AR CIVIL APPLICATION NO. 4 OF 2006- COURT OF APPEAL OF TANZANIA AT ARUSHA- RUTAKANGWA, J.A.	**ROBERT LESKAR Vs. SHIBESH ABEBE (Application to set aside the Dismissal Order of 15/09/2006 and restore AR Civil Application No. 2 of 2005 from the Ruling and Order of the High Court of Tanzania at Arusha)- Mroso, J.- Miscellaneous Civil Application No. 69 of 1998**	AR Civil Application No. 2 of 2005 was dismissed on 15th September 2006 under Rule 58 (1) of the Court of Appeal Rules, 1979 for non appearance of the applicant. This application is brought by **Notice of Motion under rule 58 (4) seeking to have the dismissed application restored.**- Rule 58 (4) does not clothe this Court with jurisdiction to grant the reliefs sought in this application. This sub-rule recognizes an application duly made under sub-rule (3).- the notice of motion seeking for its restoration ought to have been brought only under sub-rule (3). As it was brought under sub-rule (4), the Court has not been properly moved. The application is accordingly held to be incompetent and

		ought to be struck out. **Proceeding brought under wrong provisions of the law-**it is settled law in this country that a proceeding brought under wrong provisions of the law is incompetent and ought to be struck out. **Non-citation of relevant provisions in the Notice of Motion-** It is equally settled law that non-citation of the relevant provisions in the notice of motion renders the proceeding incompetent: see Full Court decisions of Court of Appeal in **Hussein Mgonja** v **The Trustees of the Tanzania Episcopal Conference, AR Civil Revision No. 2 of 2002** (unreported), **Fabian Akonaay** v **Matias**

		Dawite, Civil Application No. 11 of 2003, **Antony Tesha** v **Anita Tesha,** Civil Appeal No. 10 of 2003, **China Henan International Co-operation Group** v **Salvand K. A. Rwegasira,** Civil Reference No. 22 of 2005.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

AR CIVIL APPLICATION NO. 4 OF 2006

ROBERT LESKAR ..... APPLICANT
VERSUS
SHIBESH ABEBE ..... RESPONDENT

(Application to set aside the Dismissal Order of 15/09/2006 and restore AR Civil Application No. 2 of 2005 from the Ruling and Order of the High Court of Tanzania at Arusha)

(Mroso, J.)

dated the 28th day of September, 1998
in
Miscellaneous Civil Application No. 69 of 1998

R U L I N G

18 & 22 October, 2007

RUTAKANGWA, J.A.:

The applicant was also the applicant in this Court's AR Civil Application No. 2 of 2005. The said application was dismissed on 15th September 2006 under Rule 58 (1) of the Court of Appeal Rules, 1979 (henceforth the Rules) for non appearance of the applicant.

Following the said dismissal the applicant has lodged this application seeking to have the dismissed application restored. The application is brought under rule 58 (4) of the Rules and is by Notice of Motion.

When the matter was called on for hearing, Mr. Mwaluko, learned advocate for the respondent, rose to argue two points of preliminary objection, notice of which had earlier been filed. The points of objection are to the effect that:-

(i) the application is incompetent inasmuch as it does not comply with the provisions of Rule 45 (1) and (2) of the Rules, and

(ii) the application is incompetent because the Court has not been properly moved.

Submitting in elaboration of the two points of preliminary objection, Mr. Mwaluko was brief and to the point. **Firstly,** he argued that the application which is by notice of motion is incompetent because the notice of motion does not state the grounds of the application. This is in violation of Rule 45 (1) of the Rules. **Secondly,** Mr. Mwaluko pressed me to hold the application incompetent as the Court has not been properly moved to grant the order the applicant is seeking.

Mr. Mwaluko was very categorical that so long as the notice of motion has been brought under rule 58 (4) of the Rules instead of rule 58 (3), the Court cannot set aside the dismissal order of 15th September, 2006. In support of his submission he has referred me to many decisions of this Court on the issue, including the one in the case of **Hussein Mgonja** v **The Trustees of the Tanzania Episcopal Conference, AR Civil Revision No. 2 of 2002** (unreported). He accordingly urged me to strike out the application with costs.

Mr. Chadha, learned advocate for the applicant, was not moved in any way by the submission of Mr. Mwaluko. He vehemently resisted the preliminary objections contending that the application is competently before the Court.

In resisting the first point of preliminary objection Mr. Chadha, with transparent conviction, argued that the notice of motion has substantially complied with the requirements of rule 45 (1) and (2) which he said must be read together. While conceding that indeed the notice of motion does not state the grounds of the application, he argued that the said grounds can be gathered from the supporting affidavit which should not be severed from the notice of motion. He accordingly pressed me to dismiss the first point of preliminary objection.

On the second point of preliminary objection, Mr. Chadha was of the view that the authorities relied upon by Mr. Mwaluko do not support his stance. To him, these authorities cover situations of either citation of wrong provisions of

the law or non-citation of any provision. The application under scrutiny does not fall in either of the two categories as the relevant Rule, i.e. Rule 58 (4) has been cited, he said. For Mr. Chadha, we shall be indulging in technicalities and *"splitting hairs for nothing"* to insist that the notice of motion should have been specifically brought under sub-rule 3 of rule 58.

I shall start my discussion with the second point of preliminary objection for the law on the issue is now firmly rooted. As correctly submitted by Mr. Mwaluko, and at any rate not seriously resisted by Mr. Chadha, it is settled law in this country that a proceeding brought under wrong provisions of the law is incompetent and ought to be struck out. It is equally settled law that non-citation of the relevant provisions in the notice of motion renders the proceeding incompetent. For both propositions our jurisprudence is teeming with authorities. To mention but a few of them, these are:

(a) **Hussein Mgonja** v **The Trustees, T.E.C.** (supra in which earlier decisions on the issue are cited),

(b) **Fabian Akonaay** v **Matias Dawite,** Civil Application No. 11 of 2003,

(c) **Antony Tesha** v **Anita Tesha,** Civil Appeal No. 10 of 2003 and

(d) **China Henan International Co-operation Group** v **Salvand K. A. Rwegasira,** Civil Reference No. 22 of 2005 (all unreported).

It is not insignificant to note here that these are all decisions of the Full Court.

In the case of **Hussein Mgonja** v **T.E.C.** the Court had this to say on the issue:-

> *"If a party cites the wrong provision of the law the matter becomes incompetent as the Court will not have been properly moved".*

The application was struck out on the ground of incompetence for *"failure to move the Court properly"*.

In **Tesha** v **Tesha** (supra) the Court held that the mere citation of a section *"without indicating the sub-section and the paragraph is tantamount to non-citation"* and renders the application incompetent. Again in **Aloyce Mselle** v **The N.B.C. Consolidated Holding Corporation,** Civil Application No. 11 of 2002 (unreported) where in the Chamber Application section 5 (2) (c) of the Appellate Jurisdiction Act, 1979 was cited instead of section 5 (1) (c), the Court held that it had not been properly moved and struck out the application.

In this application, the Notice of Motion is laid under Rule 58 (4) which reads as follows:-

> *"An application made under sub-rule (3) shall be made within thirty days of the decision of the Court, or in the case of a party who should have been served with notice of the hearing but was not so served within thirty days of his first hearing of that decision".*

Clearly this sub-rule does not clothe this Court with jurisdiction to grant the reliefs sought in this application. This sub-rule recognizes an application duly made under sub-rule (3). The said sub-rule (3) reads as follows:-

> *"Where an application has been dismissed under sub-rule (1) or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re-hear it, as the case may be, if he can show that he was prevented by any sufficient cause from appearing when the application was called on for hearing".*

There is no dispute here on the fact that the applicant's application was dismissed under rule 58 (1) of the Rules. That being the case then, the notice of motion seeking for its restoration ought to have been brought only under sub-rule (3). As it was brought under sub-rule (4), the Court has not been properly moved. The application is accordingly held to be incompetent and ought to be struck out.

Of course Mr. Chadha has said something to the effect that I would be indulging in technicalities were I to succumb to Mr. Mwaluko's objection. Out of respect to him I will refer him to what this Court has said on this particular complaint. It was in the case of **China Henan** v **Salvand Rwegasira** (supra). It said that it is imperative to cite the correct provisions of the Rules. It went on to say that an error to cite the correct provision is not a technical one but *"a*

fundamental matter which goes to the root of the matter …….. Once the application is based on wrong legal foundation, it is bound to collapse".

The Court, in **China Henan** v **Salvand Rwegasira** specifically addressing itself to Article 107A (2) (e) of the 1977 Constitution unequivocally held that omission in citing the proper provision of the rule and *"worse still the error in citing a wrong and inapplicable rule in support of the application is not in our view, a technicality falling within the scope and purview of Article 107A (2) (e) of the Constitution. It is a matter which goes to the very root of the matter ….."*

In the upshot I uphold the respondent on his second point of preliminary objection and strike out the application with costs. In view of this I find no pressing need to canvass the first ground of the preliminary objection. It will suffice if I observe in passing that the law on the issue as it stands today is generally on the side of the respondent.

DATED at ARUSHA this 22nd day of October, 2007.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

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

(I. P. KITUSI)
DEPUTY REGISTRAR