IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And MASSATI, J.A.)

CONSOLIDATED CIVIL APPICATIONS NO. 84 AND 89 OF 2010

AFRICAN DEVELOPAMENT BANK .....1ST APPLICANT
EASTERN AND SOUTHERN AFRICAN TRADE
AND DEVELOPMENT BANK (PTA BANK).....2ND APPLICANT

VERSUS

M/S EAST AFRICAN DEVELOPMENT BANK.....1ST RESPONDENT
M/S BLUELINE ENTRPRISES LIMITED.....2ND RESPONDENT

(In the matter of an application by the Applicants to intervene as interested parties who will be adversely affected by the decision of the Court of Appeal in Civil Appeal No. 110 of 2009 between East African Development Bank V Blueline Enterprises Limited)

RULING OF THE COURT

14 December, 2011 & 19 March, 2012

KIMARO, J.A.:

There is pending in this Court, Civil Appeal No. 110 of 2009 between East African Development Bank as the appellant and Blueline Enterprises Limited as the respondent. The contest in the appeal is essentially on the immunity of the East African Development Bank against its property and assets. A contest between the respondents was referred to arbitration and the arbitrator determined the contest in favour of the second

respondent. In the enforcement of the award, a garnishee order was issued to attach the appellant's monies in its Bank Account.

The applicants who were not parties to the contest between the respondents have filed an application under Rules 4(1); rule 2 (a); rule4 (2) (b), rule 48(1); rule 48(2) and 49(1) of the Tanzania Court of Appeal Rules, 2009 and section 4(2) of the Appellate Jurisdiction Act 1979 and Article 13 (6) (a) of the Constitution of the United Republic of Tanzania seeking to be joined in the appeal as interested parties. The main ground for filing the application is to protect the immunity which is granted to the applicants over their property and assets by the respective Charters establishing them.

Although a similar immunity is also provided by the Charter establishing the East African Development Bank as amended by the Finance Act, No. 13 of 2005, the High Court ruled that money is not part of the assets which fall under the immunity that is provided to the East African Development Bank. In fear of the impact the decision of the High

Court would have to the immunity they are provided for, the African Development Bank filed Civil Application No. 84 of 2010 and Eastern and Southern Development Bank (PTA Bank) filed Civil Application No. 89 of 2010 seeking to be joined in the appeal so that they can be heard on the protection of their property and assets granted by the Charters establishing them. As the applications are based on same issues and the line of argument is the same in almost all respects, the Court decided for convenience purposes and saving of time, to consolidate the two applications and have them heard together. Both applications were filed by Ishengoma, Karume, Masha and Magai Advocates but at the hearing of the application Ms Fatma Karume learned advocate appeared for the applicants.

In both applications Professor Fimbo, learned advocate for the second respondent raised two points of preliminary objection under rule 107 (1) of the Court of Appeal Rules 2009. The first one is that the applications are time barred and/or the applicants are guilty of laches. The second is that the applications have been filed under wrong or inapplicable provisions of the law. For the two points of objection, Professor Fimbo

said the applications are incompetent and he prayed they be struck out. All advocates filed written submissions under Rule 109 of the Court of Appeal Rules, 2009 in support of their respective positions in respect of the preliminary objections.

As already stated, at the hearing of the applications Ms. Fatma Karume learned advocate appeared for the applicants. The first respondent was represented by Mr. Michael Sullivan, Q.C, Mr. Mabere Marando and Mr. Dilip Kesaria learned advocates. Professor Gamaniel Mgongo Fimbo represented the second respondent.

In support of the preliminary objection on non citation of the proper provisions of the law to move the Court, Professor Fimbo submitted that the principle laid down by the Court is that an application filed in the Court under inapplicable law is incompetent and should be struck out. Referring to the provisions of the law relied upon by the applicants to move the Court; the learned advocate said they are not the appropriate ones. He said the basis for filing the applications is that the applicants are aggrieved

by the decision of the High Court and they are seeking leave of the Court to be given the right to be heard.

According to Professor Fimbo, the Court is empowered to invoke Rule 4 in appropriate cases, to give directions on the procedure which has to be adopted. But there must first be an application from the applicant. It is only after the applicant is granted leave by the Court that he/she will then proceed to make the application in accordance with the directions given by the Court. Since the applications were filed without the applicants first getting the directions of the Court, argued the learned advocate, the applications are not tenable. The learned advocate cited four cases to augment his submission on the principle laid down by the Court on non-citation of the proper provision of the law or inapplicable law to move the Court. Among them are the cases of the **National Bank of Commerce vs Sadrudin Menghi** Civil Appeal No. 20 of 1997 and **Citibank Tanzania Ltd Vs TTCL Civil** Appeal No 64 of 2003 (both unreported). He prayed that the preliminary objection be upheld and the applications be struck out.

Responding to the submissions made in support of this point of preliminary objection, Ms Fatma Karume, learned advocate conceded to the principle of law enunciated by case law in respect of non citation of proper provision of the law to move the Court. However, she insisted that Rule 4(2)(b) of the Court of Appeal Rules 2009, empowers the Court to make an order necessary for the purpose of meeting the ends of justice. She also equated section 4(2) of the Appellate Jurisdiction Act [CAP 141 R.E.2002] to Order 1 rule 10(2) of the Civil Procedure Code [CAP 33 R.E.2002] which empowers the High Court to join a party to a suit either as a plaintiff or defendant as it appears necessary for the purposes of the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. She was firm that the provisions cited were the appropriate ones for moving the Court. Citing the case of **A G. Vs Rev. Christopher Mtikila** Civil Appeal No. 45 of 2009 (unreported), the learned advocate for the applicants said the Court of Appeal has the tradition of granting audience to parties who are strangers to the appeal by inviting them suo *motu.* She prayed that this point of objection be dismissed.

On his side Mr. Sullivan Q C, in his written submissions supported the applicants. He said the Court has unfettered jurisdiction under rule 4 of the Court of Appeal Rules , 2009 to give directions in proceedings before it for purposes of ensuring that substantive justice is done and that its attainment is not hindered by a pedantic adherence to procedural provisions and technicalities. He also added that the provisions of Rules 84 and 109 of the Court of Appeal Rules can also be invoked by strangers in the appeal to seek leave to be joined as interested parties.

In a brief rejoinder the learned advocate for the second respondent said that the case of **AG Vs Mtikila** (supra) caters for a situation where the Court either *suo mo*tu or on an application by an interested party invites the party to assist the Court in a determination of an important issue of public interest but the applications by the applicants do not say so. As for Rules 84 and 109 of the Court of Appeal Rules, 2009 Professor Fimbo, said that although the subject matter in the marginal notes is additional parties, the content does not match with the marginal notes. He reiterated his prayer of upholding the preliminary objection and striking out the applications.

As conceded by all the learned advocates appearing in the applications the principle of the law on non -citation of proper provisions of the law or inapplicable law to move the Court is now settled. In the case of **The National Bank of Commerce Vs Sadrudin Meghji** (supra) the Court was invited to exercise its powers of revision under section 4(2) of the Appellate Jurisdiction Act, 1979 while there was no appeal pending. In deciding the issue the Court held that:

> *In the matter before the Court, no appeal was instituted and so, the revisional powers can not be invoked for purposes of and incidental to the determination of an appeal which was not before the Court. It follows therefore that the application has been filed by notice of motion under an inapplicable Law.* ***Consequently, as the Court was not properly moved, the application is likewise, incompetent.*** (Emphasis added).

The principle was emphasised in the case of **Citibank Tanzania Limited V TTCL** (supra) that an applicant must state the specific provisions of the law under which the applicant wants to move the Court to exercise jurisdiction. Let us say that we do not share the views expressed by Professor Fimbo that Rule 4 of the Court Rules can only be invoked by a party after first getting directions from the Court. That provision allows the Court to invoke it at any time, under circumstances where there is no provision to cater for the issue at hand. A party need not first obtain leave of the Court before invoking that Rule. Rule 109(1) of the Court of Appeal Rules 2009 which was referred to by Mr. Michael Sullivan Q C, is the relevant provision under which the applications should have been filed.

Rule 109 (1) of the Court Rule reads as follows:

> *Where an appeal is called on for hearing, or* ***at any earlier time on any application of the interested person, the Court may direct that the record of appeal, or any notice of cross-appeal, be served on any party to the appeal who has not been served with it, or on any other person not already a party to***

the appeal *and may, for the purpose of such service , adjourn the hearing upon such terms as are just, and may give judgment* ***and make such order as might have been given or made if the parties served with such record or notice had been parties originally.*** (Emphasis added).

Reading through rule 109 as shown above, it is clear that it allows an interested party who was not a party to the proceedings giving rise to appeal to seek the leave of the Court to be joined in the appeal as an interested party. This is the proper provision that had to be used by the applicants to move the Court. The provisions of section 4(2) of Cap 141 are totally inapplicable under the circumstances. Even Rule 4 of the Court of Appeal Rules 2009 is not the applicable provision for moving the Court because it is reserved for a situation where there is no specific provision to cater for the situation. The authorities cited say that the specific provision conferring jurisdiction on the Court to grant the prayers sought by the applicant has to be cited. Since there is a specific Rule under the Court of

Appeal Rules, 2009 namely rule 109(1), but it was not cited by the applicants, and instead they cited other inapplicable rules, the applications are incompetent. Consequently the preliminary objection on non- citation of the proper provision or citing inapplicable provision to move the Court is upheld. Since this point of objection suffices to dispose of the applications, we see no need for going to the other point of objection. The applications are struck out. There is no order for costs. It is accordingly ordered.

DATED at **DAR ES SALAAM** this 16th day of December, 2011.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

(E. Y. Mkwizu)
DEPUTY REGISTRAR