IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CIVIL APPLICATION NO. 46 OF 2015

1. **Mr. JULIUS CLEOPA Administrator of the Estate of CLEOPA KIRIKENGORI**
2. **MR. DAUDI KIRIKENGORI**
3. **MR. ALFAYO KIRIKENGORI**
4. **MR. GODSON MEYANI**

..... APPLICANTS

VERSUS

JOSIA LENGOYA SADEMAKI..... RESPONDENT

(Application from the decision of the High Court of Tanzania at Arusha)

(Mwaimu, J.)

Dated 6th day of November, 2015
in
Land Application No. 109 of 2015

RULING OF THE COURT

6th & 13th March, 2018
MWARIJA, J.A.

On the 30/11/2015, the applicants instituted this application moving the Court to revise the decision of the High Court of Tanzania in Misc. Land Application No. 109 of 2015 (Mwaimu, J, as he then was) dated 6/11/2015. The application is supported by the joint affidavit sworn by the applicants on 25/11/2015. In the notice of motion, the applicants have cited Rule 65(1), (2), (3) and (4) of the Court of Appeal Rules, 2009 (the Rules) as enabling provisions for the application.

The respondent resisted the application by raising two notices of preliminary objection filed on 16/12/2015 and 30/1/2018. The notices consist of seven grounds challenging the competence of the application as paraphrased below:-

(i) *The Applicants have used both wrong law and wrong provisions of the law to move this Hon. Court to hear and determine the Civil Application No. 46 of 2015, hence this application of theirs is incompetent before this Hon. Court, the same ought to be struck out with costS.*

(ii) *The Civil application No. 46 of 2015 filed by the Applicants in this Hon. Court being a Revision Application is incompetent in this Hon. Court because is not attached with or accompanied with the Proceedings of the Arusha District Registry of the High Court of the United Republic of Tanzania in Misc. Land Application No. 109 of 2015, which they want the Court of Appeal of Tanzania to revise, the only remedy for it is to have it struck out with costs.*

(iii) *The Civil Application No. 46 of 2015 filed by the Applicants in this Hon. Court being a Revision Application is incompetent in this Hon. Court because the Affidavit filed in support of it contravenes the law governing affidavits Order XIX Rule 3 (1) of the Civil Procedure Code CAP 33 R.E. 2002 of the laws of the United Republic of Tanzania, Rule 65(3) of the Tanzania Court of*

Appeal Rules, 2009 and the normal legal practice of giving evidence in our Courts of Law, the only remedy for it is to have it struck out with costs.

(iv) *The aim of Civil Application No. 46 of 2015 filed by the Applicants in this Hon. Court being a Revision Application is incompetent in this Hon. Court because is hopeless time barred as per section 54(3) of the Land Disputes Courts Act, CAP 216 R.E. 2002 of the law as of the United Republic of Tanzania, the same ought to be dismissed with costs.*

(v) *The Notice of Motion is incurably defective as it contravenes the mandatory provision of Rule 65 (1) of the Tanzania Court of Appeal Rules, 2009 in that it does not state the grounds of the Application, hence this application is incompetent before this Hon. Court the same ought to be struck out with costs.*

(vi) *The Notice of Motion is incurably defective as it contravenes the mandatory provision of Rule 65(1) of the Tanzania Court of Appeal Rules, 2009 in that it does not state the grounds of the Application, hence this application is incompetent before this Hon. Court the same ought to be struck out with costs.*

(vii) *The Notice of Motion is incompetent in this Hon. Court because it contravenes a well established and known legal principle found in several decided cases by this Hon. Court including the reported case of*

> ***Augustino Lyatonga Mrema versus Republic and Dr. Masumbuko Lamwai*** *[1999] T.LR. at page 273 to the effect that in order to invoke the Tanzania Court of Appeal's power of revision there should be either no right of appeal on the matter or the right of appeal is blocked by judicial process, the only remedy for it is to have it dismissed with costs.*

At the hearing of the preliminary objection, the applicants were represented by Mr. Lengai Loita, learned counsel whereas the respondent had the services of Dr. Ronilick Mchami, learned counsel.

In the course of the hearing and upon being required to address the Court on the propriety of raising as a point of law, ground (iv), which refers to the proceedings in the trial court and grounds (v) and (vi) which seek to challenge the substance of the grounds raised in the notice of motion intending to challenge the application on merit, Dr. Mchami agreed that essentially, the three grounds go to the substance of the application. He therefore decided to abandon them.

Submitting in support of ground (i), the learned counsel argued that the applicants have not properly moved the Court because the provisions

of the Rules cited in the notice of motion are not enabling provisions for the application. He contended that the Court is vested with revisional jurisdiction by the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] (the AJA), which is the substantive law not the Rules which are made in a subsidiary legislation. As a result of non-citation of the enabling provision, which he submitted, is S. 4(3) of the AJA, Dr. Mchami stressed that the application is incompetent. He cited *inter alia* the case of **NBC v. Sadrudin Meghji,** Civil Application No. 20 of 1997 (unreported) to bolster his argument.

On ground (ii), the respondent's counsel submitted that the applicants have not attached the proceedings giving rise to the decision sought to be revised. It was his argument that, failure to attach a copy of the proceedings renders the application incompetent. He supported his submission by citing the case of **Casmir Richard Shemaki v. The Bishop, Roman Catholic Diocese of Tanga,** Civil Application No. 6 of 2013 (unreported).

As for ground No. (viii), Dr. Mchami submitted that, the applicants have a right of appeal and their right has not been blocked by a judicial

process and for this reason, he argued, they are not entitled to resort to the revisional powers of the Court. He submitted therefore that the application has been improperly brought. The learned counsel cited the case of ***Augustino Lyatonga Mrema v. Republic and Dr. Masumbuko Lamwai*** [1999] TLR 273 in support of his argument.

With regard to ground (iii), the learned counsel contended that the application is incompetent because it has been supported by a defective affidavit. The nature of the defect, according to the learned counsel, is that the same has been jointly sworn by the applicants. He relied on O. XIX Rule 3(1) of the Civil Procedure Code [Cap 33 R.E. 2002] which states as follows:

> *"Affidavits shall be confined to such facts as deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted."*

He submitted that the use of the words ***"as the deponent"*** entails that each of the applicants must have sworn his own affidavit. The

learned counsel did not however, cite any authority to the effect that a joint affidavit is not permissible in law.

In response, Mr. Loita opposed the stance taken by the learned counsel for respondent that the application is incompetent on the basis of the points raised on the notices of the preliminary objection.

Concerning the ground that the applicants have not properly moved the Court, the learned counsel conceded that S. 4 (3) of the AJA, which vests the Court with revisional jurisdiction, was not cited in the notice of motion. He argued however, that because the applicants have cited Rule 65(1), (2), (3) and (4) of the Rules, the omission is not fatal. He submitted that the defect is curable under Rules 2 and 4(2) (a) of the Rules as well as Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time (the Constitution). He also cited the case of **Balozi Abubakari Ibrahim v. Ms Benandy Limited and 3 others,** Civil Revision No. 6 of 2015 (unreported) as an authority for his proposition.

Mr. Loita conceded also that a copy of the proceedings in Misc. Land Application No. 109 of 2015 (the copy) has not been attached to the application. He argued however, that the omission resulted because, although the applicants had applied for the copy, the same was not supplied despite the efforts made by them to make a follow –up on it. According to the learned counsel, to avoid a delay in lodging the application, the applicants filed it without the copy. It was his argument that the delay by the court in supplying the copy, which he later attached to his written submission, entitles the applicants to an exemption from that requirement. He cited the case of ***D.T. Dobie and Company (Tanzania) Ltd v. N.B. Mwatebele*** [1992] TLR 152 to support his argument.

On the submission that the applicants should not have invoked the revisional powers of the Court because they have a right of appeal, Mr. Loita argued that this ground does not qualify to be raised as preliminary objection. He cited as authorities, the cases of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] E.A. 692

and **Sharifa Twalib Massala v. Thomas Mollel,** Civil Appeal No. 67 of 2011 (unreported).

The learned counsel submitted however, in the alternative, that the applicants' right of appeal had been blocked because in his decision, the learned High Court judge held that, since the dispute arose at the time when the Land Disputes Courts Act [Cap. 216 R.E. 2002] (Cap 216) was not in force, having failed to apply for extension of time within the transition period of two years prescribed under S. 54 of Cap. 216, the applicants "*can neither use the provision to move the court under the old law nor can he (sic)use the current law in pursuing his (sic) right".*

Relying on the case of ***Halais Pro-Chemie v. Wella AG*** [1996] TLR 272, Mr. Loita submitted that the applicants have taken a proper course because their right of appeal has been blocked. He conceded however, that the finding of the learned judge is appealable but maintained that the finding of the High Court has blocked that right.

With regard to the submission that the notice of motion is defective on the ground that it has been supported by a defective affidavit, Mr. Loita

submitted that the contention is devoid of merit because swearing of a joint affidavit is not prohibited by the law. On the basis of his reply submission, the learned counsel prayed that the preliminary points of objection be overruled.

In determining the preliminary objection, we intend to start with the ground that the application is incompetent because the notice of motion is supported by an affidavit which has been jointly sworn by the applicants. We need not be detained much in determining this ground. We agree with Mr. Loita that there is no law which prohibits swearing of a joint affidavit. We find that the interpretation given to 0.XIX Rule 3(1) of the CPC by the learned counsel for the respondent is, with respect, not correct. This is because, the words used in a statute in a singular number includes the plural and vise versa. Section 8(c) of the interpretation of the Laws Act [Cap. 1 R.E. 2002] provides as follows:

> *"Words in the singular number include the plural and words in plural number include the singular"*

For this reason therefore, the use of the words "the deponent" under 0.XIX r 3(1) of the CPC does not entail that more than one person may not

swear a joint affidavit. A joint affidavit may be sworn provided that all the deponents are of the same religion. This position was stated in the case of **Jibu Amiri @ Mussa v. Said Ally @ Manganya,** Criminal Application No. 27 of 2012 (unreported) in which the Court had this to say:

> *"since both of them [the deponents] subscribe to the content of the affidavit and since both of them are of the same religion, and since both of them have signed the affidavit, the affidavit would have been proper in the eyes of the law."*

In view of the above stated position, we overrule the (v) ground of the preliminary objection.

Having disposed of that ground, we now turn to consider ground (i) of the preliminary objection. It is a clear position of the law that the Court is vested with powers of revision by S. 4 of the AJA. Under S. 4 (2), such powers may be exercised in the course of hearing an appeal while under S. 4(3), the powers are exercisable when the Court is moved by a party or on its own motion *(suo motu).* Where therefore, a party moves the Court to exercise its revisional powers, he must cite S. 4(3) as an enabling provision for the application. In this case, instead of moving the Court

under S. 4(3) of the AJA, the applicants had instead, cited Rule 65(1),(2), (3) and (4) of the Rules. They have moved the Court under a wrong provision of the law. The learned counsel for the applicants has submitted that the error was a mere technicality and urged us to invoke Rules 2 and 4(2) (a) of the Rules and Article 107A (2) (e) of the Constitution to correct the error.

With respect to the learned counsel, the error is not one of technicality - See for example the case of **Omari Shabani Nyambu v. Dodoma Water and Sewerage Authority,** Civil Application No. 121 of 2015. In that case, the applicant moved the Court to revise the decision of the High Court. In his notice of motion, he did not cite S. 4(3) of the AJA. like in the present case, he cited Rule 65(1) of the Rules. The Court found the application incompetent and struck it out. In its decision, the Court quoted a passage from the case of **Paskali Arusha v. Mosses Mollel,** Civil Revision No. 13 of 2014 where it was stated as follows:-

> *"Having considered the matter in our respectful view, this application under Rule 65 could not have properly moved the Court to exercise its revisional, authority and jurisdiction, which is expressly*

conferred upon it by section 4(3) of the Appellate Jurisdiction Act. The application is therefore incompetent for having cited the wrong enabling provision of the law (see ***National Bank of Commerce v. Sadrudin Meghji,*** *Civil Application NO. 20 of 1997,* ***Almasi Mwinyi v. National Bank of Commerce and another,*** *Civil Application No. 88 of 1999, CAT (unreported)..."*

In his submission, Mr. Loita relied on the cases of **Balozi Abubakar** and **D.T. Dobie** (supra). The two case are however, not applicable. Whereas in the first case, the application for revision was initiated by the Court, in the second case, the issue in consideration was the effect of the delay in the supply by the court, of the documents necessary for appeal in the computation of the period of limitation.

The learned counsel had also relied on Article 107A (2) (e) of the constitution. In the case of **China Henan International Co-operation Group v. Salvand K.A. Rwegasira,** Civil Application No. 22 of 2005 (unreported), the Court stated as follows:-

"....Here the omission in citing the proper provision of the rule relating to a reference and worse still the error in citing a wrong and in applicable rule in

support of the application is not in our view, a technicality falling within the scope of and perview of Article 107A (2) (e) of the Constitution. It is a matter which goes to the very root of the matter. We reject the contention that the error was technical."

The error cannot therefore be cured by either Article 107A (2) (e) of the Constitution or Rules 2 and 4(2) (a) of the Rules. On the basis of the position stated above therefore, we uphold ground (i) of the preliminary objection. The omission by the applicants to cite the enabling provision of the law renders the application incompetent.

The finding on ground (i) of the preliminary objection suffices to dispose of the matter. We find it appropriate however, to briefly consider and determine ground (ii) as well. It is not in dispute that the notice of motion was not accompanied by a copy of the proceedings giving rise to the decision sought to be revised. The learned counsel for the applicants submitted that the error is excusable because, although the applicant had applied for the copy the same was not yet supplied at the time of filing the application. In an application for revision, a party who brings it has a duty of attaching with his application, copies of the proceedings and the

decision sought to be revised. This was aptly stated in the case of **The Board of Trustees of the National Social Security Fund (NSSF) v Leonard Mtepa,** Civil Application No. 1 of 2005 (unreported). In that case after having considered the principle as stated in the case **of Benedict Mabalanganya v. Romwald Sanga [2005] 2 EA 152,** the Court stated as follows:-

> *" The Court has made it plain, therefore that if a party moves the Court under S. 4(3) of the Appellate Jurisdiction Act, 1979 to revise the proceedings or decision of the High Court, he must make available to the Court a copy of the proceedings of the lower court or courts as well as the ruling and, it may be added, the copy of the extracted order of the High Court. An application to the Court for revision which does not have all those documents will be incomplete and incompetent. It will be struck out"*

Mr. Loita urged us to consider the fact that he had attached the copy in his written submission. In the case of **Abbas Sherally & Anr v. Abdul Sultan Haji Mohamed Fazalboy,** Civil Application No. 183 of 2005, (unreported) a similar situation happened. The learned counsel for the respondent failed, at the time of filing the application, to attach copy of

the decision sought to be revised. He later attached it to his affidavit in reply. The court had this to say:-

> *"The question for consideration is whether copy of the decision attached by the respondent to the affidavit in reply satisfied the requirement for the attachment of the decision sought to be revised to the application as urged by Mr. Kesaria. We do not think so. As submitted by Mr. Marando, and Mr. Kesaria apparently is not disputing, at the time the application for revision was filed on 15.12.2005 no attachment of the copy of the decision subject of revision had been attached to the application. It would therefore follow that the application was incompetent on account of lack of attachment of a copy of the decision sought to be revised."*

In view of the position stated above there is no gainsaying that the omission by the applicants, to attach the copy renders the application incompetent. As stated above the finding on ground (i) was sufficient to dispose of the application. The outcome of ground (ii) would have as well, disposed of the application. In the circumstances therefore, the need for consideration of ground (vii) of the preliminary objection does not arise.

On the basis of the foregoing reasons, the application is hereby struck out for being incompetent. The respondent shall have its costs.

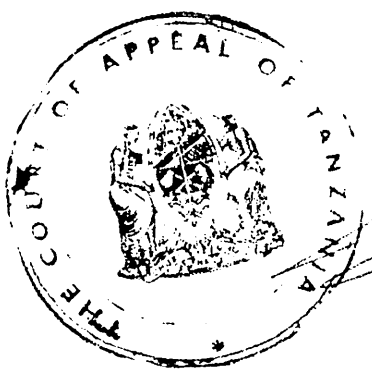
DATED at **DAR ES SALAAM** this 12th day of March, 2018.

K. M. MUSSA
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.



E.Y. MKWIZU
DEPUTY REGISTRAR
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