IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. LAND APPLICATION NO. 28 OF 2020

EMMY EPHRON NGOWI ..... 1ST APPLICANT

JOSEPHINE SAMSON KIWIA ..... 2ND APPLICANT

VERSUS

BANK OF AFRICA (T) LTD ..... 1ST RESPONDENT

MABUNDA AUCTION MART ..... 2ND RESPONDENT

VINCHI GROUP ..... 3RD RESPONDENT

MZALENDO AUCTION MART ..... 4TH RESPONDENT

RULING

24th November, 2020 & 9th February, 2021

ISMAIL, J.

In a joint application instituted by the applicants, the Court's indulgence is sought, to allow extension of time which will enable them to file a notice of appeal. The intended appeal is against the ruling of this Court (Hon. Matupa, J) delivered on 22nd January, 2019. The ruling was in respect of Land Case No. 22 of 2017. The Court acceded to the respondents' plea (the defendants then) that they had no case to answer. In consequence of this ruling, the Court dismissed the suit.

In the instant application the applicants' contention is that their quest to challenge the Court's ruling was scuppered by inaction on the part of the advocate that the applicants engaged. This is deponed in the affidavit that supports the application.

The application has encountered a challenge. Its competence has been questioned by the 1st and 3rd respondents who have preferred separate notices of objection. Whereas the 1st respondent contends that the application is defective and incompetent for wrong or non-citation of the enabling provisions, the 3rd respondent's contention is that this Court has no jurisdiction to entertain the application, in view of the existence of a notice of appeal filed by the 2nd applicant on 21st February, 2019.

Disposal of the preliminary objections was done by way of written submissions. The submissions with respect to wrong or non-citation of the enabling provisions, were made by Mr. Renatus Lubango, learned counsel for the 1st respondent. He argued that the application has been preferred under section 5 (2) (c) of the Appellate Jurisdiction Act (Cap. 141 R.E. 2019), Rule 45 (a) of the Tanzania Court of Appeal Rules, 2019, and section 47 (1) of the Courts Land Disputes Settlement Act (Cap. 216 R.E. 2019). Mr. Lubango contended that all of the cited provisions are utterly irrelevant to the instant application. He argued that, whilst the application

is for extension of time to institute the notice of appeal, the provisions invoked by the applicants relate to a person's right to prefer an appeal to the Court of Appeal against a decision of the Court. The 1st respondent held the view that, since the provisions cited by the applicants are inapplicable, then the application is essentially not enabled by any provision which, in law, amounts to a non-citation of the enabling provisions of the law. This, the counsel contended, rendered the application incurably defective. To buttress his arguments, Mr. Lubango cited a couple of the Court of Appeal's decisions. These are: ***Chama Cha Walimu Tanzania v. The Attorney***, CAT-Civil Revision No. 151 of 2008; and ***Minani Rashidi v. Republic***, CAT-Criminal Appeal No. 17 of 2019 (both unreported). In both of these decisions, the holding was that non-citation and/or wrong citation of the enabling provisions have the effect of rendering the application incurably defective and the proceedings become incompetent. It was Mr. Lubango's contention that the appropriate provision under the circumstances is section 14 (1) of the Law of Limitation Act, Cap. 89 R.E. 2019. He, in turn, prayed that the application be dismissed with costs.

The 3rd respondent's objection is predicated on what the applicants averred in paragraphs 3 of the joint affidavit, wherein they stated that they

filed a notice of appeal against the Court decision. Such notice was filed on 30th January, 2019, and that payment of the filing fees was receipted by ERV No. 24509231 dated 21st January, 2019. Mr. Deya Outa, the 3rd respondent's counsel further submitted that there is nowhere, in the entirety of the joint affidavit, have the applicants indicated that such notice of appeal was struck out or withdrawn subsequent to its filing. The learned counsel contended that, in the subsistence of the notice of appeal, the powers conferred on the Court by section 11 (1) of Cap. 141 cannot be exercised. He took the view that such powers are only exercisable before a notice of appeal is lodged. To fortify his contention, the learned counsel cited the case of ***Aero Helicopter (T) Ltd v. F.N. Jansen*** [1990] TLR 142, wherein it was held that jurisdiction of the Court ceases once appeal proceedings to the upper Court have been commenced. Making reference to the Court of Appeal Rules, 2009, Mr. Outa argued that the word "Court" referred in the said Rules means the Court of Appeal. In conclusion, the learned counsel urged the Court to strike out the application for being preferred in a court that is not vested with jurisdiction to entertain it.

In their rebuttal submission, the applicants chose to respond to the 3rd respondent's objection on jurisdiction, leaving out the 1st respondent's objection that questions the competence of the application. With respect to

jurisdiction, the applicants began with a concession that the notice of appeal was filed and it is indeed pending in the Court of Appeal. The applicants were quick to submit, however, that in terms of Rule 90 (1) (a) (b) and (c) of the Court of Appeal Rules, 2009, the Court is vested with jurisdiction to grant an extension of time to file a notice of appeal and even the appeal itself. The applicants argued that since appeals are preferable within sixty (60) days after filing the notice of appeal and, noting that such period had already expired, it was proper that a new notice be filed through extension of time that they are now seeking. They prayed that the objection be overruled.

The parties' contending submissions bring up one key question. This is as to whether the instant application is competent. I will choose to begin with the 1st respondent's objection. As stated earlier on, the argument by the 1st respondent is that the application suffers from a legal disability that arises from a wrong citation or non-citation of the enabling provisions. This contention has not been assailed by the applicants. As stated by the 1st respondent's counsel, rightly in my view, the provisions cited in the application largely provide for a party's right to institute an appeal against the Court's decision. They also cater for the requirement of certification on a point of law for appeals emanating from proceedings under Head (c) of

the Magistrates' Courts Act. None of these provisions relate to the Court's powers to extend time for lodging the notice of appeal as contended by the applicants. This means that all of the said provisions do not move this Court to entertain the instant application. They are, therefore, wrong provisions of the law which shouldn't have been invoked. In other words, the applicants have omitted or skipped relevant provisions, choosing instead, the provisions which are utterly irrelevant. This is what Mr. Lubango argued as non-citation of the relevant provision. By his reckoning, the appropriate provision is section 14 of Cap. 89.

As I fully subscribe to Mr. Lubango's submission, it behooves me to underscore the legal position as it currently obtains. It is precisely as stated in ***Chama Cha Walimu*** and ***Minani v. Republic*** (supra), that the consequence of non-citation or wrong citation of the enabling provisions is to render the application incompetent. This astute position has been accentuated in plentiful of decisions some of which are: ***Robert Leskar v. Shibesh Abebe***, CAT-Civil Application No. 4 of 2006; ***Hussein Mgonja v. The Trustees of the Tanzania Episcopal Conference***, CAT-Civil Revision No. 2 of 2002 (AR); ***Anthony Tesha v. Anita Tesha***, CAT-Civil Appeal No. 10 of 2003; ***Fabian Akonaay v. Matias Dawite***, CAT-Civil Application No. 11 of 2003; ***Aloyce Mselle v. The N.B.C. Consolidated Holding***

Corporation, CAT-Civil Application No. 11 of 2002 (all unreported); and ***China Henan International Cooperation Group v. Salvand K.A. Rwegasira*** [2006] TLR 220

In ***Robert Leskar v. Shibesh Abebe*** (supra) the Court of Appeal observed as hereunder:

> *"It is equally settled law that non citation of the relevant provisions in the notice of motion renders the proceeding incompetent."*

Significantly, the foregoing reasoning was informed by the upper Bench's earlier position in ***Hussein Mgonja v. T.E.C.*** (supra). In the latter, the application was adjudged incompetent and struck out for "failure to move the Court properly". The superior Court held:

> *"If a party cites the wrong provision of the law the matter becomes incompetent as the Court will not have been properly moved".*

Capping up the gravity of citing the relevant enabling provision, the full bench of the Court of Appeal of Tanzania held, in ***China Henan v. Salvand K.A. Rwegasira*** (supra), that the omission or failure to do so constitutes *"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". Underscoring that the severity of the infraction, the upper Court held:

> *".... worse still the error in citing a wrong and inapplicable rule in support of the application is not in our view, a technicality falling within the scope and purview of Article 107A (2) (e) of the Constitution. It is a matter which goes to the very root of the matter ...."*

Enjoined by the reasoning in the cited matters, I feel constrained to agree with the 1st respondent and hold that the applicants' misstep constitutes an incurable error of law which renders the application fatally flawed and untenable. Consequently, I hold that the objection on wrong or non-citation of the enabling provision is meritorious and I sustain it.

Accordingly, on this ground alone, I strike out the application with costs. For obvious reasons I will not dwell on the second limb of the objections.

It is so ordered.

DATED at **MWANZA** this 9th day of February, 2021.

M.K. ISMAIL

JUDGE

Date: 09/02/2020

Coram: Hon. M. K. Ismail, J

Applicants: 1st, 2nd — Absent

Respondents: 1st – Mr. Malick Hamza, Advocate; 2nd, 3rd, 4th — Absent

B/C: Josephine Mhina.

Court:

Ruling delivered in chamber, in the presence of Mr. Malick Hamza, learned Counsel for the 1st respondent and in the absence of the rest of the parties, this 09th day of February, 2021.

M. K. Ismail

JUDGE

At Mwanza

09th February, 2021