

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 109 OF 2002

In the Matter of an Intended Appeal

BETWEEN

1. JOSEPH NTOGWISANGO]
2. FIDELIS M. MASEKE (Suing in]]
APPLICANTS

representative capacity)]

VERSUS

THE PRINCIPAL SECRETARY
MINISTRY OF FINANCE AND ANOTHER.....]
RESPONDENTS

**(Application for leave to amend memorandum
of appeal from the decision of the High Court
of Tanzania at Dar es Salaam)**

(Msumi, J.K.)

**dated the 11th day of July, 2002
in
Civil Case No. 289 of 1998**

R U L I N G

MUNUO, J.A.:

Mr. Magesa, learned advocate, brought the Notice of Motion under Rules 45 and 47 of the Tanzania Court of Appeal Rules, 1979, seeking leave to amend the Memorandum of Appeal in Civil Appeal No. 97 of 2001 which is pending in this Court, on the ground that some important prayers were not included in the memorandum of appeal.

At the hearing of the application, counsel for the

applicant submitted that the application is supported by the joint affidavit of the applicants which he adopted. Counsel for the applicant further submitted that the intended amendment is reflected at paragraph 1 of the Proposed Amended Memorandum of Appeal which is intended to amend paragraph 5 of the memorandum of appeal. He prayed that the application be granted as prayed.

The learned Senior State Attorney Mr. Ngwembe, opposed the application on the grounds that it is incompetent and that it is frivolous. Contending that the application is incompetent, Mr. Ngwembe, pointed out that the Notice of Motion states that the application was filed under Rules 45 and 47 of the Court Rules but the specific sub-rules under which the application was brought were not cited. The error, the learned Senior State Attorney observed, is a fundamental irregularity which renders the application incompetent. He cited the case of **Citibank Tanzania Ltd. versus Tanzania Telecommunications Co. Lt. and 4 Others**, Civil Application No. 64 of 2003 (unreported) wherein the Court dismissed revisional proceedings which were brought under an unspecified provision of Section 4 of the Appellate Jurisdiction Act, 1979.

As for the merits of the application, Mr. Ngwembe contended that the proposed Amendment at paragraph 1 is

similar to paragraph 5 of the Memo of Appeal so in substance there is no amendment which renders the application frivolous. The learned Senior State Attorney prayed that the application be dismissed with costs because it is frivolous and incompetent in law.

Although counsel for the applicant orally submitted that the application has been brought under Rule 104 of the Court Rules which states, *inter alia*:

“104. The Court may at any time allow amendment of any notice of appeal or notice of cross-appeal or memorandum of appeal, as the case may be or any other part of the record of appeal on such terms as it thinks fit.”

The said Rule 104 was not cited in the Notice of Motion which clearly states that the application was brought under Rules 45 and 47 of the Court of Appeal Rules, 1979. It is my considered view that the applicants' counsel's attempt to orally amend the Notice of Motion (during his reply to the learned Senior State Attorney's submission that the application is incompetent in law) from the bar cannot cure the fundamental error of not properly and specifically citing

the provisions of Rules 45 and 47 under which the application was brought.

In the case of **Citibank versus Tanzania Telecommunications Co. Ltd. and 4 Others** cited supra, the Court dealt with a similar problem of not specifying the provision of law under which the application was brought and observed;

“ The central issue then for consideration and determination is whether or not the applicant was justified in moving this Court by merely citing Section 4 of the Act and Rule 3 of the Court Rules ---. In the case of **Abdul Aziz Suleman versus Nyaki Farmers Cooperative Ltd. and Another** (1966) E.A 409 the Court of Appeal for East Africa observed that the Rules of the Court of Appeal did not specifically require that a particular order and rule under which an order sought be stated in the Notice of Motion but that it was the usual practice and one which should be followed ---.”

The Court further observed;

“--- In all these cases, the Court was emphatic in stating that the applicant was required to cite the relevant provision from which the Court derives the power to hear and determine the application ---.”

Emphasizing that the practice of citing specific provisions of the law under which the Court derives jurisdiction, the Court stated furthermore that

“--- The applicant --- did not go far enough and mention the specific subsection that was applicable. As we have had occasion to point out, there are different considerations to be taken into account under Section 4 (2) and (3). It ardly needs to be emphasized that in a notice of motion, an applicant must state the specific provision of the law under which the applicant wants to move the Court to exercise jurisdiction.”

No specific sub-rules of Rules 45 and 47 of the Court Rules under which the Notice of Motion was brought were cited so the Notice of Motion is incurably defective just as was the notice of motion in the above **Citibank** case. Under the circumstances the application is incompetent in law.

Moreover, the application is lacking in merit in that the proposed amendment in paragraph 1 of the Proposed Amended Memorandum of Appeal is substantially the same as paragraph 5 of the Memorandum of Appeal only that the proposed amended paragraph 1 is more precise and to the point.

For the reasons stated above, the application is both frivolous, and incompetent in law.

I accordingly dismiss the application with costs.

DATED at DAR ES SALAAM this 24th day of June, 2005.

E.N. MUNUO
JUSTICE OF APPEAL

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

S.A.N. WAMBURA
SENIOR DEPUTY REGISTRAR