

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISL. LAND APPLICATION NO. 150 OF 2021

(Arising from Misc. Land Application No. 165 of 2020)

MRS. MARY PETER OTARU 1ST APPLICANT
(Administratrix of the Estate of the late Peter Casmir Otaru)

OTARU MANUFACTURING & TRADING CO.LTD.....2ND APPLICANT

VERSUS

AFRICAN BANKING CORPORATION (T) LTD..... 1ST RESPONDENT

DR. JONAS KIPOKOLA.....2ND RESPONDENT

MR. RAJENDER DAVE.....3RD RESPONDENT

MRS LUCY HENRY SONDO.....4TH RESPONDENT

MR. CHIDI OKPALA.....5TH RESPONDENT

RULING

Date of last Order: 20/09/2022

Date of Ruling: 28/09/2022

KHALFAN, J.

There was before me an amended application for the Respondents *inter alia*, to appear personally and show the reason why they should not be held liable for contempt of court and be punished accordingly for defying the lawful order of this court dated 11/09/2020, as per Hon. Z.D. Mango, J., in Misc. Land Application No. 165 of 2020. The amended application was



filed under **Section 68 (c), 95 and Order XXXVII, Rule (2) (2) of the Civil Procedure Code Cap 33 R.E 2019.**

Upon filing the main application, the Respondents, through Mr. Herman Majani Lupogo, learned Counsel, filed their counter affidavit together with a Notice of Preliminary Objection which states '*that this Honourable Court has been wrongly moved by the Application which suffers a wrong provision of the law.*'

At the hearing of the Preliminary Objection, the applicants were represented by Mr. Edward Chuwa, learned Counsel, while the respondents were represented by Mr. Bernard Mkwabi and Ms. Elizabeth Majuva, learned Counsel.

In the submission by the respondents, Mr. Mkwabi, asserted that the application at hand has been preferred under wrong provision of the law, but he could not state exactly what the correct provision was. He submitted that the prayers under the same application were totally wrong due to the reason that the order that the applicants claim to have been breached is neither injunctive nor interim order, hence it was a final order of Miscellaneous Land Application No.165 of 2020 (see Annexure 'A' of the affidavit in support of the application).



He also cited the case of **Felix Masha and Others vs. The Capital Markets and Securities and Another**, Miscellaneous Civil Cause No. 16 of 2011, which interpreted the provisions of **Sections 68 and Order 37 Rule 2 (2) of the Civil Procedure Code**. He finally asserted that the application suffers from wrong citation of the provisions of the law and that the prayer he argued cannot be entertained and he prayed this application be struck out with costs.

In response to the respondents' submission, Mr. Edward Chuwa, argued that the current application has been preferred under correct enabling provisions of the law. He went on submitting that the counsel for the respondents has admitted that the application before this court comes from the order of this Court in Miscellaneous Application No. 165 of 2020, whose ruling is attached in support of the affidavit.

Mr. Chuwa further submitted that **Section 95 of the Civil Procedure Code R.E 2019**, which has been cited in the present application, is the proper provision for the Court to entertain contempt proceedings as it confers inherent powers to the Court to meet the ends of justice or to prevent the abuse of Court process.



The main issue for determination in this application is whether the present application has been preferred under wrong provisions of the law. In case the first issue is answered in the affirmative, then what is the legal consequence thereof?

Before embarking on the determination on the above issue, I feel it prudent to appreciate the learned advocates for their submissions. The position of law as to the application which has been filed under wrong provisions of the law is rendered incompetent. This position was observed in the case of **Almas Iddie Mwinyi vs. National Bank of Commerce and Mrs Ngeme Mbita** [2001] TLR 83 where it was held, *inter alia*, that as a wrong citation of law renders an application incompetent, non citation of the law is worse and equally renders an application incompetent.

The above position has seemingly changed owing to the inception of the overriding objective into our laws. In the case of **Zein Mohamed Bahroon vs. Reli Assets Holdings Company Limited**, Misc. Land Application No. 307 of 2017, this Court, as per my Sister Hon. L. Mgonya, J., stated at pages 7 and 8, to I which subscribe, that:

'...There has been a school of thoughts on this matter. One is that the wrong citation would



ultimately render an Application incompetent and thus the same should be struck out. The other school of thought that non-citation or wrong citation of the law is not fatal and can be cured...'

In my settled mind, I would go for the second school of thought in that as much as I appreciate the respondent's concern, that in the present application there is a wrong citation of provision of law, the said wrong citation is not fatal or incurable as it does not affect the root of the application. I strongly advocate the stand that in any matter that is brought before the court what is paramount is the substantial justice and the courts should not be carried away by technicalities.

In the present application, there is no dispute that **Section 95 of Civil Procedure Code, Cap. 33 R.E. 2019**, confers inherent powers to the Court. Again, the respondents have not disputed the position of the law under **Section 95 of Cap. 33 R.E. 2019** which gives inherent powers to entertain the current application.

I entertain no doubt that this being the application for contempt, civil contempt for that matter, **Section 95 of Cap. 33 R.E. 2019**, is the applicable provision of the law. There is no dispute that there are no specific provisions of the law that deal specifically with civil contempt. The



- applicant has cited Section 95 together with **Order XXXVII Rule 2 (2) of the Civil Procedure Code, Cap. 33 R.E. 2019**, together with the order of this Court, as per my sister, Hon. Z. Mango, J. Much as the respondents have never been prejudiced, I find that, the application is properly before this Court.

Mr. Mkwabi submitted in the course of concluding respondents' submission in chief to the effect that:

'since the application suffers from wrong citation of provisions of law, the prayers sought in the Chamber Application cannot be entertained, we pray this application be struck out.'

He relied in his submission the case of **Felix Mosha and Two Others v. The Capital Market and Securities and Another (supra)**. I have gone through the said case. With due respect to the learned Advocate that the same case is alien from the circumstances of the instant application.

There is no dispute that in that case, the Court did not strike out the application based on the grounds of wrong citation of the law, instead it proceeded to determine the matter on merits.

I subscribe to the above position as correct proposition of the law, in the instant case in this application justice may be served by determining the application on merits.

In fine, for the reasons I have given, I find no merit in the preliminary objection, I therefore, overrule the same with costs. The application to proceed on merits.

Dated at Dar es Salaam this 30th day of September, 2022.

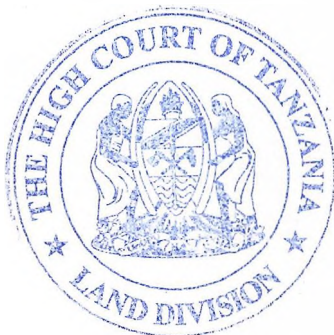


Court



F. R. KHALFAN
JUDGE
30.09.2022

Ruling delivered this 30th day of September, 2022, in the presence of Ms. Elizabeth Majuva, learned advocate for the respondent, also holding brief for Mr. Edward Chuwa and Ms. Anna Lugendo, learned Advocates for the applicant.





F. R. KHALFAN
JUDGE
30.09.2022