- Applications must always be supported by ~~chamber summons~~ Affidavits
- For an application to be competent it must show provisions of law under which it is brought,

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO.45 OF 2003

ASHRAF A. KIMARO .....APPELLANT

VERSUS

MARIAM MOHAMED KIHIYO.....RESPONDENT

RULING

Date of last order 29/05/08
Date of ruling 17/7/2008

MLAY, J.

ASHRAF A. KIHIYO filed a MEMORANDUM OF REVIEW in this court on 17/12/07. The said memorandum of review is in the following form:

"IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO.45 OF 2003

ASHRAF A. KIHIYO.....APPELLANT

VS

MARIAM A. KIHIYO.....RESPONDENT

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MEMORANDUM OF REVIEW

The appellant above named being aggrieved by the ruling of this Honourable Court (Mlay,J.) delivered on 26th June, 2007 prays for review of the whole of the said decision on the following grounds namely :

1. *That the Honourable judge erred in law and fact in holding that the appellant was personally negligent in not making a follow up wit his advocate much earlier that he did while the appellant did make follow up in court and that is when he discovered that his application had been dismissed.*

2. *The Honourable judge erred in law and fact in considering only the question of whether there existed sufficient cause for restoration of the dismissed appeal and left the fact that the appeal so dismissed had overwhelming chances*

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of success while the said appeal had overwhelming chances of success.

RENSONS WHEREAS the appellant prays that the application so dismissed be restored one the appeal be restored and prosecuted on merits"

The Respondent MARIAM M. KIHIYO through the services of Washokera And Co. Advocates gave notice of preliminary objection on points of law on grounds that :-

1. *The application is mercilessly and incurably time barred.*
2. *The application is incurably bad in law for a being accompanied by an affidavit.*
3. *The application is bad in law for not showing under which law the same was made.*

The applicant filed what he termed, **"REPLY TO TE NOTICE OF PRELIMINARY OBJECTION "** in which he stated that :

"1. The application is not time barred as it was filed within the time.

2. That both the second and third points of objection

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3. are without merit as well, there is no such

requirement for such an application."

The parties with leave of this court, filed written submissions on the preliminary objections.

On the first ground the Respondents advocate submitted that it is trite law that a memorandum of review is to be filed by way of Chamber Summons application. It is also trite law, pursuant to O.XLIII R.2 that every application must be supported by an affidavit. The learned advocated relied on the decision of this court (Mwalusanya, J.) in NBC Vs. COSMAS ON MUKOJI [1986] TLR 127. She contended that in that case, the court held that an application for review is irregular for not having been accompanied by an affidavit and the court only admitted the application on the grounds of an oral statement made by the applicant which the court found sufficient to support the chamber application instead of affidavits. The Respondent's advocated submitted that;

> *.."short of being made by way of chamber summons and having been not supported by an affidavit, the purported memorandum of review is rendered no memorandum of review at all and that the same should be dismissed for contravening the requirements of the law."*

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On the second ground, the Respondents advocate submitted that the law requires every application to show the law under which the some is made. She cited the decision of the Court of Appeal of Tanzania in ALMOSI IDDIE MWINYI V. NATIONAL BANK OF COMMERCE AND MRS NGEME MBITA Civil Application No.88/1998)unreported) and quoted the following observation by RAMADHANI J.A. (as he than was):

> *.....if wrong citation of law renders an application incompetent I have not a flicker of doubt on my mind that non-citation of law is worse and equally renders an application incompetent."*

The advocate also referred to the decision of this court to the same effect, in **DAUD MAKANYAGA V. BENEDICT MAKANYAGA (PC Civ. Appeal No.97/2006** (unreported). She argued that, since the purported application does not show the law under which the same is made, it is rendered incompetent in the eyes of the law and ought to be dismissed.

On the third and last ground, the Respondents advocate argued that the respondent's application for review is in respect of the ruling delivered on 26th June, 2007 and the period of limitation provided for an application for review under item 3 of

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Part III of the schedule to the Law of Limitation Act Cap 89 RE 2002, is thirty (30) days. She submitted that the purported application for view was filed on 17th December 2007, almost six months out of time.

In reply to the first ground, the Respondent submitted that the ground is a total misconception of Review. He argued that "*the same is made under S.78 and O. XLIR.I of Civil Procedure Code Cap 33 2002*", and quoted the provisions of section 78 which state as follows:

> *78. Subject as aforesaid, any person considering himself aggrieved -*
>
> *(a) by decree or order from which an appeal is allowed by this court, but from which no appeal has been preferred, or*
>
> *(b) by a decree or order from which no appeal is allowed by this code,*
>
> *may apply for review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit." (emphasis by the Respondent)*

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The Applicant stated that Order XLII R.I makes a similar provision that any part may apply for review of judgment or made the order. He contended that :

> *...There is no where provided that the review must be by way of chamber summons supported by an Affidavit as alleged by the Respondent..."*

Referring to the case of **NBC vs COSMA M. MUKOJI 1986 TLR 127,** the Applicant submitted that, " *the said decision clearly stated that, failure to accompany an Affidavit in a review is an irregularity which is not fatal"* (He referred to page 128 of the Report). He argued that, "*in that particular case there was no affidavit whatsoever which accompanied and/as attached to the review, the court accepted the review, entertained the some and allowed the Applicant prayers for the reasoning that the statement that was made by Applicant orally were sufficient for support the application"*

On the basis of the above argument, the Applicant submitted that there is no provision which makes it mandatory for review to be accompanied by an affidavit.

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On the second ground, the Applicant submitted that this ground also has no merit. In effect, he argued that the requirement to cite the provision of the law applies only to an application made by Chamber Summons and supported by an affidavit. On the last ground that the application is time barred, the Applicant submitted as follows:

> *"While I agree that the time limit for review is 30 days but I submit that my application was filed within the time in that I filed the some on the 17th December 2007 after realizing that the ruling was delivered on the 26th June, 2007 I was totally not aware of the said ruling as I was not informed nor summoned and my then Lawyer did not inform the (sic) latter (sic) on 7th December 2007 I can (sic) to know that the ruling was delivered hence this application."*

The Applicant further submitted that, *"in view of what is stated above, s 14(1) of the Law of Limitation Act Cap 89 RE 892002 is in essence that I was not aware of the ruling and I care to be aware on the 7th December 2007, hence the application in hand. Thus this ground also is with no merit."*

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The Respondents advocate filed a rejoinder to the Applicants reply, reiterating her submissions on the first ground that the memorandum of review must be filed by chamber summons and supported by an affidavit. As for the acceptance of the application without an affidavit in the **NBC Vs COSMA MUKAJI'S** case, the Respondents advocate argued that, that case is distinguishable from the present case in that in the former, the application was made orally while in the present case, the application has been made in writing. On the third ground, the Respondents advocate argued that under Section 14(1) of the Law of Limitation Act Cap 89 RE2002, the Applicant should have sought an extension of time before filing the application.

I propose to dispose of the preliminary objections in the order in which the parties have dealt with them in their submissions, starting from the second ground then the third ground and ending with the first ground. The second ground is that : *"the application is incurably bad in law for not being accompanied by an affidavit."* Having given due consideration to the submissions of both parties on this ground I am of the settled view that the applicants submission that there is no requirement for an application for review to be made by a Chamber Summons supported by an affidavit, is misconceived. Section 78 of the Civil Procedure Act, which the Applicant has quoted in full, and also the provisions of Order XLII Rule 1 provide for the circumstances in which a party may apply for review but the

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procedure for making all applications including an application for review, is contained in Order XLIII Rule 2 which provides as follows:

> 2. Every application to the court made under this Code shall unless otherwise provided, be made by a chamber summons supported by an affidavit. Provided that the court may where it considers it fit to do so, entertain an application made orally, or where all the parties to a suit consent to the order applied for being made, by a memorandum in writing signed by all the parties or their advocates, or in such other made as may be appropriate having regard to all the circumstances under which the application is made."

Both section 78 and Order XLII Rule I provide that a party "*may apply for review ...*" and Order XLIII Rule (2) which provides for the procedure of making applications under the Civil Procedure Code, requires mandatorily that "*Every application to the court made under this Code, shall unless otherwise provided, be made by chamber summons supported by affidavit*.". The present application has been

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made in writing in the form of a Memorandum of Review. It does not qualify under the first exception in the provision because it is not an oral application. The application does not also fall within the second exception simply because both parties did not consent to the order of review being made and also because the memorandum of review has not been signed by both parties or by their advocates. The third exception is equally inapplicable as there are no circumstances which have been alleged to exist which could warrant this application to be made by "*such other mode*." In the case of NATIONAL BANK OF COMMERCE v. COSMAS MUKOJI the judge conceded that the application for review is irregular in that "*there is no affidavit accompanying the application*" but held that "*the irregularity is not total fatal*" on grounds unless the applicant can show that section 78 or Order XLII Rule I have provided that an application for review shall be made in some different manner, then, the application for review must be made by chamber Summons supported by affidavit, as required by Order XLIII Rule 2. Neither Section 78 nor Order XLII has made provision for the procedure of making an application for review and as the result, the provisions of Order XLIII Rule 2 should have been complied with, unless, the application qualifies for the exceptions set out in the proviso to Rule 2. The exceptions are where an application has been made orally or where the parties have consented to the order of review being made by a memorandum in writing signed by all parties or by their advocates or if it should be made in some other mode having regard to the circumstances that

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.... "*the oral statements which applicant made in court were sufficient to support the chamber application instead of the affidavit.*"

I agree with the Respondents advocate that the present application is distinguishable from the COSMAS M. MUKOJIS case. First in the latter the application had been made by chamber summons, which is not the case in the present application. Secondly, the applicant had made oral statements to the court, which the court found to be supportive of the chamber summons, while in the present application there is nothing to support the application for review. The decision in COSMAS M. MUKOJI's case cannot therefore be invoked to justify the application for review which has not been made by chamber summons and which has nothing to support it. The application is therefore incompetent and liable to be struck out.

The third ground is "*that application is bad in law for not showing under which law the same is made*". The Applicant has in effect argued that it is no required to state the provision of the law because the application for review is not required to be made by chamber summons supported by an affidavit. I have held that this application like all other applications made under the Civil Procedure Act Cap 33 RE 2002 have to be made in accordance with the provisions of Order XLIII Rule 2, unless there are circumstances bringing the application within the exceptions in the proviso to that rule. Since this application had to be made by chamber summons

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supported by an affidavit, the provisions of the law under which it is brought ought to be shown for the application to be competent. The decision of the Court of Appeal in ALMOSI IDDIE MWINYI'S case cited earlier, is very clear on this.

We now come to the last ground which is the first point in the notice of preliminary objection. The point of objection is "*that the application is mercilessly and incurably out of time*". It is not in dispute that the ruling which is the subject of the intended review, was delivered on 26th June / 06 / 07 and that the "Memorandum of Review was filed on 17/12/07, nearly six months after the ruling. In term s of PART III of the Schedule to Law of Limitation Act, Cap 89 R.E 2002, the period of limitation for applications under the Civil Procedure Act for review is thirty (30) days. The Applicant has conceded that the memorandum of review was filed by after the expiry of thirty days but has argued that he became aware of the ruling in December, 2007 and filed the memorandum of review soon thereafter. The period of limitation begins to run from the date following the delivery of the ruling and unless there is a period which is excluded under Par IV of the Law of Limitation Act, the Applicant was required to file an application for review within 30 days of the delivery of the ruling. If he was unaware of the ruling, that could be a ground for seeking an extension of time in which to file the application. Since the Applicant did not apply for extension of time before filing the "*Memorandum of Review, the Memorandum of*

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Review" which was intended to be an application for Review, was filed out off time and therefore liable to be dismissed, in terms of section 3 of the Act.

However, since the "Memorandum of Review" is not properly an application for Review as it was not filed by Chamber Summons supported by an affidavit and it is not properly a memorandum of Review filed with the consent of both parties and signed by both parties, it is improperly before this court and it is accordingly struck out with costs.

J.I. Mlay

JUDGE

Delivered in the presence of both the Applicant and Respondent this 17th day of July, 2008.

J.I. Mlay

JUDGE

17/7/2008

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