IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 351 OF 2021.

(Arising from land appeal No. 209 of 2020 of the High Court Land Division and originating from Land Application No. 79 of 2019 of the Temeke District Land and Housing Tribunal)

VERONICA HASSAN KISHAI ..... APPLICANT

VERSUS

SUZAN SALUM MALANGAI ..... 1ST RESPONDENT

DORIKAS SALUM MALANGAI ..... 2ND RESPONDENT

HASSAN KISHAI ..... 3RD RESPONDENT

Date of last hearing: 30/03/2022

Date of Ruling: 01/04/2022

RULING

I. ARUFANI, J

The applicant filed in this court the instant application beseeching the court to grant her leave to appeal to the Court of Appeal of Tanzania against the decision of this court delivered in Land Appeal No. 209 of 2020. The application is made under section 47 (2) of the Court (Land Disputes Settlement) Act, Cap 216 R.E 2018 together with any other enabling provision of the law.

When the application came for mention on 21st March, 2022 in the presence of the applicant in person and in the absence of all respondents

the court entertained doubt about the propriety of the law cited to move the court to grant the applicant leave is seeking from the court. The court required the applicant to notify her counsel to attend the court to address it about the said observation.

When the application came for mention on 30th March, 2022 the applicant appeared in court with her learned counsel, Mr. Mashiku Sabasaba. The respondents did not appear in the court and no reason was communicated to the court for their absence. That being the second time for the respondents to fail to appear in the court, the court decided to allow the counsel for the applicant to address it about the impropriate observed by the court. The counsel for the applicant admitted the application is made under wrong law. He stated that, the application is made under section 47 (2) of the Court (Land Disputes Settlement) Act, Cap 216, R.E 2018 instead of being made under section 47 (2) of the Land Disputes Courts Act, Cap 216, R.E 2019. He argued that is a human error which was not done intentionally or negligently.

He submitted that, the position of the law is that, where there is such an error and the court has jurisdiction to grant the order sought, the court is at liberty to ignore the error and proceed to grant the order sought under the correct provision of the law or direct the applicant to insert the correct provision of the law in the chamber summons. He submitted that

is done under the principle of overriding objective. He supported his submission with the case of **Mussa Hamis Maramoja V. Mussa Selemani Mussa & Another**, Misc. Land Application No. 431 of 2020, HC Land Division at DSM (unreported).

He also referred the court to the case of **Dangote Cement Limited V. NSK Oil and Gas Limited**, Misc. Commercial Application No. 08 of 2020, HC Commercial Division at DSM (unreported) where the court used the overriding objective principle to find wrong citation of the provision of law in an application cannot oust jurisdiction of the court to grant an order if the court has jurisdiction to grant the sought order. He urged the court to ignore the observed wrong citation of the law and proceed to grant the order the applicant is seeking from the court as the court has jurisdiction to grant the applicant leave to appeal to the Court of Appeal of Tanzania.

He submitted in alternative that, for the purpose of putting the record of the court right he is praying to be allowed to replace the chamber summons which contain the wrong citation of the law with another chamber summons made under the correct law. He insisted that if the applicant will be allowed to refile a fresh chamber summons made under the correct law, the respondents will not be prejudiced and there will be no miscarriage of justice on the part of the respondents.

After considering the submission made to the court by the counsel for the applicant the court has found that, as the counsel for the applicant has admitted the application is made under wrong law the question to determine here is whether the court can ignore the said error and continue to entertain the application or it can allow the applicant to correct the observed wrong as prayed by her counsel. The court has found that, the requirement to make an application under correct law or provision of a law is not provided in any law governing applications filed in this court.

The procedure as to how an application to this court is supposed made is provided in the Civil Procedure Code, Cap 33 R.E 2019 (the CPC) which is a general law governing all civil matters filed in this court where there is no other specific law governing the matter. The mode of making an application under the above cited law is provided under Order XLIII Rule 2 of the CPC which provides as follows:-

> *"Every application to the court made under this Code shall, unless otherwise provided, be made by chamber summons supported by affidavit:"*

From the wording of the above quoted provision of the law it is crystal clear that, formal application made under the CPC is supposed to be made by way of chamber summons supported by an affidavit. There is no imposition of a requirement that enabling provision of the law should be

cited. Although section 101 of the CPC states the Chief Justice is empowered to issue and approve for use any prescribed form for among others, "an application" but my research has not avail me with any form issued and approved by the Chief Justice for making application like the one filed in the court by the applicant.

The court has found the requirement to cite appropriate law or provision of the law supporting an application made to the court is a creature developed by our courts through its various decisions. One of the cases where it was held wrong or none citation of law or provision of the law is a defect which renders an application defective is the case of **Project Manager ES KO International Inc. Kigoma V. Vicent J. Ndugumbi**, Civil Appeal No. 22 of 2009, CAT at Tabora (unreported) where it was held that:-

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

The stated position of the law has been followed by our courts in various decision until when the principle of overriding objective was introduced in the CPC by Act No 8 of 2018. Now the question is whether under the principle of overriding objective provided under section 3A of

the CPC the court can ignore a wrong citation of law required to move the court and proceed to entertain the application on the basis that the court has jurisdiction to entertain the application and grant the order sought or it may allow the applicant to file another chamber summons made under the correct law to substitute the one made under wrong law.

The court has found the Court of Appeal has stated categorically in the case of **SGS Societe Generale De Surveillance SA & Another Vs V. I. P Engineering and Marketing Limited & Another**, Civil Appeal No. 124 of 2017 that:-

> *"It should be noted that the overriding objective principle was not meant to enable parties to circumvent the mandatory rules of the court to turn blind to the mandatory provisions of the procedural law which goes to the foundation of the case."*

While being guided by the position of the law stated hereinabove the court has gone through the cases of **Mussa Hamis Maramoja** and **Dangote Cement Limited** cited by the counsel for the applicant to support his prayers and find that, in arriving to the decision made in the above cited cases the court borrowed the position of the law provided under Rule 48 (1) of the Court of Appeal Rules. The said rule states that, in every formal application made to the Court of Appeal, specific rule under which the application it is brought must be cited. Where a correct

law is not cited or is wrongly cited but the court has jurisdiction to grant the order sought the irregularity or omission can be ignored and the court may order the correct law be inserted.

The court has found the court based on the position of the law provided in the above referred rule to find the defect found in the cited case can be ignored as the court had jurisdiction to grant the order which were being sought from the court. I am not in dispute with the position of the law stated by my learned brothers in the two cases cited by the counsel for the applicant. However, the court has found the defect found in the mentioned cases is different from the defect found in the case at hand. The court has found while the defect in the cited cases was about wrong citation of the provision of the law but in the case at hand the defect is about wrong citation of the law which would have given the court jurisdiction to grant the order sought.

The court has found that, where the defect is in citation of law required to give the court jurisdiction to grant the order sought the position stated in the above cited cases cannot be invoked to move the court to ignore the defect or to order the correct law to be inserted in the application. The stated position of the law was taken by this court in the case of **Alliance Tobacco Tanzania Limited & Another V. Mwajuma**

Hamis & Another, Misc. Civil Application No. 803 of 2018 where my brother Mlyambina, J stated at page 5 that:-

> *"It must be noted, however, that the imported wisdom of Rule 48 of the Court of Appeal Rules into this court is limited to circumstances where an application has omitted to cite any specific provision of law or has cited a wrong provision, but the jurisdiction to grant the order sought exists.* ***It does not cover where the application has cited wrong law altogether****. In the later circumstances, in my humble view, the application should be struck out."* [Emphasis added].

The above stated position of the law was followed by this court in the cases of **Antipas Romani Tairo V. Sikudhani Jafari**, Misc. Land Application No. 531 of 2020, HC Land Division at DSM and **Augustino Elias Sokono @ Ubwabwa Ubwabwa & Two Others V. Bilala Seleman**, Land Appeal No. 252 of 2020 HC at DSM (both unreported) where it was stated that, had it been that the citation of the law was proper and the defect was on provision of the law the court would have allowed the defect to be corrected.

Since the defect found in the application at hand is on wrong citation of the law altogether and not a wrong citation of provision of the law, the court has found that, in the strength of the position of the law stated in the cases cited hereinabove it cannot use the principle of overriding

objective to ignore the said defect or order the correct law to be inserted in the application as the court has not been clothed with jurisdiction to grant the leave the applicant is seeking from this court.

In the upshot the application filed in this court by the applicant is struck out for being preferred under wrong law. As the point caused the application to be struck out was raised by the court suo moto, the applicant is granted leave to refile the application within seven days from today and each party to bear his or her own costs. It is so ordered.

Dated at Dar es Salaam this 01st day of April, 2022

I. Arufani

JUDGE

01/04/2022

COURT:

Ruling delivered today 1st day of April, 2022 in the presence of Mr. Mashiku Sabasaba, learned advocate for the applicant and in the presence of the first respondent in person but in the absence of the rest of the respondents who are reported sick. Right of appeal to the Court of Appeal is fully explained.

THE HIGH COURT OF TANZANIA
LAND DIVISION

I. Arufani

JUDGE

01/04/2022