IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

MSH. CIVIL APPLICATION NO. 1 OF 2011

BAHATI KUNDAEL KESSY.....APPLICANT
VERSUS

PASTOR INCHARGE TANZANIA
ASSEMBLIES OF GOD..... RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Moshi)

(Mzuna, J.)

dated the 3rd day of December, 2010
in
Civil Application No. 40 of 2009

RULING OF THE COURT

17th & 20th September, 2012

MBAROUK, J.A.:

By way of notice of motion, the applicant has moved this Court under Rule, 48 of the Court of Appeal Rules, 2009 (the Rules) seeking for leave to appeal to this Court. The application is supported by an affidavit sworn by Mr. Bahati Kundaeli Kessy, the applicant.

At the hearing of the application, the Court had to deal with a notice of preliminary objection first, notice of which was given earlier by the respondent. The notice of preliminary objection contained the following points:-

1. This application is incurably defective for being brought under wrong enabling provision hence incompetent in law.

2. That format of notice of appeal and notice of motion is incurably defective as it offends the provisions of rule 48 (2) and 83 (6) of Tanzania Court of Appeal Rules, 2009.

Both, the applicant and Mr. Michael Munishi, the Pastor Incharge Tanzania Assemblies of God appeared in person unrepresented. The applicant and the respondent had nothing to submit either for or against the preliminary objection understandably so because they are lay persons who cannot

argue on the points of law. They both left to the Court to decide on the relevancy of the preliminary objection.

With regard to the 1st point of preliminary objection, we agree with the respondent that the application has cited a wrong provision of the law to move the Court. The applicant has cited Rule 48 of the Rules seeking for leave to appeal to this Court. But, Rule 48 prescribes the procedure for filing applications to the Court. The Rule states as follows:

> *"48.-(1) Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, every application to the Court shall be by notice of motion supported by affidavit. It shall cite the specific rule under which it is brought and state the ground for the relief sought.*
>
> *(2) A notice of motion shall be substantially in the Form A in the First*

Schedule to these Rules and shall be signed by or on behalf of the applicant.

(3) The provisions of this Rule shall not apply-

(a) to applications made in the course of hearing, which may be made informally; or

(b) to applications made by consent of all parties, which may be made informally by letter.

(4) The application and all supporting documents, shall be served upon the party or parties affected within 14 days from the date of filing."

With respect, we think Rule 48 which governs "Forms for application" is inapplicable in seeking for an order for leave to

appeal. The applicant should have cited Rule 45 as a correct provision of the law in seeking for leave to appeal instead of Rule 48. Rule 45 is a specific provision dealing with an application for leave to appeal in civil matters. It states:-

"45 In Civil matters-

(a) where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within fourteen days of the decision;

(b) where an appeal lies with the leave of the Court, application for leave shall be made in the manner prescribed in Rules 49 and 50 and within fourteen days of the decision against which it is desired to appeal or, where the application for leave to appeal has been made to the High

Court and refused, within fourteen days of that refusal.

So it is not that, Rule 48 is wholly inapplicable in this case but it alone is not sufficient to vest the Court with jurisdiction to consider an application for leave. So, the real substance of the objection is that it has omitted to cite the relevant enabling provision for the intended substantive application. This Court has repeatedly held that failure to cite a correct provision of the law renders the application incompetent and the result is to strike out such an application. See, **Harish Ambaram Jina (By his Attorney Ajjar Patel) vs Abdulrazak Jussa Suleiman,** ZNZ Civil Application No. 2 of 2003, **Abdulhamid Ramadhani Mjombo and Two Others vs Ali Salim Ali and Two Others,** Civil Application No. 4 of 2004, **Sunflag (T) Limited vs Yerome Wambura and Four Others,** Civil Application No. 50 of 2002 and **Alliance Insurance Corporation Ltd. and Nine Others vs Commissioner of Insurance, Minister for Finance and**

Attorney General, Civil Reference No. 5 of 2005 (all unreported) are among the authorities.

In the instant application since the applicant has cited a wrong provision of the law in moving this Court; we are constrained to find the application incompetent. The same is hereby struck out with costs.

Just by the way, we have also noted that, this matter started from a primary court. So, if the attempt to institute his appeal was successful it would have been a third appeal. Section 5 (2) (c) of the Appellate Jurisdiction Act requires that the applicant should have applied for a certificate that a point of law is involved in the decision intended to be appealed against. In the absence of such a certificate, we think, both the intended appeal and the application is misconceived and untenable in law.

DATED at ARUSHA this 18th day of September, 2012.

N. P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

THE COURT OF APPEAL OF TANZANIA

M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL