IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 42 OF 2015

(Arising from Commercial Case No. 59 of 2011)

THE NATIONAL BANK OF COMMERCE ..... APPLICANT

VERSUS

PAV INVESTMENTS LTD
PETER ALBANO VAVA
MARGARITA ROSE VAVA } **..... RESPONDENTS**
YAHANA CHARLES ALBANO

10th May & 30th June, 2015

RULING

MWAMBEGELE, J.:

The applicant – the National Bank of Commerce – was the plaintiff in Commercial Case No. 59 of 2011 and the respondents – PAV Investments Limited, Peter Albano Vava, Margarita Rose Vava and Yohana Charles Albano - were defendants. That suit was dismissed for want of prosecution on 04.03.2015. On 09.03.2015, just five days after the dismissal order, the plaintiff filed this application for restoration of the suit. The application has been made under the provisions of rule

43 (1) and (2) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (hereinafter "the Rules") and Order IX rule 9 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter "the CPC"). It is supported by an affidavit of Thomas Mihayo Sipemba, an advocate of this court and courts subordinate thereto, the Primary Courts.

On 18.05.2015, the respondents acting through Mr. Shirima, learned Counsel, filed a notice of preliminary objection (hereinafter "the PO") on a point of law to the effect that "the application is incurably defective for wrong and non/incomplete citation of the specific provision of the law" and prays that the same be struck out with costs.

This application will not detain me. At the hearing of this application, Mr. Shirima, the learned counsel who raised the PO conceded that despite wrong provisions of cited, the provisions of rule 43 (2) were appropriately cited. His only complaint was in respect of the inclusion of su-brule (1) which deals with consequences of non appearance, non-citation of the relevant sub-rule of rule 9 of Order IX and the use of the phrase "any other provisions of the law". It was Mr. Shirima's submission that save for the use rule 43 (2) of the Rules, the rest involved non citation of the relevant law to move the court.

Mr. Shirima is right. As for Order IX rule 9 of the CPC, the applicant has not cited the relevant su-brule to move the court. That is not proper

and may have the effect of rendering the application incompetent. It is now settled law that wrong citation or non-citationof an enabling provision of the law renders an application incompetent – see: ***National Bank of Commerce Vs Sadrudin Meghji*** [1998] TLR 503, ***NBC (1997) Ltd Vs Thomas K. Chacha t/a Ibora Timber Supply (T) Ltd*** Civil Application No. 3 of 2000 (unreported), ***Almas Iddie Mwinyi Vs NBC & Another*** [2001] TLR 83, ***Antony J. Tesha Vs Anita Tesha*** Civil Application No. 10 of 2003 (unreported), ***Citibank Tanzania Vs TTCL & 4 Others***, Civil Application No. 64 of 2003 (unreported), ***China Henan International Co-operation Group Vs Salvand K. A. Rwegasira*** [2006] TLR 220, **Edward Bachwa & 3 Others Vs the Attorney General & Another** Civil Application No. 128 of 2006, ***Fabian Akoonay Vs Mathias Dawite***, civil Application No. 11 of 2003 (unreported), ***Chamma cha Walimu Tanzania Vs the Atttorney General*** Civil Applciation No. 151 of 2008 (unreported) and ***Harish Jina By His Attorney Ajay Patel Vs Abdulrazak Jussa Suleiman***, ZNZ Civil Application No. 2 of 2003 (unreported) to mention but a few.

As for the use of the phrase "any other enabling provision of the law", Mr. Shirima, learned counsel is, again, right. I have an opportunity in my previous rulings at the Bench to discuss the point. It is my considered view that the use of the phrase "any other enabling provisions of law" cannot provide enough legs on which an application can stand in court. This court (Mihayo, J.) has observed on occasions more than once that the phrase "any other enabling provisions of law" is

now meaningless, outdated, irrelevant and an unnecessary embellishment. In ***Janeth Mmari Vs International School of Tanganyika and Another***, Miscellaneous Civil Cause No. 50 of 2005 (unreported), His Lordship had an opportunity to make an observation on the phrase. His Lordship observed:

> "This song, **'any other enabling provisions of the law'** is meaningless, outdated and irrelevant. The court cannot be moved by unknown provisions of the law conferring that jurisdiction. That law must therefore be known. Blanket embellishments have no relevance to the law nor do they add any value to the prayers to the court."
> (Emphasis not mine).

In yet another case, His Lordship observed on the phrase in ***Elizabeth Steven & Another Vs Attorney General***, Miscellaneous Civil Cause No. 82 of 2005 (also unreported) as follows:

> "The phrase any other provision of law is now useless embellishment, the law is now settled."

In the light of the foregoing, if the applicant had cited all provisions of the law wrongly to move this court, the application could not have stood on "any other enabling provisions of law". To properly move the court, it is imperative that proper provisions of the law under which the application is made must cited. the court cannot be moved by unknown provisions of the law.

I agree with Mr. Shirima that the applicants have not cited proper provisions to move this court, save for rule 43 (2) of the Rules. This being the case, despite the non-citation referred to above, the application can, in my view, sufficiently stand on the said rule 43 (2) of the Rules. The sum total of the foregoing is to overrule the PO with costs.

Order accordingly.

DATED at DAR ES SALAAM this 30th day of June, 2015.

J. C. M. MWAMBEGELE
JUDGE