IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KIMARO, J.A., MASSATI, J.A., And MMILLA, J.A.)

CIVIL APPLICATION NO. 7 OF 2013

1. AWINIEL MTUI
2. ROGATE MINJA
3. LILIAN MAMUYA ..... **APPLICANTS**
4. VODACOM

VERSUS

STANLEY EPHATA KIMABO ..... **RESPONDENT**

(Application for stay of execution from the decision of the High Court of Tanzania at Arusha)

(Ngwala, J.)

dated the 21st day of December, 2012
in
Civil Appeal No. 36 of 2009

RULING OF THE COURT

11th & 13th December, 2013

MASSATI, J.A.:

Through the services of Ms. Materu & Co, Advocates, the applicants have filed a Notice of Motion to apply for stay of execution under Rule 11(2) (b) (c) (d) and (e) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The Notice of Motion was duly served on the respondent.

Upon service, the respondent instructed Ms. Makange Chambers to take over. Ms. Makange & Co filed an affidavit in reply

and at first, a notice of preliminary objections containing two points. Later they filed an additional notice of preliminary objection. All the preliminary objections were heard when the application came up for hearing on 11/12/2013.

The summary of the preliminary objections is that:-

(a) The application was filed in the Court of Appeal prematurely, in that, in terms of Rule 47 of the Rules, it ought first to have been taken up with the High Court under Order XXXIX r. 5 of the Civil Procedure Code (the CPC)

(b) The copy of the written submission filed by the applicant was served on the respondent out of the prescribed time; contrary to Rule 106(7) of the Rules:-

(c) That the jurat to the affidavit accompanying the Notice of Motion was defective for failure to disclose the name of the attesting officer.

In Court to argue the preliminary objections, was Mr. Herbert Makange, learned counsel. After an attempt at arguing the first

point, Mr. Makange abandoned it and proceeded to argue the remaining two.

In the second preliminary objection, Mr. Makange submitted that since Rule 106(7) was couched in mandatory terms, and since the applicant's submission was served on the respondent more than 14 days from the date of filing, the applicant should be penalised for the delay. And the only fitting penalty is to strike out the submission, and since, in terms of Rule 106(1) it is a mandatory accompaniment to an application, the application itself should be found wanting and be dismissed in terms of Rule 106(9) of the Rules.

On his part, Mr. John Materu learned counsel, who represented the applicants, submitted that, much as the respondent might be served with the submission late, there is no sanction in the scheme of Rule 106 for the delay. Certainly, Rule 106(9) would not apply, because it only applies to failure to file the same, which was not the case here, argued the learned counsel. Besides, the respondent's counsel did not show how his client was prejudiced; because he was able to file a submission in reply and a notice of

preliminary objections. So, he prayed for the dismissal of this objection.

The predominant view of the law is that a preliminary objection is one raised on a pure point of law, on the assumption that the facts are not in dispute, and no exercise of judicial discretion is involved. (See **MUKISA BISCUIT MANUFACTURING CO. LTD v WEST END DISTRIBUTORS LTD** (1969) EA 696. In the present case, the question of when the respondent was served is a question of fact, not one of law. As to the consequences of delay in service, it is true that Rule 106(9) is not applicable because the Rule applies only where the appellant/applicant "fails to file a written submission within sixty days" which is certainly not the case here. However, that does not mean that there is no sanction. In any befitting case, where there is no remedy provided by the Rules, the Court can always resort to Rule 4(2) of the Rules. The Rule provides:-

> *"(2) Where it is necessary to make an order for the purposes of*

(a) dealing with any matter for which no provision is made by these Rules or any other written law;

(b) better meeting the ends of justice, or

(c) preventing an abuse of the process of the Court, the Court may, on application or on its own motion, give directions as to the procedure to be adopted or make any other order which it considers necessary."

Indeed, even in the present case, the preliminary objections are brought under Rule 4(2) (a) and (c) of the Rules. As can easily be discernible, that Rule gives discretion to the Court to give such orders as it may deem fit. That ousts the preliminary objection in question from the purview of a preliminary objection *par excellence*. We accordingly dismiss it.

The third and last preliminary objection is that the jurat of the affidavit accompanying the Notice of Motion is defective for not disclosing the name of the attesting officer. Mr. Makange first submitted on the law in the subject matter. He referred to us several decisions of this Court; including **FELIX MKOSAMALI vs**

JAMAL A. TAMIM Civil Application No. 4 of 2012; **MS BULK DISTRIBUTORS LTD vs HAPPINESS WILLIAM MOLLEL**, Civil Application No. 4 of 2008; **SAMUEL KIMARO vs HIDAYA DIDAS**, Civil Application No 20 of 2012 and **SHARIFA AHMED KAIDI vs MAGRETH MASAO**, Civil Application No. 6 of 2011 (all unreported). Then, he showed to us his own copy of the affidavit where there is no name of the attesting officer apart from the rubber stamp. The learned counsel submitted that on the authorities, the affidavit was incurably defective, and so rendered the application incompetent. It should be struck out, with costs he prayed.

Mr. Materu did not dispute as to what the position of the law was. He simply distinguished the cases cited by the respondent, because, in the present case the attesting officer's name is in the jurat. He therefore prayed for the dismissal of the preliminary objection too with costs.

On our part, we do not think that this point should detain us. According to the records filed in court, the name of the attesting officer, one **CHRISTINA Y. KIMALE** appears in the jurat. Short of

proving that the name was fraudulently inserted in the jurat after the filing of the Notice of Motion, (the burden of which is on the respondent,) (and which would be a matter of evidence, not a pure point of law,) we are of the settled view, that this settles the alleged defect. Consequently we are inclined to hold that the alleged defect does not exist; and so dismiss this preliminary objection too.

In fine, we find that both preliminary objections lack merit. They are accordingly dismissed with costs.

DATED at **ARUSHA** this 13th day of December, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

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

E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL