules do not apply. On the other hand, he submitted that attachment of order intended to be appealed is a matter of evidence and cannot be objected. He cited the case of *Mukisa Biscuits Manufacturing Ltd v West end Distributors*, EA Law Report, 1969 at p. 616 that preliminary objection to be pure point of law and therefore argued that the second preliminary objection fails to meet the test of point of law.

He submitted that there are several letters requesting for the decision intended to be appealed against as per paragraph 5 of his affidavit but nothing was supplied to him. He asked how one can punish the applicant after all these efforts.

On the third objection, he submitted that his certificate of urgency indicates where the matter originates from, he added that the certificate of urgency form part of this application. Also, he pointed out to paragraph two of affidavit arguing that it clearly indicates that the appeal emanated from the District Land and Housing Tribunal. He submitted further that what is important in chamber summons is the provision moving the court and the prayer within. To him his application does not originate from Ward Tribunal but from this honorable Court, and therefore was properly cited. He therefore prayed for the preliminary objection be overruled with costs.

In rejoinder, Mr. Bana submitted that for the applicant to concede that his first prayer was moved under section 47 (2) of the Act and to pray to this Court to abandon the same is to pre-empt the preliminary objection. He submitted that the Court cannot proceed with incompetent application which is bad in law, and that the mere conceding does not allow the Court to proceed. He then reiterated his submission in chief.

On the second objection, it was Mr. Bana's rejoinder that the certificate of urgency does not move the court, it just show the matter of urgency. He submitted that the said paragraph in affidavit are evidence and not the way to move the court. He further reiterated his submission in chief.

Having heard the submissions from both parties, I will engage in one objection after another as hereunder.

On the 1st ground of appeal that whether the application is incompetent, unmaintainable, bad in law and misconceived for contravening section 47 of the Act, it was Mr. Bana's submission that the application is incompetent for

contravening section 47 of the Act. On the other hand, the applicant conceded to Mr. Bana's arguments and prayed for this Court to abandon the provision of section 47(2) of the Act cited in his application.

I am in agreement with Mr. Bana that as long as the applicant conceded that he did not correctly cited the enabling provision in his application that entails that he wrongly moved this Court. His prayer for this Court to abandon the said section cannot be accepted at this juncture, for as correctly argued by Mr. Bana, such prayer intends to pre-empt the preliminary objection and that is against fair practice. I therefore find that this ground to have merits.

The second objection was that the chamber application is defective for failure to attach the copies of judgment and decree against which they are appealed contrary to rule 49 (3) of Court of Appeal Rules, cap 141 R.E 2019.

Mr. Bana argued that the applicant did not attach copy of judgment and decree. On the other hand, the applicant had three arguments to counter Mr. Bana. **One**, that Court of Appeal Rules do not apply in the High Court. **Two**, the argument advanced is not fit in the criteria of what can be termed as preliminary objection. **Three**, he made efforts in requesting for the said copies which proved fruitless.

Again, I am in agreement with the position that the law is clear that Section 47 of the Act governs appeals from the High Court. The marginal note of the said provision indicates that it covers, "*Appeal from High Court*". This implies that whenever there is appeal of this nature this is a proper provision to go through. And according to our case section 47 (4) of the Act provides that,

"(4) The procedure for appeal to the Court of Appeal under this section shall be governed by the Court of Appeal Rules."

And the Court of appeal Rules have clearly stipulated the supporting documents to be attached when applying for leave to appeal to the Court of Appeal, vide under Rule 49(3) of the Court of Appeal Rules which states that,

"(3) Every application for leave to appeal shall be accompanied by a copy of the decision against which it is desired to appeal and where application has been made to the High Court for leave to appeal by a copy of the order of the High Court."

The position of law as I have cited above is that it is the requirement of law that upon filing application of this nature the copy of the decision desired to be appealed against must be accompanied with it. In the present application the said decision was not attached, a fact that the applicant does not dispute.

The applicant's argument that he made efforts in requesting for the said copies which proved fruitless, cannot stand at this juncture. He had to wait until when he was supplied with the said copies of judgment and use his argument that he was not supplied with it on time, to pray for extension of time to file leave to appeal to the Court of Appeal. In case the court is satisfied with the argument, then it would deduct the period that applicant spent while waiting for a copy of the said decision and grant his application for extension of time.

The other argument that this point does not fit in the criteria for preliminary objection has no weight as Mr. Bana has clearly indicated the law that has

been infringed. And thus, I hereby also find this point of objection to have merits.

Having found the two objections to have merits, I see no need to labor much on the remaining objection. That being said the application is hereby struck out for being incompetent. The applicant shall pay costs of this applications.

Dated at Dar es Salaam this **13th** day of **August 2021**.


.....
T. MWENEGOHA
JUDGE

