

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MAKAME, J.A., SAMATTA, J.A., And LUGAKINGIRA, J.A.)

CIVIL APPLICATION NO. 38 OF 1998
In the Matter of an Intended Appeal

BETWEEN

MOHAMED HATIBU APPLICANT

AND

SALIMA MSWAHILI RESPONDENT

(Application for service of Memorandum of
Appeal and Records of Appeal out of time
from the decision of the High Court of
Tanzania at Dar es Salaam)

(Kyando, J.)

dated the 13th day of October 1995

in

(PC) Civil Appeal No. 90 of 1994

RULING OF THE COURT

LUGAKINGIRA, J.A.:

This application came before us pursuant to orders by Ramadhani, J.A. The applicant was the unsuccessful appellant before the High Court at Dar es Salaam in (PC) Civil Appeal No. 90 of 1994 in which judgment was delivered on 13/10/95. At stake is a house on Plot No.13, Block 'E', Wasaa Street, Magomeni, Dar es Salaam which was being administered by the respondent. The appeal was heard ex parte because the respondent died just before judgment in the District Court, and nobody appeared as the deceased's legal representative.

Subsequent to the High Court judgment, the applicant lodged a notice of appeal to this Court and instituted Civil Appeal No.16 of 1998 on 5/3/98. He then immediately applied in Civil Application No. 12 of 1998 for waiver of service of the record of appeal.

At the hearing of the application before a single judge on 27/5/98, learned counsel for the applicant, Mr. Rutabingwa, informed the judge (Kisanga, J.A.) that the ownership of the suit property was being contested by some alleged buyers, whereupon the judge adjourned the hearing and directed the appearance of the contestants for verification. When the application came on for hearing on 2/7/98, Mr. Humphrey Mkondya, an advocate, appeared and informed the judge that he was prepared to accept service of the record of appeal on behalf of the relatives of the deceased respondent or the buyers of the suit house. In view of this development, the learned judge refused the application for waiver of service and directed Mr. Rutabingwa to make a formal application for enlargement of time to serve the record of appeal upon Mr. Mkondya.

Mr. Rutabingwa proceeded as directed and filed Civil Application No. 38 of 1998 which came up for hearing before Ramadhani, J.A. At the hearing it transpired that the deceased's relative whom Mr. Mkondya claimed to represent, one Asha Juma Hamisi, had never been appointed to administer the deceased's estate; had not, therefore, been made a party to the proceedings in accordance with rule 98 of the Court of Appeal Rules; but, the judge observed, "from the arguments of Mr. Mkondya, Asha wants to avoid any involvement in these proceedings." He therefore remarked:

Asha has no locus standi and I hesitate to say whether Mr. Mkondya, as the advocate of Asha, is properly before this Court unless he is taken to be amicus curiae.

In short, there was still nobody upon whom to serve the record of appeal; consequently, there was no question of whether to extend the time for doing so. But the judge was of the view that to dismiss the application would have worked injustice on the applicant as that would have meant the end of the road, when it was clear that the applicant had properly applied for waiver of service in the first place. He realised, however, that he had no jurisdiction to revisit the decision by Kisanga, J.A. He therefore desisted from taking a decision on the application and adjourned it for determination by the full Court citing rule 55, and invoked also rule 3(2(b), a provision that can be called in aid for better meeting the ends of justice. In doing so, he stated thus:

The matter before the full Court is to determine this application, that is, extension of time within which to serve a copy of the record of appeal and a copy of the memorandum of appeal on Asha. If the full Court overrules me, then that is the end of the matter. However, should the full Court uphold me, then the matter before them would be a reference from the decision in Civil Application No.12 of 1998. In that respect, I suo motu enlarge the time within which to seek reference, so that the same should not be taken to be out of time.

It is these orders that gave rise to the matter now before us, and the question is whether to grant the application for extension of time to serve a copy of the record of appeal to the respondent's side or whether to grant waiver of service as originally sought.

At the hearing of this matter, the position on the respondent's side had not changed. Mr. Mkondya was again in attendance but nobody had been made a party to the proceedings in place of the deceased. Mr. Rutabingwa pointed out this state of affairs and prayed, in the circumstances, for waiver of service. Mr. Mkondya still claimed to represent the deceased's relatives and the purchasers of the suit house and said that no one had applied to administer the deceased's estate because they lived in the bush, and Asha in particular was over 65 years of age and unable to travel.

In view of the unchanged position, we see no relevance of Mr. Mkondya's representations or his appearance except, perhaps, as *amicus curiae*. To-date nobody can be identified as the deceased's legal representative but Asha who was expected to apply for letters of administration and to be made a party in place of the respondent is understood to have dissociated herself from these proceedings altogether. We therefore find ourselves in the same situation as Ramadhani, J.A. and in the absence of any person to be served on the respondent's side, we are similarly unable to grant an extension of time for that purpose. In other words, the first limb of the question posed above is answered in the negative.

On the other hand, it is correct to say that the applicant had proceeded properly when he applied for waiver of service in the first place. According to rule 77 (i) the Court may on an *ex parte* application direct that service not be effected on any person who took no part in the proceedings in the High Court. In the instant case, no person took part in the proceedings in the High Court on the respondent's side. There is no doubt in our minds that but for Mr. Mkondya's appearance and representations, Kisanga, J.A. would have granted the application for waiver of service. The rules are silent as to whether the applicant should have made a fresh

application for waiver before coming up with a reference, but we think it would be onerous on him if the rules were so to provide. Since, as just stated, the previous application would most likely have been allowed, it is equitable and proper to regard this reference as having come from the decision in Civil Application No. 12 of 1998. The provisions of rule 3(2)(a), and even para (b) cited by Ramadhani, J.A., accommodates this position.

Accordingly, we allow the application and waive the requirement for service of the record of appeal and the memorandum of appeal on the respondent's side. The applicant may proceed with other steps necessary for the realisation of the appeal.

DATED at DAR ES SALAAM this 1st day of July, 1999.




L. M. MAKAME
JUSTICE OF APPEAL

B. A. SAMATTA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

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


(A.G. MWARIJA)
DEPUTY REGISTRAR