IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 686 OF 2021

(Arising from Misc. Land Appeal No.31 of 2021; Originating from Kinondoni District Land and Housing Tribunal in Land Appeal No.29 of 2020; and from Wazo Ward Tribunal in Case No. 1 of 2019)

ADOLF GEORGE KWEKA .....APPLICANT

VERSUS

JULIUS ELISAMEHE MKENI.....RESPONDENT

Date of Last Order: 09.05.2022
Date of Ruling 06.06.2022

RULING

V.L. MAKANI, J

This is the ruling in respect of preliminary objection raised by the defendant that:

1. *The application is time barred.*
2. *There is wrong citation in the applicant's application.*

With leave of the court the application was argued by way of written submissions. The respondent's submissions were drawn gratis by Ms. Irene Felix Nambuo, Advocate from Legal and Human Rights Centre. And the applicant personally drew and filed his submissions in reply.

Ms. Nambuo abandoned the first point of preliminary objection on time bar and proceeded to submit on the second point only. She said that the Chamber Summons is under section 5 (1) (c) and (2) (c) of the Appellate Jurisdiction Act CAP 141 RE 2019, seeking leave of this court to file appeal to the Court of Appeal of Tanzania as the present matter originated from the Ward Tribunal. That the applicant was supposed to seek certificate on point of law from this court as stated in section 47 (3) of the Land Disputes Courts Act CAP 216 RE 2019. She said that the said section requires an applicant to seek certificate from the High Court that there is a point of law involved in the appeal. That the applicant has cited a wrong provision of law to support his application hence the application should be struck out. In support of her arguments shes cited the cases of **Mgonja vs. The Trustees of the Tanzania Episcopal Conference, Civil Revision No.02 of 2002** (CAT) (unreported) and the case of **China Henan International Co-operation Group vs. Rwegasira, [2006] TLR 220.** She insisted that wrong citation is an incurable defect and prayed for the application to be struck out for being incompetent.

In reply, the applicant said that the law which guide the Court of Appeal of Tanzania includes the Appellate Jurisdiction Act and the

Court of Appeal Rules (GN No.345. of 2019) and other enabling provisions of the law. He said the Land Disputes Court Act is normally applicable in the subordinate Tribunals that is District Land and Housing Tribunal and the Ward Tribunal. He referred to section 5 (2) (c) of the Appellate jurisdiction Act which provides that no appeal shall lie against the decision or order of the High Court in any proceeding unless the High Court certifies that there is a point of law involved. He said that failure to cite section 47 of the Land Disputes Court Act does not make the application incurable because it is not the only enabling provision. That the respondent is praying for additional of the provision having the same effect to the one already cited which has properly moved the court. He said that according to the case of **George Shambwe vs Attorney General (1996) TLR 334** amendment can be allowed after preliminary objection as it has been the trend of the court since the coming into the force of the oxygen principle and even before the introduction of the oxygen principle. He insisted that in a number of cases the preliminary objection was overruled, and amendment allowed. The applicant relied on the case of **Alliance Tobacco Tanzania Limited and Others vs Mwajuma Hamisi, Civil Application No.803 of 2018** where he said the raised preliminary objection was dismissed and the

applicant was allowed to insert the proper provision of the law. Applicant prayed for preliminary objection to be dismissed with costs.

In rejoinder, Ms Nambuo said that the position of the law is now settled that where there is specific provision which covers a particular situation the provision should be cited. That the applicant was not supposed to cite section 5 (1) (c) of the Appellate Jurisdiction Act while the same is covered under section 47 (3) of Land District Courts Act. So she reiterated that the application is under the wrong provision of the law and it should be dismissed.

I have gone through the submissions and the main issue for consideration is whether the applicant has properly moved the court.

In the Chamber Summons, the applicant has moved this court vide section 5 (1) (c) and (2) (c) of the Appellate Jurisdiction Act seeking for the court to certify that there is a point of law involved in respect of the decision delivered in Lan Appeal No. 31 of 2021 (Hon. Mango, J) dated 01/11/2021.

Section 5 (1) (c) of the Appellate Jurisdiction Act provides:

> *(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-*
> *(a) NA*
> *(b) NA*
> *(c) with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.*

Section 5 (2) (c) states:

> *Notwithstanding the provisions of subsection (1):*
> *(a) N/A*
> *(b) N/A*
> *(c) no appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates' Courts Act unless the High Court certifies that a point of law is involved in the decision or order;*

On the other hand, section 47 (3) of the provides:

> *47(1) NA*
> *(2) NA*
> *(3) Where an appeal to the Court of Appeal originates from the Ward Tribunal, the appellant shall be required to seek for the Certificate from the High Court certifying that there is point of law involved in the appeal.*

A keen look at the provisions reproduced above shows that the statement in section 5(1) of the Appellate Jurisdiction Act *"except where any other written law for the time being in force provides otherwise..."* would mean, in my understanding that, the requirement

for leave of the High Court to the Court of Appeal, in a decision of the High Court in exercise of appellate and revisional jurisdiction, under the above provision is subjected to other written law in force. Presently, *the other written law for the time being in force* is Section 47(3) of the Land Disputes Courts Act, and in my view is the appropriate provision to move this court.

In this matter, section 47(3) of the Land Disputes Courts Act, which is the specific law governing an appeal to the Court of Appeal against decisions of the High Court originating from the Ward Tribunal, has not been cited. The applicant has only cited the general provision of section 5(1) (c) and (2) (c) of the Appellate Jurisdiction Act which subjects itself to the Land Dispute Court Act as a specific law. I do not, in my view, think that the cited enabling provision of law can by itself move this court in the present application. In other words, the applicant has cited the wrong provision of the law which cannot move this court. (see the case **of Iddi Uddi Miiruko vs. Simon N. Sokolo, Misc. Land Appeal No. 188 of 2020 (HC-Land Division** (unreported).

What are consequences of citing the wrong provision of the law? It is settled law that wrong citation of the enabling or applicable law in moving the Court renders the application incompetent and liable to be struck out. In the case of **China Henan International** (supra) the Court of Appeal said that it is imperative to cite the correct provisions of the Rules. It went on to say that, an error to cite the correct provision is not a technical one but "*a fundamental matter which goes to the root of the matter.....Once the application is based on wrong legal foundation, it is bound to collapse".*

I am aware of the principle of overriding objective which requires the courts to consider substantive justice. However, it is equally settled law that, the principle of overriding objective was not meant to circumvent the mandatory rules of the court or to turn a blind eye on the mandatory provision of the procedural law which goes to the very foundation of the case. (See **Njake Enterprises Limited vs. Blue Rock Limited and Another, Civil Appeal No. 69 of 2017 (CAT-Arusha)** (unreported).

Subsequently, since the present application has been brought under the wrong provisions of the law, it is defective, and therefore

incompetent. In the result, the preliminary point of objection is upheld, and I proceed to strike out the application for being incompetent. Considering the circumstances of the case there shall be no order as to costs.

It is so ordered.

THE HIGH COURT OF TANZANIA
LAND DIVISION

V.L. MAKANI
JUDGE
06/06/2022