CHIKU HUSSEIN LUGONZO *v.* BRUNNIDS S. PAULO

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(Ramadhani, Lubuva and Lugakingira, JJ.A.)

CIVIL APPLICATION No. 30 OF 1999

(From the decision of the High Court of Tanzania at Dar es Salaam, Mackanja, J., dated 3 March 1999, in Miscellaneous Civil Application No. 2 of 1998)

Civil Practice and Procedure – Appeal – Appeal from ruling of the High Court – Whether a ruling of the High Court rejecting an application for review can be appealed against – Section 5(1)(c) of the Appellate Jurisdiction Act 1979 and Order XLII, rule 7(1) of the Civil Procedure Code 1966.

Civil Practice and Procedure – Review – Application for Review not accompanied by a copy of the drawn order sought to be reviewed – Whether fatal to the application – Order XL, rule 2, Order XLII, rule , and Order XXXIX, rule 1(1) of the Civil Procedure Code 1966.

This was an application for revision under section 4(3) of the Appellate Jurisdiction Act 1979, seeking revision of an order of the High Court striking out an application for review on the ground that the said application (for review) was not accompanied by a copy of the drawn order sought to be reviewed. It was argued, in this application for revision, that it was improper for the applicant in this case to apply for revision because the way was open for the applicant to seek leave to appeal against the High Court order she sought to be revised.

Held: (i) As the application for review was based on the provisions of Order XLII, rule 7(1) which do not allow appeals, with or without leave, against rejection of an application for review, the applicant had no other option but to apply for revision; therefore the Court of Appeal is properly moved to exercise its revisional jurisdiction.

(ii) There is no provision under the Civil Procedure Code which requires a drawn order to accompany an application for review; Order XLII, rule 3 of the Civil Procedure

Code 1966 only requires the form of preferring appeals to apply, *mutatis mutandis,* to be used in applications for review;

(iii) In this case the *mutatis matandis* rule required only the form of the Memorandum for Review and did not go further to require what was to accompany the memorandum.

Application allowed

Case referred to:

(1) Halais Pro-Chemie Industries Ltd v. Wella A.G. [1996] T.L.R. 269

Statutory provisions referred to:

(1) Appellate Jurisdiction Act 1979, sections 5(1)(c), 4(3)

(2) Civil Procedure Code 1966, Order XLII, rule 7(1), Order XXXIX, rule 1(1), rule 4(2) Order XLII and Order XLII, rule 3

Mr Rutabingwa, for the Applicant

Mr Shayo, for the Respondent

RULING

(Dated 10 May 2000)

Lubuva, J.A.: This is an application for revision filed under section 4(3) of the Appellate Jurisdiction Act 1979 as amended by Act Number 17 of 1993. Under Notice of Motion, the court is moved to exercise its Revisional Jurisdiction upon the following ground:

> The Honourable Judge of the High Court did not properly exercise the jurisdiction vested in him when he heard (*sic*) that the Memorandum of Review was not accompanied by a drawn order and it was only the memorandum filed whereas the application was accompanied by the ruling and the matter was before the same court and the applicant was unrepresented.

The application is supported by an affidavit sworn by the applicant, Chiku Hussein Lugonzo. From the affidavit, the submissions by counsel

for both parties and other documents laid before the court, the background of the matter is brief. The matter arises from High Court Miscellaneous Civil Application Number 2 of 1998. In Kinondoni District Court Civil Appeal Number 68 of 1996, the applicant lost on 6 August 1997, when judgment was delivered against her. Following this decision, she filed in the High Court Miscellaneous Civil Application Number 2 of 1998 seeking extension of time in which to institute appeal out of time against the decision of the District Court. She also sought an order for stay of execution. On 30 April 1998, the High Court judge (Nsekela, J.) in dismissing the application held that the applicant had not given any reason for failure to file the petition of appeal within the prescribed time. The application for stay of execution was not granted. Undaunted, the applicant made another attempt by filing in the High Court an application for review. That is that the applicant was moving the court to exercise its jurisdiction to review its decision of 30 April 1998, dismissing the application for extension of time in which to appeal and for stay order. Following the application for review being struck out on 3 March 1999, this application has been filed.

In striking out the application for review the learned judge (Mackanja, J) held that the non-attachment of a drawn order to the application rendered the application incurably defective, it was incompetent. He stated, *inter alia*:

> Since the review is sought in respect of an order that dismissed an application then a copy of the drawn order in terms of rule 2 Order XL ought to have accompanied the memorandum for review. This was not done... [The] omission...has rendered a fatally incurable irregularity to the application for review.

The learned judge came to this conclusion on the basis of his interpretation and understanding of Order XLII, rule 3, Order XL, rule 2 and Order XXXII, rule 1 of the Civil Procedure Code.

At the hearing of this application, the applicant was represented by Mr Rutabingwa, learned counsel, and the respondent was advocated

for by Mr Shayo, learned counsel. In his submission, Mr Rutabingwa vehemently criticized the learned judge's decision to strike out the application. He stated that it was erroneous on the part of the learned judge to take the view that it was necessary under the provisions of Order XL, rule 2 to have the Memorandum for Review accompanied by a copy of the drawn order. In a case such as this one which involves the same court and case file, Mr Rutabingwa urged, it was not necessary to have the application accompanied by a drawn order. A copy of this ruling, the subject of the application attached to the application was sufficient, he added.

Opposing the application, Mr Shayo, learned counsel for the respondent urged the court to dismiss the application because it has no merit. In the first place, he stated, it is a mandatory requirement under rule 2 Order XL of the Civil Procedure Code to attach a drawn order to the Memorandum for Review. In this case, he submitted, the omission in attaching the drawn order was fatal, the learned judge had no alternative but to reject the application in terms of rule 4(2) Order XLII of the Civil Procedure Code. Secondly, with leave of the court, this matter is appellable under section 5(1)(c) of the Appellate Jurisdiction Act 1979 and so, it is inappropriate to invoke the court's power for revision. The applicant should have appealed against the High Court Order (3 March 1999) striking out the application for review Mr Shayo insisted.

We intend to deal first with the issue raised by Mr Shayo that the court is not properly being moved to exercise its revisional jurisdiction in this matter. Once the court is satisfied that it is not properly moved to invoke its revisional jurisdiction it would be unnecessary to go further into the merits of the matter. With respect, we do not agree with Mr Shayo, learned counsel, that the High Court Order of 3 March 1999 (Mackanja, J.) is appellable to this court with leave of the Court or the High Court in terms of the provisions of section 5(1)(c) of the Appellate Jurisdiction Act 1979. The reason is that Order XLII, rule 7(1) of the Civil Procedure Code clearly provides that an order of the court rejecting an application for review shall not be

appealable. As the application for review was based on the provisions of Order XLII which, as already pointed out, does not allow appeals against the rejection of an application for review, it is, in our view, inconceivable that an appeal with or without leave can, as urged by Mr Shayo, be entertained. The law simply, does not allow. This, we think is a case whose circumstances aptly fall within category (iii) of the guiding principles set out in the case of *Halais Pro-Chemie Industries Ltd v. Wella AG* (1). In that case, under category (iii), among others, the principle was stated in these terms:

> A party to proceedings in the High Court could invoke the revisional jurisdiction of the court in matters which were not appealable with or without leave.

Such being the position of the law, we are increasingly of the view that this matter is appropriately before the court as it involved a matter which was not appealable. Mr Shayo's contention that the court is not properly moved to exercise its revisional jurisdiction is therefore rejected.

Next we will deal with the merits of the application. The question that falls for consideration is whether the application for review was properly struck out. As already observed the learned judge (Mackanja, J.) was of the view that a copy of the drawn order was not annexed to the Memorandum for Review. This, the learned judge further held, was fatal because it did not comply with the mandatory provisions of Order XL, rule 2 of the Civil Procedure Code, Order XLII, rule 3 provides:

> The provisions as to the form of preferring appeals shall apply, *mutatis mutandis*, to applications for review. [emphasis supplied]

With regard to appeals, Order XXXIX, rule 1(1) states:

> 1(1) Every appeal shall be preferred in the form of memorandum signed by the appellant or his advocate ... in this behalf. *The memorandum shall be accompanied by a copy of the decree appealed from* and (unless the court dispenses therewith) of the judgment on which it is founded. [emphasis supplied]

From the wording of these provisions, it is crystal clear that as regards appeals two things are provided, namely, the form of the Memorandum of Appeal and what to accompany the memorandum. On the other hand, as regards the Memorandum for Review the position is different. Here, as seen from the provisions of Order XXXIX, rule 1 the requirement is limited to the form only. It is common knowledge that matters pertaining to the form of the Memorandum of Appeal or for review include such things like the title, the name of the parties, the number of the suit, the date of the decree, the numbering of paragraphs etc. As to what is to accompany the Memorandum for Review, it is our settled view that there is no provision under the Civil Procedure Code to that effect. For this reason therefore, we think with respect, the learned judge misapplied the provisions of the Civil Procedure Code when he erroneously held that it was a necessary requirement under Order XL, rule 2 to have the Memorandum for Review accompanied by a drawn order. As just observed, there is no such requirement relating to review.

With great respect, it appears to us that the learned judge got mixed up in applying Order XLII, rule 3 in relation to the form of preferring appeals *mutatis mutandis* to application for review without the important limitation and restriction to **form only**. At this juncture, it is perhaps instructive to briefly state in general terms what *mutatis mutandis* means. Simply stated, *mutatis mutandis* means that when dealing with cases of a similar type and circumstances, applicable principles would, in similar manner, apply to the cases with the necessary changes and modification. In this case, as already observed, from the very wording of Order XLII, rule 3 even with the necessary changes and modification, the application of the rule *mutatis mutandis* was applied only in so far as the form of the memorandum for review was concerned. The learned judge, with respect went beyond the form of the Memorandum for Review in dealing with what to accompany the memorandum.

In our view, apart from the requirement of the law under the Civil Procedure Code as we have endeavoured to explain in this ruling,

A the requirement for a drawn order to accompany the Memorandum for Review does not also accord with logic in an application for review. The reason is that unlike the situation in an appeal, in the case of an application for review involving the same file and the
B same court as was the case here, it was not necessary for review. A copy of the ruling or order attached to the application would, in our view be sufficient.

All in all therefore and for the foregoing reasons, we are satisfied
C that in the circumstances of the case, had the learned judge addressed on the fact that Order XLII, rule 3 is limited to the form of the Memorandum for Review, he would have reached the conclusion that the application was competent. Consequently, we allow the application,
D set aside the order of 3 March 1999 striking out the application.

It is further ordered that the matter be remitted to the High Court with direction that the application shall be heard a merit by another judge.

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