

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM.

MISC APPLICATION NO 204 OF 2016

BETWEEN

ZUWENA ABDUL ALI ----- APPLICANT

VERSUS

GOLD TREE (T) LTD ----- 1ST RESPONDENT
GASLAMP ----- 2ND RESPONDENT
PERCY BEDA MWIDADI ----- 3RD RESPONDENT
VICTOR JOSEPH PETER ----- 4TH RESPONDENT
RUPHINUS ANTONY MLORERE ----- 5TH RESPONDENT

RULING

SONGORO, J

This is a ruling on preliminary objection on points of law on the application filed by Zuwena Abdul Ali for review of previous court order, and for issuance of a court order compelling Gold Tree the 1st Respondent to handover some equipments to the applicant on the basis that, are his personal properties. The applicant application is made under Section 68(e) and 95 of the Civil Procedure Code Cap 33 [R.E 2002] and is supported by an affidavit affirmed by Zuwena Abdul Ali.

Respondents in the application are Percy Mwindadi, Maksim Chaldymov and Yuri Velentinovich Chernomorcenko who filed a counter affidavit and opposed the application on the basis properties being demanded by applicant are not her properties. In addition, the 2nd Respondent also raised two preliminary objection on points of law which are now subject of the present ruling. The two preliminary objection which were raised reads as follows;-

- 1) The court has not been improperly moved,
- 2) The application is misconceived

Thus in the light of the respondent's preliminary objection, the court invited both parties to pursue the objection raised by a way of a written submissions, and parties timely filed their submissions.

On his part, the 2nd respondent while being assisted by Mr. Thomas Mihayo Sipemba, Learned Advocate, submitted that, it is trite law that, for the application to competent before the court application must cite relevant and enabling provisions of the law in the chamber summons.

He then submitted that, in the chamber summon, applicant is applying for review and has cited Sections 68(e) and 95 of the Civil Procedure Code Cap 33 [R.E 2002] to support his application. The Respondent counsel then argued, the applicant by citing the said section in the chamber summons has cited wrong provisions of the law which may not enable the court to hear and determine the application at hand.

The respondent's counsel then explained that, Section 68(e) and 95 of the Civil Procedure Code Cap 33 [R.E 2002] do not grant powers to the court to undertake a review on previous court orders. It was also his argument of the respondent's counsel that, Section 68 of the Civil Procedure Code Cap 33 [R.E 2002] merely summarizes the general powers of the court in interlocutory proceedings. He also argued that, Section 95 of the Civil Procedure Code Cap 33 [R.E 2002] provides for inherit powers of the court and applies where there is no specific provision of the law which governs the granting of the said order.

Next, the Respondent counsel submitted the none of the provision cited in the applicant's chamber summons enables the court to undertake a review. So on the basis of the above mentioned point, the Respondent's counsel prayed to the court dismiss the application

Turning to the 2nd point of preliminary objection on point of law, Respondent's counsel pointed out that, the application for review originates from Commercial Case No 119 of 2015 which is before Hon Mruma J.

Mr. Sipemba then pointed out that, the applicant was not a party to the Commercial Case No 119 of 2015, and so far there is no court order which joined him to be a party to the suit. So it was the Respondent's counsel submission that, since the applicant is not a party to the suit, she may not apply or seek any interim order in any matter arising from the suit.

In the light of his submissions, Mr Sipemba prayed to the court to strike the application with costs in favour of the Respondents.

On her part, the applicant with assistance of Generous Montano, Learned Advocate, she submitted that, applicant is seeking of a review on order issued by Hon Mwambegele J (as then) issued on 14/12/2016 in the Misc Commercial Cause No 259 of 2015. The applicant's counsel the indicated that, by citing Sections 68(e) and 95 of the Civil Procedure Code Cap 33 [R.E 2002] in the chamber summons, court has been properly been moved because a relief which the applicant sought is intended to redress an order of injunction which was issued by the court to 1st 3rd and 7th Respondent.

The counsel then explained that, essentially applicant is applying for court order which will enable her establish her rights on properties kept in custody of the 1st Respondent's premises, so that, they may be released and granted to the applicant. So the counsel indicated that, the only way under which the court may intervene in this matter and asserts applicant's rights is by *a way of review* of previous court orders

On the cited section, the applicant counsel pointed out the cited Section 68 (c) of the Civil Procedure Code Cap 33 [R.E 2002] enables the court to review, its previous order. To strengthen his point the applicant Counsel referred a court to a decision in the Civil Application No 183 of 2004 between Highland Estate Ltd Versus Kampuni ya Uchukuzi Dodoma Ltd and Another (Unreported) and Civil Application No 68 of 2011 between Tanga Gas Distributor s Ltd Versus Mohamed Salim Said and two Others and other cases which confirmed that, under Section 68 (e) of the Civil Procedure Code the Court may undertake a review. So the respondent's objection that, the court has not been moved has no merit and ought to dismissed because the cited provisions enables the court to undertake a review.

In reply to the second objection that, the application is misconceived, counsel submitted that, the applicant is seeking an order of review to redress her rights on properties which are kept at the 1st respondent premises, and application is based in good faith. All in all the applicant prayed to the court dismiss the objection raised.

The court has subject Respondent's two preliminary objections on point of law and applicant response to the objection and find the applicant is applying two prayers.

The first prayer is a review of previous court order. The second prayer is for a court order which compels the 1st Respondent to handle over some properties which belongs to the applicant.

Now turning to first preliminary objection that, the application has cited Section is 68(e) and 95 of the Civil Procedure Code Cap 33 which irrelevant and not enabling provisions the court perused the two sections to find out if they are relevant to the application at hand. Turning to section 68(e) of the Civil Procedure Code Cap 33 I find it states as follows-

In order to prevent the ends of justice from being defeated the court may, subject to any rules in that, behalf-

(e) make such other interlocutory orders as may appear to the court to be just and convenient.

Now guided by the above mentioned cited section 68(e) of the Civil Procedure Code the court finds there is nothing in the cited Section which enables the Court to undertake a review.

Next, the court again perused the provision of Section is 95 of the Civil Procedure Code Cap 33 [R.E 2002] find section provided for inherent powers of the court and reads as follows;-

Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Likewise readings between the lines of 95 of the Civil Procedure Code Cap 33 [R.E 2002] the I did not find any statutory word which allows the court to undertake a "review of any previous court order in the cited section. While on this point I would sincerely state that, Section 68 of the Civil Procedure Code Cap 33 provides for supplementary proceedings as follows; .

In order to prevent the ends of justice from being defeated the court may, subject to any rules in that, behalf-

Make such other interlocutory orders as may appear to the court to be just and convenient.

Bearing in mind the applicant is applying for review while Section 68(e) of the Civil Procedure Code Cap 33 only allows the court to make interlocutory orders, I find the section is not relevant and enabling provision of the law in review.

Taking into account that, the applicant was applying for review one would have expected that, the applicant would have cited a specific provision which will enable the court to undertake review which in view is Section 78 (a) or (b) of the Civil Procedure Code Cap 33 R.E 2002, which allows any person aggrieved by an order made by any court to apply for review. Indeed Section 78 of the Civil Procedure Code states that, ;-

“Subject to any conditions and limitations prescribed under section 77, any person considering himself aggrieved–

(a) By decree or order from which an appeal is allowed by this Code but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is allowed by this Code,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.

Since, the applicant did not cite Section 78 of the Civil Procedure Code Cap 33 [R.E 2002] the court find the relevant and enabling provisions of the law which enables the court to undertake a review was not cited. None citation of relevant and enabling provisions of the law renders the application to be incompetent.

Courts including the Court of Appeal, in several decisions, including decisions in Civil Application No 144 of 2005 between Tanga Hardware and Autoparts and Six others and CRDB Bank Ltd., and Civil Application No. 64 of 2003, Citibank Tanzania Ltd. v. Tanzania Telecommunication Co. Ltd. & Four Others (CAT) and other have consistently and persistently stated that, , wrong citation of the law renders an application to be incompetent because the court has not been properly moved.

Likewise in Civil Application No 4 of 2006 between Robert Leskar Verus Shibesh Abebe Arusha Registry (Unreported) Arusha Registry the Court of Appeal also relying on the decision in the case

of Hussein Mgonja versus The Trustees of the Tanzania Episcopal Conference, AR Civil Revision No. 2 of 2002 stated and I quote;

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

I hereby sustain the preliminary objection on the point of law that, the applicant did not cite relevant and enabling provision of the law to enable the court to undertake a review. With that, court finding, I find no plausible reason to proceed with the remaining objection. Consequently I hereby strike out the application. Since there are related proceedings which are still going on I make no order as to costs the

Dated and Delivered at Dar es Salaam this 13th day of June, 2018


H.T.SONGORO
JUDGE



The Ruling was delivered in the presence of Mr. Jonathan Luhuga, Learned Advocate holding a brief of Thomas Sipemba, Learned Advocate of the Respondent and absence of the applicant and her counsel.