

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. LAND APPLICATION NO. 18 OF 2021

(C/F Misc. Land Appl. No. 62 of 2020 in the High Court of Tanzania at Arusha, Misc. Land Appl. No. 33 of 2020 in the High Court of Tanzania at Arusha, Civil Appeal No. 21 of 2018 in the High Court of Tanzania at Arusha, Civil Appeal No. 02 of 2018 at Kibaya District Court, Originating from Civil Case No. 42 of 2017 at Kiteto Primary Court at Kibaya.)

BOAZ JACOBO.....APPLICANT

VERSUS

EDWARD OITESOI.....RESPONDENT

RULING

25/11/2021 & 18/03/2022

GWAE, J

The applicant in this case has purported to move the court under the provision of Order IX Rule 9 of the Civil Procedure Code Cap 33 R.E 2019 for the orders that, this court be pleased to set aside the dismissal order in Civil Appeal No. 21 of 2018.

The application is supported by a sworn affidavit of the applicant where causes for his non-appearance are stated. The respondent on the other hand strongly opposed the application by filing a counter affidavit accompanied by a notice of preliminary objection on the following points of law;

1. The application was brought under a wrong enabling law.
2. In the alternative, that the applicant prayed for a wrong order.

As the rule of practice demands, the preliminary objection had to be entertained before hearing the merit of the application. Mr. Alute Mughwai counsel for the respondent contended as follows, **Firstly**, that, the proceedings giving rise to this application originates from Primary Courts and therefore the High Court being the second appellate court it is elementary that civil appeals in respect of proceedings originating from Primary Court is governed by the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, GN No. 312 of 1964. The learned counsel went further to state that such appeals are not governed by the provisions of the Civil Procedure Code Cap 33 R.E 2019 as cited by the applicant in his application. According to him the proper enabling provision of the law was Regulation 17 of GN No. 312 of 1964 and

Secondly, that, the applicant has sought for a wrong order in the sense that his appeal was dismissed for non-appearance, thereafter the applicant filed an application for extension of time to apply for the restoration of the dismissed appeal. Therefore, it is therefore his view the applicant in

this application ought to have sought for an order of restoration or re-admission and not an order setting aside the dismissal order.

The applicant, on the other hand, argued that wrong citation or non-citation does not make the application incompetent, he further urged this court to implore the principle of overruling objective to cure the defects.

In his short rejoinder Mr. Mughwai was of the view that the overriding objective cannot be applied in the circumstances of this case by citing the case of **Mondorosi Village Council & 2 others vs Tanzania Breweries Ltd & 4 Others**, Civil Appeal No. 66 of 2017 (Unreported). The learned counsel went on stating that, the court must be moved properly to grant the appropriate reliefs, in the premises the counsel urged this court to struck out the application with costs.

Having summarized the parties' rival submissions; the issue for decision is whether the preliminary objection has merit.

The Court record shows that, this application arises from a civil case that was initially filed by the respondent at Kibaya Primary Court. As correctly submitted by the respondent's counsel, this court is also of the same view that since the proceedings giving rise to the present application arises from

Primary Court then the proper provision of the law to move this court cannot be the Civil Procedure Code (supra) as cited by the applicant but the same ought to have been the Civil Procedure (Appeals in proceedings Originating in Primary Courts) Rules, GN No. 312 of 1964. By virtue of section 2 of the CPC it is clear that the application of the Code is only to proceedings in the High Court of the United Republic, courts of Resident Magistrates and District Courts.

The applicant has not disputed this defect nevertheless has urged this court to invoke the principle of overriding objective which requires courts to do away with technicalities. With outmost due respect, I think this is not the case at which this court may conveniently invoke the principle of overriding objective. In the matter at hand, the court has been improperly moved to grant the sought reliefs, therefore, it is considered my view that, under this circumstance, the overring objective principle cannot be applied blindly as was held by the Court of appeal of Tanzania in the Case of **Mondorosi Village Council & 2** others that;

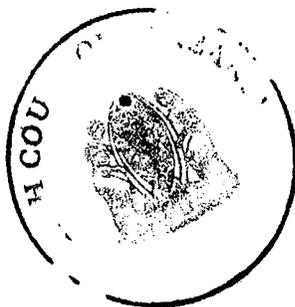
“Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case.”

In the instant application, the applicant ought to have properly moved the court by applying the provisions of the applicable law that is Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, GN No. 312 of 1964 and not Civil Procedure Code (supra).

Worse still, the applicant has wrongly brought this application by citing it as Miscellaneous Land Application No. 18 of 2021 while the dispute between the parties is based purely on civil case, that is why the applicant's appeal before the court was Civil Appeal No. 62 of 2020 and not Land Appeal. It follows therefore, this application is incompetent as it is before a wrong court forum. Hence, the court has no jurisdiction to entertain it since this court is sitting as a land court and not a civil court. Hence, it is in a wrong registry.

In the final event, this application is incompetent, I therefore strike it out with costs.

It is so ordered.




M. R. GWAE
JUDGE
18/03/2022