

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: OMAR, J.A., MNZAVAS, J.A., And LUBUVA, J.A.)

CIVIL APPLICATION NO. 64 OF 1995

BETWEEN

DAR ES SALAAM EDUCATION AND  
OFFICE STATIONERY. . . . . APPLICANT

AND

NATIONAL BANK OF COMMERCE. . . . . RESPONDENT

(Application for review from the  
Judgment of the Court of Appeal of  
Tanzania at Dar es Salaam)

(OMAR, MNZAVAS, And LUBUVA, JJJA)

dated the 24th day of November, 1995

in

Civil Appeal No. 16 of 1995

R U L I N G

LUBUVA, J.A.:

By Notice of Motion the applicant, Dar es Salaam Education and Office Stationery has filed an application requesting the Court to review its decision in Civil Appeal No. 16 of 1995 dated 24th November, 1995. The National Bank of Commerce (NBC) is the respondent. In support of the application, one Omari Mgeni, the Executive Chairman of the applicant Company has filed an affidavit deposed to by him. Mr. Leba learned Counsel appeared for the applicant and Mr. Uzanda, learned Counsel represented the respondent.

From the affidavits filed and the oral submissions by the learned Counsel for both parties, the following facts are not disputed. The respondent (N.B.C.) was dissatisfied with the decision in High Court Civil Case No. 248 of 1994 (Bubeshi, J.).

In that case, the sale of the house in dispute was set aside. On appeal to this Court, the appeal was allowed with the result that the order of the High Court setting aside the sale of the house was reversed. That was Civil Appeal No. 16 of 1995. Dissatisfied with our decision in that appeal, the applicant, Dar es Salaam Education and Office Stationery has, as indicated earlier filed this application for the review of our decision in that appeal. Pending the determination of this application for review, the applicant applied for stay of execution. In Civil Application No. 4 of 1996, a single judge of this Court granted the application for stay pending the final determination of this application.

Mr. Uzanda, learned Counsel for the respondent filed a preliminary objection based on the following grounds:-

- (a) that the application is incompetent as it does not fall within the provisions of Section 4(2) of the Appellate Jurisdiction Act, 1979, No. 15 of 1979 as amended by Section 2 of the Appellate Jurisdiction (Amendment) Act No. 17 of 1993;
- (b) that the application, being tantamount to a request to reverse the decision of this Honourable Court of the 24th November, 1995, is misconceived, and should accordingly be struck out with costs.

At the hearing of this application Mr. Uzanda learned Counsel argued at length and convincingly that the application is incompetent

and misconceived. Urging for its dismissal, he advanced two reasons. In the first place, he submitted that the application has been filed under a wrong section of the law i.e. Section 4(2) of the Appellate Jurisdiction Act, 1979 as amended. He stated that this section cannot be invoked after an appeal has been heard and finally determined by this Court. This is because, he stated, the section under which the application was filed relates specifically to matters incidental to the hearing and determination of an appeal. In this application, the appeal had already been heard and finally determined on 24.11.1995, so the section could not be invoked as a basis for filing this application Mr. Uzanda charged. In support of his argument on this point, we were referred to the decision of the full bench of this Court in Civil Application No. 18 of 1993 - Transport Equipment Ltd. V Devram P. Valambhia (unreported) and Civil Appeal No. 12 of 1981 - Peter Adam Mboweto V Abdallah Kulala and Mohamed Mweke (1981) TLR 335.

When Mr. Leba, learned Counsel for the applicant was called upon to respond to Mr. Uzanda's submission on the preliminary objection, he requested for an adjournment in order to prepare himself to advance his argument on the issue. He stated that he had just been served with the notice of preliminary objection here in Court when he came for the hearing of this application. Therefore, he did not have sufficient time to prepare himself. We granted the adjournment. At the resumed hearing of the application, he conceded that the application was incompetently filed under Section 4(2) of the Appellate Jurisdiction Act, 1979. However, Mr. Leba was quick to argue that even though the application was filed under a wrong section of the law, still

the Court could deal with the matter by invoking its inherent jurisdiction. With this approach, he invited the Court to review its decision of 24th November, 1995 because, he said without such a review, the outcome of the case now pending before the High Court regarding the extent of the applicant's indebtedness to the bank would be rendered nugatory. He further stated that a review of the Court's decision was necessary because the house involved had been sold at a very low price. He also claimed that there was a miscarriage of justice in that the auctioning of the house was effected without sufficient publicity. He prayed for the dismissal of the preliminary objection.

As argued by Mr. Uzanda, learned Counsel on the preliminary point, the central issue before us is whether this application is properly before this Court. Mr. Uzanda has ardently submitted that it is not. He elaborated on this in a very lucid and convincing manner. On this, Mr. Leba, learned Counsel for the respondent has conceded and rightly so in our considered view. This is so because, the provisions of Section 4(2) of the Appellate Jurisdiction Act 1979 as amended is crystal clear. The section provides -

4(2) - for all purposes of and incidental  
to the hearing and determination  
of any appeal in the exercise of  
the jurisdiction conferred upon  
it by this Act, the Court of  
Appeal shall, in addition to any  
other power, authority and  
jurisdiction conferred by this  
Act, have the power of revision

and the power, authority and jurisdiction vested in the court from which the appeal is brought."

From the provisions of this Section, it is quite clear that Section 4(2) of the Appellate Jurisdiction Act, 1979 can only be invoked when the Court is in the process of adjudicating on an appeal from the courts below. That is, the exercise of such jurisdiction is incidental to the hearing and determination of an appeal. In the instant application the position was different. In that case, the Court had finally heard and determined the matter in Civil Appeal No. 16 of 1995 and pronounced its decision on 24.11.1995. In those circumstances, the matter could not as correctly stated by Mr. Uzanda and conceded by Mr. Leba be brought up before this Court under Section 4(2). It was thus incompetent. It was brought up under a wrong section. We had occasion to deal with a similar situation in Civil Application No. 18 of 1993 - Transport Equipment Ltd. V Devram P. Valambhia, (unreported), Civil Application No. 19 of 1995 - Halais Pro-Chemie Industries Ltd. V Wella A.G. (unreported) and Civil Application No. 24 of 1995 - Laurian G. Rugaimukamu V 1. Dereck Murusuri  
2. The Editor of  
Mfanyakazi Newspaper  
(unreported).

Even though we think the first point raised in the preliminary objection is sufficient to dispose of this matter at this juncture, nonetheless we would go further. As urged by Mr. Leba, learned Counsel are the circumstances of this case such that the Court could properly invoke its inherent jurisdiction in dealing with the matter. It is common knowledge that the full bench of this

Court has decided that the Court has inherent jurisdiction of reviewing its decision in appropriate situations. In this application, the main ground urged for review is that the applicant still has a pending case before the High Court in order to ascertain the extent of the applicant's indebtedness to the respondent bank. Secondly, that the house in question was sold at a very low value. With respect, these are not the circumstances which would warrant the Court to invoke its inherent jurisdiction to review its own decision.

We can hardly find any evidence showing manifest error on the face of the record or that the decision was obtained by fraud. Neither are we convinced that the applicant was denied a hearing which resulted in the miscarriage of justice as claimed by the applicant. On the contrary, it appears to us that at this stage, the applicant is raising issues which were not raised in the pleadings. This, in our view, is not proper because the object behind the amendment to the law which introduced the Court's powers of revision was not meant to cover situations of this kind. At any rate, the deponent of the affidavit in support of this application one Omari Mgeni was not a party to the suit that gave rise to the proceedings in this matter. Then the applicant also raised the issue of the low price realised from the sale of the house. This again in our considered opinion is not one of the circumstances which would justify the Court to review its decision. If the applicant felt dissatisfied with the manner in which the sale was conducted a cross appeal should have been lodged in relation to that. This was not done either. In that situation, as a

fall back position we venture to think that it was still open for the applicant to bid for the purchase of the house particularly so as the debt was not disputed.

For these reasons, we are satisfied that this application is incompetent. It is accordingly dismissed with costs.

DATED AT DAR ES SALAAM this 15th day of April, 1996.

A.M.A. OMAR  
JUSTICE OF APPEAL

N.S. MNZAVAS  
JUSTICE OF APPEAL

D.Z. LUBUVA  
JUSTICE OF APPEAL

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

  
( M.S. SHANGALI )  
DEPUTY REGISTRAR