IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO, J.A., NSEKELA, J.A. AND KAJI, J.A.)

CIVIL APPEAL NO. 37 OF 2005

SEA SAIGON SHIPPING LIMITED ..... APPELLANT

VERSUS

MOHAMED ENTERPRISES (T) LIMITED ..... RESPONDENT

(Appeal from the Ruling, finding and order of the High Court of Tanzania, Commercial Division, at Dar es Salaam)

(Bwana, J.)

dated the 20th day of December, 2004
in
Commercial Case No. 58 of 2004

JUDGMENT OF THE COURT

KAJI, J.A.:

In this appeal, the appellant, SEA SAIGON SHIPPING LIMITED, is appealing against the decision of the High Court, Commercial Division (Dr. Bwana, J.) in Commercial Case No. 58 of 2004, where the appellant's suit was dismissed for being Res Judicata and an abuse of court process.

For easy appreciation of the sequence of events leading to this matter, we think it is desirable to outline briefly the historical background of the case.

There was a case filed in the High Court (Main Registry) at Dar es Salaam. It was Civil Case No. 8 of 2004 where the current respondent MOHAMED ENTERPRISES (T) LIMITED was the plaintiff. There were twelve defendants. The appellant was not a party in that case.

In that case, the plaintiff/respondent company was claiming against the defendants jointly and severally for payment of US$ 1,473,000/- being money had and received by one of the defendants on account of the purchase of 6,000 metric tons of long grain rice, and US$ 24,000/-, the value of four rice whitening machines which were to be delivered to the plaintiff/respondent at Dar es Salaam. The said rice and machines were never delivered to the plaintiff or at all. While the case was still pending, a ship christened Can Gio Imo Number 8131154 Ex-Sea Maid, berthed at the Port of Dar es Salaam. This prompted the plaintiff/respondent to file a chamber summons (Ex-parte) under Section 68(c) of the Civil Procedure Code and any other enabling provisions of law praying for an order to arrest the said vessel before judgment. The reason behind that application was that the vessel was alleged to be the property of one of the defendants, the 12th defendant – THE GOVERNMENT OF VIETNAM, and that, since all the defendants did not have any property within the United Republic of Tanzania and were non-residents, there was no way they could be forced to satisfy any decree that might have been passed against them. And further that the only attachable property in Tanzania at that time was the vessel which, if not arrested, would sail out of

Tanzania once the discharge was completed. It was the plaintiff's/respondent's fear that if that happened, it would lose the only chance it had to enforce a decree that might have been passed against it.

Pursuant to that application which was filed under a certificate of urgency, the vessel, Can Gio Imo Number 8131154 Ex Sea Maid, was arrested. This prompted the appellant company which claimed to be the owner to institute objection proceedings under ORDER XXXVI rule 9, and ORDER XXI Rules 57 to 59 of the Civil Procedure Code, 1966 and any other enabling provisions of law, calling upon the court to investigate its claim to the said vessel and to order for the release of the vessel from attachment, and for freedom to sail out of Dar es Salaam Port.

The Court investigated and came to the conclusion that the vessel, Can Gio, is the property of the 12th defendant, the Government of the Socialist Republic of Vietnam.

The appellant company was dissatisfied with the decision. It instituted Commercial Case No. 58 of 2004 in the High Court, Commercial Division, to establish the right which it claims to the vessel in dispute. The appellant company instituted the suit in accordance with the provisions of ORDER XXI Rule 62 of the Civil Procedure Code, 1966 which reads:-

> “62: Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.”

The respondent company, which was the defendant, raised a preliminary objection on the following grounds:-

1. That, the suit ought to be struck out with costs on the grounds that the Honourable Court does not have jurisdiction to entertain it since it does not arise out of a commercial transaction, and thus it is not a commercial dispute.
2. That, the suit is incompetent and ought to be dismissed with costs for being res judicata since the issue of ownership was adjudicated by the High Court, Ihema, J., in Civil Case No. 8 of 2004.
3. That, the suit is brought in the abuse of the process of the Court, and thus ought to be rejected with costs.

Learned counsel for both parties submitted at length on the points. The learned trial judge overruled the first ground of objection and sustained the second and third grounds and dismissed the suit.

In sustaining the second and third points of objection, the learned trial judge had this to say:-

“ I am aware that the provisions of ORDER XXI Rule 62 of the Civil Procedure Code may be applied where an objector has not succeeded under Rule 56 and 59 of that Order XXI. That approach is supported in the **Valambia case** (supra). However, the situation is distinguishable. In the ordinary sequence of events Rules 56, 59 and 62 of Order XXI would be applicable during execution stage – the trial having come to finality. It is highly improbable and most likely improper that where a party who loses by way of an interlocutory order would be allowed to open a fresh case pursuant to Rule 62 while the main suit is still pending in Court.

Meanwhile it is my view that the provisions of Rule 9 of ORDER XXXVI of the Civil Procedure Code were invoked by Justice Ihema in disposing of the application. That Rule 9 cannot be invoked to institute a fresh suit as is the case now. Where such a move is preferred, then the relevant provisions of Order XXI (supra) have to be applied – Therefore should this Court allow the present suit to proceed, it will not only offend the principle of

> res judicata but also will be allowing a gross abuse of the court process. That should not be entertained."

The appellant was aggrieved by the decision, hence this appeal.

Before us the appellant was represented by Mr. Kesaria, learned counsel, who had also represented the appellant in the objection proceedings before the High Court Main Registry and in the suit before the High Court Commercial Division. The respondent was advocated for by Dr. Lamwai learned advocate, who had also represented the respondent in the objection proceedings and in the suit before the High Court, Commercial Division.

Mr. Kesaria preferred four grounds of appeal, namely:

1. That, the Honourable Judge erred in failing to correctly apply the provision of ORDER XXI, Rule 62 of the Civil procedure Code, 1966.
2. That, the Honourable Judge has fundamentally erred in distinguishing the decisions of this Court by finding that ORDER XXI Rule 62 of the Civil Procedure Code, 1966 cannot be invoked to file a fresh suit until finalization of the main suit.

3. That, the Honourable Judge has erred in failing to

appreciate that an order for attachment before judgment by its very nature can only issue at an interlocutory stage and therefore having accepted that ORDER XXXVI Rule 9 of the Civil Procedure Code, 1966 was the correct applicable provision of the law for investigating claims in attachments before judgment, the Honourable Judge further erred in deciding that it was improper for the appellant to file a fresh suit pursuant to ORDER XXI Rule 62 of the Civil Procedure Code, 1966 while the main suit was still pending in the lower (sic) court.

4. That, the Honourable Judge grossly erred in disregarding this Court's decision in Civil Application No. 15 of 2002 – **The Bank of Tanzania v Devram Valambhia** (as confirmed in Civil Reference No. 4 of 2002 between the same parties) which decisions were binding upon the Honourable judge.

Mr. Kesaria argued the first ground of appeal – separately and the second and third jointly, and lastly the fourth ground separately. Arguing the first ground of appeal Mr. Kesaria contended that, since the vessel in issue was arrested before judgment, the principles applicable were those specified under ORDER XXXVI Rules1-13 and particularly Rule 6. Rule 8 specifies the mode of making an attachment before judgment, that is, save as otherwise expressly provided, the

attachment shall be made in the manner provided for the attachment of the property in execution of a decree. The manner provided for the attachment of the property in execution of a decree is provided for under ORDER XXI Rules 40 to 56. Mr. Kesaria further contended that, where any property has been attached before judgment and an objector raises a claim to the property attached, such claim must be investigated in the manner provided for the investigation of claims to property attached in the execution of a decree for payment of money as provided for under ORDER XXXVI Rule 9. The learned counsel pointed out that, the manner for the investigation of claims to property attached in execution of a decree for the payment of money is provided for under ORDER XXI Rules 57 to 62. After investigation, if the objector's claim is disallowed, the only remedy open to him is to institute a fresh suit to establish the right which he claims to the property in dispute as provided for under Rule 62, the learned counsel contended. It is the learned counsel's submission that the learned trial Judge erred in failing to correctly apply the provision of ORDER XXI Rule 62 when he held that the Rule was not meant for allowing fresh suits.

On the second and third grounds of appeal, Mr. Kesaria contended that, the learned trial Judge properly acknowledged that the attachment and investigation were made under ORDER XXXVI Rules 6 and 9. However, the learned counsel pointed out that, the learned judge erred when he held that ORDER XXI Rule 62 is applicable only

where the property has been attached in execution of a decree when the case has already been finalized and not where the property has been attached before judgment when the main suit is still pending. The learned counsel contended that, the manner for investigation of claims to property attached before judgment is the very one applicable for investigation of claims to property attached in execution of a decree as provided for under ORDER XXXVI Rule 9, and that both provisions have to be read together. He cited the decision of a single judge of this Court in the case of **THE BANK OF TANZANIA V DEVRAM P. VALAMBHIA** – Civil Application No. 15 of 2002 (unreported), which was accepted by the full court in Civil Reference No. 4 of 2002 between the same parties. Mr. Kesaria further contended that, where the objector's claim is disallowed, that decision is final and the objector has no right of appeal. The only remedy open to him is to institute a fresh suit to establish the right which he claims to the property in dispute, and such move cannot be said to be res judicata or abuse of the court process. The learned counsel reiterated the decision of this Court in the **Valambhia case** (supra) on this point. Mr. Kesaria pointed out that, since the learned trial judge was bound by the decision of this Court, the learned judge erred in disregarding the decision by holding that institution of a fresh suit is res judicata and an abuse of the court process.

On the fourth ground the learned counsel reiterated more or less what he had already submitted on the second and third grounds.

On his part, Dr. Lamwai, learned counsel for the respondent, conceded that where any property is attached before judgment under ORDER XXXVI, and there is an objection by the objector, the objector's claim must be investigated in the manner provided for the investigation of claims to property attached in execution of a decree for the payment of money. But the learned counsel pointed out that, in the instant case, the vessel was not attached under ORDER XXXVI but was arrested under Section 68(c) @ 68(e) of the Civil Procedure Code. The learned counsel contended that, for an attachment before judgment under ORDER XXXVI Rule 6, a particular procedure has to be followed such as furnishing security or production of the property or its value at the disposal of the court, and that the hearing has to be inter partes. The learned counsel contended that, in the instant case the respondent company was not invoking the powers of Order XXXVI where attachment or arresting a sea going vessel is not provided for; but that it was invoking the powers of Section 68(c) @ 68(e) which allow a court to make such other interlocutory orders as may appear to the court to be just and convenient. Dr. Lamwai further contended that, Order XXI Rules 40-62 which refer to attachment of property is inapplicable in the instant case where there is no attachment of property but arrest of a sea going vessel, and that, the suit at the Commercial Court which was instituted under Rule 62 was based under an inapplicable provision of the law. Dr. Lamwai conceded that, in the certificate of urgency filed on 27.7.2004 in Civil Case No. 8 of 2004, the

words “the hearing of the application for attachment before judgment” were used. But he was quick to point out that, a certificate of urgency is not a pleading and that, the relevant pleading was the chamber summons which showed that it was made under Section 68(c), and that it was for the arrest of the vessel in dispute.

Furthermore, the learned counsel pointed out that, in Civil Case No. 58 of 2004 before the Commercial Court, the appellant was asking the Court to determine ownership which had already been dealt with by Ihema, J. in Civil Case No. 8 of 2004. In that respect, the learned counsel contended, the learned trial judge was right in holding that the matter was res judicata and an abuse of the court process. Dr. Lamwai observed that, Order XXI Rule 62 was meant for establishing a different cause of action and not the one which has already been adjudicated upon. The learned counsel contended that, the cases cited by Kesaria refer to garnishee orders under Order XXI Rule 35, and that the learned trial judge was right in distinguishing them from the instant case. The learned counsel was of the view that, the only remedy open to the appellant is to wait for the final determination of Civil case No. 8 of 2004.

In a rejoinder, Mr. Kesaria for the appellant, pointed out that, the words “arrest” and “attachment” under Order XXXVI are used interchangeably, and that, whether arrested or attached, the end result is the same. The learned counsel insisted that the learned trial judge

was bound by the decision of this Court in the **Valambhia case** (supra), and that the circumstances in the instant case are similar as far as the remedy for an objector under Order XXI Rule 62 is concerned, that is, to institute a fresh case.

As observed earlier, this appeal is against the decision in Commercial Case No. 58 of 2004. But, upon close consideration of the rival submissions by learned counsel for both parties, it became clear to us that the whole matter hinges on the ruling delivered on 8.10.2004 by Ihema, J., pursuant to an application which was filed in Civil Case No. 8 of 2004 on 27.7.2004 by the current respondent, Mohamed Enterprises (T) Ltd. We therefore invited the learned counsel for both parties to address us on the following issue:

> " Whether the application before Ihema, J. dated 27th July, 2004, and the proceedings which led to the Ruling dated 8th October, 2004, were competent."

Addressing us on the point, Mr. Kesaria contended that, the application before Ihema, J. was incompetent on the following :-

One, according to paragraphs 5 and 6 of the respondent's affidavit accompanying the chamber summons, it is very clear that the respondent was applying for attachment before judgment, argued the

counsel. The learned counsel pointed out that, the proper provision of the law for attachment before judgment is Order XXXVI Rule 6, and not Section 68(c) as cited by the respondent's counsel in the chamber summons. The learned counsel contended that, Section 68(c) @ 68(e) is only applicable where there is no specific provision of the law. The learned counsel pointed out that, in the instant case, there is a specific provision for attachment before judgment, that is, Order XXXVI Rule 6, and that it was improper for the respondent to cite Section 68(c) which is similar to section 95 which is a saving of inherent powers of court. It is the learned counsel's submission that failure to cite a proper provision of the law renders the application incompetent. He cited the decisions of this Court in **Citibank Tanzania Limited v Tanzania Telecommunications Company Limited and Others** – Civil Application No. 64 of 2003 (unreported), and Civil Application No. 65 of 2003 (unreported) between the same parties, and the **National Bank of Commerce v Sadrudin Meghji** – Civil Application No. 20 of 1997 (unreported).

Two, the learned counsel contended that, one important element to be established before an order for attachment before judgment is granted, is the defendant's intention to obstruct or delay the execution of any decree that may be passed against him. It was the learned counsel's submission that, in the instant case, there is no evidence that the appellant intended to obstruct or delay the execution of any decree, and that, at any rate, the appellant was not aware of the suit

until when it saw it in one of the local newspapers.

On his part, Dr. Lamwai, learned counsel for the respondents, contended that, the application was properly before Ihema, J. for the following reasons:-

One, the learned counsel conceded that the proper provision of law for an application for attachment of property before judgment is Order XXXVI Rule 6. But the learned counsel pointed out that in the case before Ihema, J., the respondent was not applying for attachment before judgment but for arresting a sea going vessel, and that there is no specific provision for arresting a sea going vessel; hence Section 68(c) @ 68(e). The learned counsel contended that Section 68(c) @ 68(e) is wide enough to cover the situation at hand. The learned counsel explained out that he cited Section 68(c) instead of 68(e) because there is a typographical error under Section 68 whereby subsection (c) has been written twice covering even what is supposed to be (e). However, the learned counsel observed that, the anomaly was rectified by Ihema J. in his ruling. In his view, the rectification by Ihema, J. was proper because under Section 58 of the Evidence Act, 1967, courts are presumed to know the law.

On which one is superior to the other between Order XXXVI and Section 68, Dr. Lamwai contended that Section 68 which is in the main Act is superior to Order XXXVI which is in the schedule to the Act.

However, Dr. Lamwai conceded that, section 68 is supplemental proceeding, but was quick to point out that, in his view, section 68 is supplemental to civil proceedings and not supplemental to Order XXXVI. The learned counsel emphasized that, since the respondent was applying for the arrest of a sea going vessel and not for attachment of property before judgment, and that since there is no specific provision for arresting a sea going vessel, the provision of Section 68(c) cited in the chamber summons was proper, and that, the application was competent and properly before Ihema, J.

Two, Dr. Lamwai conceded that the decisions in the Valambhia cases (supra) are proper authorities on what remedy is open to the defendant where his property has been attached before judgment. But those cases are irrelevant in the instant case where the matter is about the arrest of a sea going vessel and not attachment of property before judgment, submitted the learned counsel. The learned counsel also countered Kesaria's submissions that citing Section 68 is more or less the same as citing Section 95. Dr. Lamwai contended that the two provisions are neither equal nor similar in that, while Section 68 declares the powers of the Court in preventing the ends of justice from being defeated, Section 95 saves the powers of the Court in preventing abuse of court process.

Lastly, Dr. Lamwai was skeptical on whether this Court can use its revisional jurisdiction under Section 4(2) of the Appellate jurisdiction

Act, 1979 as amended, to revise Ihema J.'s decision in the instant appeal where it is not appealed against.

In his rejoinder Kesaria insisted on what he had submitted earlier.

As observed earlier, the appeal before us is against the decision in Commercial case No. 58 of 2004. But in the course of hearing the appeal it became clear to us that the facts in the matter are so much intertwined with the application in High Court Civil Case No. 8 of 2004 before Ihema, J. that it is almost impossible to arrive at a proper decision in this appeal without considering that application. We therefore invited learned counsel for both parties to address us on the competence or otherwise of that application before Ihema, J. and the proceedings which led to the decision dated 8.10.2004 which ultimately led to the institution of Commercial Case No. 58 of 2004. The rationale behind it is to see whether we can use our revisional jurisdiction under Section 4(2) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993 to revise it in the event we consider it to be incompetent. Dr. Lamwai, learned counsel for the respondent, has expressed his doubt whether we can properly use our revisional jurisdiction to revise Ihema, J.'s decision which is not directly the subject matter in this appeal. In his view, we would only be seized with that power if the appeal before us would be against that decision. For easy of reference we reproduce Section 4(2) of the Appellate Jurisdiction Act, 1979, as amended by Act No. 17 of 1993. It reads as

follows:-

> 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."

In our view, since the facts in the application before Ihema, J. are so much intertwined with those in Commercial case No. 58 of 2004, and since Commercial case No. 58 of 2004 is subsequential to the decision in that application before Ihema, J., we think we have jurisdiction and power to revise that decision even though it is not appealed against in the instant appeal. At any rate, it could not be appealed against by virtue of Order XXI Rule 62 which declares findings in objection proceedings to be final unless ordered otherwise in a subsequent suit. In the premises, it is our holding that, under the provision of Section 4(2) cited above, we have jurisdiction and power to revise the application before Ihema, J. in the instant appeal. We now move on to the application before Ihema, J.

We have carefully considered the arguments and submissions by learned counsel for both parties.

It is common ground that the application before Ihema, J. was lodged under Section 68(c) of the Civil Procedure Code 1966, which later Ihema, J. in his ruling rectified to read 68(e). It is also common ground that when that application was made, the main suit Civil case No. 8 of 2004 was s

till pending. In other words, it was made before judgment. According to the chamber summons (Ex-parte), the current respondent who was the plaintiff was praying the court to issue an order for the arrest of the 12th defendant's ocean going vessel named Can Gio Maid berthed at the Port of Dar es Salaam, before judgment.

The crucial issue is whether that application was properly before Ihema, J. Kesaria says it was not, because it was made under a wrong provision of the law, and that since it was for attachment before judgment, it ought to have been made under Order XXXVI Rule 6. But Dr. Lamwai says it was properly before Ihema, J. and that, the provision of law cited thereat is the correct one, because the application was for the arrest of a sea going vessel and not for attachment of property before judgment, and that there is no specific provision for arresting a sea going vessel.

These expressions "attachment before judgment" and "arresting a sea going vessel" have greatly taxed our minds. But it would appear they are terminologies used interchangeably depending on the nature

of the property to be detained. Where the property to be detained is any property other than a sea going vessel, the word used is “attachment”. But where the property to be detained is a sea going vessel, the word used is “arrest”. Likewise, if what is to be detained is a human being, the word used is “arrest”. For example, where a defendant attempts to defeat the ends of justice, a court can issue a warrant of arrest to arrest him and compel him to show cause why he should not give security for his appearance (Order XXXVI Rule 1(b)). Whether it is the attachment of property before judgment or arrest of a sea going vessel or arrest of a human being, the court derives its general powers for so doing from Section 68, and follows the procedure prescribed in the schedule, that is the Orders. The general powers for attachment of property before judgment are under Section 68(b). The procedure for attachment before judgment is prescribed under Order XXXVI Rule 6. The powers for arresting a human being, that is, a defendant who is attempting to defeat the ends of justice are provided for under Section 68(a). The procedure for arresting such a defendant is prescribed under Order XXXVI Rule 1(b). The powers for ordering a temporary injunction are provided for under Section 68(c). The procedure for obtaining a temporary injunction is prescribed under Order XXXVII. The powers for making such other interlocutory orders as may appear to the court to be just and convenient are provided for under Section 68(e). The procedure for making any such other interlocutory orders is prescribed under Order XXXVII.

It is to be observed that Section 68 is supplemental proceeding. It summarizes the general powers of the court in regard to interlocutory proceedings. This section is similar to Section 94 of the Indian Code of Civil Procedure where it is also specified as a supplemental proceeding. Commenting on this provision of law (section 94), Mulla on the Code of Civil Procedure, Volume 1, Fifteenth Edition, at page 666 had this to say:

> "This section summaries the general powers of the court in regard to interlocutory proceedings. The details of procedure have been relegated to schedule 1."

Since Section 68 merely summaries the general powers of the court in regard to interlocutory proceedings, whoever applies for a specific order must cite the order under which he is applying for. For example, if he is applying for attachment before judgment he must cite Order XXXVI and the appropriate rule. If he is applying for an injunction order or for any such other interlocutory orders, he must cite the order applicable to injunction or other interlocutory orders, that is, Order XXXVII, and the appropriate rule. In the instant case, we are told by Dr. Lamwai that before Ihema, J., the respondent was applying for the arrest of the sea going vessel pending determination of the main suit. Paragraphs 5 and 6 of the affidavit accompanying the chamber summons, **Gulamabbas Hassanali Fazal Dewji** who is the

Chairman of the respondent company, explained the reason why the sea going vessel Can Gio Imo should be arrested before judgment.

He deponed as follows:-

> "5 --- that since all the defendants do not have any property within the United Republic of Tanzania and are non-residents, there is no way they can be forced to satisfy any decree that may be passed against it.
>
> 6 --- that the only attachable property now available in Tanzania within the jurisdiction of this Honourable Court is the said vessel, which will definitely sail out of Tanzania once the discharge is completed. In that case the plaintiff will lose the only chance it has to enforce a decree that may be passed against it."

Generally speaking, these grounds are applicable to applications for attachment before judgment under Order XXXVI Rule 6 and 7 although the defendant has first to show cause why he should not furnish security before his property is attached. This is provided for under the following provisions:_

Order XXXVI Rule 6(1):

> "Where, at any stage of a suit the court is

> satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him –

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant …….. to appear and show cause why he should not furnish security.

> 7(1) where the defendant fails to show cause why he should not furnish security …….. the court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached."

In an appropriate case similar grounds can also be applicable to an application for a temporary injunction under Order XXXVII Rule 1(b). That provision of law reads:-

> "XXXVII Rule 1: where in any suit it is proved by affidavit or otherwise –
> (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors, the court may by order grant a temporary injunction to restrain such act, or make any such other order for the purpose of

> staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders."

But in the instant case, according to the overall circumstances as stated above, it is apparent to us that when the respondent applied for the arrest of the vessel in issue, the whole idea behind it was that that vessel would be held as security, and in the event of a decree against the 12th defendant in Civil Case No. 8 of 2004 eventually be sold to facilitate the execution of that decree. In that respect, and for the reasons stated, we are satisfied that the application before Ihema, J. was subject to rules applicable to applications for attachment before judgment, that is, Order XXXVI Rule 6, and that the word "arrest" was used because it is the appropriate terminology used in attaching or detaining a sea going vessel. In that respect, the current respondent company, which had cited only Section 68(c) (or 68(e) as rectified by the High Court), had not properly moved the court for the order it was applying for.

The crucial issue is as to what is the effect of non-citation of the relevant provision in an application.

In numerous cases, this Court has emphatically held that the applicant must cite the relevant provision from which the court derives

the power to hear and determine the application, and that non-citation of the relevant provision renders the application incompetent. The followings are just some of them:-

i) National Bank of Commerce v Sadrudin Meghji – Civil Application No. 20 of 1997 (unreported).

ii) Almas Iddie Mwingi v
1. National Bank of Commerce
2. Mrs. Ngeme Mbita – Civil Application No. 88 of 1998 (unreported)

iii) Citibank Tanzania Limited v Tanzania Telecommunications Co. Ltd. and Four Others – Civil Application No. 64 of 2003.

In that respect, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, 1979, as amended by Act No. 17 of 1993 to hold that the application before Ihema, J. dated 27th July, 2004, and the proceedings which led to the Ruling dated 8th October, 2004 were incompetent. Likewise, Commercial Case No. 58 of 2004 which emanated from the said incompetent application is also incompetent.

Even if the respondent company had intended the vessel to be merely arrested and detained temporarily pending determination of

the main suit for reasons other than to facilitate execution of the decree that might have been passed against the 12th defendant, it was required to cite also the relevant order applicable to applications for temporary injunctions and other interlocutory orders, that is, Order XXXVII and the relevant rule.

After holding that the application before Ihema, J. and the proceedings and ruling that followed thereat were incompetent, we do not consider that it is necessary to discuss also the other grounds of the appeal.

Since the application before Ihema, J. dated 27th July, 2004 and the proceedings which led to the Ruling dated 8th October, 2004 were incompetent, and since Commercial Case No. 58 of 2004 which was subsequential to the said application is also incompetent, we do hereby quash them accordingly.

In the event, and for the reasons stated, we allow the appeal. Since our decision is mainly based on the import of Section 68 which was raised by the court ***SUO MOTU,*** we order that each party is to bear their own costs.

DATED at DAR ES SALAAM this 11th day of August, 2005.

J. A. MROSO
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR