IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION No. 498 OF 2022

(Arising from Land Appeal No. 279 of 2021)

AWADHI IBRAHIM MSUYA (Administrator of the estate of the late Ibrahim Swalehe) ..... **APPLICANT**

VERSUS

JAMILA SALEHE KILUWASHA (Administrator of the estate of the late Mwanaidi Msuya) ..... **1ST RESPONDENT**

EUDIA SAMWEL BANGU ..... **2ST RESPONDENT**

RULING

Date of last Order: 06.10.2022

Date of Ruling: 07.10.2022

A.Z. MGEYEKWA, J

This application is brought under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019] and Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009. The applicant seeks to leave to appeal to the Court of Appeal of Tanzania to impugn the decision of this Court in Land Appeal No. 279 of 2021 delivered on 25th July, 2022. The application is supported by an affidavit

deponed Awadhi Ibrahim Msuya, the applicant. The respondent feverishly opposed the application. In a counter-affidavit sworn by Eudia Samwel Bangu, the second respondent. The application stumbled upon preliminary objections from the 1st respondent. He has raised three points of preliminary objection that:-

1. *The application is incurably defective for being made under the wrong section of the law.*
2. *The affidavit is bad in law for contravening the mandatory provisions of Order VI Rule 15 (2) of the Civil Procedure Code, Cap. 33 [R.E 2019] by containing a defective verification clause.*
3. *The application is brought by non-existing law which is Tanzania Court of Appeal Rules, 2009 as amended.*

When the matter was called for hearing before this court on 20th September, 2022 the applicant and 1st respondent appeared in person, unrepresented whereas the 2nd respondent enlisted the legal service of Ms. Juliana Swai, learned counsel.

As the practice of the Court, I had to determine the preliminary objection first before going into the merits or demerits of the suit. That is the practice of the Court founded upon prudence which I could not overlook.

The applicant urged this Court to dispose the preliminary objections by way of written submissions. The respondents conceded. The Court acceded to the applicant's proposal to have the matter disposed of by way of written submissions whereas, the 2nd respondent's advocate filed her submission in chief on 26th September, 2022. The applicant was supposed to file a reply on 3rd October, 2020 and a rejoinder on 6th October, 2022.

The applicant has defaulted the court order which was made at his prayer and to date, no such submissions had been filed yet. The 1st respondent was timeous in filing his written submission in chief. This court has held time without number that failure to file written submissions as ordered by the court is akin to a failure to appear when the case is called on for hearing and consequent orders for such nonappearance are inevitable.

There is an unbroken chain of decisions of this court that so hold. These include **Perpetua H. Kirigini & Another v Dr. Msemo Diwani Bakari**, Land Appeal No. 3 of 2005 (unreported), **Athumani Kungubaya & Another v PSRC & TTCL**, Misc. Civil Appeal No. 1 of 2001 (unreported), **Tanzania Electric Supply Co. Ltd v Abubakar Adam**, Civil Appeal No. 46 of 2008 (unreported) and **Twaha Songoro & 2 Others v Arnold Kato**, PC Civil Appeal No. 18 of 2003 (unreported), to mention a few. In view of the above

case law, I am of a settled view that the applicant has failed to defend his case. Therefore as already alluded to above, I will decide this preliminary objection *exparte* against the applicant.

The 1st respondent's counsel began by tracing the genesis of the matter which I am not going to reproduce in this application.

Arguing for the first limb of the objection, the 1st respondent's counsel contended that the application is incurably defective since it is brought under a wrong section of the law. He submitted that the applicant is seeking leave to appeal to the Court of Appeal of Tanzania against the Judgment and Decree of this Court in Land Appeal No. 279 of 2021 under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019]. It was his submission that section 5 (1) of the Appellate Jurisdiction Act, Cap. 141 does not apply to land matters, the same applies to civil matters.

Ms. Julianaa went on to submit that this application arises from the District Land and Housing Tribunal for Kinondoni at Mwananyamala and the matter was decided in favour of the respondents. Hence the applicant filed an appeal before this Court, thus, this is a land matter and therefore the application at hand was required to be preferred under section 47 (2) of the Land Disputes Courts Act, Cap. 216. Therefore, in her view, this court is

improperly been moved to grant the prayers sought in the Chamber Summons hence the application is incompetent before this Court. To bolster his submission Ms. Juliana cited the case of **Mariam Kaijage v Rhobi Chacha**, Misc. Land Application No. 160 of 2021 in the High Court, Land Division at Dar es Salaam (unreported).

Submitting on the second limb of the objection, the counsel for the 2nd respondent argued that Order VI Rule 15 of the Civil Procedure Code, Cap. 33 requires pleadings to be verified by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case. To fortify her submission, she cited Rule 15 (2) of Order VI of the Civil Procedure Cap. 33. She asserted that in the verification clause, the applicant wrote 'verified at Dar es Salaam this 22nd day of August, 2022.

The counsel for the 2nd respondent went on to argue that there are facts that are purely legal matters which a layman must have been advised by an advocate. She stressed that the said facts cannot be in the applicant's own knowledge as the information was obtained and he was advised by his counsel because they are purely legal matters. To support her contention she referred this court to paragraphs 8, 9, and 10 of the applicant's affidavit.

The learned counsel for the 2nd respondent did not end there, she submitted that there are facts that seem to be based on information whereby the applicant obtained the same from his counsel. To support his submission, Ms. Juliana referred this Court to paragraphs 8, 9, and 10 of the affidavit and argued that there is no disclosure of facts in the verification clause. She stressed that the applicant ought to show matters which were true to the best of his knowledge and other paragraphs are matters which are truly based on the legal advice given to him by his counsel.

Ms. Juliana did not end there, she contended that the said verification clause is not in incompliance with the rules of procedure contained in Rule 15 (2) of Order VI of the Civil Procedure Code Cap.33. To buttress her contention she cited the cases of **Kigongo and Associates Gold Mining Company Limited v Universal Gold NL** (2002) TLR 129 and **Salima Vuai Foum v Registrar of Cooperative Societies & 3 others** (1995) TLR 75.

As to the third limb of the objection, Ms. Juliana contended that the application is brought by non-existing law. She asserted that the applicant is seeking leave to appeal to the Court of Appeal of Tanzania under Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009 as amended. In her view, the applicant has failed to move the court properly and the same renders the application incompetent and the same deserves to be dismissed.

On the strength of the above submission, Ms. Juliana urged this Court to uphold the preliminary objections and dismiss the applicant's application with costs.

I have duly considered the arguments made by the learned counsel for 2nd respondent. It is an indisputable fact that in this application, the applicant seeks to be granted leave to appeal to the Court of Appeal of Tanzania.

On the first limb of the objection, the 2nd respondent's counsel contends that this application is incompetent because it is brought under the wrong section of the law. The 2nd respondent's contention they challenge the competence of the application on the basis of the applicant's application that the same is brought under a wrong citation of the section of the law.

The first issue for our determination on this point of the preliminary objection is whether the application itself is incompetent for being brought under a wrong provision of the law. It is noteworthy that leave to appeal to the Court of Appeal is a mandatory step to be undertaken by any party who wants to challenge decisions from this court. Section 47 (2) of the Land Disputes Court Act Cap. 216 imposes a condition that to appeal to the Court of Appeal of Tanzania, the aggrieved party must seek leave from the High Court. For ease of reference, I reproduce Section 47 (2) of the Land Disputes Court Act, hereunder:-

"47 (2) *"A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal." [Emphasis added].*

Given the above provision of the law, it is vivid that in the instant application the applicant in his Chamber Summons has cited the wrong legislation to move this Court to grant his application. As rightly stated by Ms. Juliana, since the application is related to land matters then the proper law was the Land Disputes Court Act, Cap. 216 [R. E 2019].

Failure to cite the proper legislation renders the application incompetent and hence the Court is not properly moved. In our jurisprudence, it is equally settled law that non-citation of the relevant law and/or provisions renders the application incompetent and hence the Court is not properly moved. In the case of **Project Manager ES-Koo International Inc. Kigoma**, Civil Application No. 22 of 2009, the Court of Appeal of Tanzania, at Tabora (unreported) held that:

" ...It is now settled law that the wrong citation of the law, section, subsection and or paragraph of the law or non-citation will not move the Court to do what is being asked to do and accordingly the application is incompetent..."

There is a chain of authorities to the effect that non-citation or wrong citation renders the matter before this Court incompetent and is liable to be struck out. See **NBC v Sadrudin Meghji**, Civil Application No. 20 of 1997, and **China Henan International Co-Operation Group v Salvand K. A. Rwegasira**, Civil Reference No. 22 of 2005 (all unreported).

At the outset, I should state that the point of preliminary raised by the respondent has merit. The string of authorities on the need to cite proper law to move the Court to grant the prayer being sought requires this Court to declare that the application is incompetent. Therefore, the first point of preliminary objection is upheld. Since the first point renders the application incompetent, I find no any justifiable legal reasons to deal with the remaining points of preliminary objection, as it will not reverse the decision made above.

In light of the stated position of the law, the current application is incompetent for the wrong citation. As such, the application is hereby struck out with costs.

Order accordingly.

Dated at DAR ES SALAAM this date 7th October, 2022.

THE HIGH COURT OF TANZANIA
LAND DIVISION

A.Z.MGEYEKWA
JUDGE
07.10.2022

Ruling delivered on 7th October, 2022 via video conferencing whereas the applicant and Ms. Juliana Swai, learned counsel for the 2nd respondent were remotely present.

A.Z.MGEYEKWA

JUDGE

07.10.2022