IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., KILEO, J.A., And BWANA, J.A.)

CIVIL APPLICATION NO. 98 OF 2010

RUTAGATINA C.L. ..... APPLICANT

VERSUS

1. THE ADVOCATES COMMITTEE
2. CLAVERY MTINDO NGALAPA ..... RESPONDENTS

(Application for extension of time to file an application for leave to appeal and leave to appeal against the decision of the Full Bench of the High Court of Tanzania at Dar es Salaam)

(Mandia, Mlay And Shangwa, JJJ.)

dated the 6th day of September, 2006
in
Civil Appeal No. 221 of 2005

RULING OF THE COURT

11th & 18th February 2011

MSOFFE, J.A.:

In this omnibus application there are two basic prayers. Extension of time to file an application for leave to appeal AND leave to appeal against the decision of the Full Bench of the High Court dated 6/9/2006 in Civil Appeal No. 221 of 2005. In the notice of motion it is evident that the application is made under Section 5 (1) (c) of the Appellate Jurisdiction Act (CAP 141 R.E. 2002) and Rules

10, 45 (b) and 49 (1) of the Tanzania Court of Appeal Rules, 2009 (hereinafter the Rules). The notice of motion is supported by the affidavit of the applicant Mr. Christian Laurent Rutagatina.

When the application was called on for hearing we wanted to ascertain from Mr. Israel Magesa, learned advocate for the applicant, whether or not the application, in its present form, is properly before the Court. He seemed to agree that this indeed is an omnibus application. Inspite of this, he however invited us to invoke Rule 4 (1) of the Rules and proceed to determine the application on merit. In saying so, we understood him to mean that the application, though omnibus, is properly before the Court.

The respondents were duly served but none entered appearance. So, before asking Mr. Magesa to address us on the above point we invoked Rule 63 (2) and proceeded in the absence of the respondents. It follows therefore that we got no input(s) from the said respondents on the above point.

With respect, we decline the invitation extended to us by Mr. Magesa for reasons which will emerge hereunder.

Rule 4 (1) of the Rules reads as under:-

> *4 (1) The practice and procedure of the Court in connection with appeals, intended appeals and revisions from the High Court, and the practice and procedure of the Court in relation to review and reference; and the practice and procedure of the High Court and tribunals in connection with appeals to the Court shall be as prescribed in these rules or any other written Law,* ***but the Court may at any time, direct a departure from these Rules in any case in which this is required in the interests of justice.***
>
> *(Emphasis supplied.)*

It is clear from the above sub-rule that the Court may direct a departure from the Rules in any case in which that is required in the interests of justice. Besides asking us to depart from the Rules, Mr.

Magesa did not tell us why he thought the interests of justice in this case require us to depart from the said Rules! In this regard, Mr. Magesa's request was not substantiated or backed up by any reason(s). All in all, we see no justification for making a departure from the Rules in this matter.

A close look at the general scheme of the Court Rules, particularly Rules 44 – 66 appearing under PARTS III, IIIA and IIIB, will show that all of them have one common feature. Each one of those rules, as and where is relevant, refers to **an application.** None of them talks of **applications.** It follows that under the Rules it was never envisaged that an intended applicant would file **applications.** It is no wonder that Rule 49 prescribes the manner in which a formal **application** can be presented to the Court. Thus, it occurs to us that there is no room in the Rules for a party to file **two applications** in one, as happened here.

Under the relevant provisions of the law an application for extension of time and an application for leave to appeal are made differently. The former is made under Rule 10 while the latter is

preferred under Section 5 (1) (c) of the Appellate Jurisdiction Act read together with Rule 45. So, since the applications are provided for under different provisions it is clear that both cannot be "lumped" up together in one application, as is the case here.

The time frames within which to prefer the applications are also different. For example, by its nature, an application under Rule 10 has no time frame within which to be filed. Under Rule 45 a time frame of fourteen days is prescribed under both (a) and (b) thereto in the case of an application for leave to appeal in civil matters.

In determining both applications the considerations to be taken into account are different. An application under Rule 10 may be granted **upon good cause shown.** An application for leave is usually granted if there is good reason, normally on a point of law or on a point of public importance, that calls for this Court's intervention. Indeed, on the aspect of leave to appeal the underlying principle was well stated by this Court in **Harban Haji Mosi and Another v Omar Hilal Seif and Another,** Civil Reference No. 19 of 1997 (unreported) thus:-

> *Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance.*

The same principle was restated in the subsequent decision of this Court in **British Broadcasting Corporation v Eric Sikujua Ng'maryo,** Civil Application No. 133 of 2004 (unreported) as follows:-

> *Needless to say, leave to appeal is not automatic. It is within the discretion of the Court to grant or refuse leave. The*

> *discretion must, however be judiciously exercised on the materials before the court. As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal (see:* ***Buckle v Holmes*** *(1926) ALL E.R. Rep. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted.*

In both applications the jurisdiction is also different. An application under Rule 10 is at the exclusive domain of this Court. Under Section 5 (1) (c) of the Appellate Jurisdiction Act and Rule 45 of the Rules both the High Court and this Court have jurisdiction to determine applications for leave to appeal.

Furthermore, in terms of Rule 60 (1) of the Rules an application for extension of time is heard by a single Justice whereas under sub-rule 2 (a) thereto an application for leave is determined by the Court.

In the totality of the foregoing, we are satisfied that the Rules do not provide for an omnibus application. For this reason, we hereby strike out this omnibus application.

As for costs, we wish to state that the first respondent through Mr. Obadia M. Kameya, learned Principal State Attorney, filed an affidavit in reply and a written submission in opposition to the application. This suggests that the first respondent spent some time, money and effort to oppose the application. The second respondent did not file anything to oppose the application. However, the first respondent's affidavit in reply and the written submission relate to the merit of the application. They have nothing to do with the point we have canvassed above. In this sense, it is therefore apparent that we have determined the application on the basis of our own

effort and reasoning for which it is only fair that we make no order as to costs.

We wish to observe here for the benefit of Mr. Kameya that although his affidavit is titled "COUNTER AFFIDAVIT" that in fact is an affidavit in reply because there is nothing like a counter affidavit in the Rules. Rule 56 (1) refers to affidavits in reply and not counter affidavits.

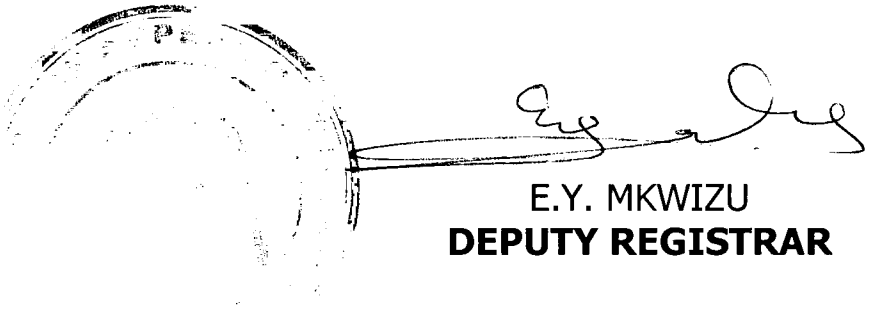
DATED at DAR ES SALAAM this 15th day of February, 2011.

J.H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

S. J . BWANA
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR