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

**CIVIL APPLICATION NO. 134 OF 2004**

**OTHUMANI M. OTHUMAN AND ANOTHER..... APPLICANTS**

**VERSUS**

**TANZANIA INVESTMENT OIL AND TRANSPORT CO LTD. ..... RESPONDENT**

**(Application for Stay of Execution from the decision of the High Court of Tanzania – Commercial Division at Dar es Salaam)**

**(Kalegeya, J.)**

**dated the 10th day of September, 2003**
**in**
**Commercial Case No. 167 of 2002**
**----------**
**R U L I N G**

**MROSO, J.A.:**

The two applicants through Nyangarika and Co. Advocates, filed a notice of motion containing two prayers. In the first prayer it is sought that a notice of appeal relating to High Court of Tanzania, Commercial Case No. 167 of 2002 be struck out. The second prayer sought on order of the Court striking out an appeal to this Court against the decision of the High Court Commercial Division in the same case. The Notice of Motion cited Rules 3 (2) (a) and (b), 47 (1), 83 (1) and 83 (2) of the Court Rules, 1979 as the enabling provisions for this Court to grant the said prayers.

Before the application came for hearing, the learned

advocates for the applicants filed a “Notice of Intention to amend the Notice of Motion”. This notice is shown to have been given under Rule 3 (2) (a) of the Court Rules and reads, as relevant:-

> TAKE NOTICE that on the first day of hearing of this Application or any subsequent date on which the hearing shall stand adjourned the Applicant above-named shall pray to be allowed to amend the citation of the Rule in the Notice of Motion filed on 1st October, 2004 as Rule 3 (2) (a) and (b), 47 (a) and 83 (a) of the Court Rules, 1979 to read “as made under Rule 82 of the Court of Appeal Rules 1979”
> WHEREFORE the Applicant will pray that the Application be amended accordingly.

Mr. Walter Chipeta, advocate for the respondent, objected to the Notice, arguing that it is unknown in law, peculiar and could not be brought under Rule 3 (2) (a) of the Court Rules, 1979. He further argued that the notice itself was an application and should have complied with Rules 45 and 47 of the Court Rules. The intention to have the Notice of Motion amended was an acknowledgment that it was

defective and a nullity and as such it was not capable of being amended. Furthermore, if the Notice of Motion had cited wrong provisions it meant that this Court had not been properly moved. The law was that if the Court was not properly moved, the matter was incompetent with the consequence that it must be struck out. He cited **Citibank Tanzania Ltd. v. TTCL and 4 Others,** Civil Case No. 64 of 2003 (unreported) as authority.

If by the notice of intention to amend the Notice of Motion it was envisaged that an informal application for leave to amend would be made, that would not be possible because there would not be such opportunity. The Court would not start to hear an incompetent application so that in the course of hearing the oral application would be made, added Mr. Chipeta.

Mr. Nyangarika does not accept that the Notice of Motion was a nullity. It was merely defective and he intended to remedy the defect by seeking to have it amended. At the commencement of the hearing he was intending to make an informal application for leave to amend it by citing what he considered were the correct provisions for moving the Court to consider and grant the prayers contained in the Notice of Motion. Since there had not been a Notice of Preliminary Objection to the Notice of Motion, he

was trying to pre-empt the possibility of the application being declared incompetent for failure to cite the correct provisions for moving the Court. The case of **Citibank Tanzania Limited v. Tanzania Telecommunication Company Limited** cited by Mr. Chipeta was distinguishable, according to Mr. Nyangarika.

It appears to me that the issue in controversy at present is whether the applicants could amend the Notice of Motion which was filed in Court on 6th October, 2004 and which sought, *inter alia*, an order of this Court to strike out the respondent's appeal to this Court. If the answer be in the affirmative then the question that should follow would be how to go about it. One approach would be to make a formal application for leave to amend and Rules 45 and 47 (1) of the Court Rules would come to play. In such a case it would be mandatory for the applicants to lodge with the Registrar of the Court a Notice of Motion in which the grounds for the application would be stated.

The other approach would be to make an informal application during the hearing of the Notice of Motion for its amendment. Both Mr. Chipeta and Mr. Nyangarika seem to agree that those are the two different approaches to have a Notice of Motion amended. The point of departure however is that while Mr. Nyangarika thinks that he was on the correct path to apply informally for leave to amend the Notice of

Motion, Mr. Chipeta believes that the approach adopted by Mr. Nyangarika was a non-starter for the reasons which he gave and which were summarized earlier in this ruling. I will attempt to consider the main reasons of objection which were advanced by Mr. Chipeta.

It was correct to say that this Court holds the view that an applicant has to cite the provision of the law under which the Court is moved, see **Almas Iddie Mwinyi v. National Bank of Commerce and Another,** Civil Application No. 88 of 1998 (unreported). Failure to do so will result in an application being struck out for incompetence. Similar consequences will follow if the specific correct provision of the law is not cited. Thus, if the correct specific enabling sub-section or sub-rule are not cited but only the section or rule generally are cited, the application can be struck out for incompetence. See **The National Bank of Commerce v. Sadrudin Meghji,** Civil Application No. 20 of 1997 – (unreported).

It is not however correct to say that what would be an incompetent application cannot be corrected in good time, because an incompetent application is not necessarily a nullity, as Mr. Chipeta appears to argue that it is. Mr. Nyangarika who had second thoughts and considered that his notice of motion ran the risk of being declared

incompetent because of what he believed were wrongly cited legal provisions in his notice of motion rightly, in my view, gave advance notice to the Court and to the respondent of his intention to apply for amendment of the notice of motion in order to cite in it what he thinks are the correct rules to move the Court. Since no preliminary objection to the Notice of Motion preceded the notice of intention to amend, I think it was legitimate to give notice that the applicants intended to ask for leave to amend the Notice of Motion before proceeding to hear the application in the Notice of Motion.

I do not see why the advance notice should be construed as an application which should be by notice of motion. The criticism that the notice is not recognized in law is uncalled for because if a party at the hearing of a matter can make an informal application to Court for leave to amend it, why should it be wrong and contrary to law to give advance notice of the intention to do so? I am not by any means saying that the corrections which Mr. Nyangarika intends to make to his notice of motion are necessarily correct. We have not yet reached that stage. He had not yet even made his oral application for the intended amendment.

The **Citibank** case which was cited by Mr. Chipeta is not relevant at this stage. I should say that Mr.

Nyangarika's intention to amend the Notice of Motion was aimed at avoiding the same consequences as in the **Citibank** case.

Mr. Chipeta also argued that Mr. Nyangarika had not complied with Rule 47 (1) of the Court Rules. The Rule specifically provides for formal applications for leave to amend a document. But Mr. Nyangarika says he intended to make an informal application for leave to amend his Notice of Motion. If the Court grants him leave to amend the Notice of Motion, then Rule 47 (2) will have to be complied with.

The notice of intention to apply informally for leave to amend was made under Rule 3 (2) (a) of the Court Rules presumably because there is no specific Rule providing for such a procedure. Assuming, without making a specific finding, that it was unnecessary for Mr. Nyangarika to cite the rule, I do not consider that such superfluity would render the notice either incompetent or a nullity.

The oral objection to the notice was unnecessary and it is overruled with costs.

DATED at DAR ES SALAAM this 13th day of October, 2005.

J.A. MROSO
**JUSTICE OF APPEAL**

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

( S.M. RUMANYIKA )
**DEPUTY REGISTRAR**