IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

CIVIL APPLICATION NO. 3 OF 2015

ELLY PETER SANYA ..... APPLICANT

VERSUS

ESTER NELSON ..... RESPONDENT

(Application for extension of time from the High Court of Tanzania At Mbeya)

(Chocha, J.)

Dated the 28th day of April, 2015

In

Misc. Civil Appeal No. 27 of 2014

.....

RULING

13th & 15th April, 2016

MUGASHA, J. A.:

This is an application by notice of motion under Rule 8 of the Court of Appeal Rules, 2009,(the Rules) in which the Court is moved to extend time within which to lodge an application for a certificate on a point of law. The application is supported by the affidavit of **ELLY PETER SANYA,** the applicant.

When the application was called on for hearing, the respondent did not enter appearance despite being served with the notice of hearing on 9/3/2016. The applicant prayed and he was allowed to proceed argue the application in the absence of the respondent in terms of Rule 63(2) of the Rules.

The Court *suo motu* required the applicant to make an address on the competence of the application brought under Rule 8 and seeking extension of time to lodge a certificate on a point of law.

The applicant who was unrepresented maintained that, the application is properly before the Court because he looks forward to appeal against the decision of Ngwala, J. which was a subject of the application for extension of time to certify a appoint of law which was dismissed by Chocha, J.

A brief background to this application is as follows: The applicant lodged a notice of appeal seeking to appeal against the decision of the High Court by Ngwala, J. in Matrimonial Appeal No. 2 of 2013. The applicant requested and he was supplied with proceedings and the decree on 22/10/2014. By then, the time to apply for the certificate on points of law had already expired. This made the applicant to file Miscellaneous Civil Application No. 27 of 2014 seeking to be granted extension of time to apply for the certificate which was dismissed on 28. 04. 2015. As such, in this application before the Court, the applicant is still seeking extension of time to apply for the certificate on points of law.

The point for determination is whether this application is competent.

The discretion of the Court to grant extension of time is pursuant to Rule 10 of the Rules which categorically states:

> *"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after doing of the act, and any reference in these Rules, to any such time shall be construed as a reference to that time as so extend."*

Rule 48(1) of the Rules prescribes the form of application to the Court as follows:

> *"Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, every application to the Court shall be by notice of motion supported by affidavit, it shall cite the specific rule under which it is brought and state the ground for the relief sought"*

A similar application was preferred under rule 8 of the Rules in **JOHN DAVID KASHEKYA VS THE ATTORNEY GENERAL, CIVIL APPLICATION NO. 1 OF 2011**(unreported). The Court observed among other things, as follows:

> *"There is now a requirement to cite a specific rule under which an application is made. It is no longer a question of practice of the Court but a requirement of the Rules. The current rule 10 is dealing with applications for extension of time. Rule 8 deals with computation of time, two different matters"*

In view of the stated position of the law, the current application is brought under a wrong provision of the law which renders the application incompetent and hence the Court is not properly moved. In our jurisprudence, it is equally settled law that non-citation of the relevant provisions in the notice of motion renders the proceeding incompetent (**ROBERT LESKAR VS SHIBESH ABEBE, CIVIL APPLICATION NO. 4 OF 2006** (unreported). In the case of **HUSSEIN MGONJA VS THE TRUSTEES OF THE TANZANIA EPISCOPAL CONFERENCE, CIVIL REVISION NO 2 OF 2002,** the Court said:

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

In a recent case of **MPAZI ALBERT ELIA BOAZ VS THE DIRECTOR OF PREVENTION OF CORRUPTION BUREAU AND TWO OTHERS, CIVIL APPLICATION NO. 13 OF 2013** (unreported), the Court said that, non-citation of the relevant provision of the law from which the Court derives power to hear and determine the application offends the mandatory requirement of rule 48(1).

As earlier intimated, this application suffers wrong citation which is tantamount to non-citation and it violates the provisions of rule 48(1) of the Rules, which renders the present application incompetent and the remedy is to strike it out.

Without prejudice to the aforesaid, assuming that the application was competent, would this application be tenable considering that the applicant is seeking extension of time to lodge an application for a certificate on a point of law?

Certification on points of law to be determined by the Court is the exclusive domain of the High Court in terms of section 5(2) (c) of the Appellate Jurisdiction Act [**CAP 141 R.E. 2002**] which categorically states:

> *"No appeal shall be against any decision or order of the High Court in any proceedings under Head (c) of part 111 of the Magistrate Courts Act unless the High Court certifies that a point of law is involved in the decision or order."*

This position was restated in the case of **EUSTACE KUBALYENDA VS VENANCIA DAUD, CIVIL APPLICATION NO. 70 OF 2011**(unreported) where the Court among other things, said:

> *".....But it is the High Court only which has been granted exclusive jurisdiction to certify to the Court that a point or points of law is or are involved in the impugned decision or order in respect of the proceedings falling under Head (c) of Part III of the Magistrates' Courts Act, CAP 11 RE.2002 (the MCA), The said provisions of the MCA deal with the appellate and revisional jurisdiction of the High Court in matters originating from the primary courts"*

The same position applies to the case at hand because the matter originates from the Primary Court of Uyole in Matrimonial Cause No. 47/2012.

In the light of the stated position of the law, the current application is not tenable because the grant of certificate on points of law is not the domain of the Court of Appeal. In a nutshell, the application is not competent for wrong citation and seeking the untenable. As such, the application is hereby struck out with no order as to costs because the respondent neither contested nor appeared in Court at the hearing of the application.

DATED at MBEYA this 14th day of April, 2016.

S.E.A. MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL