

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CIVIL APPLICATION NO. 4 OF 2013

KHADIJA MLEBYA APPLICANT

VERSUS

MOHAMED AMRI RESPONDENT

**(Application for an order that the applicant be granted extension
of time to file an appeal out of time from the Judgment of the
High Court of Tanzania at Mwanza)**

(Mwakipesile, J.)

dated the 19th day of July, 2011

in

PC. Matrimonial Appeal No. 15 of 2009

.....

RULING

10th & 12th September, 2014

JUMA, J.A.:

The applicant, KHADIJA MLEBYA has through the services of ADOLOS LAW CHAMBERS, brought this application by way of Notice of Motion under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The motion is seeking the orders that the applicant should be granted an extension of time within which to file her appeal out of time. The motion is predicated on two grounds. The first ground of motion contends that the High Court, did not within time, grant her a certificate on the existence of

points of law for determination by the Court of Appeal of Tanzania. The second ground is to the effect that the respondent will not be prejudiced, should the Court grant her this extension. The Notice of Motion is supported by an affidavit affirmed by the applicant herself.

Through her supporting affidavit, the applicant narrated how aggrieved she is, with the Judgment and Decree of the High Court in PC Matrimonial Appeal No. 15 of 2009. Mwakipesile, J. delivered that Judgment on 18th July, 2011. The applicant also affirmed how she manifested her intention to appeal on 21st July, 2011 when she filed her Notice of Appeal. She also, on 26th July, 2011 lodged in the High Court the Miscellaneous Civil Application No. 64 of 2011 moving the High Court at Mwanza to certify for her, that there were in her intended appeal, points of law for this Court to determine. It was later on 19th March, 2013 when the High Court (Sumari, J.) finally issued an order to certify the existence of points of law worth determination by this Court.

The motion for extension of time is opposed by the respondent, MOHAMED AMRI. This respondent affirmed an affidavit in reply insisting that the applicant should blame herself for failing to seek from the

Registrar a Certificate of Delay to account for the delay she is now seeking an extension to remedy. Aside from the affidavit in reply, KAILU LAW CHAMBERS (ADVOCATES) in addition, filed on respondent's behalf, two notices of preliminary objection. The first notice was filed on 5th May, 2014 containing two grounds of objection. Additional notice was filed on 9th September, 2014 containing one ground of objection. In their totality, the three grounds of objection were:

- 1. The applicant's application is an abuse of the Court processes as necessary and prompt steps have not been taken to lodge the appeal in time.*
- 2. The applicant's application is incurably defective for arising from un-existing [non-existent] decision in law.*
- 3. The applicant's application is incompetent before the Court for failure to file in the Court a Written Submission and/or serve the same to the respondent contrary to Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009.*

At the hearing of the preliminary points of objection on 10th September, 2014, the applicant and the respondent were respectively

represented by two learned counsel who had earlier on applied; and granted a waiver to appear and represent their respective clients in terms of Rule 33 (3) of the Rules. Mr. Mathew Gombanila Nkanda, learned advocate appeared for the applicant. Mr. Julius Mushobozi, learned advocate, represented the respondent.

As is the practice of the Court, the preliminary Objection was heard first. Mr. Mushobozi abandoned the third ground of objection, preferring to argue the first two grounds.

Mr. Mushobozi begun with his second ground of objection by elaborating why, he is challenging the competence of this Court to hear and determine this application. He asserts that the Judgment of the High Court referred in the motion does not exist and an extension of time cannot be granted to appeal against non-existent decision of the High Court. He submitted that the Notice of Motion suggests that if the extension to file an appeal is granted, it is the Judgment of Mwakipesile, J. which was delivered on 18/7/2011, which will be subject of an appeal to the Court. This supposedly date of delivery is also mentioned in the second paragraph of the affidavit which the applicant affirmed. The learned

counsel also pointed out that the third paragraph of the same affidavit refers to an attached copy of Notice of Appeal which also refers to 18/7/2011 as the date of the delivery of the Judgment subject of the intended appeal.

Mr. Mushobozi invited me to look at the copy of the Judgment (Annexure IK1) in order to find that although the Judgment of Mwakipesile, J. is dated 8/7/2011 but it was in fact delivered on 19/7/2011, and not on 18/7/2011 suggested in the Notice of Motion and supporting affidavit. Further, he submitted that in so far as the Notice of Motion refers to a non-existent Judgment of the High Court that was purportedly delivered on 18/7/2011, this application for extension of time is defective and should be struck out with costs. The learned counsel referred me to Rule 48 (2) to amplify his submission that a Notice of Motion that refers to a non-existent Judgment is defective. He pointed out that this sub-rule (2) in mandatory terms, requires notices of motion to substantially be in the **Form A** in the First Schedule of the Rules. This **Form A** requires notices of motion to show correct dates when the Judgment subject of intended appeal was delivered.

While conceding that indeed the date of delivery of the Judgment referred to in the Notice of Motion and supporting affidavit should have been 19/7/2011 but not 18/7/2011, Mr. Nkanda faulted Mr. Mushobozi for raising this objection on defective date rather prematurely. Instead, he should have waited to raise the objection once an appeal has been filed. At any rate, the learned counsel pointed out that defective date appearing in the Notice of Motion and in the Notice of Appeal is curable under Rule 111 of the Rules. Mr. Nkanda urged me not to strike out the application on that ground alone because the mistaken date of delivery was nothing more than a slip of the pen.

When given a chance to reply, Mr. Mushobozi out rightly rejected the line of submission which contends that there was a slip of the pen, to justify mistaken date of when the Judgment was delivered. He insisted that a slip of the pen regarding 18/7/2011 cannot be so consistent as to appear in the Notice of Motion, in the second and third paragraphs of the supporting affidavit, and in the Notice of Appeal. He similarly insisted that the Rules governing correct dates are couched in mandatory terms and

cannot be cured by belated suggestions that amendment will be sought under Rule 111.

I have considered the submissions of the two learned counsel who both are on common ground that the date of 18/7/2011 supposedly when the Judgment referred to in the Notice of Motion was delivered, does not tally with 19/7/2011 when Mwakipesile, J. delivered her Judgment. I have come to the conclusion that I should first address myself on this ground of objection before moving to the next.

Upon a closer scrutiny of sub-rule (2) of rule 48, Mr. Mushobozi is with due respect correct to submit that the Notice of Motion is defective for failing to refer to a valid decision subject of appeal should the extension of time be granted to lodge an appeal. Sub-rule (2) of rule 48 referred to by Mr. Mushobozi, states as follows:

48 (2). - A **Notice of motion shall be substantially in the Form A** in the First Schedule to these Rules and shall be signed by or on behalf of the applicant. [Emphasis provided].

Further, Form A referred to under Rule 48 (2) provides:-

FORM A

(Rule 48)

In the Court of Appeal of Tanzania at..... Criminal/Civil or
Application No ... of ... 20...

In the matter of an intended appeal/Criminal/Civil or Appeal No
... of ... 20....Between.....Appellant andRespondent

(Appeal from the ... of the High Court of ... at..... (Mr. Justice
.....) **Dated..... 20...** in ... Criminal/Civil Application/Appeal No.
.... of20.....) [Emphasis added].

In so far as it has not referred to the correct date of when the
Judgment of the High Court subject of intended appeal was delivered; the
Notice of Motion which the applicant filed on 25/3/2013 is defective for
failing to abide by the substance of **Form A**.

There is no dispute that the Notice of Appeal in the motion refers to
a non-existent decision of the High Court which was purportedly delivered
on 18/7/2011. This anomaly gives some reason for me to doubt whether
the applicant has initiated any appeal to this Court by a valid Notice of
Appeal. Rule 83 (6) of the Rules read together with **Form D** of the Rules,

in mandatory language also requires the Notice of Appeal to make reference to the day, month and the year when the decision subject of intended appeal was delivered. Rule 83 (6) and the relevant part of Form D of the Rules make the following provisions:

83 (6) A notice of appeal shall be substantially in the Form D in the First Schedule to these Rules and shall be signed by or on behalf of the appellant.

FORM D

(Rule 83)

In the Court of Appeal of Tanzania at..... Criminal/Civil or
Application No ... of ... 20...

In the matter of an intended appeal/Criminal/Civil or Appeal No ... of ... 20.... Between.....Appellant andRespondent (Appeal from the ... of the High Court of ... at..... (Mr. Justice) **Dated..... 20...** in ... Criminal/Civil Application/Appeal No of20.....)

NOTICE OF APPEAL

TAKE NOTICE that..... being dissatisfied with the decision of the Honourable.....Mr. Justice..... **given at ... on the... day of...20.....,** intends to appeal to the Court of Appeal of Tanzania against the whole of the said decision/such part of the said

decision as decided. [Emphasis on requirement of date is added].

In the present application, the Notice of Appeal appearing in the record of appeal incorrectly asserts that the Judgment of Mwakipesile, J. was given on 18th day of July, 2011. As we now know, the Judgment of Mwakipesile, J. though signed on 8th August, 2011; it was actually delivered on 19th July, 2011.

In so far as the Notice of Motion and the Notice of Appeal included in this application refer to a non-existent Judgment of the High Court that was purportedly delivered on 18th July, 2011, both the Notice of Motion and the Notice of Appeal are defective. With such defect, this Court cannot be seized with jurisdiction to extend time within which the applicant may lodge her appeal to this Court. This Court has with respect to civil and criminal proceedings held that it is a valid Notice of Appeal which initiates an appeal to this Court. An application for extension of time to lodge an appeal presupposes that an applicant has a valid Notice of Appeal. There cannot be any appeal before this Court where it is based on an invalid notice of appeal: **Richard Japheti vs. The Director of Public Prosecutions**, Criminal Appeal No. 172 of 2007 (unreported); **Tanzania**

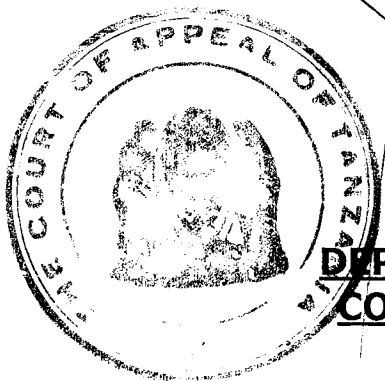
Telecommunications Company Ltd vs. The Attorney General and Two Others, Civil Application No. 97 of 2010 (unreported).

In the end result, the ground of objection contending that this application for extension of time is incurably defective is sustained. Sustaining this ground alone, is sufficient to dispose of this matter. The application is struck out with costs. It is so ordered.

DATED at **MWANZA** this 10th day of September, 2014.

I.H. JUMA
JUSTICE OF APPEAL

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




M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL