

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

AR. CIVIL APPLICATION NO. 9 OF 2014

**AYUBU BENDERA AND 10 OTHERS..... APPLICANTS
VERSUS**

A.I.C.C. ARUSHARESPONDENT

**(Application for extension of time to file an application for
Revision of the proceedings and Ruling of the
High Court of Tanzania Labour
Division at Arusha)**

(Sarwatt, DR)

Dated the 24th day of May, 2003

In

Misc. Application No. 20 of 2012

RULING

28thSeptember, & 1stOctober, 2015

JUMA,J.A.:

Ayoub Bendera and 10 other applicants filed this Motion to seek, *inter alia*, the order of the Court to extend time to enable them to lodge an application for the revision of the proceedings and Ruling of the High Court of Tanzania, Labour Division at Arusha in Misc. Application No. 20 of 2012. To move the Court the applicants invoked the provisions of Rule 10 of the

Court of Appeal Rules, 2009 (the Rules) and section 14 (1) and (2) of the Law of Limitation Act Cap 89 and what they described as "*any other enabling provisions of the laws in force*".

The motion was supported by a joint affidavit invariably sworn to and affirmed by all the applicants: namely, Ayoub Bendera, Chia Masonga, Hemedi Shoko, Oliva P. Mudogo, Ahmed Mmuni, William Kuppa, Masselle J. Bushububili, Monica Mathew, Anitha Lyimo, Genevefa J. Sizya and Zulfa Mhina. Apart from the affidavit in reply to oppose the motion, the respondent AICC also filed a notice of a preliminary objection containing the following four grounds:-

- 1. That, the Notice of Motion was brought wrongly under the provisions of the Law of Limitation Act (CAP 89 R.E. 2002), contrary to section 43 (b) of the said Law of Limitation Act.*
- 2. That, the Notice of Motion is materially defective as it discloses no ground(s) on which the Motion was made, contrary to rule 48 (1) of the Tanzania Court of Appeal Rules, 2009.*
- 3. That, the Heading to the Notice of Motion do not state the names of the other 10 alleged Applicants, apart from AYOUB BENDERA, contrary to rule 30 (1) of the Rules.*
- 4. That, a copy of the Notice of Motion was not served upon the Respondent within 14 days from the date of filing, contrary to rule 48 (4) of the Rules.*

5. That, the joint affidavit accompanying the Notice of Motion does not contain a complete record of all the documents in support of the Application, contrary to rule 48 (4) of the Rules.

6. That, the Applicants did not serve the Respondent a copy of their Written Submission (if any) in support of the Application, contrary to rule 106 (7) of the Rules.

Through the services of Alute S. L. Mughwai, learned Advocate, the respondent also filed written submissions in support of the Preliminary Objection. In urging the Court to sustain the first ground of objection, it was submitted that Rule 10 of the Rules was sufficient in itself, but, by also citing section 14 (1) and (2) of the Law of Limitation Act, Cap 89 (LLA) which does not apply to the proceedings in this Court, the whole application is rendered incompetent. It was also submitted that the phrase "*any other enabling provisions of the laws in force*" are empty words which cannot in any case move the Court.

Submitting on the objection that the Notice of Motion does not disclose grounds mandatorily required under Rule 48 (1), Mr Mughwai referred to Form A in the First Schedule to the Rules to reiterate the duty the law imposes on the applicants moving the Court by notice of motion to

state ground on which their motion is based. On mandatory language employed by Rule 48 (1) of the Rules, the learned counsel cited the decision of the Court in **Atlantic Ltd vs. Morogoro Region Cooperative Union (1984) Ltd** [1993] T.L.R. 12 to underscore his point that the applicants' notice of motion is defective for failing to state the ground for relief.

Submitting on the third point of objection the learned counsel pointed out that the instant motion is fatally defective for it violates Rule 30 (1) of the Rules because only Ayoub Bendera appears as a party, whereas the names of the other ten applicants, are missing out from the face of the notice of motion. Placing reliance in the decision of the Court in **Udangwega Bayay & 16 Others vs. Halmashauri ya Kijiji cha Vilima Vitatu and Another**, Civil Application No. 5 of 2010 (unreported), he submitted that the Notice of Motion should bear the names of all eleven applicants who stand to benefit from the extension of time.

On the point of objection contending that the notice of motion was not served on the respondent within the prescribed 14 days, Mr. Mughwai

referred me to the record which shows that it was served on the respondent on 25th September, 2014, which was beyond the 14 days.

Elaborating the respondent's fifth ground of objection contending that the motion has not included some documents in compliance with Rule 48 (4) of the Rules, Mr. Mughwai referred to Annexures B1, B2 and B3 which are referred to in the copy of the joint affidavit. He submitted that the instant motion is defective insofar as these documents were not included in the record of the motion. With regard to the final ground of objection alleging the failure of the applicants to serve the respondent with a copy of their Written Submissions, the learned counsel placed reliance on mandatory language of sub-rules (1) and (7) of Rule 106 of the Rules to pray for dismissal of this motion.

On 14th September, 2014 the applicants filed their joint written submissions in response to the respondent's submissions. Regarding the ground objecting the citation of section 14 (1) and (2) of the LLA to invoke the jurisdiction of the Court, it was conceded that LLA does not apply to govern proceedings before this Court. However, it was pointed out, this

objection has no merit because Rule 10 which the applicants cited alongside section 14 of LLA, is sufficient to save the motion.

Regarding their failure to state the grounds for the relief of extension of time, it was submitted that the joint affidavit which the applicants filed, include the grounds for the relief.

Reacting to the respondent's submissions on the third ground of objection, the applicants do not deny that only the name of one applicant, Ayoub Bendera, appears in their Notice of Motion. They, however, hastened to point out that this defect was cured by their supporting affidavit. Submitting on objection that the respondent was not served with the notice of this motion, the applicants had a different version. In so far as they are concerned, the respondent was served with the notice of motion within time. At any rate, they added, since this ground of objection requires proof, it does not fall within the realm of pure point of law capable of being disposed of at this preliminary stage.

The applicants dismissed off the contention that some documents mentioned in the supporting affidavit were not included in the record of motion. The applicants submitted that since theirs was an application for

extension of time and not main application for revision, the documents that were actually attached were sufficient for purposes of this motion.

The applicants did not consider their failure to file their written submissions on their application for extension of time is so fatal as to dispose of this instant application seeking an extension of time.

At the hearing of the Preliminary Objection the respondent was represented by Mr. Mughwai. All the respondents totaling 11, appeared before me in person and adopted their submissions which they filed in reply to the respondent's submissions.

On reflection, Mr. Mughwai abandoned the first ground of objection which had invited the Court to strike out the motion because of citing Rule 10 which is applicable to move the Court to extend time, together with section 14 of the Law of Limitation Act, which does not apply to proceedings in this Court.

I agree with Mr. Mughwai that this Court was immediately seized with requisite jurisdiction by citing Rule 10 of the Rules. This jurisdiction to extend time was not taken away simply because the applicants in addition cited section 14 of the LLA.

In so far as the remaining second, third, fourth, fifth and sixth grounds of preliminary points of objection are concerned, it is pertinent to observe that this Court has embraced and continues to expound the parameters of preliminary points of objection which were articulated by the the Court of Appeal for Eastern Africa in **Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors Ltd.** [1969] E.A. 696. In **Hezron M. Nyachiya vs. Tanzania Union of Industrial and Commercial Workers and Others**, Civil Appeal No. 79 of 2001 (unreported), this Court reiterated that to be regarded as a preliminary point of objection, the point concerned must raise *"a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion."*

The Court elaborated the space for sustaining preliminary objections in **Tanzania Telecommunications Co Ltd. vs. Vedasto Ngashwa and Four Others**, Civil Application No. 67 of 2009 (unreported) where, the Court highlighted three conditions which a preliminary point of law must satisfy. **First**, the point of law raised must either be pleaded or must arise as a clear implication from the pleadings. **Secondly**, it must be pure point of

law which does not require close examination or scrutiny of the affidavits or counter affidavits. **Thirdly**, determination of such a point of law in issue must not depend on the discretion of the Court. The question whether there are pure points of law, shall guide my determination of the remaining grounds of objection.

I can out rightly dismiss grounds of objection number four; five and six, because these grounds do not raise pure points of law capable of disposing of the instant application without going into the merit. The fourth ground of objection on the failure of applicants' to serve the respondent with their Notice of Motion within the period prescribed under Rule 48 (4) of the Rules does not raise pure point of law in so far as it requires proof. The notice of motion which the applicants filed on 15th May, 2014 indicates that its copy was to be served on the respondent, AICC Arusha. There is no acknowledgment whether it was actually served. But, the applicants have insisted that it was served. Further proof beyond the current pleadings is inevitably needed. This ground is as a result dismissed.

Next, there are two main reasons why I think that the fifth ground of objection which contends failure by the applicants to include documents they mentioned in their supporting affidavit should not detain me. First, unlike the

main application seeking for revision, a motion seeking an extension of time does not prescribe any type of documents to be included in the motion. An applicant seeking an extension of time is free to put across such facts and documents as he thinks fit to show good cause under Rule 10 of the Rules. Secondly, the jurisdiction of this Court under Rule 10 is judicial discretion that is not pegged on any prescribed documents. As the Court said in **Henry Muyaga vs. Tanzania Telecommunication Company Ltd**, BK Civil Application No. 8 of 2011 (unreported), judicial discretion to extend time is unfettered:

The discretion of the Court to extend time under Rule 10 is unfettered, but it has also been held that, in considering an application under the rule, the Courts may take into consideration, such factors as, the length of the delay, the reason for the delay, the chance of success of the intended appeal, and the degree of prejudice that the respondent may suffer if the application is granted.

It is therefore not for the Court to demand any type or number of documents and other facts to establish good cause. Rather, it is up to the party concerned to determine what facts, including documents; that can

move the Court to exercise its unfettered discretion to extend time under Rule 10 of the Rules. The fifth ground is similarly dismissed.

With regard to the sixth point of objection pegged on the failure by the applicants to file written submissions, it seems clear from the decision of the Court in **Eusto Ntagalinda v Tanzania Fish Process Ltd**, MZA Civil Application No. 8 of 2011 (unreported); that the statutory framework of Rule 106 of the Rules and its sub-rules, envisage room for the exercise of discretion by the Court where a party fails to lodge written submissions. Therefore, in light of the room for the Court to exercise its discretion to allow the filing of submissions out of time, no pure point of law can arise from failure to file written submissions. The Court in **Ntagalinda v Tanzania Fish Process Ltd** (supra) clearly saw the judicial discretion when it stated:

*"...Further, as stated earlier, **the issue at hand is the failure to file written submissions within the prescribed period as provided for under Rule 106 (1) of the Rules. While we do appreciate the mandatory nature in which Rule 106 (1) is couched, we are alive to the provisions of Rule 106 (19) which in essence gives power to this Court, in the interest of justice and taking into consideration the***

circumstances of each application, to waive compliance with the provisions of this Rule in so far as they relate to the preparation and filing of written submissions.” [Emphasis added].

The sixth ground of objection is also dismissed.

In their respective submissions on the second ground of objection, the applicants and the respondent, are on common ground that a notice of motion must not only be supported by affidavit, it must also cite the specific rule under which it is brought and also state the ground for the relief sought required under Rule 48 (1) of the Rules.

Although the applicants have submitted that their joint affidavit actually **“reveal the reasons that led the applicants to fail to file their application within time,”** this bold assertion is not supported of any of the nine paragraphs of their joint affidavit. Not a single paragraph of their affidavit mentions the grounds required to support their motion. These paragraphs merely trace the history of their grievance back to how the Deputy Registrar of the Land Division of the High Court (Misc. Labour Application No. 20 of 2012) struck out their application for extension of time to file an application to execute a Decree that was in their favour. The

applicants concentrated on the circumstances which led to their winning that Decree which the Deputy Registrar later struck out. In short, neither their notice of motion, nor their joint affidavit, state the ground for the relief they are seeking from this Court.

The consequences that results from the failure to state the ground for the relief sought are well settled by the Court. In **Ahmed Mbaraka vs. Abdul Hamad Mohamed Kassam and Abdulatiff I. Murukder**, Civil Application No. 23 of 2011 (unreported) the Court considered the scope of Rule 48 (1) and (2) following an objection that the Notice of Motion did not contain grounds on which it is based. The Court stated:

"...failure to include in a Notice of Motion grounds justifying the application being made, a mandatory requirement under the Rules, renders the application incompetent attracting only an order striking it out."

In **Eliya Anderson vs. R.**, Criminal Application No. 2 of 2013 (unreported) the Court is on record that failure to state the grounds for relief sought by way of notice of motion can be cured where the supporting affidavit go ahead to disclose the grounds missed out in the notice of

motion. It is clear to me that the applicants cannot benefit from the authority of **Eliya Anderson vs. R** (supra) because neither their notice of motion, nor their joint affidavit, states the ground for the relief they are seeking.

In the upshot of the above, the preliminary point of objection contending failure to state grounds for relief is sustained. As this ground alone is sufficient to dispose of the matter, the instant application is incompetent and is hereby struck out.

DATED at ARUSHA this 30th of September, 2015.

I.H. JUMA
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL