

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO.85 OF 2022**

**AMANIEL RWEGOSHORA BEBELWA (as a
Legal Attorney of PERAGIA BUBELWA) APPLICANT**

VERSUS

GODFREY BUBELWA RESPONDENT

RULING

Date of last order: 30.05.2022

Date of Ruling: 31.05.2022

A.Z.MGEYEKWA, J

This application is brought under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2002] and Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009. The applicant seeks leave to appeal to the Court of Appeal of Tanzania to impugn the decision of this Court in Land Appeal No. 238 of 2020. The application is supported by an affidavit deposed by Mr. Amanuel Bubelwa, the applicant. The respondent opposed

the application. In a counter-affidavit sworn by Godfrey Bubelwa, the respondent also raised points of preliminary objections as follows:-

1. *That this court is wrongly moved for citing wrong or inapplicable provisions of laws*
2. *That the affidavit in support of the application is bad and incurably defective for containing opinion, prayers, and conclusion.*
3. *In the absence of notice of appeal the application is untenable,*

When the matter was called for hearing before this court on 11th May, 2022 the court ordered the preliminary objections to be argued by way of written submissions whereas, the respondent filed his submission in chief on 16th May, 2022 and the applicant file his reply on 25th May, 2022. As the practice of the Court has it, we had to determine the preliminary objection first before going into the merits or demerits of the appeal.

The respondent in his written submission was brief and straight to the point. On the first limb of the objection, Mr. Mshana contended that this court is wrongly been moved. He submitted that the applicant has cited section 5 (1) (c) of the Appellate Jurisdiction Act, Cap.141 [R.E 2002] and Rule 45 (a) of the Tanzania Court of Appeal Rules of 2009. He submitted

that both laws were revised in 2019 thus revised edition of 2002 is not operative and leave to appeal to the Court of Appeal of Tanzania is sought under section 47 (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019]. He added that the cited laws do not confer jurisdiction to this court. Fortifying his submission he cited the cases of **Zalia Salmain Jaha v Hamad Hamad Matonela**, Misc. Civil Application No.158 of 2007, **China Henan International Cooperation Group v Salvand K.A Rwegasira**, Civil Reference No.22 of 2005, and **Aloyce Mselle v The Consolidated Holding Corporation**, Civil Application No. 11 of 2002 (unreported). The court held that:-

"... there is an unbroken chain of authorities of this court to effect that wrong citation of a provision of law under which an application is made renders that application incompetent. Such decisions include NBC V Sadrudian Meghji, Civil Application No. 20 of 1997, Rukwa Autoparts Ltd Lestina G. Mwakyoma, Civil Application No. 45 of 200; and Citibank (1) Ltd V TTC & Others, Civil Application No. 65 of 2003."

As to the second limb of objection, the learned counsel for the respondent contended that the affidavit supporting the application is bad and incurably defective for containing opinion, prayer, and conclusion. He submitted that the impugned paragraph is number 8 which state that in

the circumstance it is appropriate that leave to appeal is granted as the Court of Appeal of Tanzania may look into the matter and decide the case appropriately.

The learned counsel for the appellant went on to submit that the defective affidavit violates Order XIX Rule 2 of the Civil Procedure Code Cap. 33 [R.E 2019]. He urged this court to expunge paragraph 8 from the affidavit, hence the application becomes unsupported and the resultant effect being a striking out the order with costs.

As to the third limb of the objection, Mr. Mshana argued that they were not served with a copy of a Notice of Appeal and nothing was stated nor attached to the application. He valiantly contended that it is impossible for the court to know which decision is sought to be challenged and whether any steps have been taken to institute the appeal for which leave is sought. He went on to submit that a Notice of Appeal precedes an application for leave to appeal. Fortifying his submission he cited Rule 46(1) of the Court of Appeal Rules 2019 [R.E. 2019]. He claimed that there is no any proof whether the Notice of Appeal was filed before the application for leave. It was his conclusion that the Notice of Appeal does not exist. He urged this court to strike out the application for failure to comply with the requirement of the law. To buttress his contention he

cited the cases of **Shamash Ramzan Dharamsi Wau (as Personal Legal Representative of Karim Abdulrasul Adam) v Asily John Mwankenja**, Misc. Land Application No. 404 of 2017 (Originating from Misc. Land Application No. 123 of 2015 and Land Case No.196 of 2008).

In conclusion, Mr. Mshana beckoned upon this court to strike out the application ought to be struck out with costs.

In reply, the applicant argued that the applicant cited section 5 (1) of the Appellate Jurisdiction Cap. 141 [R.E 2002] and Rule 45 (a) of the Court of Appeal Rules of 2019. It was his view that the error was a slip of the pen. The counsel relied on the Court's decision in **Beatrice Mbilinyi v Ahmed Mabkhut Shabiby**, Civil Application No. 475/01 of 2020 Court of Appeal of Tanzania (unreported). He also referred this court to Article 107A (2) (e) of the Constitution of the United Republic of Tanzania Cap.2

Arguing for the second limb of the objection, the applicant's counsel simply argued that the objection does not go to the root of this matter. It was his submission that procedure should not be used to defeat justice. The counsel drew the Court's attention to the decisions of the Court in **Uganda v Commissioner of Prison expert Matovu** (1966) EA 516 and Order VI Rule 17 of the Civil Procedure Code Cap. 33 and section 95 of the Civil Procedure Code Cap.33 which state that:-

" Nothing in this Code shall be deemed to limit or otherwise to affect the Court to make such orders as may be necessary for the ends of justice or prevent abuse of the process of the Court.

With respect to the third limb of objection. The learned counsel for the applicant again simply argued that this court is bound to offer the applicant the natural justice principle of fair hearing '*audi alteram partem*'. He argued that this principle has been adopted as a basic right in our country that requires that a party should be accorded a satisfactory right to be heard. To fortify his submission he cited Article 13 of the Constitution of the United Republic of Tanzania Cap.2 and the case of **Abdallah Mponzi v Daudi Miwilo** (2000) TLR 328.

In conclusion, the learned counsel for the appellant beckoned upon this court to overrule the preliminary objection with costs.

I am in the position to determine the points of law raised by the learned counsel for the respondent. In determining the preliminary objection I will address the issue *whether the preliminary objections are meritorious?*

I wish to begin with the third limb of objection which in my view, if decided in the positive, is sufficient to dispose of the entire application for reasons which will unfold in the course.

The learned counsel in his submission has stated that the applicant has filed an application for leave without first filing a Notice of Appeal in court. On his side, the applicant's counsel simply urged this court to apply the principle of fair hearing which in my view the same does not apply in the matter at hand. In the matter at hand, it is the procedural requirement for an aggrieved party to file a Notice of Appeal the same cannot be said that the court will be proceeding with hearing the application while the applicant has not complied with the law.

As rightly pointed out by Mr. Mshana a Notice of Appeal precedes an application for leave to appeal. Rule 46 (1) of the Court of Appeal Rules 2019 [R.E. 2019] provides that:-

*" 46 (1) Where an application for a certificate or leave is necessary, it shall be made **after the notice of appeal is lodged.**" [Emphasis added].*

Applying the above provision of the law, in the matter at hand, it is obvious that the application is defective. I fully subscribe to the submission of the learned counsel for the respondent that this court cannot entertain the instant application in the absence of a Notice of Appeal to the Court of Appeal of Tanzania.

For the above reasons, I sustain the preliminary objection and proceed to strike out the application without costs.

Order accordingly.

Dated at Dar es Salaam this date 31st May, 2022.

 A.Z. MGEYEKWA
JUDGE
31.05.2022

Ruling delivered on 31st May, 2022 in the presence of Mr. Marco, learned counsel for the applicant and Mr. Assenga, learned counsel for the respondent

 A.Z. MGEYEKWA
JUDGE
31.05.2022