IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 231 OF 2019

(Arising from Land Case No. 177 of 2008)

NASIR ISLAM AWADH BALETH ..... APPLICANT

VERSUS

1. **MUSLIM RAMZANALI ALIMOHAMED MEGHJI**
2. **NAZIRALI RAMZANALI ALIMOHAMED MEGHJI** ..... **RESPONDENTS**

RULING

Date of Last Order: 02/07/2021 &
Date of Ruling: 05/07/2021

S.M KALUNDE, J:-

NASIR ISLAM AWADH BALETH, the applicant herein, seeks to review the order of this Court dated 17th September, 2015 in Land Case No. 177 of 2008, as such, his advocate **Mr. Samson Mbamba** filed a Memorandum of Review on 17th April, 2019. Upon being served with the summons and the Memorandum of Review, the respondents, through their advocate **Mr. Stanslaus Inshengoma** learned counsel, filed a Notice of Preliminary objection, in the notice the counsel raised a preliminary objection on a point of law that the counsel for the applicant, Mr. Mbamba, was acting without the applicant's proper instructions.

Hearing of the preliminary objection was conducted through written submissions. Submissions of the respondents were drawn and filed by learned counsel Mr. Inshengoma while those of the applicant were drawn and filed by Mr. Mbamba, learned advocate. Submissions were filed in compliance with the schedules ordered by the Court.

In his submissions Mr. Ishengoma submitted that an advocate can only act and render legal services upon instructions by that person, without such mandate an advocate cannot enter appearance and act for that person. In line with that, he strongly argued that, Mr. Mbamba, the counsel for the applicant did not have proper instructions from the applicant in filing the present application. He argued that, on 07th December, 2018, the applicant's wife advertised through Nipashe Newspaper that her husband went missing since 09th March, 2018. He reasoned that, since the present application was filed on 17th April, 2019, the counsel was acting without instructions of the applicant. He thus convinced this Court to dismiss the application for being filed without instructions.

In the alternative, Mr. Ishengoma argued that the present application ought to be struck out for being preferred under a wrong provision of the law. The counsel submitted that, **Order XLII Rule 1** of **the Civil Procedure Code, Cap. 33 R.E. 2019** is limited to sub-rules (1) and (2) and does not extend to sub-rule (6). Thus, he concluded that, having being filed under **Order XLII Rule 1 (6)** of **the Civil Procedure Code, Cap. 33 R.E. 2019**, the present application has been filed under a non-existing

provision of the law. He prayed that the application be dismissed with costs for being incompetent. To bolster his position he cited the Court of Appeal decision in the case of **China Henan International Cooperation Group vs. Salvand K. A. Rwegasira**, Civil Reference No. 22 of 2005

At the outset, Mr. Mbamba attacked the first limb of the preliminary objection for not being a pure point of law. He argued that a preliminary objection must contain a pure point of law which a self-proof and do not require some other material facts. To support his view he cited the case of **NIC vs. Shengena Ltd, Civil Application No. 20 of 2007** and the Ruling in **Mukisa Biscuits Manufacturing Company LTD vs. West End Distributors LTD (1969) EA 696**.

In the alternative, the counsel cited the case of **Said Salim Bakharesa vs. Ally Ngume (1977) TLR 312** and submitted that, instructions to the Counsel need not be strictly proved in Court. In addition to that the counsel argued that he has been representing the applicant in various applications before the Court and wondered what has prompted him in raising the present issue. in conclusion, the counsel reasoned that the first point was not self-proof.

As for wrong citation of the applicable law, Mr. Mbamba argued that an application for review did not need to cite an enabling provision of the law. He implored that whether wrongly or rightly cited, the provision of the law did not have any implication on the application. To further strengthen his

argument, he cited **Order XLII Rule 3** of Cap. 33 which requires that the form for preferring appeals to be applicable in applications for review. To further bolster his argument he cited the case of **Chiku Hussein Lugonzo vs. Brunnids S. Paulo** (2001) TRL 498. The counsel reasoned that the preliminary objections ought to be dismissed for lack of merit.

In rejoining Mr. Ishengoma insisted that advocates were required to act under the instructions of the parties and not on their own. He added that representing the applicant in previous applications or matters was not sufficient to assume instructions in the present application. By way of distinguishing, he argued that, in the case of **Said Salim Bakharesa** (supra) there was proof that instructions were given by the appellants nephew which is not the case in the present application.

In relation to the second point, the counsel rejoined that, the applicants counsel has admitted that provisions cited in the memorandum for review are incapable of moving the Court. He added that even if the argument that an application for review was to follow a form for an appeal was admitted, the present application would fail as it failed to comply with the said form. he insisted that the application ought to be struck out with costs in person to the advocate.

Having considered the submissions made by the counsel for the parties, the question for my determination is whether the raised preliminary objections are merited. The first point to start is to understand the principles governing preliminary objections aa

known to our jurisdiction. It is trite law that a preliminary objection cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion. See **Sir Charles Newbold P.** statement in **Mukisa Biscuits** (supra) at page 701.

It is also trite that a preliminary objection must only contain a pure point of law which does not call for evidence to be adduced for its verification. That position has been consistently held by the Court of Appeal including in its decisions in The **Soitsambu Village Council vs. Tanzania Breweries Ltd and Tanzania Conservation Ltd**, Civil Appeal No.105 of 2011 (unreported); and **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 (unreported).

In **Soitsambu Village Council** (supra) the Court of Appeal stated thus:

> *"A preliminary objection should be free from facts calling for proof or requiring evidences to be adduced for its verification. Where a court needs to investigate facts, such an issue cannot be raised as preliminary objection on a point of law. The court must therefore insist on the adoption of proper procedure for entertaining application for preliminary objections. It will treat as preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should not condescend to affidavit or other documents accompanying the pleadings to support the objection such as exhibits."*

In the first point of objection Mr. Ishengoma argued that the counsel for the applicant is acting without instructions from the applicant. In his submissions he appended a newspaper cutting allegedly from Nipashe dated 07th December, 2018, where the applicant's wife advertised that her husband went missing since 09th March, 2018. I do not think that was even proper. First, submissions are not evidence, besides authorities cited therein, it is not an acceptable practice to attach evidence alongside written submissions. Secondly, as indicated above, it is settled that, any preliminary objection requiring proof or evidence must be rejected. On the basis of the authority in **Mukisa Biscuits** (supra) and **Soitsambu Village Council** (supra) I am satisfied that the first point of preliminary objection lacks merit and it is hereby dismissed.

In the second point of preliminary objection, the respondents argued that the application was incompetent for being preferred under a wrong provision of the law. Mr. Ishengoma argument was that the application was preferred under **Order XLII Rule 1 (6)** of **Cap. 33** which is non-existent, he thus prayed the application be struck out with costs. On his part Mr. Mbamba argued that, the manner for filing a review is governed by the provisions of **Order XLII Rule 3** of Cap. 33 which requires that the form for preferring appeals be applicable in applications for review. He also cited of **Chiku Hussein Lugonzo** (supra).

Admittedly, Order XLII Rule 3 of Cap. 33 provides that the form applicable for appeals shall apply for application for review. The sections provides that:

> *"The provisions as to the form of preferring appeal shall apply,* ***mutatis mutandis****, to applications for review."*

The reading of Order XLII Rule 3 presupposes that the form for preferring an appeal shall be applicable to an application for review. The form and content of an appeal is provided for under **Order XXXIX Rule 1(1)** and **(2)** of **Cap.33**. The respective order provides that:

> *"1.-(1)* ***Every appeal shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the High Court*** *(hereinafter in this Order referred to as "the Court") or to such officer as it appoints in this behalf and the memorandum shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded.*
>
> *(2)* ***The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative****; and such grounds shall be numbered consecutively." [Emphasis mine]*

On the basis of the above knowledge lets now apply it to the present case, in the present application the application is preferred as reproduced hereunder:

> ***"IN THE HIGH COURT OF TANZANIA***
>
> ***(LAND DIVISION)***

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 231 OF 2019

(Arising from Land Case No. 177 of 2008)

NASIR ISLAM AWADH BALETH ..... APPLICANT

VERSUS

1. MUSLIM RAMZANALI ALIMOHAMED MEGHJI ..... 1ST RESPONDENT

2. NAZIRALI RAMZANALI ALIMOHAMED MEGHJI ... 2ND RESPONDENT

MEMORANDUM OF REVIEW

(Under Order XLII Rule 1 (6) of the Civil Procedure Code CAP 33 R.E. 2002)

(Pursuant to the order of the court for extension of time dated 18th March, 2019, ***Hon. D.B. Ndunguru, Judge****)*

(copy of the order extending time attached)

The applicant above named wishes to apply for review of the order of the court dated 17th September, 2015 in Land Case No. 177 of 2008, on the ground that;

There is an error apparent on the face of record, namely that the court should not have dismissed for want of persecution a partly heard case.

WHEREFORE *it will be prayed that the order be vacated and the suit be set for continuation of hearing."*

The question now is whether an application filed in the above form complies with the requirements of **Order XLII Rule 3** read together with **Order XXXIX Rule 1(1)** and **(2)** of **Cap.33.** My answer to that is positive. A reference to Order XLII Rule 1 (6) would not any way operate to defeat the competence of application, after all that is not even the requirement of the law. I agree with Mr. Mbamba that, whether wrongly or rightly cited, that citation would not affect the competence of the application. I am supported in this view by the Court of Appeal

decision in **Chiku Hussein Lugonzo** (supra). In the cited case the Court of Appeal had an opportunity to consider the applicability of Order XXXIX Rule 1(1) of Cap.33 in relation to memorandum for review. Having quoted the section, the Court (**Lubuva, J.A**) went on to state that:

> *"From the wording of these provisions, it is crystal clear that as regards appeals two things are provided, namely, the form of the Memorandum of Appeal and what to accompany the memorandum. On the other hand, as regards the Memorandum for Review the position is different. Here, as seen from the provisions of Order XXXIX, rule 1the requirement is limited to the form only.* ***It is common knowledge that matters pertaining to the form of the Memorandum of Appeal or for review include such things like the title, the name of the parties, the number of the suit, the date of the decree, the numbering of paragraphs etc.*** *As to what is to accompany the Memorandum for Review, it is our settled view that there is no provision under the Civil Procedure Code to that effect. For this reason therefore, we think with respect, the learned judge misapplied the provisions of the Civil Procedure Code when he erroneously held that it was a necessary requirement under Order XL, rule 2 to have the Memorandum for Review accompanied by a drawn order. As just observed, there is no such requirement relating to review." [Emphasis mine]*

In accordance with the above quoted binding authority, the important consideration to be looked at includes such things like the title, the name of the parties, the number of the suit, the date of the decree, the numbering of paragraphs. The requirement to cite an enabling provision is certainly not included in the list and

cannot be said to be in any was a necessary change and modification that would be read into the word *mutatis mutandis*. It is therefore not a requirement of law to cite an enabling provision in a memorandum of review. Non citation or wrong citation, therefore, would not render the memorandum incompetent. The second ground of preliminary objection must fail for lack of merit.

For the foregoing, the preliminary objections raised by the counsel for the respondents lacks merit and they are consequently overruled. Costs to be in course.

Order accordingly.

DATED at **DAR ES SALAAM** this **05th** day of **July, 2021**.

S.M. KALUNDE

JUDGE