

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 93 OF 2020**

**(Arising from Commercial Case No. 35 of 2020)**

**MBEZI FRESH MARKET LIMITED ..... 1<sup>ST</sup> APPLICANT**

**KHALIFA SALUM ALLY ..... 2<sup>ND</sup> APPLICANT**

**FIRDAUS ISMAIL KHAMIS ..... 3<sup>RD</sup> APPLICANT**

**VERSUS**

**INTERNATIONAL COMMERCIAL**

**BANK (TANZANIA) LIMITED ..... RESPONDENT**

**RULING**

**B.K. PHILLIP, J**

This ruling is in respect of a point of preliminary objection raised by the learned advocate for the respondent, Mr. Juventus Katikiro, to wit;

- *That the applicants have not cited the enabling provision.*

A brief background to this application is that, the respondent herein lodged a suit under summary procedure (Order XXXV of the CPC), vide Commercial Case No. 35 of 2020, against the applicants herein (defendants in the suit), claiming for among other reliefs, payments for a sum of Tshs. 1,008,065,243.08 arising from an overdraft facility granted to the 1<sup>st</sup> applicant. The same was secured by legal mortgages in respect of the properties located on plot No. 583 Block "J" Mbezi Area L.O. 123333,

CT No. 46224, Kinondoni Dar es Salaam and Plot No. 582 Block "J", Mbezi Area Kinondoni, Dar es Salaam, and guarantee of the Directors of the 1<sup>st</sup> applicant.

The applicants through the legal services of the learned Advocate Deogratias Mwarabu of South Law Chambers ( Advocates) lodged the application in hand for leave to defend the suit under the provisions of Order XXXV Rule 3(1)(a) (b) and (2) and Order XLIII Rule 2 of the Civil procedure Code Act Cap 33 R.E. 2019 (Henceforth "the CPC"). Upon being served with the application, Mr. Katikiro raised the aforementioned point of preliminary objection, which I ordered to be disposed of by way of written submissions.

Submitting in support of the point of preliminary objection, Mr. Katikiro submitted that in this application the applicants have not cited the provisions of Order XXXV Rule 3(1)(c) of the CPC as amended by the Mortgage Financing (Special Provision) Act No. 17 of 2008, which is the enabling provision in an application for leave to defend a suit arising out of mortgage. He contended that failure to cite the aforementioned provisions of the CPC is fatal and the consequence thereof is for the application to be strike out. To cement his arguments he cited the case of **Tanperch**

**Limited and three others Vs National Bank of Commerce Limited, Misc. Commercial applications No. 159 of 2018 and 157 of 2018,** (unreported), in which this court struck out the applications for leave to defend a suit for failure to cite the provisions of Order XXXV Rule 3 (1)(c) of the CPC. Another case cited by Mr. Katikiro is the case of **Mazongera Building Contractors Ltd and three others Vs. Diamond Trust Bank (T) Ltd. Misc. Commercial Case No. 35 of 2015** (unreported).

In rebuttal Mr. Mwarabu submitted that, he cited the provisions of Order XXXV Rule 3(1)(a)(b) and (2) but he mistakenly forgot to cite Rule 3(1)(c) of the CPC. He was of the view that since the applicants have filed the application for leave to defend the suit in compliance with the law and only omitted the provisions of Rule 3(1) (c) of Order XXXV of the CPC, then this court should be considerate enough to allow the applicants to insert the omitted provision of the law that is, Rule 3(1)(c) of order XXXV of the CPC, in order to achieve substantive justice. Mr. Mwarabu insisted that this court is vested with jurisdiction to entertain this application. To cement his arguments he cited the case of **Alliance One Tobacco Tanzania Limited & Hamisi Shani Vs. Mwajuma Hamisi and Haritage Insurance Company (T) limited, Misc. Civil Application No. 803 of**

**2018** (unreported), **Samson Ngw'alida Vs The Commissioner General Tanzania Revenue Authority, Civil Appeal No. 86 of 2008,** (unreported) in which the court of appeal said the following;

*'We did not consider the non citation of the relevant provision in the Notice of Preliminary objection to be something that could deter the delivery of substantial justice.'*

Another case cited by Mr. Mwarabu is the case of **Stirling Civil Engineering Ltd Vs. Hon. Attorney General of the Government of the United republic as Tanzania Misc. Cause No. 3 of 2006,** (unreported).

In rejoinder, Mr. Katikiro, reiterated his submission in chief. Moreover, he submitted that the principle of overriding objective cannot be applicable in the circumstances of this application. He contended that the Court of Appeal has set the standards for the application of the principle of overriding objective that is, the same should not be applied blindly and that mandatory legal procedures cannot be ignored. To cement his arguments he cited the case of **Mondorosi Village Council and three other Vs Tanzania Breweries Limited and Four others, Civil Appeal No. 66 of 2017** (unreported) and **Martin D. Kumalija & 117 others Vs Iron and steel Ltd, Civil Application No.70 of 2018**(unreported).

Having analyzed rival submissions made by the learned advocates appearing herein, I wish to state from the outset that, there is no dispute that in a case arising out of mortgage, the proper provisions of the laws for moving the court in an application for leave to defend the suit are Order XXXV Rule 3(1)(c) of the CPC. This position of the law was also stated in case of **Leila Meghi t/a The House Enterprises Vs International Commercial Bank (Tanzania) Limited (2016) TLR 332** in which Hon. Mwambegele, J as he then was said the following

*'.....the prevailing law has it that an application for leave to defend a summary suit will only be maintainable if brought under order XXXV rule 3 (1)(c) of the CPC in the light of the amendment effected thereto in 2008 vide the mortgage Financing (special Provisions) Act, 2008...'*

Also, [see the case of **Tanperch limited** (supra)].

Mr. Mwarabu conceded that he mistakenly forgot to cite the above enabling provision of the law. So, under the circumstances, the pertinent issues that I need to address are; whether or not under the circumstances omission to cite the enabling provisions of the law as conceded by Mr. Mwarabu is minor and whether this court can invoke the principle of overriding objective to order the applicant to insert the correct provision of the law.

At this juncture, I think it is worth pointing out that despite the advent of the principle of overriding objective, the position of the law as far as the legal requirement to move the court properly is concern is still the same, that is, the parties to a case have to move the court properly by citing proper provisions of the law. However, considerations are always taken on the type of omission, whether it goes to the root of the matter or not and the fact that each case shall be decided on its own merits remains applicable. From the foregoing, in my considered legal opinion, failure to cite the provision of the law which confers powers to this court to grant the orders sought goes to the root of the application, since the court grants orders/ relief sought by virtue of the powers conferred unto it by the relevant provisions of law(s). Now, if a party fails to cite the relevant provision of the law, the omission is fatal. It is not a minor one.

This takes me to the well known position of the law that is failure to move the court properly renders the application incompetent.( see the case of **National Bank of Commerce Vs Sadrudin Meghji ( 1998) TLR 503** and **Tanzacoal East Africa Mining Limited Vs Minister for Energy and Minerals, Misc Commercial Application No.74of 2014, ( 2016) TLS LR 152**). An incompetent application is not worth any amendment.

Moreover, the position of the law is that an application made to pre-empt a point of preliminary objection raised by the other side, as Mr. Mwarabu is trying to do in this application is not allowed. ( see the case of **Mary John Mitchell (Legal representative of Isabela John Vs Sylvester Magembe Cheyo and others, Civil Application No. 161 of 2008** (unreported) and **Almas Iddie Mwinyi Vs National Bank of Commerce Ngama Msite, ( 2002) TLR 83**).

With due respect to Mr. Mwarabu, the case of the Court of Appeal he cited, [**Samson Ng'walida**(supra)] which is binding to this court, is distinguishable from the facts of this case as the same was about a party's failure to cite a relevant provision of the law in the notice of preliminary objection. It was not for moving the court to grant an order for leave to defend a suit as it is in the present application. Gravity of the error/omission made in the case of the Court of Appeal is quite different from the gravity of the error /omission in the application at hand, as in this application the omission made goes to the root of the application.

The case of **Stirling Civil Engineering Ltd**, (supra) though it is not binding to me as it is the decision of the High Court, but it is also distinguishable from the facts of this application since it was not about

non-citation of the relevant provision of the law and the court made it clear in the ruling that, the procedure irregularities pointed out in that application were minor.

As regards the decision of this court in the case of **Alliance One Tobacco Tanzania Limited and Hamisi Shoni** (supra), the same is not binding to me and the facts behind the application in hand are different from the facts of that case.

I am in agreement with Mr. Katikiro that the principle of overriding objective cannot be applicable under the circumstances of this case as the failure to move the court properly is purely due to an oversight done by the applicant's advocate. The Court of Appeal has said several times that the principle of overriding objective should not be applied blindly as doing so will lead to chaos in the administration of justice.

In the case of **Puma Energy Tanzania Limited Vs Ruby Roadways (T) Limited Civil Appeal no. 3 of 2018** (unreported) the Court of Appeal said the following;-

*"What emerges from above decision is that the overriding objective is not meant to overhaul the rules of procedure but facilitate their application. As the Supreme court of Kenya stated in Mradina Suresho Kantaris V. Suresh Nanalai Kantaria, Civil Appeal No. 277 of*



*2005 (unreported) the overriding objective is not a panacea for all ills and in every situation. A foundation of its application must be properly laid and the benefits of its application judicially ascertained."*

Also, in the case of **Sgs. Societe Generale De Surveillance SA and two others Vs VIP Engineering and Marketing Limited, and another , Civil Appeal No. 124 of 2017** (unreported) the Court of Appeal said the following;

*'We also find that the overriding objective principle does not and cannot apply in the circumstances of this case since its introduction in the written laws (Miscellaneous Amendments) (NO. 3) Act, 2017 (Act No. 8 of 2017) was not meant to enable parties to circumvent the mandatory rules of the court or to turn blind to the mandatory provisions of the procedural law which go to the foundation of the case. [see Martin D. Kumaliya & 117 others and Mondoroso Village council and 2 others (supra)].'*

From the foregoing, I hereby uphold the point of preliminary objection. The application is struck out with costs.

Dated this 3<sup>rd</sup> day of February 2021.



  
**B.K.PHILLIP**

**JUDGE**