

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CIVIL APPLICATION NO. 67 OF 2017

AFRICAN BANKING CORPORATION (T) LTD APPLICANT

VERSUS

GEORGE WILLIAMSON LIMITEDRESPONDENT

**(Application for order of stay of execution of the decree of the
High Court of Tanzania at Dar Es Salaam District Registry)**

(Shangwa, J.)

**dated the 10th day of July, 2015
in
Civil Case No. 50 of 2011**

RULING OF THE COURT

3rd May & 13th June, 2018

MWANGESI, J.A.:

The application at hand has been preferred by way of notice of motion made under the provisions of Rule 11 (b) (c) and (d), 60 (1) and (2) (b) of the Court of Appeal Rules, 2009 (**the Rules**), whereby, the applicant is moving the Court for orders that, execution of the decree of the High Court of the United Republic of Tanzania, Dar Es Salaam District Registry dated the 10th day of July, 2015, be stayed pending the hearing and final determination of the intended appeal to this Court. The notice of motion has been supported by an affidavit that was sworn on the 16th day

of February, 2017 by one Lilian Musingi, who happens to be the head of the legal department of the applicant company.

The notice of motion has however strenuously been resisted by the respondent vide the affidavit in reply that was sworn on the 10th day of March, 2017 by Deryck Henry Tweedley, who has introduced himself as the Director of the respondent company.

When the application was called on for hearing on the 3rd day of May, 2018, Dr. Masumbuko Lamwai learned counsel, entered appearance for the applicant whereas, Joseph Sang'udi also learned counsel, entered appearance to represent the respondent. Before the Court could proceed to hear the rival arguments from either side, it wanted to satisfy itself as regards the propriety of the application, which seemingly, was made under improper provisions of the law, and furthermore, some annexes which had been referred to in the supporting affidavit to the notice of motion, had not been appended to the notice of motion. In that regard, the Court did *suo motu* ask the learned counsel to address it on those aspects.

In response to the Court's quest, Dr. Lamwai readily conceded that, there was a defect on the notice of motion in that, sub - rule (2) of Rule 11 of **the Rules** under which the notice of motion was made, had been

inadvertently omitted in the citation. There was as well concession from the learned counsel for the applicant on the missing annexes that were named in paragraph 9 of the affidavit that was sworn by the applicant to support the notice of motion. It was the argument of the learned counsel that, the omissions were attributed by mere confusion in the course of filing the notice of motion which was hurriedly made to avoid being overtaken by time bar. In that regard, the learned counsel asked for the indulgence of the Court, to adjourn the hearing of the application to another date, so that they could do the needful to their application.

Mr. Sang'udi on the other hand, in responding to his learned friend's submission, submitted that the law is well settled that, where there is an improper citation or non-citation of the proper provisions of the law, the impropriety renders the Court to have not been properly moved to award the sought reliefs, and the only available remedy, is to strike out the application. The same being the situation which has befallen the instant application, Mr. Sang'udi urged us to follow the letter of the law.

And as regards the failure by the applicant to append to the notice of motion the annexes referred to in the affidavit, Mr. Sang'udi submitted that, it carries the same effect as above, of rendering the notice of motion

defective and therefore, incompetently before the Court. To that end, the learned counsel for the respondent asked us to strike out the application. He however did not press for costs for the reason that, the defects in the application have been unearthed by the Court.

In a brief rejoinder, Dr. Lamwai reiterated his previous stance that, the omission to name the proper provision of law was occasioned by mere confusion. He implored us to treat the application at hand as a special case due to its urgency and the colossal amount of money involved. And, with regard to the failure by the applicant to append the annexes referred in the affidavit to the notice of motion, the learned counsel argued that, with the coming into force of the amendments of **the Rules** made by the Government Notice No. 362 of 2017, the requirement has been rendered unnecessary even though, the application was lodged before its coming into force because, it is a procedural provision.

Since there is no dispute to the fact that the application before the Court is incompetent for the reason that, it was made under improper provisions of law, what stands for the Court to resolve is whether or not, the prayer by Dr. Lamwai to adjourn the hearing of the application to another date to enable him to rectify the anomaly, instead of striking it out

as prayed by his learned friend is feasible. In resolving the issue, our starting point will be the wording of the provisions of Rule 48 (1) of **the Rules** that regulates lodgment of documents in Court. The same reads:

*"Subject to the provisions of sub-rule (3) and to any other rule allowing informal applications, **every application to the Court shall be by notice of motion supported by an affidavit. It shall cite the specific rule under which it is brought and state the grounds for the relief sought.**"*

[Emphasis supplied]

The above quoted provision has loudly been amplified by the Court in a number of authorities that include: **Rukwa Auto Parts Limited Vs Justina G. Mwakyoma**, Civil Application No. 45 of 2000, **China Henan International Corporation Group Vs Salvand K. A. Rwegasira**, Civil Reference No. 22 of 2005, **Rutagatina C. L. Vs The Advocates Committee and Another**, Civil Application No. 124 of 2006, **Selina Chibago Vs Finhas Chibago**, Civil Application No. 98 of 2007 and **Mpazi Albert Elia Boaz Vs the Director of Prevention and Combating of Corruption Bureau (PCCB) and Two Others**, Civil Application No. 13 of 2013 (all unreported).

It was the holding of the Court in **China Henan International Corporation Group Vs Salvand K. A. Rwegasira** (supra) that:

"The omission to cite the proper provision of the rule relating to reference or citing a wrong and inapplicable rule in support of the application is not a technicality falling within the scope and purview of Article 107 (2) (e) of the Constitution. The application was therefore struck out."

In yet another holding in the case of **Rutagatina C. L. Vs the Advocates Committee and Another** (supra), the Court reiterated the stance taken in the above case by stating that:

"The mere citation of only Rule 9 in the application without citing sub-rule (2) (b) amounted to non – citation of the relevant law. As already sufficiently demonstrated, renders the proceeding incompetent. For the foregoing reasons, I hold that the application is incompetent. The application was struck out."

In the light of the foregoing holdings which represent many others of the like, there is no gainsaying in holding that, the position of law regarding wrong citation or non - citation of the provision of law enabling the Court to grant a sought relief is that, the anomaly renders the

application to be improperly before the Court. What the Court has to do with such an application is to strike it out. And, the reasons for so doing is not farfetched in that, an adjournment cannot be made to an incompetent application. In the circumstance, we find ourselves constrained to join hands with Mr. Sang'udi in upholding the prevalent position of law that, an incompetent application has to be struck out. We accordingly strike it out with no order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 29th day of May, 2018.

M.S. MBAROUK
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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


B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL