IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: MROSO, J.A., MUNUO, J.A., And NSEKELA, J.A.)

ZNZ CIVIL APPLICATION NO. 2 OF 2003

BETWEEN

HARISH AMBARAM JINA
By his Attorney AJAR PATEL.....APPLICANT

AND

ABDULRAZAK JUSSA SULEIMAN.....RESPONDENT

(Application for Revision from the decision
of the High Court for Zanzibar at Vuga)

(Bakari, J.)

dated the 9th day of January, 2003
in
Civil Case No. 2 of 2003

R U L I N G

MROSO, J.A.:

The applicant through his attorney, Mr. Patel, has brought an application by notice of motion for revision of High Court Civil Case No. 2 of 2003, citing Section 2 (3) (sic) of the Appellate Jurisdiction Act, 1979 as the enabling provision. Mr. Patel had applied to the High Court, Bakari, J., under Order III Rule 2 of the Civil Procedure Decree for leave to institute a suit as attorney for the applicant, against the respondent. Leave was granted but three days later the judge revoked his order for leave for the reason that "it didn't follow

the proper/formal procedure". Mr. Patel wrote several letters to the Registrar of the High Court seeking clarification on what was meant by the words "proper/formal procedure". Eventually the Registrar wrote to say that Mr. Patel was supposed to file a formal application which should accompany the plaint. Only then would the application for leave to file the suit as an attorney be considered. Dissatisfied, Mr. Patel brought this application to this Court. Before the application could be heard, Mr. Mbwezeleni, learned advocate for the respondent, filed a notice of preliminary objection, raising three points. First, that the application was incompetent and/or misconceived for want of form and propriety. Second, that the application was bad in law and not maintainable because of a pending application in the High Court for extension of time and for leave to appeal. Third, that the application was an abuse of the process of the Court because the revocation order which was sought to be revised was either appellable or reviewable.

Mr. Mbwezeleni started off by pointing out that section 2 of the Appellate Jurisdiction Act, 1979 does not have a sub-

section (3). At any rate the section has nothing to do with revisions. If the applicant meant to move the Court to call for and revise the lower court record he should have cited Section 4 (3) of the Appellate Jurisdiction Act, 1979. That is the provision which empowers the Court to call for and examine a lower court record of proceedings to satisfy itself as to the correctness, legality and propriety of such a record.

Mr. Mbwezeleni submitted that citing the wrong enabling provision of the law rendered the application incompetent. He cited **The National Bank of Commerce v Sadrudin Meghji,** Civil Application No. 20 of 1997 to back up his submission.

It was also pointed out by Mr. Mbwezeleni that the notice of motion had another serious defect which rendered it incompetent. The notice of motion did not conform substantially to Form A in The First Schedule, as required under Rule 45 (2) of the Court Rules. In Form A in the Schedule it is shown that grounds for the application need to be stated. But in the Notice of Motion which was filed by Mr. Patel no reasons are stated for the application for revision. It

was submitted that that was yet another reason why the notice of motion was incompetent.

Mr. Mbwezeleni sought to bring to the Court's attention that the applicant here had filed an ex parte chamber application seeking extension of 14 days to apply for leave to appeal against the order of Mshibe Bakari, J., dated 9th January, 2003. That application was still pending at the time the application for revision was filed. It meant that the applicant was trying to ride two horses at the same time, which could not be permitted. He cited a decision of this Court – **Jaffari Sanya Jussa and Another v Saleh Sadiq Osman,** Civil Appeal No. 54 of 1997 (unreported) in support of his argument. He submitted that the applicant should have exhausted that remedy in the High Court and pursue the appeal, if leave to appeal was granted, before applying for revision.

It was also a ground of objection that the notice of motion in which application for revision was made amounted to an abuse of the Court process. He said the order which was made by Bakari, J., on 9th January, 2003 by which he revoked

his previous order was appellable with leave or reviewable. Since a revision is not a substitute for an appeal, it was wrong, he submitted, for the applicant to choose to apply for revision as a substitute for an appeal which could have been pursued. That conduct on the part of the applicant was said to amount to an abuse of the Court process.

In response to the arguments advanced by Mr. Mbwezeleni in the preliminary objection Mr. Patel said the citing of section 2 (3) of the Appellate Jurisdiction Act, 1979 was a typographical error and he meant section 4 (3) of the Act. After all, he said, section 2 of the Act does not have sub-sections. He applied for leave to rectify that position which he called an obvious typographical error. He also argued that there are special circumstances which compelled him to apply for revision. Bakari, J. had adamantly refused to consider his requests to either clarify what he meant in his order or to dismiss his suit as requested in the letters he had been writing to the Registrar of the High Court. Then, throwing his hands up, as it were, Mr. Patel said if the Court considered the first ground of objection was enough to dispose of the notice of

motion, it was futile for him to advance arguments against the other grounds which Mr. Mbwezeleni filed.

We think Mr. Mbwezeleni is on firm ground in saying that the Court is not properly moved if a wrong provision of the law is cited in a Notice of Motion. This Court said so in **National Bank of Commerce v Sadrudin Meghji,** Civil Application No. 20 of 1997 (unreported), a decision which was later followed by the same Court in **Almas Iddie Mwinyi v National Bank of Commerce and Another,** Civil Application No. 88 of 1998 (unreported). In **Meghji** there was application to this Court for revision. In the Notice of Motion was cited section 4 (2) of the Appellate Jurisdiction Act, 1979. The correct subsection was (3), not (2). It was submitted in a preliminary objection which was raised against the Notice of Motion that the Court had not been properly moved. This Court, referring to the error said –

> It follows therefore that the application has been filed by notice of motion under an inapplicable section of the law. Consequently, as the Court was not

properly moved, the application is likewise, incompetent.

In **Meghji** the correct section had been cited and the error was only in citing the incorrect subsection which did not empower the Court to call for the lower court record to consider the propriety of the proceedings and decision of the High Court. In the case before us a wholly inapplicable section was cited, which was a worse situation than in **Meghji.**

It may well have been a typographical error as pleaded by Mr. Patel, but if that was so, he ought to have sought to correct the error before the preliminary objection was filed only seven days before the matter came for hearing before us. The application had been filed six months earlier. To allow a correction on the hearing date is to pre-empt the preliminary objection against that error.

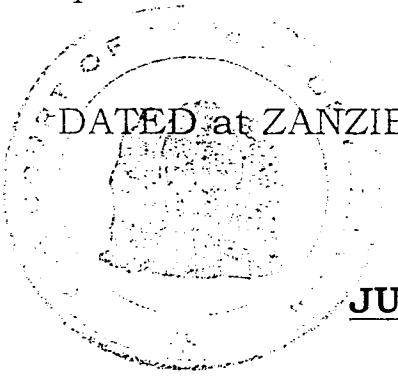
It is also true, as pointed out by Mr. Mbwezeleni, that the Notice of Motion does not conform substantially to Form A of the First Schedule in the Court Rules, as required

under Rule 45 (2) of the Court Rules. No grounds for the prayers in the Notice of Motion were given. It was as if Mr. Patel wanted to be on a fishing expedition in Court. He would think of the reasons and present them to Court as the hearing proceeded. That cannot be proper. The Court and the other party to the application are entitled to know the grounds on which the application for revision was being made. The failure by the applicant to comply with Rule 45 (2) of the Rules was sufficiently grave to render the application incompetent, even if the applicant were to cite the correct provision for revision. We do not find it necessary to discuss the second part of the first point of objection or any of the other points of objection in detail because, having held that this Court is not properly moved, there is really no application for revision before the Court to be considered on its merits.

We only need to say in passing regarding points 2 and 3 in the Preliminary Objection that we agree with Mr. Mbwezeleni that there was indeed no need for the applicant to seek revision of Bakari, J.'s order because it was appellable with leave. Indeed, there was already pending in the High

Court an application for extension of time to apply for leave to appeal against the order. Mr. Patel should have pursued that correct course to its conclusion instead of coming to this Court for revision. It was unnecessary and an abuse of the process of the Court to pursue two different avenues in two different courts at the same time.

For the reasons which we have given, the application is incompetent and is struck out with costs.



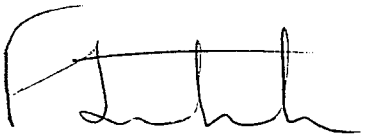
DATED at ZANZIBAR this 14th day of November, 2003.

J.A. MROSO
JUSTICE OF APPEAL

E.N. MUNUO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

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



(F.L.K. WAMBALI)
DEPUTY REGISTRAR