IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LUANDA, J.A., MASSATI, J.A. And MUGASHA, J.A.)

CIVIL APPLICATION NO. 21 OF 2015

1. **RASHID TWALIB MAKONYORA (ADMINISTRATOR OF THE ESTATE OF THE LATE TWALIB RASHID MAKONYORA)**
2. **AHMAD K. MWILIMA**
3. **JUJU HILALI**

.....APPLICANTS

VERSUS

SALIM TWALIB MAKONYORA (MINOR)
SUING THROUGH ASHURA HAMIS (NEXT FRIEND).....RESPONDENT

(Application from the decision of the High Court of Tanzania at Tabora)

(Rumanyika, J.)

dated the 13th day of May, 2015
in
Land Appeal No. 28 of 2013

RULING OF THE COURT

7th & 9th December, 2015

LUANDA, J.A.:

The High Court of Tanzania (Rumanyika, J.) has overturned the decision of the District Land and Housing Tribunal of Kigoma which declared the above named respondent the winner. The above named applicants are aggrieved with that decision, they are intending to appeal to this Court. They

accordingly not only lodged a notice of appeal but also an application for stay of execution of decree of the High Court.

The application for stay of execution was to come for hearing on 7/12/2015. Three days before the hearing of the application, Mr. Mussa Kassim learned counsel who represented the respondent raised a preliminary objection on two points of law which basically are to the following effect and were raised in the alternative. The first one was that the application is incompetent as the applicant had served the respondent outside the prescribed time of 14 days contrary to Rule 48(4) of the Court of Appeal Rues, 2009 (the Rules). In the alternative to the above, the applicants filed their written submission in support of the application but failed to serve the respondent in time contrary to Rule 106(7) of the Rules.

Arguing the first ground, Mr. Mussa said the application for stay of execution was lodged on 13/7/2015 and he was served on 19/11/2015 a period of more than 4 months. Since in terms of Rule 48(4) of the Rules the same was supposed to be served within 14 days, the services affected beyond the 14 days was not proper.

Turning to the alternative point, Mr. Mussa said the written submissions were filed on 13/7/2015 but served on 20/11/2015 which was beyond the prescribed time of 14 days contrary to Rule 106(7) of the Rules. He accordingly prayed that the application be struck out with costs.

Reacting to the submissions of Mr. Mussa, Mr. Kayaga in the first place agreed that the service in respect of the notice of motion for an application for stay of execution was filed beyond the 14 days, if Rule 48(4) of the Rules were to apply. Mr. Kayaga said the correct applicable Rule is Rule 55(1) of the Rules which states the same to be served within at least two clear days before the hearing. As to the late filing of the written submissions under Rule 106(7) of the Rules he said the Court may use its discretion to waive that requirement.

After an informal discussion with the Court, that Rule 55(1) of the Rules is not applicable under the aforestated circumstances, Mr. Kayaga conceded that the notice of motion was not served upon the respondent within 14 days. He however prayed to the Court to do justice by hearing the application.

Following the concession made by Mr. Kayaga we would have easily made an appropriate order. But we thought it is ideal to explain why we think Rule 48(4) and not Rule 55(1) of the Rules is appropriate.

The said Rules read as follows: -

> *"48(4). The application and supporting documents, shall be served upon the **party or parties affected** within 14 days from the date of filing.*
>
> *55(1). The notice of motion and copies of all affidavits shall be served on all **necessary parties** not less than two clear days before the hearing.*
>
> [Underscoring ours]

Having read the above Rules carefully we are of the settled view that the two are distinct and serve different purposes. Who are **all necessary parties** as opposed to **the party** or **parties affected** as envisaged in those Rules? Our reading and understanding as to the party or parties affected, it refers to the parties to the proceedings. In our case the applicant and respondent. When you refer to all necessary parties it refers to parties who are not parties to the proceedings but their attendance is necessary in order to enable the Court effectually and completely to adjudicate upon the

application in question. The idea behind Rule 55(1) of the Rules is to make sure that any interested party not a party to the proceedings to appear and present his case so that the Court can adjudicate the matter once and for all.

Applying the above interpretation, we were of the view that Rule 55(1) of the Rules does not apply. The appropriate Rule is Rule 48(4). The applicant did not serve the respondent within the prescribed time of 14 days. The application is incompetent. The same is struck out with costs.

It is so ordered.

DATED at **TABORA** this 8th day of December, 2015.

B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

S. E. MUGASHA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL