IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: JUMA, Ag. CJ., MUGASHA, J.A., And MWANGESI, J.A.)

CIVIL APPLICATION NO. 25 OF 2013

CHADHA AND COMPANY ADVOCATES.....APPLICANT

VERSUS

1. ARUNABEN CHAGGAN CHHITA MISTRY
2. MR. NAUSHAD MOHAMEDHUSSEIN
3. MR. MOHAMEDRAZA MOHAMEDHUSSEIN ..... RESPONDENTS

(Application for review from the decision of the Court of Appeal of Tanzania at Arusha)

(Rutakangwa, Mbarouk, Oriyo, JJJ.A.)

dated the 7th day of May, 2013
in
Civil Application No. 138 of 2012

JUDGMENT OF THE COURT

17th & 22nd May, 2017

MUGASHA, J.A.:

The applicant has brought this application seeking a review of the Ruling of this Court (**RUTAKANGWA, MBAROUK, ORIYO, JJJ.A**) in Civil Application No 138 of 2012 dated 7th May, 2013, which on account of citing a wrong provision of the law, the application was struck out for being incompetent. Also, for that reason, the applicant who was not present in Court was condemned for being negligent and he was ordered to bear the costs of the 2nd and 3rdrespondents. Aggrieved with his condemnation to pay

costs for the negligence, the applicant brought this notice of motion under rule 66 (1) (a), (b), (d), (e), (2) and (3) of the Court of Appeal, Rules, 2009.

The background of the application is briefly as follows: The 1st respondent was applicant in Civil Application No. 138 of 2012 filed under Rule 11 (c) and (d) seeking for stay of execution of the decree of the High Court in Land Case No.8 of 2010 pending the determination of the hearing of the application *inter partes*. The application was drawn by the applicant being a former advocate of the 1st respondent. When the application was called on for hearing on 6th May, 2013, Mr. Ojare represented the 2nd and 3rd respondents. Mr. Ojare raised a preliminary objection to the effect that notice of motion was fatally defective for citing a wrong and non- existent rule, in contravention of Rule 48 (1) of the Rules. Dr. Lamwai who represented the 1st respondent conceded to the preliminary objection, but pleaded with the Court not to condemn his old and widowed client who had already lost her house. Instead, he asked the Court to condemn Mr. Chadha to bear the costs, being the one who drew the impugned notice of motion. This supposition was not resisted to by Mr. Loomu Ojare who in addition, asserted that, the applicant should suffer costs due to the negligence in the improper drafting of the notice of motion. Mr. Vicent Tangoh learned Principal State Attorney who happened to represent two other respondents

who are not parties in this application, urged the Court to strike out the application. He did not press for costs. The Court did strike out the application for being incompetent and ordered the applicant to bear costs of the 2nd and 3rd respondents for the negligence.

It is the said order which precipitated the present application whereby as earlier stated the applicant is moving the Court to review its Ruling and Order on grounds stated in the notice of motion as follows:-

1. *The decision was based upon manifest error on the face of record as is that, an important point of law decided by the Court of Appeal of Tanzania was not brought to the notice of Court during the hearing of Civil Application No. 138 of 2012 by Dr. Masumbuko Lamwai Counsel for Arunaben Chaggan Chhita Mistry.*
2. *The applicant was wrongly deprived of an opportunity to be heard before making the impugned order.*
3. *That, with respect, the Court acted in excess of its jurisdiction as in that there is no provision which empowers the Court to make such order against the Advocate without giving him an opportunity of being heard.*
4. *That Dr. Masumbuko Lamwai Counsel for Arunaben lied to the Court that his client was an old and widow, while she is neither old not widow and further, he had no authority to state that the applicant was negligent and he failed to inform the Court that the Omission to properly cite the applicable provision was inadvertent and curable.*

The application is accompanied by the affidavit of Mr. Bharat Chadha, the applicant.

The application has been challenged by the 2nd and 3rdrespondents through the affidavit in reply of **ELIUFOO LOOMU OJARE**, learned counsel for the respective respondents. Parties have filed written submissions in support of their arguments for and against the grant of the application. The 1st respondent did not file an affidavit in reply or written submissions.

The applicant appeared in person and the 1st respondent was represented by Mr. John Matteru learned counsel and the 2nd and 3rd respondents were represented by Mr. Eliufoo Loomu Ojare learned counsel. The applicant and Mr. Ojare adopted the written submissions earlier on filed in terms of Rule 106 of the Rules.

The hearing of the application was preceded by a preliminary objection raised by the 2nd and 3rdrespondents on the competence of the application on the following grounds:-

1. *That the affidavit of BHARAT B. CHADHA, Esq. Advocate in support of the application is incurably defective for containing legal discourses in paragraphs 2 and 4; conclusion in paragraph 3 and hypothetical arguments and hearsay in paragraph 5.*

2. *That, the applicant's application has been filed in the wrong Registry of the Court contrary to the provisions of Rule 51(1) of the Tanzania Court of Appeal Rules, 2009 and without being accompanied by a Certificate of Urgency pursuant to Rule 51(2) of the Tanzania Court of Appeal Rules, 2009.*

3. *That the applicant's written submissions have been filed under a non-existent Rule of the Tanzania Court of Appeal Rules, 2009.*

At the hearing of the preliminary objection, the 2nd and 3rdrespondents' counsel abandoned the 2nd and 3rd grounds and argued only the 1st ground. Mr. Ojare submitted that, the affidavit in support of motion is defective as paragraphs 2, 3, 4 and 5 contain extraneous matters in the form of legal discourse, hypothetical arguments, hearsay conclusions and opinion. He specifically pointed out that the affidavit suffers the following defects: **One,** paragraphs 2 and 4 contain legal discourses, hypothetical conclusions based on opinion which looks like grounds of appeal or written submissions. **Two,** paragraph 3 bears a conclusion that the applicant was wrongly deprived of an opportunity to be heard. **Three,** paragraph 5 has legal propositions and it is basically hearsay having alleged that, Dr. Masumbuko Lamwai lied before the Court in submitting that the 1st respondent was old and widowed while the applicant was not present at the hearing of the application in question.

In this regard, the learned counsel argued that, the affidavit is defective because it contravenes the principle of law which require affidavits to be confined to facts and must be free from extraneous matters. He referred us to the cases of **LALAGO COTTON GINNERY AND OIL MILLS COMPANY LIMITED VS THE LOANS AND ADVANCES TRUST (LART)** Civil Application No. 80 of 2002, **MUSTAPHA RAPHAEL VS EAST AFRICAN GOLD MINES LIMITED,** Civil Application No. 40 of 1998 and **IGNAZZIO MESSINA VS WILLOW INVESTMENT SPRL**, Civil Application No. 21 of 2001 (all unreported). Mr. Ojare also attacked the verification clause of the applicant's affidavit arguing that, it cannot cure the defects because the information contained in paragraphs 5 is not based on applicant's knowledge because he was not present in Court.

In the light of the said defects, Mr. Ojare urged the Court to strike out the application because it is not accompanied by a proper affidavit as the substantive paragraphs of the affidavit are fatally defective.

Mr. Matteru learned counsel for the 1st respondent, joined the submission of Mr. Ojare. And, on a reflection he realised that, the application was filed within the required time. He thus abandoned the preliminary objection he initially raised to the effect that the application is time barred.

On the other hand, Mr. Chadha on probing by the Court conceded that paragraph 4 of his affidavit contains both facts and law. However, he challenged the preliminary point of objection on the remaining paragraphs arguing the same to have been misinterpreted by the respondents' counsel. He pointed out that, paragraphs 2,3 and 5 of the affidavit are statements of facts indicating that, there is an error manifest on the face of record which made the applicant to be wrongly deprived of the opportunity to be heard.

As to the deposition in paragraph 5 of the affidavit, he argued the same to be a statement of fact based on his own knowledge in terms of what he verified since he did not endorse Dr. Lamwai to support what was submitted by Mr. Ojare. He added that, Dr. Lamwai lied before the Court in reporting that the client is old and widowed which is not the case. Mr. Chadha distinguished authorities cited by Mr. Ojare arguing that, they are not applicable in the present situation. He urged us to dismiss the preliminary point of objection because the application is supported by a valid affidavit according to the law.

In rejoinder Mr. Ojare submitted that, the applicant's affidavit is not proper because Rule 49 (1) of the Rules specifically directs that the contents of the affidavit must be based on knowledge of the facts and not on

extraneous matters. He reiterated that, the defective affidavit renders the application incompetent and the remedy is to strike it out.

After a careful consideration of the submission of counsel the point for determination is whether the affidavit is defective. We have deemed it pertinent to reproduce the applicant's affidavit as follows:

> *" 1, Bharat B. Chadha, adult, Male, Hindu by religion, Advocate by profession, resident of Arusha, do hereby solemnly affirm and state as under:-*
>
> 1. *That I am an advocate of M/S Chadha and Company Advocates, Arusha – the above named applicant.*
> 2. *That the impugned decision was based upon manifest error manifest error on the face of record as in that, by mistake an important point of law decided by the Court of APPEAL OF Tanzania in Fortunatus Masha v. William Shija and Another (Mfalila, J.A.) – TLR 1997 page 154 and Samson Ngwalida v. The Commissioner General Tanzania Revenue Authority Dar es Salaam Civil Appeal No. 86 of 2008 (Kileo, J.A. – unreported)* ***was not brought to the notice*** *of the Court during hearing of the Civil Application No. 138 of 2012 on 6/5/2013 by Dr. Masumbuko Lamwai – Counsel for Arunaben Chaggan Chhita Mistry.*
> 3. *That the Applicant was wrongly deprived of an opportunity to be heard before making the impugned order. Copies of the Ruling and order in Civil Applicatlon No. 138 of 2012 are annexed here to and collectively marked as Annex A/1-2.*

4. *That, with respect, (the Court acted in excess of its jurisdiction as in that,) there is no provision under the Tanzania Court of Appeal Rules, 2009, which empowers the Court to make such Order against the Advocate without giving him an opportunity of being heard.*

5. *That Dr. Masumbuko Lamwai – Counsel for Arunaben chaggan Chhita Mistry* ***lied to the Court*** *that his* ***client was an old and widow, while she is neither old nor widow,*** *and (besides that, he had no authority to state that the above – named Applicant was negligent and further, he failed to inform the Court firstly, that the omission of inserting the words "2(b)" in the Notice of Motion was inadvertent."*

Rule 49 (1) of the Rules, among other things requires formal applications to the Court to be supported by one or more affidavits of the applicant or some other persons having knowledge of the facts. As to what should be contained in the affidavit, in the case of **UGANDA v. COMMISSIONER OF PRISONS EXPARTE MATOVU (1966) EA 514** it was held:

> *"As a general rule of practice and procedure an affidavit for use in court, being a substitute for oral evidence, should only contain statements of facts and the circumstances to which the witness deposes either of his own knowledge... such affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion"*

The affidavit must be verified by the deponent on what is true based on knowledge, belief or information whose source must be disclosed in the verification clause of the affidavit. The rule governing the modus of

verification on the contents of the affidavit that can be acted upon was stated in the case of **SALIMA VUAI FOUM v. REGISTRAR OF COOPERATIVES SOCIETIES & 3 OTHERS (1995) TLR 75,** whereby the appellant filed a chamber application in the High Court of Zanzibar. The application was confronted with a preliminary objection and struck out because it had no verification and did not reveal the source of deponent's information and knowledge of some facts stated therein. On appeal the Court said:

> *"Where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specified".*

In the light of the above position of the law, we agree with Mr. Chadha that paragraph 3 of the affidavit is a statement of fact to the effect that he was wrongly deprived of the opportunity to be heard and condemned in Misc. Civil Application No. 138 of 2012. The applicant has verified such fact to be true based on his own knowledge. However and as rightly conceded by Mr. Chadha, paragraph 4 of the affidavit contains extraneous matter in the form of a legal argument as hereunder reflected:

> *"That with respect, the Court acted in excess of its jurisdiction as in that there is no provision under the Tanzania Court of Appeal Rules, 2009 which empowers the Court to make such*

order against the advocate without giving him an opportunity to be heard."

The contents of paragraphs 2 and 5 of the affidavit are a combination of both statements of facts and extraneous matters in the form of opinion and case law. What constitute statements of facts therein include the applicant's deposition that, the decision was based on manifest error on the face of record and that he was required to appear before the Appeals Chamber at ICTR on 6.5.2013. As to the remaining contents, since Mr. Chadha was not present at the hearing of the application and a subject of the impugned decision, what transpired thereat including what was not brought to the attention of the Court, is information whose source ought to have been disclosed. This is contrary to what the deponent has verified in the verification clause having stated that such averments are true according to his own knowledge.

In this regard, the offensive areas of the affidavit are: the whole of paragraph 4 and parts of paragraphs 2 and 5 and the issue for determination is whether the defects adversely impact on the entire affidavit.

In the case of **STANBIC BANK TANZANIA LIMITED VS KAGERA SUGAR LIMITED, CIVIL APPLICATION NO. 57 OF 2007**(Unreported) which was cited with approval the case of **PHANTOM MODERN TRANSPORT (1985) LIMITED VS D.T.DOBIE (TANZANIA) LIMITED, CIVIL REFERENCES NOS 15 OF 2001 AND 3 OF 2002,** and the Court held:

> *" where the offensive paragraphs are inconsequential, they can be expunged leaving the substantive parts of the affidavit remaining intact".*

In terms of what was said by the Court in **PHANTOM MODERN TRANSPORT (1985) LIMITED VS DT DOBIE (TANZANIA) LIMITED,** we do not think that, it is necessary to strike out the entire application because the defects in those paragraphs are inconsequential and the offensive parts of the affidavit can be expunged or overlooked, leaving the substantive parts of the affidavit intact. We say so believing that, the salvaged parts of the affidavit are adequately complemented by the Notice of Motion. On this accord, we wish to repeat what we said in the case of **THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICE (1992)** TLR 387 :

> *" a notice of motion and the accompanying affidavit are in the very nature of things complementary to each other, and it would be wrong and indeed unrealistic to look at them in isolation. The proper thing to*

do is to look at both of them and if on the basis of that it is clear what relief is being sought then the court should proceed to consider and determine the matter regard being had to the objection if any, raised by the opposite party."

The principle that can be extracted from this holding is that, the inconsequential defects in the affidavit can be safely overlooked or ignored, if the substantive intact parts of the affidavit can be gleaned from what is stated in the grounds on motion.

In the present matter, we are satisfied that, the substantive intact parts of the affidavit are adequately complemented by grounds stated in the Notice of Motion. As such, the preliminary objection is partly sustained.

Reverting back to the substantive application, Mr. Chadha submitted that, the review is sought particularly on the portion of the Court's decision which condemned the applicant to bear costs of the 2nd and 3rd respondents having concluded that, the applicant was negligent for citing a wrong provision of the law in the Civil Application No. 138 of 2012. He argued that, apart from the omission being inadvertent and not occasioned by the applicant's negligence, the applicant was condemned without being heard subsequent to the submission by Mr. Ojare which was supported by Dr.

Lamwai. He added that, the accusation by Dr. Masumbuko Lamwai that the inadvertent omission to cite the proper provision of the law was negligence, is well below the threshold for sufficient negligence or unreasonableness to justify the impugned order of costs. He also argued that non citation of correct provision of the law is not fatal. He referred us to the case of **FORTUNATUS MASHA v. WILLIAM SHIJA and ANOTHER (1997) TLR 154.**

Addressing the Court on his absence when the application in question was called for hearing; he submitted that, on the same date and time he was required to appear before the Appeals Chamber of the International Criminal Tribunal of Rwanda (**ICTR**). He also added that, the 1st respondent withheld information to the Court to have withdrawn instructions from being represented by the applicant and instead had engaged Dr. Lamwai.

Mr. Chadha further submitted that, he was not served with a notice requiring him to show cause before the adverse steps were taken against him. As such, he argued that, his right to be heard was violated contrary to article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977, which renders the impugned order a nullity. He referred us to the cases of **DISHON MTAITA VS THE DIRECTOR OF PUBLIC PROSECUTIONS,** Criminal Appeal No. 132 of 2004, **ABBAS SHERALLY AND ANOTHER VS ABDUL S.H.M**

FAZALBOY, Civil Application No. 33 of 2002 and **FRANCIS KWAANG MUSEI VS HON. WILBROAD PETER SLAA AND OTHERS** Civil Application No. 2 of 1999 (all unreported).

On the other hand, Mr. Matteru, learned counsel for the 1st respondent submitted that since the applicant received a notice of hearing and indicated that Dr. Lamwai will be representing the 1st respondent, the applicant, ought to have entered appearance to inform the Court or inform the 1st respondent to lodge a notice of change of advocate as per rule 32 (1) of the Rules. He added that, since the Court noted that the 1st respondent was represented by Dr. Lamwai and Mr. Chadha, the applicant was aware of the hearing but took no action to withdraw from the conduct of the case. As such, Mr. Matteru was of the view that the principle of fair hearing was not breached and the applicant was the cause of his own peril. Mr. Matteru urged us to dismiss the application with costs because it is without substance.

Mr. Ojare learned counsel for the 2nd and 3rd respondents, acknowledged that it is a fundamental principle in the Rule of Law that, a party must be given opportunity to be heard before condemnation. However, he argued that the applicant had a duty to comply with a court summons to enter appearance and inform the court if he had no further instructions from

his client. Thus, Mr. Ojare argued that the applicant was given opportunity to be heard but never utilised the same. He urged us to dismiss the application and referred us to the case of **AMINA RASHID VS MOHINDER SINGH AND ANOTHER (1986) TLR 196** where the Court declined to set aside the order where a party deliberately was absent at the hearing.

In a brief rejoinder, Mr. Chadha reiterated that, the punitive order spontaneously arose at the hearing of Misc. Civil Application No 138 of 2012. As such, regardless of his non appearance in the said application, it was improper to condemn him prior to availing him notice to show cause. Apart from informing the Court that the Bill of Costs was withdrawn, he asked the court to set aside the punitive order in order to be cleared of the condemnation of being negligent.

After a careful consideration of the submission of the parties, the point for determination is whether the applicant has made out a case warranting a review on account of wrongly being denied a right to be heard.

We are aware of the principle that a review is by no means an appeal in disguise because it is a matter of policy that litigation must come to an end.(See **RIZALI RAJABU vs REPUBLIC,** Criminal Application No. 4 of 2011 (unreported). There is also no doubt that this Court has jurisdiction to

review its own decision in any given case which is aimed at ensuring that a manifest injustice does not go uncorrected (See **CHANDRAKAT JOSHIBHAI PATEL vs REPUBLIC** (2004) TLR. 218. The grounds on which this Court could review its decisions are at present limited to only four as are listed in Rule 66 (1) (a) to (e) of the Rules namely:-

a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; or
b) a party was wrongly deprived of an opportunity to be heard;
c) the court's decision is a nullity; or
d) the court had no jurisdiction to entertain the case.
e) The judgment was procured illegally, or by fraud or perjury.

There are no hard and fast rules that can be laid down to categorize what may constitute errors apparent on the face of the record. Each case would depend on its own facts, but in each case the basic principle underlying review must be considered; which is whether: the Court would have acted as it had if all the circumstances had been known. (See The **NGUZA VIKINGS @ BABU SEYA AND ANOTHER vs REPUBLIC.**, Criminal Application No. 5 of 2010 (unreported) and **CHANDRAKAT JOSHIBHAI PATEL vs REPUBLIC**. (*supra*),

We have carefully considered the rival arguments of the parties and we shall be guided by Rule 66 (1) (b) of the Rules in disposing of this

application. It is not in dispute that, when Misc. Application No. 138 of 2012 was called on for hearing, Dr. Lamwai represented the 1st respondent and Mr. Ojare represented the 2nd and 3rd respondents. The applicant for reasons earlier stated was absent. In this regard, we shall only deal with the second ground of complaint which is that the party was not accorded opportunity to be heard before the said punitive order was issued. This is reflected on pages 6 to 7 of the impugned Ruling whereby, having considered the submissions on the preliminary point of objection by Mr. Ojare and the reply by Dr. Lamwai the Court concluded as follows:

> *" As for the issue of costs, we fully agree with Mr. Ojare and Dr. Lamwai that M/S Chadha and Company Advocates who drew the notice of motion on behalf of the applicant was negligent. Hence, we are of the opinion that M/S Chadha and Company Advocates should bear the blame instead of the applicant. M/S Chadha advocate should have been more careful as Rule 48 (1) of the Rules is now much clear that the specific rule under which the application is brought has to be clted. As the application has been found incompetent, we are constrained to strike it out. In the event, the application is struck out with costs. M/S Chadha and Company Advocates to bear the costs of 1st and 2nd respondents. It is so ordered."*

Gathering from the impugned decision, it is not indicated if the applicant was served with the notice to show cause prior to the issuing of such punitive

order. We are therefore satisfied that the applicant was not heard at all. What are the consequences?

In case of **FRANCIS KWAANG MUSEI VS HON WILBROAD PETER AND OTHERS,** Civil Application No. 2 of 1999 (unreported), the Court was confronted with a situation whereby the advocate was ordered to pay costs personally for failure to adduce evidence to prove the allegation of corrupt practice against the 1st respondent in an election petition. The Court relied on the decision of the House of Lords in **MYERS V ELMAN (1934) 4 All ER** at page 508 where Lord Wright stated:

> *"But before the court exercise this summary jurisdiction to mulct a solicitor in costs it must first give that solicitor an ample opportunity to meet the complaint against him and answer it."*

The Court therefore in **FRANCIS KWAANG MUSEI** (supra) among other things, held that, the applicant was condemned without being given opportunity to be heard.

It is our considered view that, due to the absence of the applicant at the hearing of Misc. Civil Application No. 138 0f 2012, prior to making a punitive order, the Court was bound to ensure that the applicant is given ample opportunity to answer the complaint against him. (**SEE J.B. KOHLI AND OTHERS VS BACHULAL POPATLAL (1964) E.A. 219).**

In **DISHON JOHN MTAITA VS THE DPP** (supra), the Court was confronted with a scenario whereby the High Court dismissed the appeal of the appellant who was in custody and was not informed of the day and place at where the appeal would be heard. The Court said:

> *" The right to be heard when one's rights are being determined by any authority, leave alone a court of justice, is both elementary and fundamental. Its flagrant violation will of necessity lead to the nullification of the decision arrived at in breach of it."*

In another case of **ABBAS SHERALLY AND ANOTHER VS ABDUL S.H.M FAZALBOY,** Civil Application No. 33 of 2002 (unreported) this Court did not hesitate to hold that:

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because violation is considered to be a breach of natural justice."*

In the light of the cited decisions, the consequences of determining one's right without giving him/her opportunity to be heard in any proceedings would definitely vitiate proceedings. In this regard, in the case of **MBEYA –RUKWA AUTO PARTS AND TRANSPORT LIMITED vs.**

JESTINA GEORGE MWAKYOMA, Civil Appeal No. 45 of 2000 (Unreported) the Court went further and held:

> *"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law, and declares in part:*
>
> *"To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely: when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing".*

We agree with Mr. Chadha that, there was no justification for not giving the applicant opportunity to answer the complaint of negligence in drawing the application which lacked a proper provision of the law.

Both counsel for the respondents pursued an argument that, Mr. Chadha though served with notice of hearing Misc. Application No. 138 of 2012, deliberately defaulted appearance and as such he was not denied of a right to be heard. We found this submission wanting because even if the applicant had defaulted appearance in the said application, the Court should not have issued a punitive order personally against the applicant without giving him notice to show cause and answer such complaint.

Mr. Ojare referred us to the case of **AMINA RASHID VS MOHINDER SINGH AND ANOTHER** (supra) whereby, the appellant who was present at the court premises disappeared after her advocate informed her that he intended to withdraw. When the matter was called for hearing, the advocate was granted leave to withdraw from the conduct of the case with an order that the matter proceed *exparte.* On appeal this Court held that the appellant deliberately absented herself from the hearing of the application. With respect, this is distinguishable from the present matter because the applicant was never served with the notice to show cause in respect of the negligence in drawing the application in question. As such, it cannot be safely vouched that, the applicant deliberately defaulted appearance. In the circumstances, we are satisfied that, the punitive decision of the Court against the applicant was reached at in violation of the applicant's constitutional right to be heard and it is a nullity.

In the event, we grant the application for review by modifying our decision of 7th May, 2013 by deleting the following phrase appearing on page 6:

> " *As for the issue of costs, we fully agree with Mr. Ojare and Dr. Lamwai that M/S Chadha and Company Advocates who drew the notice of motion on behalf of the applicant was negligent. Hence we are of the opinion that M/S Chadha and Company Advocates*

should bear the blame instead of the applicant. M/S Chadha should have been more careful as.."

We in addition modify our decision by deleting the following phrase appearing on page 7:

"M/S Chadha and Company Advocates to bear the costs of the 1st and 2nd respondents."

After the said modification the last two paragraphs or our decision of 7th May, 2013 shall read as follows:

"Rule 48 (1) of the Rules is now very much clear that the specific rule under which the application is brought has to be cited. As the application has been found incompetent, we are constrained to strike it out. Each party shall bear own costs."

For the purposes of the instant application before us, each party shall bear its costs. It is so ordered.

DATED at **ARUSHA** this 20th day of May, 2017.

I. H. JUMA
Ag. CHIEF JUSTICE

S. E. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL