**Registered Trustees of Korea Evangelical Church v Yum Yun Hwa and**

**another**

**Division:** Court of Appeal of Tanzania at Dar-es-Salaam

**Date of ruling:** 23 December 2003

**Case Number:** 80/03

**Before:** Ramadhani, Mroso and Nsekela JJA

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**Summarised by:** A Mwanzia

*[1] Appeal – Record of appeal – Application seeking injunction pending revision of proceedings –*

*Record of appeal incomplete – Whether application incompetent and to be struck out.*

*[2] Court of Appeal – Injunction – Procedure – Whether Court of Appeal may entertain application*

*brought under rule 3 – Whether rule 9(2)(b) appropriate.*

**Ruling**

**LUBUVA JA:** The application by notice of motion filed under certificate of urgency seeks to move the Court for the following orders: That the Court be pleased to give a protective order restraining the respondent their agents, workmen servants and whoever is acting on their behalf from selling and or suing the properties which were collected and handed over to the first respondent by the second respondent wrongly pending the hearing and determination of the revision. From the affidavit sworn by one Youn Yeoun Chin, a registered trustee of the Korean Evangelical Church, in support of the application, the background giving rise to the case is as follows: On 16 May 2003, in High Court probate and administration cause number 20 of 2001, the High Court granted the application of the first respondent, Yum Yun Hwa, adminisratrix of her late husband that the properties of her late husband be collected and handed over to the Court broker. The process and execution of the order collecting the properties by the Court broker aggrieved the applicants. On 30 July 2003, their application objecting to the process of collecting the properties was dismissed by the High Court. The applicants have filed this application seeking the above order. At the commencement of hearing the application before me Mr *Hosea*, learned counsel for the respondents raised a preliminary objection upon the grounds that:

1. T he application is incompetent because it has been filed under wrong and inapplicable provisions of the law. 2. T he orders that are sought in the application are unmaintainable in law. In support of the preliminary objection, Mr *Hosea* submitted that after the application for stay of execution, raising the attachment and investigation was dismissed by Luanda J on 30 July 2003, it was open for the applicants to pursue the matter on appeal. The process of appealing, he said, was set in motion when the notice of appeal was lodged on 6 August 2003 but the appeal was not instituted. Instead Mr *Hosea* further stated, the applicants apparently, filed an application for revision followed by this application for injunctive orders pending hearing and determination of the intended revision. As this is a matter which is more appropriate for appeal, it is improper for the applicants to invoke section 3(2) of the appellate Jurisdiction Act of 1979 and rule 3 of the Court Rules and not rule 9(2)(*b*) in filing the application, Mr *Hosea* contended. As correctly submitted by Mr *Mgare*, learned counsel, assisted by Mr *Myovela*, learned counsel for the applicants, this is not an application for stay of execution, it is an application for what is described as injunctive orders. In that case, the application of rule 9(2)(*b*) is irrelevant. Therefore, the competence or otherwise of the application cannot in my view, be grounded on the non-application of rule 9(2)(*b*) of the Court Rules of 1979 as Mr *Hosea* urged me to accept. It is common knowledge that the injunctive orders are not provided for under the rules. It is for that reasons that and as contended by Mr *Mgare* the application was filed under rule 3. In that situation, I do not think that the application can be said to be incompetent on the ground, if may well be so on other grounds as I shall presently advert to. It would be a different matter if at a later stage it is found that there is no merit or otherwise in the application or the alleged revision. I am therefore unable to accept Mr *Hosea*’s contention that the application is incompetent on account of the fact that rule 3 was invoked instead of rule 9(2)(*b*) in filing it. Mr *Hosea* has also raised another point in ground two. It was his contention that the application is incompetent because there is no basis upon which the application is made. According to him, there is nothing on the record of the application to show that there is in fact an application for revision pending in this Court. As such, he further contended, the Court cannot be moved to make orders pertaining to a pending matter in the Court the existence of which has not been established. He urged the Court to strike out the application on account of its being incompetent. Both Mr *Mgare* and Mr *Myovela*, learned counsel for the appellants, addressed the Court in turn. On ground two of the preliminary objection, the essence of their submission was to the following effect. While it was conceded that the record of the application does not contain any document or evidence to show that the application for revision had been filed in this Court, learned counsel sought to inform the Court from the bar that revision application number 79 of 2003 was filed in this Court on unspecified date and that it was served on the first respondent on 1 September 2003. For this reason, it was strongly urged that the application was properly before the Court. It is common ground that the record in this application does not contain any document to show that there was a revision application filed in the Court pending the finalisation of which the injunctive orders are sought. It goes without saying that the record in this application is incomplete. It was as a result of the Court’s prompting that Mr *Mgare*, learned counsel, revealed to the Court that civil application number 79 of 2003 had been filed in court and that the first respondent had been served on 1 September 2003. It is trite principle that the Court cannot take for granted the existence of certain facts on the basis of information from the bar as Mr *Mgare* attempted to do in this case. All the more so, for the basic factors such as the existence of the revision application upon which the orders were sought. It was imperative for counsel for the applicants to ensure that this aspect was clearly brought out in the supporting affidavit showing the number of the application and when it was filed with a copy of the application attached. Apart from the merits of the application, the Court would then be in a position to satisfy itself on its existence and the time when it was filed. After all, it is a requirement of the law that applications for revision have to be filed within 60 days of the decision in respect of which revision is sought. In the circumstances, it would be presumptuous on the part of the Court to grant the orders sought in respect of an application for revision the existence of which is not supported by any evidence. On this, with respect, both Mr *Mgare* and Mr *Myovela*, did not attempt to give an explanation for the omission in the record of documents relating to the revision application. The record before me being incomplete, I am not persuaded from the bar to assume the existence of the revision application. Accordingly, the application being incompetent, the preliminary objection raised by Mr *Hosea* is sustained with the result that the application is struck out with costs. For the applicants:

*Mr Mgare* and *Mr Myovela*

For the respondent:

*Mr Hosea*