IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

MISC. LAND APPLICATION NO. 134 OF 2021

(Arising from the Judgment and Decree of the High Court of United Republic of Tanzania (Bukoba District Registry) at Bukoba (Hon. A. E. Mwipopo, J.) dated November 12, 2021, in Land Appeal No. 51 of 2020)

VODACOM TANZANIA LIMITED .....1ST APPLICANT

IMELDA CONIDAS .....2ND APPLICANT

VERSUS

WINFRIDA WILLIAM (Administratrix of the Estate of the Deceased person PASTORY VALENTINE)
.....RESPONDENT

RULING.

05/04/2022 & 22/04/2022

NGIGWANA, J.

This ruling is in respect of the raised preliminary objections on points of law. The Applicants upon filing the application for leave to appeal to the Court of Appeal, have now encountered a stumbling block from the respondent's counsel who raised good number of objections as follows: -

(a) *This Application is bad in law for being wrongly applied under Section 47(3) of the Land disputes Courts Act Cap. 216 R: E 2019). This Court has no jurisdiction to issue a certificate on point of law on matter originating from District Land and Housing Tribunal for Kagera at Bukoba.*

(b) *That the matter originates from Land Dispute Settlement mechanism, the Applicants have wrongly called up on the jurisdiction on this court*

under Section 5(1) (c) of the Appellant Jurisdiction to act on this Application.

(c) *That the Applicants has cited Rules 45(a) and 45(b) dichotomy of Jurisdiction of the High Court and Court of Appeal of Tanzania. At the same time. This court has no jurisdiction to act up on such Application except to reject it as the jurisdiction of court is interwoven to process the leave.*

(d) *That the Affidavit in support of Application for Certificate is contains(sic) grounds of appeal which this Court has no jurisdiction to hear and determined as it is functus officio to its judgment.*

Invited to argue for the above objections, Advocate Mathias for the respondent, started with the first limb of Preliminary Objections where he submitted that the court is not properly moved as section 47 (3) of Land disputes Court's Act, Cap. 216 (R: E 2019) is applicable where the DLHT deals with the matter while exercising its appellate or revisionary jurisdiction thus the High Court is required to certify that there is a point of law involved. He substantiated that since Application No. 51 of 2020 originates from DLHT exercising its original jurisdiction the applicants ought to have cited section 47 (2) of Cap. 216 which requires only leave to be sought from this court.

As regards to the second P.O, Mr. Mathias argued that with the enactment of the Land Disputes Courts Act, Cap. 216, matters in relation to appeal from the DLHT are governed therein. Therefore, the applicant citing section 5 (1) (c) of the Appellate Jurisdiction Act and rules 45 (a) and 45 (b) of the Court of Appeal rules was an error as they cannot go together while there is a specific law that is Land Disputes Courts Act. Cap 216. Another argument he advanced is that, Rule 45 (a) relates to powers of the High Court while rule 45 (b)

relates to powers of the Court of Appeal which the application becomes incurably defective.

On the 3rd P.O, the respondent's advocate submits that the Affidavit is defective as it contains submissions on paragraph 4 and 5 and paragraph 8 contains argument while paragraph 10 contains grounds of appeal.

In connection to the 3rd P.O, the learned counsel drew the 4th P.O where he submitted that, since paragraph 10 of the applicants' affidavit contains grounds of appeal to be dealt by Court of Appeal therefore, this court is **functus officio** on those grounds. He made a reference to Rule 93(1) of the Court of Appeal Rules, 2009. Equally straight, he cited the case of **Richard Julius Rukambura vs Isaack, Ntwa Marakajila** and Another, Civil Appeal No. 11 of 1995, CAT at Mwanza (unreported) which elaborates what kind of application is for leave and what kind of application is for certification.

In reply, Mr. Kyariga Kyariga, learned advocate for the applicants conceded that, in this application where the DLHT exercised original jurisdiction, the proper application is for leave to appeal to the Court of Appeal and not for certification. That they wrongly cited section 47(3) instead of section 47 (2) of Cap. 216 R: E 2019 as a slip of pen. That since the error was not intentional and since the law is settled that the jurisdiction of the court is not ousted by wrong citation and since the jurisdiction of the court is conferred by law and not by chamber summons, the court may insert the proper provision and proceed to entertain the application. He cited **Aman Girls Home versus Isack Charles Kanela**, Civil Application No. 325/08/2019, CAT at Mwanza (unreported) Page. 7, likewise the case of **Dangote Cement Ltd versus NSK Oil and Gas Ltd**, Misc. Commercial Application No. 08 of 2020 HCT at

Arusha (unreported) page 15 where Magoiga J. found that where there is failure to cite a proper provision, the irregularity is curable. At page 18 the judge stated that jurisdiction is conferred by law and not a chamber summons. Kyariga went on submitting that with the Advent of overriding objective, the court is enjoined to do away with technicalities at the expense of substantive justice to minimize costs to the parties and save time.

Responding on the 2nd P.O, the learned counsel argued that the Appellate Jurisdiction Act is the general law in civil matters and that Land matters are Civil matters. That there is no wrong in law citing the general law and specific law together.

As regard to the 3rd P.O, he replied that it is trite that Rule 45(b) governs leave to the Court of Appeal, thus not applicable to this court. He maintained his stance that the failure or irregularity is curable as they as they have filed a proper provision and improper one together.

As regard to the last 4th P.O, he stated that what is before the court is leave and not certification on point of law. That the affidavit is not defective as paragraph 4 contains facts, paragraph 5 contains narrations and not submissions. It is narration of what has occurred in the judgment that likewise in para 8. That para 10 is the combination of Law and facts to be determined by the Court of Appeal. That they have to be raised in the Affidavit for the High Court to be in a position to determine if there is an arguable case before granting leave or otherwise. He cited **Bulyankulu Gold Mine Ltd and 2 Others versus Petrolube (T) Ltd and Another**, Civil Application No. 364/16 of 2017 CAT, at DSM (unreported).

That the High Court is not called upon to determine the grounds but just to see whether there is an arguable case hence the court is not **functus officio**. He concluded by reiterating on the principle of overriding objective that it should be embraced as striking out the application will be a burden to the Applicants.

He prayed for this court to follow the stance in **Aliance one Tobacco Tanzania Ltd and another versus Mwajuma Hamis (as administatix of the estate of Philemoni R. Kilengi and another**, Misc. Civil Application No. 803 of 2018 HCT at DSM.

In rejoinder, Mr. Mathias submitted that the laws of the Land impose a duty to Advocates as officers of the court to draw properly legal documents. That the error was not a slip as looking at paragraph 10 of the applicant's Affidavit shows that what was in the mind of the applicant was certification on point of law and not leave. That, even where there is an irregularity, the mode of correcting it has to be clear, whether by amendment or with the leave to refile a proper application. That there was no application preferred by the applicant's advocate to drop the improper provisions or to insert a proper provision or correct it, hence the application remains incompetent and thus subject to be struck out.

The task of this court is to determine whether the raised objections are meritorious. Starting with the first P.O which in my view seems to have much affiliation on jurisdiction issue.

This Application is bad in law for being wrongly applied under Section 47(3) of the Land disputes Courts Act Cap. 216 R: E 2019) This Court has no

jurisdiction to issue a certificate point of law on matter originating from District Land and Housing Tribunal for Kagera at Bukoba.

The respondent counsel proposes that the application for leave sought from this court which the applicants have cited the provision of section 47(3) of Cap 216 is incompetent and the defect is incurable. The respondent's proposition is grounded on the reasons that the cited law is for certification on the point of law which this court has no jurisdiction to grant since the impugned decision was determined by the DLHT exercising its original capacity. His proposition was straightly conceded by the applicant's counsel but argued that the said defect is curable by the Principle of Overriding Objectives and proposes that the remedy is for the court itself to insert a proper provision.

I rightly to agree with the respondent's counsel that the defect is incurable due to the herein below reasons. I must say at the outset that the persuasive High Court cases of **Dangote Cement Ltd versus NSK Oil and Gas Ltd** (supra) and **Aliance one Tobacco Tanzania Ltd and another versus Mwajuma Hamis** relied by the applicants' counsel to cure the wrong citation defect, both were premised on the amendments of the Court of Appeal Rules upon which GN No. 345 of 2019 in particular rule 9 which amended rule 48 of the Court of Appeal Rules of 2009 by adding Sub Rule 1 in the said Rule 48. The amendment reads;

"Provided that where an application omits to cite any specific provision of the law or cites a wrong provision, but the jurisdiction to grant the orders sought exists, the irregularity or omission can be ignored and the Court may order that the correct be inserted."

In that regard, the cases of **Richard Julius Rukambura versus Isaack, Ntwa Marakajila and one another** and that of **Aman Girls Home versus Isack Charles Kanela** both of Court of Appeal which were followed by this court were interpreting the provision of Rule 48 of the Court of Appeal Rules which do not apply in this Court. Since there is no such amendment to the Land Disputes Courts Act or any other applicable law to High Court, the said Court of Appeal cases are distinguishable in this circumstance. Conversely, the said High Court cases are not binding to me but rather persuasive.

However, even if the amendments were only affected through rule 48 of Court of Appeal Rules which its scope of application remain only in the domain of Court of appeal as I said earlier, it will not be an error for courts below to borrow such experience even if there is no such provision to cure the defects since I am aware that there is a clarion call to embrace the overriding objective principle.

It follows therefore that, the question to be resolved here is whether in the circumstances of this case, the omission to cite the provision for leave and instead citing the provision for certification on point of law can be cured by invoking the Principle of Overriding Objective? I am alive that the Principle of Overriding Objective introduced in 2018 vide the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018 was aimed to facilitate the just, expeditious, proportionate and affordable resolution of disputes without due regard to technicalities as opposed to substantive justice as argued by the applicant's counsel but I am also alive that the principle does not help a party to circumvent the mandatory procedures. See **Martin Kumalija & 117 Others versus Iron and Steel Ltd**, Civil Application No. 70 o/18 of 2018

CAT (unreported). This position was stated in the case of **Juma Busiya versus Zonal Manager, South Tanzania Postal 5 Corporation**, Civil Case No. 273 of 2020 where the Court of Appeal had this to say;

"*The principle of overriding objections is not the ancient Greek goddess universal remedy called panacea, such that its objective is to fix every kind of defects and omissions by the parties in court.*"

However, reading between the lines, the holding of the Court of Appeal herein above, it is apparent that even where the jurisdiction of the court to grant the order sought exists, (despite the available specific enactment of rule 48 in Court of Appeal Rules) the Court of Appeal itself is still left with the discretion to decide whether to ignore the omission or otherwise depending to the circumstances of each case. See also the decision of this court in **Rehema Mohamud and 4 Others vs Kagera Cooperative Union (1990)** Misc. Land Application No.124 of 2021, HCT at Bukoba (Unreported). What is worth to remember and take into account is the trite principle of law that, the discretion must always be exercised judiciously.

Stressing on compliance of the mandatory procedures, the Supreme Court of Zambia in the case; **Access Bank (Zambia) Limited and group five Zcon Business Park Joint venture** (2016) (although it is a persuasive decision) had this to say:

"Justice also requires that this court, indeed all courts, must never provide succor to litigants and their counsel who exhibit can't respect for rules of procedure. Rules of procedure and timeliness serve to make the process of adjudication fair, just, certain and even-handed. Under the guise of doing justice through hearing matters on their merit, courts cannot aid in the bending or circumventing of these rules and shifting goal posts, for while laxity

in application of the rules may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. In our considered view, it is in the even- handed and dispassionate application of the rules that courts can give assurance that there is a dear method in which things should be done so that outcomes can be anticipated with a measure of confidence, certainty and clarity. This is regardless of the significance of the issues involved or questions to be tried."

In my view, while embracing the fruits of overriding objective principle which include just, expeditious, proportionate and affordable resolution of disputes, courts must also strive to strike a balance between promoting and encouraging professionalism, consistence, competence, seriousness **visa-vi** the applicability of overriding objectives because legal professionalism like citing relevant law and seeking proper order by advocates have value in the administration of justice. As Mr. Mathias righty submitted that the laws of the Land impose duty to Advocates as officers of the court to draw properly legal documents. In our particular case, the applicant's advocate was not expected to have cited the provision of section 47 (3) of the Land Disputes Courts Act, Cap 216 R: E 2019 applying for certification on point of law for the matter originating in the DLHT which actually this court has no jurisdiction to grant. The learned counsel for applicants was not again expected to proceed to pray for this court to insert the proper provision for him. This was to surrender his duty to this court which in my view, is not a legal procedure and the court cannot condone to such laxity of the learned counsel.

In the premises, this court holds that from that defect of wrong citation, it is incurable as the court is not properly moved and the application is incompetent. Since this objection alone puts the matter at rest, determining

the rest will be merely for purposes of academic exercise. The application is thus consequently struck out with costs.

It is so ordered.

E.L. NGIGWANA.

JUDGE

22/04/2022

Ruling delivered this 22nd day of April, 2022 in the presence of Mr. Kyariga Kyariga, learned advocate for the Applicants, Respondent in person, Mr. E.M. Kamaleki, Judges' Law Assistant and Ms. Tumaini Hamidu, B/C.

E.L. NGIGWANA.

JUDGE

22/04/2022