IN THE HIGH COURT OF TANZANIA

AT TABORA.

CIVIL REVISION NO. 8OF 2014

(Arising fromCivil Application No. 21 of 2014, in the District Court ofKasulu, atKasulu and Civil Case No. 86 of 2011 at Kasulu Urban Primary Court)

ASHERY S/O JAMES (As administrator of the estate of the late James Kalangi)..... APPLICANT

Versus;

MONICA ZABLON.....RESPONDENT.

RULING

20 & 21/8/2015.

Utamwa, J.

The applicant in this application, Ashery s/o James (As administrator of the estate of the late James Kalangi) applies for the order of revision against the ruling made by the District Court of Kasulu, at Kasulu (the District Court) in Civil Application No. 21 of 2014 (dated 24/10/2014).He also applies for costs to be provided and any other order this court may deem fit to award. The application is made by way of chamber summons under section (s.) 78, Order XLII rule 1, Order XLIII rule 2, Order XXI rule 24 (1) and s. 95 all of the Civil Procedure Code, Cap. 33 R. E. 2002. It is also supported by the affidavit sworn by the applicant himself. The respondent, Monica Zablon objected the application by filing her counter affidavit.

When the application came before me for hearing, both parties who appeared without any representation were ready for hearing of the same. Upon perusing the record of this matter before the hearing proceeded I detected that this matter originated from the Primary Court of the District Court of Kasulu, at Kasulu (Urban) in Civil Case No. 86 of 2011. I then invited the applicant to address me in showing cause as to why his application should not be struck out before it goes for

hearing on the ground that it had been brought under wrong provisions of the law. This followed my understanding that Cap. 33 does not apply to proceedings originating from primary courts. As a layman, the applicant submitted that he only took over the case from his late father and prayed for mercy of the court. When the respondent was given room to address the court she prayed for the court to terminate the application if it had been wrongly filed in court.

In my view, courts of law must decide matters according to law even where parties do not raise issues of law before them. My role here is thus to inquire and see whether the application is properly before this court. As hinted above, Cap. 33 applies only in matters originating from District Courts, Courts of Resident Magistrates and this court, see s. 2 of Cap. 33. Matters originating from primary courts like the one at hand are not governed by Cap. 33, but by the Magistrates Court Act, Cap. 11 R. E. 2002 and the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, G.N. No. 312 of 1964 made under the Judicature and application of Laws Act, Cap. 358, R. E. 2002.I also underscored this position in many other decisions including in **WendelineMahundi v. NicodemuKasikana, High Court Civil Appeal No. 82 of 2004, at Dar essalaam** (unreported) and I do the same in the case at hand. Revisions of decisions made by District Courts in matters originating from primary courts are specifically governed by Cap. 11, under Part III, sub-part (c) titled "Appellate and Revisional Jurisdiction of the High Court in Relation to Matters Originating in Primary Courts" which envelopes ss. 25-32. In fact s. 31 of Cap. 11 is the most applicable section of the law in circumstances of this case.

For the above reasons it is clear that the application was filed under wrong provisions of the law. The legal effect of this slip is clear. Wrong or non-citation of the enabling provisions of the law renders an application incompetent and liable to be struck out. There is bulky of authorities to this respect, see for example in; **Chama cha Walimu Tanzania v. The Attorney General, Tanzania Court of Appeal (CAT) Civil Application No. 151 of 2008, at Dar es Salaam** (unreported), **M/S Ilabila Industries Ltd. & 2 others v. Tanzania Investment Bank & another CAT, Civ. Application No. 159 of 2004, at Dar es Salaam** (unreported)and**Ingoma Holding Limited v. Kagera Co-Operative Union (1990) Ltd and Jackem Auction Mart & Brokers Ltd, CAT Civil Appl. No. 166 of 2005, at Dar es Salaam** (unreported).

The law further commands that, wrong or non-citation of the law in applications is not a mere procedural slip; it is fatal and goes to the root of the matter. There is again a heap of precedents to that effect; see the CAT decisions in the **Chama Cha Walimu Tanzania** case(supra),**NaibuKatibuMkuu (CCM) v. Mohamed Ibrahim Versii and sons, Zanzibar CAT Civil Application No. 3 of 2003** (unreported) and **Almas IddieMwinyi v. National Bank of Commerce Civil Application No. 88 of 1999** (unreported). See also the decisions by this court in the cases of **Said SalimBakhresa and Co. Ltd v. Master of MV. DenIer Trade Ltd, London C/O Mr. DenIer Premier Dar es salaam, High Court Commercial Court Case No. 46 of 2004, at Dar es salaam** (unreported) and **Ernest A. Mwakasala and another v. Kinondoni Municipal Trade Officer and two others, Misc. Civil Case No. 96 of 2005, at Dar es salaam** (unreported) which I made recently.

Moreover, I am of the settled view that the rationale for the rule against wrong or non-citation of enabling law is that, it assists the court to determine whether it has jurisdiction to entertain the matter and whether the person moving the court is entitled under the law, to the sought orders before the court tests the merits of the matter. Moreover, the rule is intended to relieve the court from the torment of perusing the bulky laws in search of provisions serving the purposes just mentioned herein above. For this understanding the CAT once made useful remarks in **Bahadir Sharif Rashid and 2 others v. Mansour Sharif Rashid and another, CAT Civil Application No. 127 of 2006, at Dar es Salaam** (Unreported), and I quote the same for a readymade reference;

> "The court should not be made to go on a fishing expedition pouring over sections, rules and the like in order to ascertain whether or not it has jurisdiction to make the particular order"

The lamentations by the applicant for mercy of the court on the ground that he just took over the case from his late father is in fact sympathetic, but sympathy does not change the law. I therefore, answer the question posed above negatively to the effect that the application is improperly before this court, hence incompetent.

I will however not dismiss the application, but I will only strike it out. The legal dissimilarity between the two is that, a dismissal follows a decision upon hearing a matter on merits while striking out follows a decision on technicalities or

incompetence of the matter for improper filing in court, see the CAT decisions in **ZaidSozyMziba v. Director of Broadcasting, Radio Tanzania Dar es salaam and another, CAT Civil Appeal No. 4 of 2001, at Mwanza** (unreported) and **Bernard Malinga v. Presidential Parastatal Sector Reform Commission (PSRC) and another, CAT Civil Appeal No. 65 of 2007, at Mbeya** (unreported) following its previous decision in **SadikiAbdallah Alawi v. ZulekhaSuleman Alawi and National Bank of Commerce, CAT Civil Reference No. 29 of 1997.** I therefore, find that the proper remedy in the case at hand is to strike out the application since I did not test its merits through hearing, but I have only found it incompetent as shown herein above.

I therefore, strike out the application for its incompetence in which said case the applicant is at liberty to re-file it subject to the law of limitation. However, each party shall bear his own costs since the point terminating the application has been raised by the court *suo-motu*. It is accordingly ordered.

JHK. UTAMWA

JUDGE

21/8/2015.

21/8/2015

CORAM; Hon. Utamwa, J.
For Applicant; present in person
For Respondent; present in person.
BC; M/s. AshaJummanne.
Court; Order delivered in the presence of the applicant and the respondent, in court this 18th day of August, 2015.

J.H.K. UTAMWA

JUDGE.

21/8/2015