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

(CORAM: MUSSA, J. A., MUGASHA, J. A. And MWANGESI , J. A.)

CIVIL APPLICATION NO. 193 OF 2012

AFRITOKI ENTERPRISES CO. LTD..... APPLICANT

VERSUS

PACIFIC INTERNATIONAL LINES (T) LTD..... RESPONDENT

(Application for Revision from the decision of High Court)
at Dar-es-Salaam.)

(Fauz, J.)

dated the 24th October, 2012
in
in Civil Case No. 43 of 2012.

.....

RULING OF THE COURT

22nd June & 5th July, 2017.

MUGASHA, J.A.:

The applicant (**AFRITOKI ENTERPRISES CO. LTD**) instituted in the High Court a suit against the respondent (**PACIFIC INTERNATIONAL LINES (T) LTD**) for payment of **USD 32,700**. The claim hinged on additional port charges paid by the applicant due to the respondent's act of lodging manifest as local cargo Part I instead of Transit cargo Part II as directed in

the Bill of Lading. The applicant as well claimed to be paid a sum of **USD 1,500,000** as general damages for loss of business.

The respondent raised preliminary points of objection including that, the jurisdiction of the High Court was ousted by the clause contained in the contract between the parties having stated that, it shall be governed by the Singapore law. The preliminary point of objection was sustained and the suit was dismissed for want of jurisdiction. Dissatisfied, the applicant filed the present application seeking to have the decision of the High Court revised mainly on ground that it failed to exercise jurisdiction.

The motion is brought under Rule 65 (1), (2), (3) and (4) of the Court of Appeal Rules, 2009 (The Rules). The affidavit of **KARIM LADHA,** Managing Director of the applicant is in support of the application.

The application is opposed by the respondent through the affidavit in reply of **BHARAT KHATRI,** principal officer of the respondent. In addition the respondent has raised preliminary points of objection challenging the competency of the application to the effect that: **One,** it has been brought under a wrong provision of the applicable law and **two,** a copy of the decision sought to be revised is not attached to the application.

At the hearing, the applicant was represented by Mr. Samwel Shadrack learned counsel and Mr. Dilip Kesaria learned counsel represented the respondent.

Mr. Kesaria submitted that this application suffers wrong citation having been brought under Rule 65 (1), (2), (3) and (4) of the (The Rules) which are procedural Rules for making and prosecuting the application for revision not mandating the Court to invoke its revisional jurisdiction. He pointed out that the application ought to have been brought under section 4 (3) of the Appellate Jurisdiction Act [**CAP 141 RE.2002]** which clothes the Court with revisional jurisdiction. He argued that, the omission is fatal rendering the application incompetent as the Court is not properly moved. He as such, urged us to strike out the application. To support his propositions he cited the cases of **CITIBANK TANZANIA LIMITED VS TANZANIA TELECOMMUNICATIONS CO. LTD AND OTHERS,** Civil Application No. 64 of 2013 (unreported) and **CHAMA CHA WALIMU VS ATTORNEY GENERAL EALR [2008]** 57.

Responding to the first limb of objection, Mr. Shadrack submitted that, the present application brought under Rule 65 of the Rules has properly moved the Court to invoke its revisional jurisdiction to revise the decision of the High Court. To back up his proposition he relied on the case of **OTTU** on behalf of **P.L ASSENGA & 1106 OTHERS VS AMI TANZANIA LTD**, Civil Application. No. 35 of 2011 (unreported). He submitted that, in **OTTU'S** case, the Court did not fault a party for seeking revision under Rule 65. When asked if he is aware of subsequent decisions of the Court stating the consequences of wrong citation, he declined to know any.

In our consideration of the rival arguments, at the outset we have to satisfy ourselves whether or not mere citation of Rule 65 of the Rules clothes the Court with mandate to exercise its revisional jurisdiction. Rule 65(1), (2), (3) and (4) state as follows:

> *"(1) Save where a revision is initiated by the Court on its own accord, an application for revision shall be by notice of motion which shall state the grounds of the application.*
>
> *(2) The notice of motion shall be signed by or on behalf of the applicant.*

(3) The notice of motion shall be supported by one or more affidavits of the applicant or some other person or persons having knowledge of the facts.

(4) Where the revision is initiated by a party, the party seeking the revision shall lodge the application within sixty days (60) from the date of the decision sought to be revised".

Section 4(3) of the AJA states as follows:

"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".

In resolving the issue of enabling provision of the law for a party who seeks to move the Court to exercise its revisional jurisdiction in the case of **JUMANNE JAFARI NGUGE VS NZILIKANA RAJABU,** Civil Revision No. 4 of 2013 (unreported) where we said that, section 4 (3) of **AJA** is the enabling provision through which the Court is seized of revisional jurisdiction

through a party, whereas Rule 65 of the Rules, prescribes the manner through which the latter invokes such jurisdiction

Mr. Shadrack learned counsel relied on the case of **OTTU** on behalf of **P.L ASSENGA & 1106 OTHERS VS AMI TANZANIA LTD (supra)** where: the application for revision was sought under Rule 65 of the 1999 Rules which were nonexistent and it was confronted by a preliminary point of objection on wrong citation. Apart from not faulting the party for having not struck out the application, the Court did encourage the practice of citing relevant statutory provisions in applications of this nature. In a number of decisions including those decided before and after **OTTU's** case, the Court has consistently held that, an application which is not brought under a proper enabling provision suffers wrong citation and renders the application incompetent.(See **JUMANNE JAFARI NGUGE VS NZILIKANA RAJABU,** Civil Application No. 4 of 2013 (unreported).

The applicant's counsel's reliance on **OTTU'S** case presupposes existence of conflicting decisions in the area under scrutiny. This was addressed in the case of **ARCOPAR (O.M) SA VS HARBERT MARWA AND FAMILY INVESTMENTS CO. LTD AND 3 OTHERS,** Civil Application No. 94 of

2013(unreported), the Court cited with approval the Canadian cases as good practice in the eventuality of conflicting decisions of the Court. In the case of **FISKEN et al MEEHAN (1876) 40, U C Q.B 146,** the position was that, where there are conflicting decisions of equal weight, the Court should follow the more recent decision. In **CAMPBELL VS CAMPBELL (1880) 5 App Case 787**, it was held to the effect that, where two cases cannot be reconciled, the more recent and the more consistent with the general principles. Relying on the cited Canadian cases, the Court in **ARCOPAR (O.M) SA** (supra) among other things said:

> *"Following the most recent decision in our view makes a lot of legal common sense, it makes the law predictable and certain and the principle is timeless in the sense that, if for instance a full Bench departs from its previous recent decision that decision would prevail as the most recent...until such time the full Bench would be convened to resolve the conflict, or the statue is amended...."*

We fully subscribe to what we said in **ARCOPAR (O.M) SA** (supra). In this regard, unless such time the full Bench is convened to resolve the

conflict, or the statute is amended, the position of the law in respect of a party seeking to move the Court to invoke revisional jurisdiction must come by way of section 4(3) of the **APPELLATE JURISDICTION ACT** (supra) and not Rule 65 of the Rules which only prescribes the manner through which a party invokes such jurisdiction. This position was articulated in one of the most recent decision of **JUMANNE JAFARI NGUGE VS NZILIKANA RAJABU,** (supra).

We are therefore in agreement with Mr. Kesaria that, for the Court to be properly seized of its jurisdiction, it is imperative for the intending party to cite section 4(3) of AJA which clothes the Court with revisional jurisdiction.

Since this application has not been brought under a proper enabling provision, it is equally settled law that, non-citation of the relevant provisions in the notice of motion renders the application incompetent (**ROBERT LESKAR VS SHIBESH ABEBE, CIVIL APPLICATION NO. 4 OF 2006** (unreported).In the case of **HUSSEIN MGONJA VS THE TRUSTEES OF THE TANZANIA EPISCOPAL CONFERENCE, CIVIL REVISION NO 2 OF 2002,** the Court said:

"If a party cites a wrong provision of the law the matter becomes incompetent as the Court will not have been properly moved"

In the light of the stated principle, this application for revision brought under Rule 65 suffers wrong citation of the provision of law which deprives it with the required competency to invoke the revisional jurisdiction of the Court. We as such, sustain the first preliminary point of objection.

Since the first point of objection disposes of the matter we shall not embark on the second point of objection. However, we wish to note that the purported application was not accompanied by the written submissions of the parties filed and acted upon by the High Court Judge in his final determination. This as well puts to test the competency of this application having been accompanied by incomplete proceedings of what would have constituted a subject for revision as we said in the cases of **AMOS FULGENCE KARUNNGULAA VS KAGERA CO-OPERATIVE UNION (1990) LTD,** Civil Application No. 2 of 2013 and **THE BOARD OF TRUSTEES OF THE NATIONAL SOCIAL SECURITY FUND (NSSF)** Civil Application No. 140 of 2005 (all unreported).

On account of wrong citation, the Court is not properly moved by the incompetent application and we accordingly strike it out with costs.

DATED at **DAR ES SALAAM** this 29th day of June, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL