IN THE HIGH COURT OF ZANZIBAR
AT TUNGUU

CIVIL APPLICATION NO. 133 OF 2023

SALEH SEIF CHUM..... APPLICANT

VERSUS

SULEIMAN MOHAMED ABDALLA AND 19 OTHERS.....RESPONDENTS

(Application for revision of the ruling and order of land tribunal of Zanzibar, at Gamba)
(M. Subeit, RM)

Dated 10th day of May,2023
In
Land Petition No.36 of 2022

R U L I N G

6th March, & 2nd May, 2024

H S.K. Tetere J.:

This ruling is in respect of points of preliminary objection against the present application for revision raised by the counsel for the respondents. The chamber application is made under section 90(b) and (c) together with section 129 of civil procedure decree, cap 8, the law of Zanzibar, and section 3-(1) of the high court act No. 2 of 1985. The affidavit in support of application sworn by the Applicant's advocate Ms. Zulekha A. Khamis.

Upon being served with the application, the respondents filed their respective counter-affidavit confronted the application with a notice of a preliminary objection that canvassed with three grounds, namely;

1. That, the applicant's application is incompetent before this court.
2. That this honorable court has no jurisdiction to entertain this application.
3. That the affidavit filed in support of the chamber summons is bad in law in that it was sworn by incompetent person.

To shed light on what had transpired, a brief fact of the matter at hand shall serve the purpose. The applicant named above, filed a land petition No. 36 of 2022 against the respondents claiming for ownership of a piece of land situated at Mahonda, in North "B" District, within the Northern Region of Unguja. The respondents in confronted with the applicant's claim, raised a point of preliminary objection to the effect that the case filed against them is res judicata and time barred. The objection for res judicata was in respect of the land petition No. 38 of 2020 which was attached in respondent's counter affidavit as annexture R2.

It is worth noting that after the preliminary objection being heard, the Honorable magistrate of land tribunal sustained the objections raised and dismissed the land petition No. 36 of 2022. Aggrieved, the applicant has come before this Court challenging that dismissal by way of revision. However, his application has met some obstacles following points of preliminary objection raised by the respondent's advocate as intimated above and which are subject of the present ruling.

At the hearing of the application, the applicant enjoyed the legal service of Mr. Said Ramadhan assisted with Ms. Zulekha A. Khamis both the learned advocates whereas Mr. Rajab Ngwatu entered appearance for all the respondents.

When given the floor to argue the preliminary objection, Mr. Rajab Ngwatu, argued the first and second objection jointly. He submitted that applicant filed this application under section 90 (b), (c) and 129 of civil procedure decree cap 8, of the law of Zanzibar and section 3-(1) of the high court act No. 2 of 1985. He said that section 90 (b) and (c) is applicable when there is no room for appeal. He contended that following the dismissal order of land petition No. 36 of 2022, the remedy available to the applicant is to appeal and not revision. To support his stance, he cited

section 41 of the land tribunal act No. 7 of 1994 as amended by act No. 1 of 2008 as the sole provision that gives room for appeal to high court against all decisions of land tribunal. Mr. Ngwatu also cited the case ***Abeid Zahor Othman Vs Latifa Khamis Mzee***, Civil Revision, No. 2 of 2023 where this court faced with similar scenario and applicant's application for revision was struck out for failure to exercise his right of appeal first before filing the revision.

The third point of the objection, Mr. Ngwatu, submitted that the affidavit in support of the application was sworn by incompetent person. He contended that the supporting affidavit was sworn by applicant's advocate Ms. Zulekha A. Khamis but its content recognized her as the applicant. In that regard, he argued that all paragraphs of the affidavit in support of the application went contrary to the verification clause. He therefore, urged the court to find the applicant's affidavit is defective. And so, the application has not been supported with affidavit. To reinforce his point, he cited the case of ***Anatol Peter Rwebangira Vs The Principal Secretary, Minister of defence and National Service and Another***, civil application No. 548/04 of 2018, where the court struck out the application for being accompanied with defective affidavit. He therefore,

pray to the court to sustain the preliminary objections and struck out the application with cost.

In reply to the above submission, Mr. Said Ramadhan, the learned counsel for Applicant, contended that there is no practice of filing preliminary objection on the application. He argued that the respondent's advocate, raised preliminary objection through order VIII rule 2 together with section 129 of civil procedure decree of cap 8, the law of Zanzibar. He said that the order cited is talking about written statement of defense and plaint while the present preliminary points of objection were raised on application. He was on the view that the proper way is to raise a legal concern instead of failing a notice preliminary objection. To buttress his point, he cited the case of ***Kikadini Investment Co. Ltd Vs Haji Hafidh Hamdan***, civil case No. 25 of 2009, where the honorable Judge of this court Mshibe J, held the view that order VIII rule 2 is only applicable on written statement of defence and plaint as the civil procedure is silent on raising preliminary objection on application. He thus, prays the preliminary objection raised to be struck out as it was improperly filed.

On the merit of the application, Mr. Said, contended that the basis of the applicant's application is section 3-(1) (a) of the high court act No. 2 of

1985, where the high court has unlimited jurisdiction to hear the matter at hand. He also cited article 93-(1) of Zanzibar constitution of 1984 which established the high court of Zanzibar and its jurisdiction to hear all civil and criminal matters. He thus, maintained that this court has jurisdiction to hear the application at hand.

Expounding further on the issue, Mr. said contended that section 41 of land tribunal act has no basis at this juncture. He said that following the amendment of land tribunal act No. 1 of 2008, section 15 which amended section 16 of act No. 7 of 1994, the same act recognizes the applicability of civil procedure decree cap 8, before the land tribunal. He further contended that, the present application is filed under section 90 (b), (c) and section 129 of civil procedure decree together with section 3-(1) of the high court act. He said that all the cited provisions, grant the high court jurisdiction to hear the matter at hand.

Basing on the cited reference cases, Mr. Said, submitted that ***Zahor Othman*** and ***Said Khalfan's*** case is not binding to this court, it only persuasive and for ***Said Khalfan's*** case, this court should not consider its finding because the respondent's advocate failed to furnish a single copy in

court. Thus, it is not clear to the court on what have been submitted is the actual facts raised in that particular case. He urges.

Regarding the third ground, Mr. Said, submitted that what had transpired in the applicant's affidavit is a typing error of which it is not fatal, taking into consideration that the verification clause shows the deponent is an advocate and not the applicant. Regarding the cases cited by respondent's advocate, Mr. said argued that those cases are distinguishable to the circumstance of this matter.

Ms. Zulekha, the leaned advocate, who team up with Mr. Said in representing the applicant, supported what have been submitted by her colleague. Therefore, she prays the court to strike out the preliminary objection raised and proceed with the hearing of the application in merit.

In his rejoinder, counsel Rajab Ngwatu, disagreed with views of the Applicant's advocate on raising preliminary objection on application. Mr. Ngwatu stated that the practice allows raising P.O on application and the best example is ***Abeid Zahor's*** case cited. He also contended that the ***Kikadini's*** case supra, is a case of 2009 and the case he cited is of 2023. He was on the view that the decision of ***Kikadini's*** case has been overrule

by the decision of ***Abeid Zahor's*** case which is the current one. He further contended that section 3-(1) of high court act No. 2 of 1985 and article 93 of Zanzibar constitution is inapplicable to the circumstance of this matter because in the presence of the specific law and general law, the specific law is applied. He stressed further that the cited above provision is contrary to section 41 of the land tribunal act No. 7 of 1994 as amended by act No. 1 of 2008 and the use of civil procedure decree is applicable when the land tribunal act is silent. He therefore, maintained that section 41 of land tribunal is a specific one and it should be applied. Mr. Ngwatu, further stated that the power of this court to hear application for revision is under section 90 (b) and (c), as it was observed in ***Abeid Zahor's*** case.

On the point of defective affidavit, Mr. Ngwatu disagreed on what transpired in applicant's affidavit as a typing error. He said that all 12 paragraphs of applicant's affidavit introduced the Advocate as the applicant of the application but in the verification clause, introduced the deponent as the advocate for the applicant. He argued that the deponent verified something which does not exist. In that regard, he maintains that there is no supporting affidavit in law and this court should not considered as the

omission is fatal. For the rest, Mr. Ngwatu reiterated his submission in chief and prays the preliminary objection be sustain.

After having heard the counsel for the parties, I find it is important first to determine the question of rising preliminary of objection on application as it was pointed out by Mr. Said Ramadhan, the learned advocate for the applicant.

It is clear, our Civil Procedure Decree Cap 8 is silent on the manner in which preliminary objection should be raised on application. However, as practice has shown that in the absence of such specific provision, the general provisions of section 129 of cap 8 is apply. The practice has also shown that one must give notice of preliminary objection before the hearing date to avoid to take the opposite party by surprise. The purpose approach of this tradition is to prevent surprise and ensure fair hearing. It also settles law that preliminary objection to an application is, procedurally, similar to preliminary objection to an appeal, and must therefore be made before hearing of the application begins. This position was well elucidated by the Court of Appeal, in the case of ***Commissioner General (TRA) vs Pan African Energy T. Ltd*** (Civil Application 206 of 2016) [2017] TZCA

157 (9 May 2017) Tanzlii (unreported) (At page (10), It was stated as follow: -

> *"We made it dear that- there is no specific rule concerning preliminary objections to applications filed in court. we are also satisfied that a preliminary objection to an application is, procedurally, similar to preliminary objection to an appeal, and must therefore be made before hearing of the application begins....."*

In the instant application, the respondents, filed preliminary objection through order VIII rule 2 and section 129 both of the civil procedure decree cap 8. The provision reads as follow: -

> *"The defendant must raise by his pleading all matters which shows the suit is not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as for instance, fraud,*

limitation, release, payment, performance, or facts showing illegality.

And for section 129, it reads: -

"Nothing in this Decree shall be deemed to limit or otherwise affect the inherit 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"

From the above provisions, the former is inapplicable to the application but the latter is applicable in absence of the specific provision as our current practice operate. See example in the case of ***Abeid Zahor's (supra).*** Thus, this court is disassociated with the finding of ***Kikadini's case (supra)*** and hold that preliminary objection is allowed on application subject to issue advance notice to opposite party as it was previously held in Abeid Zahor' case.

But again, what if the notice of preliminary objection raised was brought without citing enabling provision under which they are made, will the position of this court be different? The answer is no, because failure to cite enabling provision under which a preliminary objection is made is not fatal. I'm saying so because the same is not an application, it is a mere

notice. This stance, has been taken in the case of ***MBEYA-RUKWA AUTOPARTS & TRANSPORT LTD Vs JESTINA GEORGE MWAKYOMA, (2003) T.L.R. 251,*** it was held as follow: -

> *".....It does not appear to us that the omission to cite the provision under which it was brought was fatal. We say so because a Notice of Preliminary Objection which, of course, falls under rule 100, is not an application. It is simply a notice and is given just before hearing of the appeal begins."*

This court is also aware that, the Court of Appeal at a time has been striking out Preliminary objections which have not cited or wrongly cited enabling provisions under which they are made. For instance, the case of ***Mathias Ndyuki and 15 Others Vs Attorney General***, Civil Application No. 144 of 2015, CAT. Single Justice appeal, (Oriyo JA,) strikeout the notice of preliminary objection for failure to cite enabling provision. However, in the case **Commissioner General (TRA) vs. Pan African Energy (T) Ltd, (Supra),** the court of appeal disassociated with finding of **Mathias Ndyuki** case (supra); and hold that failure to cite or wrongly

citing an enabling provision under which preliminary objection is made, will not render the same liable to being struck out.

Therefore, that being a current position, this court is in agreement with Mr. Rajab Ngwatu, the learned counsel for the respondents that our current practices allow preliminary objection on application as the same was not made by surprise. Consequently, the preliminary objections raised are properly filed before this court.

Now, having heard the parties, on preliminary points of objection and examined the chamber summon and supporting affidavit, the issue calling for determination is whether the application for revision before this court is competent.

The point of objection raised regarding the competence of the present application is based on section 90 (b) and (c) together with section 3-(1) (a) of high court act No. 2 of 1985. For ease of reference, I find it apposite to reproduce hereunder. It reads: -

> 90 (b) "*The high court may call for the record of any case which has been decided by any court subordinate to such high court and* ***in which no appeal lies thereto****, and if such subordinate court appears* - (emphasis added)

(a) *to have exercised a jurisdiction not vested in it by law.*

(b) to have failed to a exercise a jurisdiction so vested.

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

Also, section 3-(1) (a) reads:

"The high court for Zanzibar shall continue to exist and shall as here to fore have: -

(a) *Unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law in force in Zanzibar."*

Admittedly, the above provisions, it is crystal clear that, the power of high court to revise the records of subordinate courts is provided under section 90 of the CPD and such power is exercisable when there is no right to appeal. On the other hand, section 3-(1) (a) of high court act is general provision and it does not talk about revision. It only clarifies the power of the high court to have unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law in force in Zanzibar. Hence, as correctly argued by Mr. Ngwatu, section 3-(1) (a) being general provision is inapplicable to the circumstance in hand.

In the instant application, the ruling and order which is subject to be revise by this court is the dismissal order of the land petition No. 36 of 2022. The section 90 (b) and (c) cited in the chamber summon is applicable for revision when there is no right to appeal. Following the dismissal order, the applicant has automatic right to appeal to this court as provided under section 41 of Land Tribunal Act No. 7 of 1994 as amended by act No. 1 of 2008. It reads: -

> *"Any party who is aggrieved by the decision of the Land Tribunals shall have the right to appeal to the High Court and such appeal shall be heard by a judge of the High Court"*

From the cited provision, it clear that the applicant has a right of appeal. He therefore, has an alternative remedy provided by law, that is, to file an appeal to this Court but he moved the court to solve his grievances by way of revision. It is the view of this court that revisional jurisdiction is exercisable only where there is no right of appeal. See example, the case of ***Said Ali Yakut & Others Vs Feisal Ahmed Abdul***, civil application No. 4 of 2021, (2011) TZCA 145 (23 February 2011) Tanzlii, (Unreported) it was observed as follow: -

"It is our considered view that, where a party has the right of appeal, he cannot properly move the Court to use its revisional jurisdiction. He must first exhaust all remedies provided by law before invoking the revisional jurisdiction of the Court. As the applicants have not yet exhausted all remedies provided by law, they cannot invoke the revisional jurisdiction of the Court."

See also, the decision of this court in the case of ***Abeid Zahor's*** **case** (supra) where my brother Judge, Hon. Kazi J, faced with similar scenario and strike out the application for being incompetent. Thus, as the applicant has not yet exhausted all remedies provided by law, he cannot invoke the revisional jurisdiction under section 90 (b) and (c) of CPD. In the circumstances, the first and second preliminary points of law raised is answered in affirmative.

In the upshot, having answered the first and second objection in affirmative. I find no need to consider the third point of objection. This application is therefore incompetent.

In the event and for the reasons stated herein, I strike out the application. Having considered circumstances of this matter, I do not prescribe an order as to cost.

It is accordingly ordered.

DATED at **ZANZIBAR** this 2nd day of May, 2024.

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HAJI S. K. TETERE
JUDGE