IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KILEO, J.A., MASSATI ,J.A., And MMILLA,J.A.)

CIVIL APPLICATION NO. 94 OF 2013

ARCOPAR (O.M.) S.A .....APPLICANT

VERSUS

1. HARBERT MARWA AND FAMILY INVESTMENTS CO. LTD
2. SIMON DECKER
3. ATTORNEY GENERAL
4. BADAR SEIF SOOD

.....RESPONDENTS

(Revision from the proceedings and the decision of the High Court of Tanzania at Dar es Salaam)

(Sheikh, J.)

Dated the 5th day of April, 2013
in
Civil Case No. 173 of 2002

.....

RULING OF THE COURT

12th December, 2014 &

MASSATI, J.A:

The background to this matter is this: The controversy is over a registered property on plot No. 43 Mtwara Crescent, Oysterbay, Dar es Salaam City, held under a Certificate of Title No. 186035/17. The history of its ownership begins in 1951, but of immediate relevancy to the present dispute, is the fact that, in 1995, it was transferred to HARBERT MARWA

AND FAMILY INVESTMENT LTD (the first Respondent) who then mortgaged it to **SIMON DECKER** (the second Respondent). It then passed hands to the Applicant who sold it to **BADAR SEIF SOOD** (the Fourth respondent). However, on 22nd September, 2008, the first Respondent successfully instituted a suit in the High Court at Dar es Salaam against the second, third, and fourth respondents to nullify the subsequent dispositions.

The Applicant got wind of that decision and the attendant orders. It was aggrieved. So, on 4/6/2013 it lodged the present application for revision through the services of Ms. Sylvester Shayo & Co. Advocates. The Notice of Motion was taken out under section 4(2) & (3) of the Appellate Jurisdiction Act (Cap 141 RE. 2002) (the Act), and Rules 48(1) and (2) and 65(1) of the Court of Appeal Rules, 2009 (the Rules).

But before the application could proceed to hearing, the Court had to contend with two sets of preliminary objections, notice of which had earlier been filed by the 1st Respondent, under Rule 4(1) of the Rules. The first one was filed on 3rd September, 2013, and it is to the effect that the application was incompetent for being supported by a defective affidavit.

The second set was filed on 17th November, 2014. In this, initially there were six (6) objections (a) to (f). However at the prompting of the Court, the 1st Respondent agreed that objections (b) through to (e) touched on matters of evidence, which could not be tackled as preliminary objections. They were deffered to some appropriate stage. So from this set, two objections remained on board, namely:

(a) That the Applicant has no *locus standi* in this matter; alternatively, the Applicant had not abided with a proper procedure in instituting the present proceedings for revision being a party who was not a party to the proceedings in the court below.

(f) The application is incompetent for offending the provisions of Rule 12(4) of the Court of Appeal Rules, 2009

This ruling is on those objections.

We shall begin with the second set of preliminary objections.

At the hearing of those preliminary objections, Mr. Sylvester Shayo, learned counsel, appeared for the Applicant, Mr. Charles Semgalawe and Mr. Zephrine Galeba, learned counsel, appeared for the 1st Respondent, Mr.

Bethuel Peter, learned counsel, appeared for the Second Respondent; Mr. Obadia Kameya, learned Principal State Attorney, appeared for the third Respondent, and Mr. Dilip Kesaria, learned counsel, appeared for the Fourth Respondent.

Arguing the first leg of preliminary objection, Mr. Semgalawe, elaborated that, as the Applicant was not a party in the proceedings in the lower court, he could/and did not properly come to this Court by citing section 4(2) and (3) of the Act or Rules 48(1) and (2) and 65 (1) of the Rules, because those provisions could only be invoked by a person who was a party in the previous proceedings. So, in his view, the application was incompetent and should be struck out.

Mr. Peter, Mr. Kameya, Mr. Kesaria as well as Mr. Shayo, did not agree. In unison, they submitted that, although section 4(2) could only be used by the Court in the course of hearing an appeal, section 4(3) and Rule 65(1) were properly cited. Mr. Kesaria went further and cited the decision of this Court in **KHALIFA SELEMANI SADDOT vs YAHYA JUMA AND FOUR OTHERS,** Civil Application No. 20 of 2003 (unreported) to the effect that if a person was not a party to the previous proceedings, he could rightly bring an application for revision under section 4(3) of the Act. Like

Mr. Kameya, Mr. Kesaria also submitted that a 'party' referred to in Rule 65 of the Rules is a party to the application for revision and not one in the previous proceedings. For these reasons counsel urged the Court to overrule the preliminary objection for want of merit. Mr. Kesaria also hinted that once rule 65(1) was cited it was unnecessary to cite Rule 48(1) which applied to applications generally.

In his rejoinder submission, Mr. Galeba said that, he did not believe that **KHALIFA'S** case was decided correctly and that this Court should not follow it. He did not however cite any authority of this Court to support his contrary view.

We are settled in our minds that this first objection lacks merit. Section 4(3) of the Act provides as follows:

> "(3) *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".

The application and scope of this section was first distilled in **MOSES MWAKIBETE vs THE EDITOR, UHURU AND TWO OTHERS** (1995)TLR 134 (CA) which was followed in **HALAIS PRO-CHEMIE v WELLA A.G.** (1996) TLR.269 (CA) where the Court held that:

"..... this Court can be moved to use its revisional jurisdiction under section 4(3) only in cases where there is no right of appeal or where there is, it has been blocked by judicial process. Lastly where such right exists but was not taken, good and sufficient reason be given why no appeal was lodged."

Unfalteringly thereafter, this reasoning has been followed in several subsequent decisions of this Court. For instance, in **HALIMA HASSAN MAREALLE vs PARASTATAL SECTOR REFORM COMMISION AND ANOTHER,** Civil Application No. 84 of 1999 (unreported), it was held that, the applicant who had interest in the suit house and could not appeal against the order of the High Court because she was not a party to the

proceedings in that court, could competently move this Court for revision under section 4(3) of the Act. Similarly in **AHMED ALLY SALUM vs RITHA BAJWALI AND ANOTHER,** Civil Application No. 21 of 1999 (unreported) it was held that, as the applicant who also was not a party to the proceedings below could not have appealed, revision was his only remedy. That indeed, is the gist of this Court's decision in **SADDOT's** case cited by Mr. Kesaria, where the Court said:-

> *"Here, the applicant could not have appealled because he was not a party to Miscellaneous Civil application No. 16 of 2000. Hence, he rightly brought the application for revision under section 4(3) of the Appellate Jurisdiction Act 1979 as amended by Act No. 17 of 1993. That being the case, this application for revision is properly before us."*

In similar vein, the present applicant was not a party in the proceedings before the High Court. If he feels that he has interest in the suit property, and he cannot appeal, his only remedy is to come to this Court by way of revision under section 4(3) of the Act.

In view of the above, we think that so long as section 4(3) of the Act and Rule 65(1) of the Rules have been cited in the Notice of Motion, the application is properly before the Court, notwithstanding the superfluous reference to other provisions such as subsection (2) of section 4 of the Act. We do not think, however, that, in view of our finding above, and with the scanty arguments before us, on this point, it is necessary or fair for us to decide the point raised by Mr. Kesaria, whether or not it was necessary to cite rule 48(1) in the application, in the determination of this objection. It has to await a more convenient opportunity where the Court would receive more arguments by learned counsel. That said, we find that this objection has no merit and we accordingly dismiss it.

The next objection from this set of objections was on non-compliance with Rule 12(4) of the Rules. That Rule provides as follows:

> *12 (4) "In all applications and appeals, every tenth line of each page of the record shall be indicated in the margin on the right side of the sheet".*

It was contended by Mr. Galeba that, this Rule was not complied with in the preparation of the record of revision; and that since the wording of

the Rule was mandatory, its breach must be visited by severe consequences; including the striking out of the application. Later however, he softened up, and left it to the Court to decide as it deemed fit in the interests of justice.

In response, Mr. Kameya left it to the Court to interpret it, guided by Rule 2 of the Rules, while Mr. Kesaria, submitted that non- compliance with the Rule was not meant to attract any sanction, as no such sanction is attached to it.

The wording of this Rule is similar to Rule 10(5) of the Court of Appeal Rules, 1979 (the old Rules). We agree with Mr. Galeba that the wording of the Rule is couched in mandatory terms by the use of the word "shall". We also agree that in terms of section 53(2) of the Interpretation of Laws Act (Cap 1 RE 2002), where in any written law the word "shall" is used, it should be interpreted to mean that the function conferred must be performed. However that section must be read in the context of the whole, and in particular, section 2 (2) (a),(b) and (c), of that Act. Read in that context, the words "may or "shall in any written law, may not necessarily mean what they are directed to mean in section 53(2) of the interpretation of Laws Act if :-

(a) there are express provisions to the contrary in the particular Act

(b) applying that wording would be inconsistent with the intent and object of the written law or.

(c) in the case of a subsidiary legislation, applying such interpretation would be inconsistent with the intent and object of the principal law.

Simply put, this means, that the, word "shall" does not necessarily mean mandatory in every case it is used in any written law. To determine the real intention any such provision must be read in its context. On the other hand, we do not agree with Mr. Kesaria that, non compliance of the Rule should not attract a sanction because no such sanction is attached. The simple reason is that, in the scheme of the current Rules, there are many Rules which do not have express sanctions attached to their non compliance, but this Court has ruled their non compliance fatal. Examples include provisions on notices of appeal. What has always prevailed is the wording, importance and purpose of a particular Rule and this can only be discerned from the pronouncements of this Court from time to time on those Rules.

Fortunately in the present case, the Court has already previously commented on the provision now in question. The first occasion was in **THE PRESIDENTAL PARASTATAL SECTOR REFORM COMMISSION vs THE IMPALA HOTEL LIMITED,** Civil Appeal No. 100 of 2003 and the second one was in **GLOBAL DISTRIBUTORS (T) LTD AND TWO OTHERS vs CRDB BANK LTD** Civil Appeal No, 87 of 2001 (both unreported) where a similar objection was raised. The Court held that:-

> *"The Court will undoubtedly be inconvenienced in reading pages of the record of appeal whose tenth lines are not indicated, but this is not a ground for rendering the appeal being incompetent".*

We do not see any circumstances that would move us to depart from those decisions. Consequently, we find that this objection is also devoid of merit and we dismiss it.

We now come to the objection raised in the first set of objections. That relates to the defective jurat of the affidavit filed in support of the application.

Mr. Galeba, submitted that since the attesting officer in the jurat, did not print his names, the jurat and therefore the whole affidavit was defective rendering the whole application incompetent. For that, he relied on the decision of this Court in **FELIX FRANCIS MKOSAMALI vs JAMAL TAMIM,** Civil Application No. 4 of 2012 (unreported). But Mr. Bethuel Peter, Mr. Shayo and Mr. Kesaria, all countered by submitting that in the light of the recent majority decision of this Court in **SAMWEL KIMARO vs HIDAYA DIDAS**, Civil Application No. 20 of 2012 (unreported), the law has now changed and this Court should follow its recent decision.

From the above submissions, it is obvious that there exist at least two parallel decisions of this Court on the same subject. In **MKOSAMALI's** case, it was held that the jurat of an affidavit which only bears the signature but lacks the name of the attesting officer is defective and the defect renders the application incompetent. But in **SAMWEL KIMARO's case,** Kimaro JA. followed the reasoning in **MKOSAMALI's** case, but Msoffe JA. and Juma JA. in their separate rulings, declined to follow it, both giving the reason that it was not a requirement of the law for the jurat to insert the name of the attesting officer although it may be

desirable to do so. The issue now is, what should the Court do when faced with conflicting decisions of its own on the same point?

The doctrine of precedent (*or stare decis)* is an integral part of the administration of justice in this country and others that follow the common law system. Speaking of the final Court of appeal, under this doctrine, the general rule is that, whenever possible, the Court is bound to follow its own decisions, and for that purpose, all decisions of the Court, (whether by a single justice, by the full court, or by the full Bench), rank equally. However in **JUMUIYA YA WAFANYAKAZI TANZANIA vs KIWANDA CHA UCHAPAJI CHA TAIFA,** (1988) TLR. 146 this Court held:-

> *" the Court of Appeal should be free in both civil and criminal cases to depart from such previous decisions when it appears right to do so"*

As to what would necessitate the Court to depart from its previous decisions, the Court adopted the following caution from **DODHIA v NATIONAL & GRINDLAYS BANK LTD AND ANOTHER** (1970) EA 195.

> *"...it will of course, exercise this power only after careful considerations of the consequences of doing so,*

and the circumstances of the particular case, but I would not seek to lay down any more detailed guide to the circumstances in which such a departure should take place as the matter would be best left to the discretion of the Court at the time it was up for consideration".

In **JUMUIYA YA WAFANYAKAZI** case, the Court refused to follow its previous decision in **ZAMBIA TANZANIA ROAD SERVICES LTD v J.K. PALLANGYO** Civil Appeal No. 9 of 1982 for the reason that it was decided per incuriam, but it did not lay down any general guidelines. Twenty six years on today, in Tanzania, a close examination of previous instances where this Court, and courts in other jurisdictions have declined to be bound by their own previous decisions for the past two centuries or so, shows, what appears to be an established pattern of circumstances in which, the Courts would not follow a precedent case. These include, if:

(i) in criminal cases, following the precedent case would result in an improper conviction or;

(ii) it does not stand for the legal proposition for which it has been cited or ;

(iii) it articulates the legal proposition for which it has been cited, the proposition was obiter dicta or, the ratio decidendi is too wide or obscure; or;

(iv) the precedent case has been effectively overruled by a new statute or given per incuriam or;

(v) the case has a built in public policy factor or based on the customs, habits and needs of the people prevailing at that time, and the public policy or the customs, habits and needs of the people have since changed;

(vi) the ratio decidendi of the precedent case is in conflict with a fundamental principle of the law;

(vii) there are conflicting decisions of equal weight that stand for the opposite proposition;

(See an article by **PAUL M. PERELL – Stare decisis and the techniques of legal reasoning and argument,** published in (1987) 2.23 Legal Research Update II.) (See also **YOUNG v BRISTOL AEROPLANE COMPANY, LIMITED.** (1944) 1 KB. 718. **DODHIA NATIONAL GRINDLAYS BANK** (supra).) **The doctrine of precedent**

in the Court of Appeal for East Africa by G.F.A SAWYER, and J.A.HILLER (TPH 1971).

We have to finish this note however, by cautioning that the above list of circumstances justifying a departure from the Court's own decisions is by no means exhaustive; and that generally those principles do not apply to subordinate courts of appeals; when they are faced with the decision(s) of this Court, however erroneous they might appear to be.

The situation we have at hand is therefore one of the exceptional circumstances to the application of the doctrine of precedent. When confronted with such a situation, the approach by various commonwealth jurisdictions does not differ much. Thus, in **YOUNG v BRISTOL AEROPLANE COMPANY LTD** (supra) the Court of Appeal of England, through Lord Greener, MR. (at page 729) formulated the following instructive guideline:-

> *"On a careful examination of the whole matter we have come to the clear conclusion that this Court is bound to follow previous decisions of its own*

as well as those courts of co-ordinate jurisdiction.

The only exceptions to this rule are:.....

(1)The court is entitled and bound to decide which of the two conflicting decisions of its own it will follow".

But in 1876 in Canada, the Ontario Court of Appeal held in **FISKEN et al v MEEHAN** (1876) 40, U C Q.B. 146) that, where there are conflicting decisions of equal weight, the Court should follow the more recent decision. And in **CAMPBELL v CAMPBELL** (1880) 5 App. Case 787, it was held that, where two cases cannot be reconciled, the more recent and the more consistent with general principles ought to prevail.

Although these authorities are not binding on this Court, they are highly persuasive and we think they reflect and so we do not hesitate to adopt them as good practices. Following the most the recent decision, in our view, makes a lot of legal common sense, because 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. On that score, we agree with

Mr. Kesaria, Mr. Peter and Mr. Shayo that, where the Court is faced with conflicting decisions of its own, the better practice is to follow the more recent of its conflicting decisions unless it can be shown that it should not be followed for any the reasons discussed above. It is for the above reasons that we have decided to follow the majority decisions in **KIMARO's case**, not out of disrespect for the author of the minority decision, but because as observed above, the latter follows the older of the two schools of thought. So, in our view until such time as the full Bench would be convened to resolve the conflict, or the statute is amended, the position of the law on this point, should be that, the absence of an attesting officer's name in the jurat of an affidavit by itself, is not an incurable defect.

On the premises, we also overrule and dismiss the third preliminar objection.

At the end of the day, all the points of preliminary objections are found to be devoid of merit, and are accordingly dismissed with costs. We direct that the application for revision now be fixed for hearing on merit.

DATED at **DAR ES SALAAM** this 3rd day of February,2015.

E. A. KILEO
JUSTICE OF APPEAL

S.A.MASSATI
JUSTICE OF APPEAL

B.M.K. MMILLA
JUSTICE OF APPEAL

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

Malewo M.A
DEPUTY REGISTRAR
COURT OF APPEAL