IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. LAND APPLICATION NO. 12 OF 2022

(c/f Land Appeal No. 35 of 2021, Originating from Application No. 127 of 2015 District Land and Housing Tribunal of Moshi)

ZENO JAMES MBUYA..... APPLICANT

VERSUS

LILIAN MMARI ..... RESPONDENT

RULING

10/5/2022 & 20/6/2022

SIMFUKWE, J

The applicant, pursuant to **section 47(2) of the Land Disputes Courts Acts, Cap 216 R.E 2019** has moved this court seeking for the following orders:

1. *That the applicant be given leave to appeal to the Court of Appeal of Tanzania against the Judgment and decree of Hon B. Mutungi in Land Appeal No.35 of 2021 filed in the High Court of Tanzania at Moshi and delivered on 23rd February 2022.*
2. *Costs to be borne by the Respondent.*

The gist of this application is to the effect that; the applicant herein unsuccessfully instituted a suit of trespass to land before the District Land and Housing Tribunal against the respondent herein. Since he was not satisfied with the decision of the District Land and housing Tribunal, the applicant herein appealed to this court (Land Case Appeal No.35 of 2021). However, luck was not his portion. This court dismissed his appeal with costs. Still aggrieved, the applicant eagerly wishes to institute the second appeal before the Court of Appeal. As per the requirement of the law, the appellant is required to apply for leave before the High Court. He thus lodged the instant application. He faced the Preliminary Objection from the respondents on the following points:

1. *That, this application is fatally defective for not being accompanied with the order being appealed against as provided under* ***Rule 49(3) of the Court of Appeal Rules, Cap 141 R E 2019.***
2. *This application is fatally defective as it contravenes* ***Rule 4 (1) of the Court of Appeal Rules Cap 141 R E 2019.***
3. *The application is bad in law for not sighting (sic) the necessary provision to move the Court.*
4. *That the application is fatally defective for being filed by unknown/unverified person.*

The application was argued through written submissions. The applicant was unrepresented while the respondent was represented by Mr. Philip Njau, the learned advocate.

On the first ground of Objection that this application is fatally defective for not being accompanied with the order being appealed against as

provided under **Rule 49(3) of The Tanzania Court of Appeal Rules** (supra) it was argued that this is an application for leave to file appeal against Land appeal No. 35 of 2021 which was before this court. Thus, for a court to act on an application like this, it should be guided by **Rule 49(3) of the Court of Appeal Rules** (supra) which provides that:

> *"Every application for leave to appeal shall be accompanied by a copy of the decision against which it is desired to appeal and where application has been made to the High Court for leave to appeal by a copy of the Order of the High Court."*

The learned advocate argued that, in the instant application, it was mandatory to be accompanied with a copy of the Order of the High Court. However, the same has been filed accompanied with the judgment of this court in appeal without accompanying with the order of the same. In that respect he was of the view that since the Order is missing, it makes the application defective or incompetent for lacking the order being appealed against. The consequence is obvious that it ought to be struck out. To substantiate his position, the learned advocate cited the case of **Grace Fredrick Mwakapiki vs Jackline Fredrick Mwakapiki and Others (Civil Application No. 51 of 2021** in which the applicant filed the application without accompanying the necessary order being appealed against; at page 6 it was held that;

> *"In the case **Alex Maganga vs. The Director Msimbazi Centre Civil Application No 81 of 2001**, while interpreting rule 46(3) of the Court of Appeal Rules 1979 (now revoked) but which is pari materia with Rule 49(3) of the present rules, this Court observed:*

"Apart from the fact that a copy of the decision was not filed along with the notice of motion, the order of the High Court was also not filed. What was filed was a copy of the proceedings in the High Court during the hearing of the application for leave. It was in those proceedings that it was ordered that the application be dismissed for being incompetent. A copy of those proceedings does not satisfy the requirements of Rule 46(3) of the Court Rules, as amended by GN No. 57 of 1984. ***The words order of the High Court in the sub rule mean an extracted order of the High Court, which was not filed.*** *It is apparent, therefore that the applicant did not comply with Rule 46(3) at all and the application before me would be incompetent". [Emphasis added].*

In this matter, like in the above authority of this Court, what was not filed along with the application, was the order of the High Court, a drawn order so to speak. In the circumstances, we are not hesitant to hold, as we hereby do, that an essential document required by rule 49(3) of The Rules, to accompany an application for leave before the Court, was not attached with the application, in this case it is incompetent."

In the same vein, Mr. Njau urged this court to make a finding that the application at hand is incompetent for not being accompanied with the Order being appealed against. He also implored the court to struck out the application out.

Mr. Njau also submitted in respect of the 2nd and 3rd grounds of Preliminary Objections that the application is fatally defective as it contravenes **Rule 4(1) of The Tanzania Court of Appeal Rules** (supra) and that the same is bad in law for not citing the necessary provisions to move the Court. He submitted to the effect that the applicant moved this court under **section 47(2) of the Land Disputes Courts Act,** (supra) seeking for leave to appeal to the Court of Appeal against the decision in Land appeal No. 35 of 2021. Thus, for an application for leave to be heard by the court, the Applicant must move the Court by citing the proper provisions. Mr. Njau was of the firm view that since the suit is intended to the Court of Appeal, then one should be guided by the Court of Appeal Rules which provides for hearing of applications of this nature; particularly **Rule 4(1) of The Court of Appeal Rules** which is to the effect that:

> *"The practice and procedure of the court in connection with appeals, intended appeals and revisions from the High Court, and the practice and procedure of the Court in relation to review and reference; and the practice and procedure of The High Court and Tribunals in connection with appeals to the Court shall be as prescribed in these rules or any other written law but the Court may at any time, direct a departure from these Rules in any case in which this is required in the interest of justice."*

In that respect therefore, the learned advocate was condemning the applicant for failure to cite any Court of Appeal provision of the law that will move this Court to hear the application and instead he cited **section 47(2) of the Land Disputes Courts** (supra) alone. In the circumstances, it was Mr. Njau's comment that this application being a

first step towards knocking the doors of the Court of appeal, it is fatally defective since it contravened the above cited rule which has specified for Applications to the Court of appeal to be regulated by the Court of Appeal Rules.

He continued to argue that **section 47(2)** which was cited meant to compliment a Court of Appeal provision which is the one to move the Court. He opined that the necessary provision of the Law is found under **Part III of the Appellate Jurisdiction Act, Chapter 141, section 5(1)(c)** which deals with Appeals in Civil cases. It provides as follows:

> *5 (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.*
>
> *(c) with leave of the High Court or of the Court of Appeal against every other decree, order, judgment, decision or finding of the High Court.*

Basing on the above cited provisions, the learned counsel pleaded the court to make a finding that the application is defective for contravening **Rule 4 (1) of the Tanzania Court of Appeal Rules** (supra). Also, it was his opinion that since the Applicant has failed to move the Court, this court should make a finding that the application in hand is bad in law for not being filed with a proper provision to move the Court. He thus prayed for the application to be struck out for being incompetent.

In respect of the 4th ground of Preliminary Objection that the application is defective for being filed by unknown/unverified person, Mr. Njau submitted to the effect that it is fundamental requirement that for a sworn affidavit to be authentic, it has to be from a person who is credible,

capable, and of sound mind. That, the person taking the oath has the duty to prove his locus and status by introducing himself and cloth himself with that credibility, capability and sound mind. It is only after providing all the required information in his sworn affidavit that the affidavit is presumed to be proper and the Court will act on it accordingly.

Having established that, the learned advocate made reference to the applicant's affidavit which reads as follows:

> *"I, Zeno James Mbuya, male, Christian and Resident of Moshi District, do hereby take oath and states as under:"*

In respect of the above quotation, it was Mr. Njau's argument that one is left to wonder who is this person? That, has he introduced himself to the extent of convincing the Court to his written oath? It was the learned counsel's comment that the obvious defect here is that he has not stated his age to warrant him to adduce the evidence under oath. Since the affidavit is not complete as evidence as it leaves much to be desired, one being, that not being sure whether the deponent is an adult or a minor. He substantiated this allegation by referring to **section 4 (a) of The Oaths and Statutory Declarations Act [Cap 34 R.E. 2019]** which states as follows:

> *"Subject to any provision to the contrary contained in any written law, an oath shall be made by-*
>
> > *a) any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a Court.*

The learned advocate referred to **section 127 of the Evidence Act [Cap 6 R.E 2019]** which outlines for who may testify; that, a child is allowed to give evidence without taking an oath.

In construing a meaning from these provisions, it was submitted that, the deponent has not authenticated his personality to allow the filed Affidavit to have a meaning and be effective in Court. The learned advocate was of the view that since an affidavit is a substitute of oral evidence, then such affidavit must be clear without any ambiguity.

The respondent's counsel contended that even if it is assumed that the deponent is a of minor and he has made oath through this affidavit, can this Court give it weight while not being sure as to whether the deponent understands the meaning of telling the truth? He stated further that, the court has to be sure as to the position of the deponent before accepting his statement made under oath. To cement this point, he cited the case of **Juma Ibrahim Mkoma and 39 Others vs Association of Tanzania Tobacco Traders, Misc. Labour Application No. 4 of 2020** in which the applicants did not identify themselves properly and the court at page 6 held that:

> *"...Also guided by the reason elucidated in the Case of **Judicate Rumishael Shoo & 64 Others vs The Guardian Limited, Civil Application No 43 of 2016** that;*
>
> > *"All names of applicants must be mentioned in the notice of Motion. They must all be identified by names. Reference to the rest as "Others" is insufficient the reasons are that it is significant that it be known who are those persons, by names, moving the Court and who would bear the consequences in*

case the application is not successful for example payment of costs etc."

Basing on the above findings, it was submitted that the age of the applicant/deponent must be established to enable the Court to act on such sworn affidavit.

Mr. Njau argued further that since the affidavit is sworn evidence, the Court ought to satisfy itself on the knowledge of the deponent as far as an oath is concerned. That, if a person is of sound mind, age is another factor that needs to be looked into before accepting the affidavit before the Court. It was the learned counsel's opinion that since the introduction by the deponent has not cleared the air, then the affidavit is defective for being sworn or verified by unknown person in the eyes of the law.

In his final analysis, Mr. Njau prayed the court to uphold all the raised grounds of Preliminary Objections and strike out the application with costs for not being properly before the Court.

Replying the 1st ground of Preliminary Objection, the applicant who was not represented submitted briefly that the respondent's written submission in respect of the 1st ground has no substance in it because he attached a copy of the decision of the matter being appealed against.

He further argued that the applicant is not appealing against the order to pay costs of Land Appeal No.35 of 2021 rather he appealed against the decision (Judgment) whose copy was attached to the application.

Regarding the 2nd and 3rd ground of objections that the applicant improperly moved this court, it was submitted that the provision was

amended by **The Written Laws (Miscellaneous Amendments) (No 3) Act 2018.**

On the 4th ground of objection, the applicant submitted that the same does not hold water as the applicant has been attending the Court during proceedings and the Respondent has never challenged his age as an adult. That, in his chamber summons he has signed as having drawn and filed the same. Thus, the Respondent cannot now turn round and say that the Applicant is under age.

Expounding further on this ground, the applicant submitted that missing identification of age in the Affidavit is not an essential element for the purposes of determining this application, and the Respondent has not objected the Application for leave to appeal to the Court of Appeal.

In conclusion, the applicant prayed the Court to grant the leave, since denial of the same will be closing the doors of justice. The Applicant also prayed for costs of this application.

Rejoining on the 1st ground of objection, the respondent's advocate didn't dispute the fact that the applicant has attached copy of judgment being appealed against. However, he insisted that judgment and order are two different documents. That, as per **Rule 49(3) of Court of Appeal Rules,** the law demands that an Order must be attached to the application not the judgment. The learned advocate was of the view that since the applicant acknowledged that he has not attached copy of the Order when filing the Application, then he has conceded to the 1st ground of objection. He thus prayed that this court to uphold the same and proceed to strike out the application for being defective.

In respect of the 2nd and 3rd grounds of the objection, it was submitted that the applicant has failed miserably to argue against the objections raised. He challenged the attached amendment in respect of **section 47 of the Land Disputes Courts Act** (supra) by arguing that the same has been incorporated in the Land Disputes Courts Act, revised edition of 2019. Also, he condemned the applicant for failure to read the whole subsections especially **section 47(1) and 47(4)** of the said Act, hence missed the meaning of the law.

In construing the said provisions of the law, the learned advocate was of the view that for a person to grasp the meaning of section 47, it is important to read the entire section of the law and from the wording of this section especially under 47(1) and 47(4) where he will find that it is insisted for an intended application to the Court of Appeal to be governed by the **Appellate Jurisdiction Act** and **The Court of Appeal Rules.**

He further argued that by quoting **section 47 (2) of the Land Disputes Court Act** alone, the applicant missed the directive contained therein in the said sub sections and made the application to contravene the law since the same has specified application to be governed by **the Appellate jurisdiction** Act and **The Court of Appeal Rules.**

The learned advocate reiterated that the proper provisions of the law to move this Court have not been cited and hence the Court has not been moved to act on the application. It was the opinion of Mr. Njau that, since in his reply, the Applicant has stated that he has only cited **section 47(2) of the Land Dispute Courts Act**, he has conceded to their argument as contained in their submission in chief in support of the 2nd and 3rd grounds the preliminary objections.

Also, the learned advocate reiterated what has been submitted in chief in respect of the 4th ground of objection. He added that the Affidavit being a substitute to oral evidence must be genuine and authentic. That, Authenticity can be traced in the identity of the person swearing that affidavit.

He faulted the applicant's affidavit for being filed by a person who has not established his status, particularly his age. In that respect he was of the view that since an Application to the Court must be by chamber summons supported by an affidavit, and considering that the Affidavit is defective, then the application cannot stand as there are no legs to stand on. It must collapse.

He thus prayed this court make a finding that the raised objections on point of law has merit and proceed to struck out the application with costs for being fatally defective.

Having considered the partie's submissions, their respective affidavits and the laws, I now turn to the merit or otherwise of the raised Preliminary Objections.

Under the 1st ground of objection, the respondent's advocate faulted the instant application for failure to attach the order of this court as per **Rule 49(3) of the Court of Appeal Rules.** The applicant argued that he has attached a copy of the judgment being appealed against.

As per **Rule 49(3) of the Court of Appeal Rules**, the order of the High Court has to be attached. In the instant matter the applicant attached the copy of the decision appealed against. Without hesitating, I am of considered view that failure to attach the order is not fatal as it can be

cured by the principle of Overriding Objective which requires the court to deal with substantive justice.

The respondent's advocate cited the case of **Grace Fredrick Mwakapiki** (supra) to substantiate that failure to attach the order is fatal. With due respect, the cited authority is distinguishable to the circumstances of this application. In that case, the applicant therein applied for leave to appeal to the Court of Appeal as a second bite after being denied by the High Court. He didn't attach the copy of the order which refused to grant him leave. The Court of Appeal ruled out at page 6 that; *"The application was supposed to be accompanied with the order of the High Court refusing leave, which order, we indicated, is missing."*

In this particular matter, since the applicant wish to appeal to the Court of Appeal against the decision of the High Court, which was attached and is a substitute of an order. The aim of Overriding objective is to avoid technicalities and the court to deal with substantive justice.

In respect of the 2nd and 3rd grounds of Preliminary Objection, it was the learned counsel's argument that, the application is bad in law for failure to comply with Rule 4(1) and citing only **section 47(2) of the Land Disputes Court Act** without citing the provision of the Court of Appeal Rules.

It is true that as per the chamber summons, the applicant moved the court by **section 47(2) of Land Disputes Court Act** (supra) which deals specifically with appeals originating from land matters. For ease reference it reads;

"A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may with leave of the High Court or Court of Appeal, appeal to the Court of Appeal."

Basing on the above provision of the law, without further ado, I am of firm stand that, this being a land matter, the applicant has properly moved the court. Failure to cite the Court of Appeal Rules which I am of considered view that it supplements section 47(2) is not fatal considering that the provision which moved the court squarely deals with land matters. Such failure to cite the supplementary provision can be cured by the principle of overriding objective which implores the court to avoid technicalities while dispensing justice. The fact that this court has mandate determine the application for leave and since the enabling provision has been cited, then the raised preliminary objection has no basis. In the case of **Joseph Shumbusho v. Mary Grace Tigerwa and 2 others, Civil Appeal No. 183 of 2016** at page 13 and 14 the Court cited the case of **Mic Tanzania Ltd v. Golden Globe International Service Ltd, Civil Appeal No. 1/16 of 2017** which held that:

"....it need not unnecessarily detain us, granted that section 4(1)(2) are (sic) in applicable to the situation at hand as correctly formulated by Mr. Kapinga, the same are mere surplusage which should simply be ignored so long the enabling provision has been cited.

Turning to the last ground of objection that the application is defective for being filed by unknown or unverified person, the respondent's advocate alleged was that as per the affidavit, it is not certain whether the one who

swore is an adult. The learned advocate cited different authorities to substantiate his position. The applicant argued to the contrary, that at this stage the respondent cannot turn around and say that the applicant is under age considering the fact that the applicant has been attending the court during proceedings.

This ground will not detain me. As per the affidavit, it has not been established whether the applicant is of majority age, thus adult. However, this is not fatal considering the fact that the one who swore an affidavit was the applicant himself who is obviously an adult who instituted and prosecuted the case before the trial tribunal to this stage. In the circumstances, the omission to indicate if he is an adult is not fatal since it has not prejudiced the respondent herein. The Overriding objective is there to cure this kind of defect.

Basing on the above findings, it is my considered opinion that the four raised grounds of preliminary objection have no merit and I hereby overrule the same with costs. The application should proceed for hearing on merit.

It is so ordered.

Dated and delivered at Moshi this 20th day of June, 2022.

S.H. SIMFUKWE

JUDGE

20/6/2022