IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MWARIJA, J.A. AND MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 206 OF 2016

COMMISSIONER GENERAL (TRA) ..... APPLICANT

VERSUS

PAN AFRICAN ENERGY (T) LTD ..... RESPONDENT

(Review of the decision of the Court of Appeal of Tanzania at Dar es Salaam)

(Kimaro, J.A., Oriyo, J.A. and Mwarija, J.A.)

Dated the 9th day of May, 2016
in
Civil Appeal No. 146 of 2015

RULING OF THE COURT

27th April & 29th May, 2017

MWAMBEGELE, J.A.:

Against the application for review filed by the applicant, the respondent has filed a preliminary objection to the effect that the Court has not been properly moved for the applicant's failure to cite relevant and applicable provisions of the law. The preliminary objection has been taken under the provisions of rule 4 (2) of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (hereinafter referred to as "the Rules").

The application was argued before us on 27.04.2017 during which the applicant was represented by a team of lawyers – Mr. Gabriel Malata; learned Principal State Attorney, Ms. Ellen Rwijage; learned State Attorney, Prof. Angelo Mapunda, learned advocate and Mr. Juma Beleko, learned advocate. Mr. Fayaz Bhojani, Dr. Kibuta Ong'wamuhana and Mr. Gaudiosus Ishengoma; learned advocates, joined forces to represent the respondent. This is a ruling thereof.

We do not find it irrelevant to point out at this stage that the team of lawyers for the applicant, speaking through Mr. Malata, learned Principal State Attorney, attempted at the very outset to object the preliminary objection for the reason that the respondent has not cited the relevant paragraph of rule 4 (2) of the Rules under which the preliminary objection has been taken. For reasons that will be apparent in the course of this ruling, we dismissed the applicant's prayer to address us on that point at that stage. We, however, allowed the Principal State Attorney to address us on the point in the course of responding to the preliminary objection, if he so wished.

Arguing for the preliminary objection, the respondent, speaking through Mr. Bhojani, learned advocate, was brief but to the point. Having stated the

background to the application, the learned counsel launched the onslaught by submitting that the application for review filed by the applicant has been taken under the provisions of rule 66 (1) (a) and (2) of the Rules which are not the proper provisions to move the Court. To properly move the Court, argued the learned counsel, the applicant ought to have cited section 4 (4) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (hereinafter referred to as "the Act") as amended by the Written Laws (Miscellaneous Amendments) Act, 2016 – Act No. 3 of 2016 (hereinafter referred to as "Act No. 3 of 2016"). That provision bestows upon the Court statutory power to review its own decisions. For non-citation of section 4 (4) of the Act, he argued, the application becomes fatally defective and thus prayed that it should be struck out with costs. The learned counsel relied on several authorities for this proposition. These are: **China Henan International Co-operation Group v. Salvand K. A. Rwegasira** [2006] TLR 220 and **Citibank Tanzania Limited v. TTCL & 4 others**, Civil Application No. 64 of 2003, **Paskali Arusha v. Mosses Mollel**, Civil Revision No. 13 of 2014 and **Omary Shabani v. Dodoma Water and Sewarage Authority**, Civil Application No. 121 of 2015 (all unreported), among others.

On the other hand, Mr. Malata's response against the preliminary objection was two-pronged. On the first limb, the learned Principal State Attorney submitted that the Court has not been properly moved in the preliminary objection, for the respondent has cited rule 4 (2) of the Rules to move it. He argued that the respondent should have cited a specific paragraph of sub-rule (2) of rule 4 to properly move the Court on the preliminary objection. Relying on **University of Dar es Salaam v. Silvester Cyprian and 210 others** [1998] TLR 175, at p. 179, the learned Principal State Attorney proposed that the preliminary objection should not be entertained. He also submitted that the preliminary objection should be struck out for not showing a specific paragraph of rule 4 (2) of the Rules as was the case in **Mathias Ndyauki & 15 others v. Attorney General**, Civil Application No. 144 of 2015 (unreported).

On the second limb of his response, Mr. Malata conceded that the provisions of section 4 (4) of the Act have not been cited as one of the enabling provisions to move the Court. He also conceded that it was true that section 4 (4) of the Act was in force on 13.07.2016 when the present application for review was filed. However, he was quick to state that the provision came into force on 08.07.2016 which was a Friday. As 09.07.2016

was a Saturday and 10.07.2016 a Sunday, he said, the applicant was not aware of the provision at the time of filing the application on 13.07.2016 as the law was not in public domain by that time. When asked by the Court as to when the applicant came to be aware of the provision, the learned Principal State Attorney stated that they came to be aware of the provision in March, 2017.

The learned Principal State Attorney urged the Court to use the reasoning in **Zela Adam Abraham & 2 others v. the Hon. Attorney General & 6 others**, Consolidated Civil Revision Nos. 1, 3 and 4 of 2016 (unreported) wherein at p. 18, the Court said that the learned judges, state attorneys, advocates and litigants were not aware of the existence of the National Elections (Election Petitions) (Amendment) Rules, 2012 – GN No. 106 of 2012 (hereinafter referred to as "GN. 106 of 2012") and therefore allowed the cases to proceed despite non-compliance with the requirement of filing affidavits of witnesses under GN. 106 of 2012. He added that in view of the fact that before the coming into force of section 4 (4) of the Act, the Court was being moved by the provisions cited by the applicant in support of the present application, we should disregard the respondent's preliminary objection and allow the application to proceed to hearing on merits.

Rejoining, Mr. Bhojani, learned counsel, complained of the applicant's ambush in respect of the complaint regarding the provisions under which the preliminary objection was taken. The applicant, he submitted, ought to have given the respondent enough time within which to prepare and argue the seemingly preliminary objection on the preliminary objection which according to practice, he added, is discouraged by the Court as it has the effect of not bringing litigations to an end. The complaint notwithstanding, the learned counsel rejoined that the Court will be creating a very bad precedent to allow the application to proceed to hearing on merits without hearing the preliminary objection.

On the question of non-citation of the specific paragraph under rule 4 (2) of the Rules, the learned counsel stated that the whole of sub-rule 2 of rule 4 of the Rules is applicable; that is to say, all the three paragraphs of sub-rule 2 of rule 4 are applicable and therefore, he argued, there was no need to cite the three paragraphs as provisions under which the preliminary objection was taken.

As for taking inspiration from the reasoning of the Court in **Zela Adam Abraham** (supra), the learned counsel stated that that case is distinguishable from the present case in two aspects; first, that it was an

election petition whose handling is very sensitive and secondly, the non-compliance in that case was in respect of a rule of procedure; not a substantive provision which goes to the root of the matter which is the position in the instant case.

Giving Mr. Bhojani a hand, Mr. Ishengoma, learned counsel, added a forceful argument to the effect that non-citation of a relevant provision under which a preliminary objection has been made is not fatal. The learned counsel promised to supply the Court with an authority to that effect and indeed, the learned counsel walked the talk. The learned counsel has, with amazing speed, supplied the Court with two authorities -**Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] TLR 251 and **Standard Chartered Bank (T) Ltd v. Interbest Investment Company Limited**, Civil Application No. 130 of 2015 (unreported); both decisions of the Court.

We have subjected the contending arguments of the trained minds for both parties to proper scrutiny. Having so done, we think there are only two questions which this ruling must answer: first, whether or not the preliminary objection should be struck out for failure to cite the relevant paragraph of rule 4 (2) of the Rules and secondly, if the answer to the first question is in

the negative, whether or not the Court should overlook the non-citation of the provisions of section 4 (4) of the Act because the application was filed just five days after the provision came into force.

We start with the first question. As already stated at the beginning of this ruling, we did not allow Mr. Malata to address us on the point regarding objection to the preliminary objection at that stage. We did so because the course of action would have the meaning and effect of pre-empting the preliminary objection raised. The Court has, in a number of decisions, discouraged the course which the learned Principal State Attorney attempted to take. One such decision is **Mary John Mitchell v. Sylvester Magembe Cheyo & others**, Civil Application No. 161 of 2008 (unreported) in which we reiterated our earlier position we stated in **Method Kimomogoro v. Board of Trustees of TANAPA**, Civil Application No. 1 of 2005 (also unreported) in the following terms:

> *"This court has said in a number of times that it will not tolerate the practice of an advocate trying to preempt a preliminary objection either by raising another preliminary objection or trying to rectify the error complained of."*

That was not the first time we held that a preliminary objection should not be pre-empted. There is a string of cases by the Court on the point. Such cases include **Shahida Abdul Hassanali Kassam v. Mahedi Mohamed Gulamali Kanji**, Application No. 42 of 1999 (Unreported), **Almas Iddie Mwinyi v. National Bank of Commerce & Another** [2001] TLR 83, **the Minister for Labour and Youth Development and Shirika la Usafiri DSM v. Gaspa Swai & 67 others** [2003] TLR 239 and **Frank Kibanga v. ACCU Ltd**, Civil Appeal No. 24 of 2003 (unreported), to mention but a few.

In urging the Court to strike out the preliminary objection, Mr. Malata cited two authorities: **University of Dar es Salaam** and **Mathias Ndyauki & 15 others** (supra). We have read the two decisions. Having so done, with due respect to the learned Principal State Attorney, we think the two decisions are distinguishable from the facts of the case at hand. In **University of Dar es Salaam**, at page 179 at which the learned State Attorney has directed us to have a glance, we were grappling with the issue under which provision can a preliminary objection in applications be made. We categorically stated that rule 100 of the Tanzania Court of Appeal Rules, 1979 [whose gist has been recited under rule 107 (1) of the Rules] applies to

appeals only. We made it clear that there is no specific rule concerning preliminary objections to applications filed in the Court. We were, however, satisfied that in the absence of such specific rule, the general provisions of rule 3 (now rule 4 of the Rules) apply. We were also satisfied that a preliminary objection to an application is, procedurally, similar to a preliminary objection to an appeal, and must therefore be made before the hearing of the application begins.

In **Mathias Ndyauki**, a single justice of this court was seized with a situation where the Attorney General who was the respondent therein, raised a preliminary objection on non-compliance with the provisions of rule 106 (9) of the Rules against sixteen unrepresented laypersons. Underlining the use of the words *"the court may dismiss"* under the sub-rule, and taking into consideration that the Attorney General; the respondent therein, did not cite any provision under which the preliminary objection was made, the Court struck out the preliminary objection.

It is apparent from the facts that the two cases are quite distinguishable from the case at hand. While **University of Dar es Salaam** (supra) articulated preliminary objections in appeals and applications, **Mathias Ndyauki** was about a situation under which, in a matter involving

laypersons, the Attorney General did not cite any provision under which the preliminary objection was taken.

In the instant case, the respondent has cited the provisions under which the preliminary objection has been taken. The only complaint by the applicant is that the respondent has not cited the relevant paragraph of the sub-rule under which the objection was made. It is apparent that the two cases are not directly applicable to the present case in the context suggested by the applicant.

It may not be irrelevant to state here that the applicant, as stated by Mr. Bhojani, has surprised the opposite party and the court by raising such a "preliminary objection" without prior notice. It is elementary law that litigation should be conducted fairly, openly and without surprises. In **Hon. B.P. Mramba v. Leons S. Ngalai & the Attorney General** [1986] TLR 182, we made reference to **Halsbury's Laws of England**, 4th Edition, Vol. 36, paragraph 38, and underlined:

> *"The function of particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises, and incidentally to reduce costs".*

On this point, we find it irresistible to associate ourselves with the persuasive decision of the High Court of Kenya (Mbogholi and Kuloba, JJ.) in **Juma and others v. Attorney-General** [2003] 2 EA 461, wherein it was stated at p. 467:

> *"Justice is better served when the element of surprise is eliminated from the trial and the parties are prepared to address issues on the basis of complete information of the case to be met".*

For the avoidance of doubt, we are aware that the foregoing authorities were dealing with surprises in the course of trial. However, we are certain in our minds that the principle is applicable to the situation at hand as well. The course taken by Mr. Malata, is therefore an unfortunate undertaking not worth emulating, for it is not a recipe for a fair and expeditious trial. If anything, it is a recipe for the opposite. We think this sufficiently explains why we refused Mr. Malata's prayer to address us on the point before arguing the preliminary objection.

Next for consideration is the question whether or not the respondent ought to have cited the specific paragraph of rule 4 (2) of the Rules. We find it apt to start the determination of this point by citing the relevant provision. It reads:

"(1) [NOT APPLICABLE]

(2) Where it is necessary to make an order for the purposes of:-

(a) dealing with any matter for which no provision is made by these Rules or any other written law;

(b) better meeting the ends of justice; or

(c) preventing an abuse of the process of the Court, the Court may, on application or on its own motion, give directions as to the procedure to be adopted or make any other order which it considers necessary."

Mr. Bhojani told the Court that there was no need to cite the paragraphs under which the preliminary object was made as, according to him, they are all applicable. Mr. Bhojani's proposition seems very enticing at first sight but having subjected the three paragraphs to the preliminary objection, we find ourselves unable to entirely agree with him. What is apparent in the matter under discussion is that the Rules, unlike in appeals, do not have a specific provision under which a preliminary objection in applications should be made. Rule 107 (1) of the Rules caters for appeals; not applications. In the circumstances, and as stated in **University of Dar**

es Salaam (supra) and **Haji Hassan Amour & 112 others v. The Managing Director, Peoples Bank of Zanzibar**, Civil Application No. 20 of 2011 (unreported), the proper provisions applicable are the general provisions of rule 4.

But rule 4 of the Rules has three paragraphs. Having considered the matter in its detailed aspect, we think the proper paragraph to cater for the situation at hand should be paragraph (a) of sub-rule 2 of rule 4. The paragraph, as it speaks for itself, is about taking an act of procedure which has not been provided for by the Rules. There is no provision in the Rules regarding preliminary objections in respect of applications. What the Rules provide is preliminary objections in respect of appeals; and that is rule 107 (1). The respondent, therefore, ought to have taken its application under the provisions of rule 4 (2) (a) of the Rules which caters for a situation not provided for under the Rules.

Mr. Bhojani's argument to the effect that the paragraphs were not cited because all the three paragraphs are applicable is not acceptable. Having juxtaposed the three paragraphs against the preliminary objection, as already stated, we think the proper paragraph is (a). Even in a situation where the three paragraphs would have been applicable, it would, we think, still be

desirable to cite all of them as enabling provisions. We are therefore disinclined to accept Mr. Bhojani's contention on this aspect.

Be that as it may, we do not find as fatal the error to cite a specific paragraph under which a preliminary objection was made. For us, even when no provision is cited in a preliminary objection, we think, the objection will not be amenable to being struck out. We shall demonstrate shortly.

As good luck would have it, the question whether or not failure to cite an enabling provision under which a preliminary objection is made is not a virgin territory; it has been traversed by the Court before. In **Mbeya-Rukwa Autoparts** (supra), we discussed at some considerable length on the point. In that case, we were seized with an akin situation wherein the respondent challenged the appellant for not citing rule 100 of the Tanzania Court of Appeal Rules, 1979 [now rule 107 (1) of the Rules]; the provision which catered for preliminary objections in appeals. We observed at p. 260 as follows:

> *"... we think, with respect, Mr. Mbise's challenge to the notice of preliminary objection is untenable ... It does not appear to us that the omission to cite the provision under which it was brought was fatal. We say so because a Notice of Preliminary Objection*

which, of course, falls under rule 100, is not an application. It is simply a notice and is given just before hearing of the appeal begins."

We stated reasons for the above stance at the same page as follows:

"What is essential is reasonable notice both to the opposite side and the Court. If the Court does not consider the notice reasonable it may adjourn the hearing of the appeal in order for reasonable notice to be given. Rule 100 is procedural rather than substantive. It does not confer any right upon litigants nor does it bestow any power on the Court, it merely regulates the conduct of the business of the Court. Omission to cite a procedural rule does not bring into question the jurisdiction of the Court to hear and determine the matter before it and is therefore not fatal."

After discussing at some length on preliminary objections in appeals and applications and having given illustrations of several cases to that effect, we concluded at P. 262 as follows:

"... rule 100 is not enabling, in other words, it is not a provision from which the Court derives power to transact anything but it regulates the manner of exercising a power granted elsewhere. As stated earlier, what matters under the rule is reasonable notice and Mr. Mbise did not complain about the reasonableness of the notice. ***The omission to cite the rule, although this is by no means encouraged, was therefore inconsequential.***"

[Emphasis supplied].

We reiterated the above stance in **Standard Chartered Bank** (supra) in which, relying on **Mbeya-Rukwa Autoparts,** we stated:

"The objection was raised under an inapplicable Rule 107 of the Rules which caters for appeals and not applications. But all the same, the wrong citation does not confer jurisdiction of the Court to hear and decide the matter, the wrong citation is not fatal at all".

Even with the foregoing authorities which state in no uncertain terms that wrong or non-citation under which a preliminary objection is made is not fatal, the Court has not been strict in the wrong or non-citation of the

enabling provisions to move the Court. We shall demonstrate. In **University of Dar es Salaam** (supra), for instance, prior to the hearing of the application, the respondents had filed a notice of preliminary objection under the provisions of rule 100 of the Old Rules under which he purported to move the Court by way of a preliminary objection. The Court stated that that provision catered for a preliminary objection in an appeal and, the ailment notwithstanding, proceeded to consider the same. The Court did not strike out the preliminary objection; the course which Mr. Malata, learned Principal State Attorney, urged us to take.

Similarly, in **Samson Ng'walida v. the Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 86 of 2008 (unreported), the Court proceeded to consider the preliminary objection which was without the citation of the provisions under which it was made. In that case, what happened is that the respondent lodged a preliminary objection without stating an enabling provision but at the hearing, the respondent's counsel informed the court that the preliminary objection was taken under rule 107 (1) of the Rules and rule 21 of the Tax Revenue Appeals Tribunal Rules of 2001. We could not consider the non-citation of the relevant provision in the

notice of preliminary objection to be something which would deter us from delivery of substantive justice.

Likewise, in **Haji Hassan Amour & 112** (supra), the respondent raised a preliminary objection under rule 107 (1) of the Rules. Relying on **The University of Dar es Salaam** (supra) we stated:

> *"... a preliminary objection can be raised in an application but not using Rule 100 (of the 1979 Rules which is similar to Rule 107 (1) of the 2009 Rules). The enabling provision has, therefore to be Rule 4 (2) (a) of the 2009 Rules. Rule 4 is an aid to the Court."*

On that stance, the Court proceeded to consider the preliminary objection, the applicant's objection on the provisions under which it was made notwithstanding.

The foregoing discussion shows that the Court has categorically stated that wrong or non-citation of a provision under which a preliminary objection is taken is not fatal. In cases where the Court did not state so, the objections on preliminary objections that the same were not made under the enabling

provisions or made under wrong provisions were taken to be of no serious effect.

In the case at hand, the respondent made the preliminary objection under proper provisions of the law but omitted to cite the exact paragraph as enabling provisions. Given the position we took in **Mbeya-Rukwa Autoparts** and **Standard Chartered Bank** (supra) and the liberal nature of the practice on such objections in **University of Dar es Salaam**, **Samson Ng'walida** and **Haji Hassan Amour** (supra) as discussed, we are settled in our minds that the respondent's omission to cite paragraph (a) of sub-rule 2 of rule 4 of the Rules is not fatal.

We wish to point out at this stage that we are alive to the fact that the Court, at times, has been rejecting or striking out preliminary objections which have not cited or wrongly cited the enabling provisions under which they are made. One such case is **Mathias Ndyauki** (supra); a case cited and supplied by the applicant. For us, we find it appropriate to associate ourselves with the former position discussed and taken above. We are of the considered view, as already stated, that in a preliminary objection, failure to cite or wrongly citing an enabling provision under which the same is made, for reasons stated, will not render the same liable to being struck out. The

ailment, in our considered view is inconsequential. This stated, we will proceed to determine the substance of the preliminary objection raised by the respondent.

The substance of the preliminary objection is embodied in the second question we posed earlier. That is, whether or not the Court should overlook the non-citation of the provisions of section 4 (4) of the Act because the application was filed just five days after the provision came into force. The applicant conceded that section 4 (4) of the Act, has not been cited as an enabling provision for the application for review. While Mr. Bhojani, on the one hand, argues with some force that section 4 (4) of the Act ought to have been cited, failure of which makes the application incompetent, Mr. Malata, on the other hand, submits with some equal force that citation of the provisions of rule 66 (1) (a) and (2) of the Rules is proper because section 4 (4) of the Act was not within the public domain on 13.07.2016 when the application was lodged in Court. In the circumstances, he argued, since sub-rules (1) (a) and (2) of rule 66 were the provisions used to move the Court before the coming into force of section 4 (4) of the Act, the omission to cite section 4 (4) is not fatal.

We wish to start with a statement that the provisions of section 4 (4) of the Act were introduced in the Act by Act No. 3 of 2016 which, by virtue of section 14 of the Interpretation of Laws Act, Cap. 1 of the Revised Edition, 2002, came into force on 08.07.2016; the date on which the amending Act was printed in the Government Gazette hence in law the date of its publication. By section 4 of Act No. 3 of 2016, the Act was amended in section 4 by, *inter alia*, adding immediately after subsection (3) the following new sub-section:

> *"(4) The Court of Appeal shall have the power to review its own decisions."*

Before that, as Mr. Malata submitted and seemingly conceded by Mr. Bhojani, the Court, in applications for review, was being moved by the provisions of rule 66 (1) (a) and (2) of the Rules as well as case law. It is our well considered view that it was not legally appropriate for the Rules to empower the Court to entertain and hear applications for review instead of the same being promulgated in the Act. In this token, we think and highly recommend that the maker of the Rules should amend the provisions of rule 66 which purport to bestow upon the Court with substantive powers over review. Those powers should be moved to the provisions of the already in

place section 4 (4) of the Act and rule 66 should be left to deal with only procedural aspects.

It may not be irrelevant to state here that that was not the position in respect of powers of the Court regarding revision. Revision had a statutory provision – section 4 (3) of the Act – under which the Court was being moved. For easy reference, we take the liberty to reproduce the sub-section hereunder:

> *"Without prejudice to subsection (2), the Court of Appeal shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court."*

Having realized a *lacuna* in the Act in respect of review, the maker of the Rules introduced in the Act section 4 (4) of the Act to cater for review. That amendment came into force on 08.07.2016; the date of its publication. The applicant does not dispute this glaring fact. Through the learned

Principal State Attorney, the applicant submits that by the time they filed the application on 13.07.2016, it was only five days since Act No. 3 of 2016 was printed in the Government Gazette and that the same had not yet been in the public domain. He has beckoned the court to take inspiration from the case of **Zela Adam Abraham** (supra). Mr. Bhojani strenuously countered the argument stating two reasons for his stance. First, that **Zela Adam Abraham** is distinguishable in that that was about election petitions which are construed more strictly than normal civil cases. Secondly, that case was grappling with non-compliance with a rule of procedure; not a substantive statutory provision as is the case in the case at hand. Mr. Bhojani, learned counsel, warned the court that should it buy the learned Principal State Attorney's argument (of overlooking the five days for the reason that act No. 3 of 2016 was not in public domain), it will be creating a very bad precedent.

Mr. Bhojani is right. We find very cheap to buy the learned Principal State Attorney's argument of overlooking the five days under the pretext that Act No. 3 of 2016 was not in public domain when the applicant filed the application. As Mr. Bhojani has rightly submitted, **Zela Adam Abraham** was dealing with failure to comply with a rule of procedure in election petitions. In that case, the advocates for the parties, the State Attorneys as well as the

court conducted some of the election petitions without compliance with the amendment introduced to the National Elections (Election Petitions) Rules, 2010 – GN No. 447 of 2010 by GN No. 106 of 2012 which, *inter alia*, required that evidence of witnesses in an election petitions shall be given by filing affidavits to that effect setting out the substance of their evidence. The Court overlooked the non-compliance for the reason, *inter alia*, that the amendment was not brought to the attention of stakeholders after publication. The Court arrived at such a conclusion because election petitions are considered more strictly than ordinary civil cases – see: **Philip Anania Masasi v. the Returning Officer, Njombe North &others**, Miscellaneous Civil Cause No. 7 of 1995 (unreported).

Again, there is another reason why **Zela Adam Abraham** is distinguishable from the present case. This is the point stated by Mr. Bhojani to the effect that that case dealt with non-compliance with the rule of procedure and not a statutory provision of the National Elections Act, Cap. 343 of the Revised Edition, 2015. In the case at hand it is the statutory provision, not a rule of procedure under the Rules, which is at stake and whose compliance is mandatory.

But even if we were to agree with Mr. Malata, the position in **Zela Adam Abraham** would not be applicable in the circumstances of this case. We are of such a stance because we take judicial notice that amendments to legislation are, normally, instigated by the Office of the Honourable the Attorney General and we have not been told if the present instance falls under exception. To justify his contention, the learned Principal State Attorney who is from that office has stated that 09.07.2016 was a Saturday and 10.07.2016 was a Sunday. We agree. But the learned Principal State Attorney has not brought to the fore any iota of explanation regarding 11.07.2016 and 12.07.2016 which dates preceded the lodgment of the application on 13.07.2016 and each of which was not a *dies non*. We are aware, as rightly pointed out by Mr. Bhojani, learned counsel for the respondent, the Honourable the Attorney General who is "Advocate No. 1" is the one who instigated the amendment and to whom publication of the amendment was or supposed to be communicated first. And as if to clinch the matter, we think, the applicant was supposed to be vigilant in following up publication of the amendment. We are not prepared to accept the contention that the applicant was not aware of Act No. 3 of 2016 from the date of publication on 08.07.2016 to the month of March, 2017, about eight months after publication.

In respect of powers of revision by the Court, we have held in a number of decisions that the enabling provision in such an application is section 4 (3) of the Act and failure to cite it in a Notice of Motion makes the application incompetent and deserves the wrath of being struck out. Such authorities include **Village Chairman of Igembya Village v. Bundala Maganga**, Civil Application No. 5 of 2014 and **Eliakimu Swai & another v. Thobias Karawa Shoo**, Civil Application No. 1 of 2015 (both unreported), to mention but two of them. We have no scintilla of doubt that the same position should be taken in respect of applications for review. That is to say, to legally move the Court, an application for review must cite section 4 (4) of the Act, failure of which makes it incompetent and deserves to be struck out. In the circumstances, we are of the considered view that the Notice of Motion in this application ought to have been brought under the provisions of section 4 (4) of the Act as an enabling provision to move the Court. That was not done and, as a consequence, the application for review filed by the applicant becomes incompetent and deserves the wrath of being struck out.

The foregoing stated, we are of the settled minds that the applicant ought to have mandatorily cited the provisions of section 4 (4) of the Act to move the Court in his application for review. For the reasons stated, we

decline the invitation extended to us by the learned Principal State Attorney to overlook the five days between the date of publication of Act No. 3 of 2016 and 13.07.2016; the date of lodging the Notice of Motion in respect of the application. The present application for review is therefore incompetent for non-citation of section 4 (4) of the Act as an enabling provision. We find merit in the preliminary objection raised by the respondent and consequently strike out the application with costs.

Order accordingly.

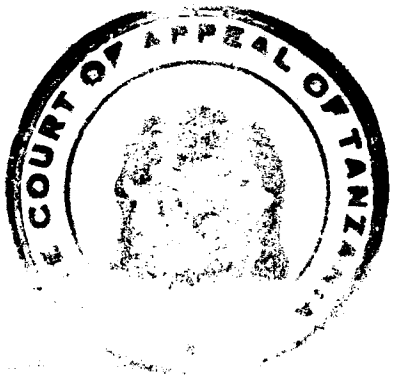
DATED at DAR **ES SALAAM** this 9th day of May, 2017.

B.M. LUANDA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL