

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM  
MISC. LAND CASE APPLICATION NO. 519 OF 2022**

**BETWEEN**

**HAMIS MFAUME SAID (*Administrator of the Estate of the Late Mfaume Said Mwalimu*)**

..... **APPLICANT**

**VERSUS**

**ALLY SULTANI MBEGU.....1<sup>ST</sup>RESPONDENT  
FATUMA SAID MKUMBANGE.....2<sup>ND</sup>RESPONDENT  
RASHID ABDALLAH KIPENGELE.....3<sup>RD</sup> RESPONDENT**

**RULING**


*Date of last Order: 27/2/2023*

*Date of Ruling: 09/03/2023*

**A. MSAFIRI, J.**

The applicant has instituted this Application under Order IX Rules 8 and 9 (1) and Section of 95 of the Civil Procedure Code Cap. 33 R.E 2019. (the CPC). He is seeking for the Court's order to set aside its decision of dismissing Land Appeal No. 193 of 2021 dated 03/8/2022.

The application is supported by an affidavit of the applicant, Hamis Mfaume

Said. 

Only the 1<sup>st</sup> respondent appeared in Court and filed his counter affidavit. With it he filed a Notice of Preliminary Objection on point of law to the effect that the application is incompetent for wrong citation of law.

It is trite law that once the preliminary objection is raised in any matter before the court, the proceedings on merit on that particular matter should not commence until the determination of the said preliminary objection.

On the date set for preliminary hearing, the 1<sup>st</sup> respondent appeared in person. Being a layman, he did not have much to submit to the Court. He just adopted the contents of his Notice of preliminary objection and prayed for the Court to sustain the raised preliminary objection.

The applicant, who also appeared in person, did not have much to respond on the objection. He argued that the application is competent before this Court. He prayed for the same to be argued on merit.

In rejoinder, the 1<sup>st</sup> respondent reiterated his submission and prayed for the Court to strike out the application with costs.

Having heard the submissions from both rival parties, the issue is whether the raised preliminary objection has merit.

As per the chamber summons, this application has been brought under Order IX Rule 8 and 9 (1) and Section 95 of the CPC. The applicant is seeking for the court's order to set aside the dismissal order made by this Court in Land Appeal No. 193 of 2021 dated 03/8/2022.

Order IX Rule 8 of the CPC provides as follows; *Adele*.

*Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed and the court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.*

By the contents of this Rule, it is crystal clear that it provides for the procedure in case of non-attendance of one or more defendants. Obviously, it is wrong provision to be used in the application at hand because in this, it is the applicant who was then the appellant who is seeking to set aside the dismissal order.

Order IX Rule 9 of the CPC which also has been cited in support of this application provides as follows;

*In any case in which a decree is passed ex-parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside...*

It is also clear that this Rule also provides for a procedure of setting aside decree or judgment ex-parte against the defendant.

Section 95 of the CPC provides for inherent powers of this Court to make such orders as may be necessary for the ends of justice. It is not enabling provision and cannot stand alone.

Having had a glimpse of Order IX Rules 8 and 9 of the CPC, it is clear that the applicant has cited totally wrong enabling provisions of the law. The provision which would suit the circumstances of the present matter was Order IX Rule 3 of the CPC and any other enabling provision. *Atle.*

Having been satisfied that the Application has been brought under totally wrong enabling provision, the major question is whether this Application is competent before this Court.

There are plethora of authorities by this Court and the Court of Appeal which has set a principle that wrong citation of enabling provision of law renders an application incompetent.

In the case of **Marmo Slaa @ Hofu & 3 others vs the Republic, Criminal Application No. 3 of 2012 CAT at Arusha (unreported)**, the Court of Appeal cited with approval the case of **Edward Bachwa & 3 others vs the Attorney General & another, Civil Application No. 128 of 2006 (unreported)** where it held that;

*".....The answer is found in unbroken chain of authorities to the effect that wrong citation of the law, Section, sub Section and/or paragraphs of the law or non-citation of the law will not move the court to do what is asked and renders the application incompetent".*

Basing on the above principle, the application at hand is incompetent before this Court for the reason of wrong citation of the enabling provision of law.

Unfortunately, this is not curable as it goes to the root of the application. (see the case of **Juma Mohamed Futo vs Shabani Selemani (Administrator of the Estate of the late Abdala Juma Konge, Land Revision No. 13 of 2020, High Court Dar es Salaam (Unreported)**).

In the cited case my learned sister Hon. Makani, J, held that wrong citation of the enabling provision goes to the root of application and it is not a technical matter. I wholly subscribe to that position and add that the

*Alle.*

circumstance in the application at hand cannot be cured by the principle of overriding objective.

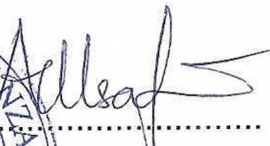
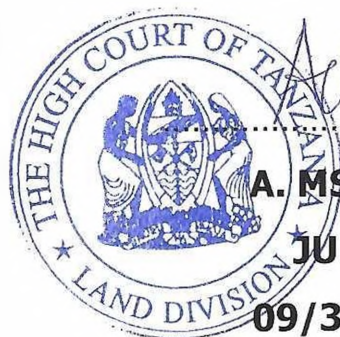
In the case of **Juma Mohamed Futo (supra)**, Hon. Makani J, cited with approval the case of **Mondorosi Village Council & 2 others vs Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017 (CAT – Arusha) (Unreported)** whether it was held that;

*“Regarding overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case”.*

Basing on the above decision, it is clear as I have observed earlier that the circumstances in the application does not attract the invocation of the principle of overriding objective. The wrong citation of the enabling provision by the applicant renders the application incompetent before the Court. The only remedy available to such an application is to strike it out.

That being said, this application is hereby struck out with costs.

Order accordingly.

  
  
**A. MSAFIRI**  
**JUDGE**  
**09/3/2023**