

TANZANIA / JUDGMENT

kidenya ngalu and another versus maduhu mpemba 2024 tzhc 151 2 february 2024

COURT
TZHCDECIDED
2 February 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA SHINYANGA SUB-REGISTRY AT SHINYANGA MISC. LAND APPLICATION NO. 15 OF 2023 (Arising from the judgment of the High Court of Tanzania at Shinyanga (Hon. S. M. Kulita, Judge) delivered on 17th February 2023 in Land Appeal No. 63 of 2021) KIDENYA NGALU 1 ST APPLICANT SUMAYI NGALU II
..... 2ND APPLICANT VERSUS MADUHU MPEMBA RESPONDENT

RULING

29th Nov, 2023 & 2nd February, 2024 MASSAM, 1.: The Applicant brought this application under section 47(1) (3) of the land Dispute Court Act, Cap 216 R.E 2019 of the Appellate Jurisdiction Act. 1979 Cap 141 R. E 2019 seeking for leave to appeal to the Court of Appeal of Tanzania against the decision of this court in Land Appeal No 63 of 2021 that was pronounced on 11h February 2023. The application is supported by an affidavit sworn by both applicants herein. The Respondent contested the application through his counter affidavit that was proceeded by a notice of preliminary objection to the effect that, Page 1 af 7

1. The application has been brought under the wrong provision of the law.
2. The affidavit of the applicants has contravened order XIX Rule 3(1) of the Civil Procedure Code Cap 33 R.E 2019. Hearing of the preliminary objection on points of law was by way of oral submission and as a matter of legal representation Mr. Constantine Ramadhani a learned advocate appeared for the Applicants while Mr. Frank Samweli also a learned advocate appeared to defend the Respondents interest. Arguing in support of the preliminary points of objection, Mr. Samweli in the foremost abandoned the 2nd point of preliminary point of objection and proceeded to submit for the 1st point of objection that, the application was brought under a wrong provision of law that is Section 47(1) and (3) of the land Disputes Courts Act Cap 216 R.E 2019 while the proper provision which ought to have been cited is Section 47 (2) of Cap 216 (Supra). Basing on the submission made, the counsel for the respondent prays that the application be struck out with costs. Responding to the submission made, Mr. Constantine conceded to the fact that, the provision used in the

application is not proper as the matter originated from the District Land and Housing Tribunal and he proceeded by starting that, the proper section to grant leave is section 47(2) of the mentioned law. So he prays the said application to be struck out with costs. In the side of the applicants conceded the issue that the section used was not proper and proceed to state that, the wrong citation of the enabling provision cannot make the application to be struck out as this court under the overriding objective can order the insertion of the proper provision and proceed to hear and determine the application on merit. He referred this court to rule 48 (1) of the Court of Appeal Rule, Article 107(A) (2) of the Constitution of the United Republic of Tanzania, The Applicant's counsel also referred this court to the Holy Bible in Luke 2(17-26), Mark 2(1-12) where Jesus healed a patient who was brought to him without following the procedure. To support his stance reference was also made to the case of Dangote Cement limited vs. Oil and gas Ltd, Mise. Commercial Appl No. 8 of 2020 HC Commercial Division at Arusha. The Applicants' advocate is of the view that, overriding objective came in to force that the wrong citation of the enabling provision is not fatal anymore as the court has to consider if it has jurisdiction to grant the order sought or not. It is the Applicant's prayer that the PO be Page 3 of 7 dismissed as the counsel for the Respondent has not stated how the same has occasioned a miscarriage of justice on its part. In a brief rejoinder, Mr. Samweli reiterated that the court has jurisdiction to entertain the application but by citing the wrong provision of law the court lacks jurisdiction, he also distinguished the case cited by the counsel for the Applicant from the current case and the rule cited such that, the same applies to the Court of Appeal and not to this court. On the application of the Constitution and the Overriding objective, the respondents counsel responded that, the same cannot apply where the court has no jurisdiction over the matter. On the part of the cited provision from the bible he responded that, if Jesus had no jurisdiction to heal that patient, he could not have healed him, that in the current application much as the Applicant has conceded that the proper provision was not used then the application be struck out with costs. I have analyzed the submissions made by both parties for and against the preliminary objection, the question that follows is whether the preliminary objection is of merit. In determining this issue, I will be guided with the holding made in the famous case of Mukisa Biscuit Manufacturers Ltd Vs. West End Distributors Ltd [1969] EA 696, where it was held that, Page 4 of 7 '1 preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of Law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion. II In the same case, at page 700 the court had this to say: - "50 far as I am aware/ a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleading~ and which if argued as a preliminary objection may dispose of the suit Examples are an objection to the jurisdiction of the court or a plea of (time) limitation or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration. II In the instance application it is the submission by the counsel for the Respondent that the application is incompetent before this court for failure of the Applicants to cite the proper provision of the law. While I agree with the counsel for the Respondent that, section Section

47(1), (3) of the Land disputes Courts Act, Cap 216 R.E 2019 cited by the Applicants are not specific provision dealing with the grant of leave and thus cannot be considered as specific enabling provision for the current application. Similarly, it must be noted that, the current application emanated from an appeal that was preferred before this court which originated from the decision issued by the District Land and Housing Tribunal for Maswa. In other words the proper section which the applicants ought to have inserted in its submission is section 47(2) of the District land and Housing Tribunal Cap 216 which is hereunder reproduced for easy of reference, Section 47(2) states that, "A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may: with leave of the High Court or Court of Appeal, appeal to the Court of Appeal." In that regard, the provisions cited by the Applicants, that is section 47 states generally on the Appeals from the High Court, and the sub sections thereto categorically specify on the procedure to be followed when the high Court exercises its original, revisional or appellate jurisdiction, thus to me it cannot be considered as wrong provision as they are relevant provision but the Applicant skipped referring the specific provision moving the court for the Applicant. In this matter I agree that, what was raised by the Respondent is a pure point of law as there was non-citation of the specific enabling provision of the law moving the court to grant the application. Now, the question is what is the consequence of non-citation of the specific enabling provision of the law? Page 6 of 7 I am inclined to say that, where the Applicants has omitted only to cite any specific provision of the law, such defect can be cured under the overriding objective as so submitted by the counsel for the Applicant by allowing the insertion of that provision which I so assume. The Reason for saying the same is based on the fact that the omission to insert the specific section to me has no occasioned any miscarriage of justice on the side of the respondent and basing on the ambit of timely dispensation of justice without being tied with technicalities, I overrule the Preliminary point of objection and allow the insertion of the specific section so as the application can be heard on merit. However, that will be different from the wrong citation of the law moving the court to grant the order sought as in the current application there was only an omission to insert the specific subsection and not the enabling provision of the law. The preliminary objection is therefore overruled without costs. It so ordered DATED at SHINYANGA this 2nd day of February, 2024. ~ R.B. Massam JUDGE 2/2/2024 Page 7 of 7

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