IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KILEO, J.A., MMILLA, J.A. And JUMA, J.A.)

CIVIL APPEAL NO. 69 OF 2013

MOHAMMED ENTERPRISES (T) LTD.....APPELLANT

VERSUS

CMA CGM TANZANIA LTD.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Bukuku, J.)

dated the 15th day of May, 2013
in
Commercial Case No. 16 of 2011

RULING OF THE COURT

7th & 16th December, 2015

KILEO, J.A.:

Mr. Bernard Mbakileki learned advocate, appeared before us to argue a Notice of Preliminary Objection to the appeal by Mohamed Enterprises Ltd. which he filed on behalf of the respondent on 9/1/2014. The appellant was represented at the hearing of the Notice of Preliminary Objection by Dr. Masumbuko Lamwai and Mr. James Bwana, learned advocates.

Basically, Mr. Mbakileki submitted that the appeal is not maintainable because the appellant did not file a written submission pursuant to rule 106

(1) of the Court of Appeal Rules, 2009 (Court Rules). In support of the argument he referred us to our decision in **Mechmar Corporation (Malaysia) Berhard versus VIP Engineering and Marketing Ltd.** Civil Application No. 9 of 2011, (unreported) where the Court dismissed an application for Review on account of the fact that the applicant had failed to file a written submission in support of the application. In that case the Court observed:

> *".....We could have used our discretion conferred upon us by Rule 106 (19) of the Court Rules,* ***but bearing in mind that each case has to be decided according to its circumstances,*** *we are not convinced that here are exceptional circumstances which would allow us to extend time. Having given due consideration to all the circumstances of the case which has been in the court since 2002, and bearing in mind that justice delayed is justice denied, we are constrained to uphold the preliminary objection raised"* (Emphasis provided).

In response, while conceding that the appellant neither filed a written submission nor applied for extension of time to file the same, Dr. Masumbuko Lamwai argued that the Notice of Preliminary Objection was

not sustainable as it was not a pure point of law. He pointed out that the consequences of non-compliance with rule 106 (1) of the Court Rules are to be found in sub rule (9) which confers a discretion on the Court to dismiss an appeal. The learned counsel, in the circumstances of the case asked us to allow the appellant to file a formal application for extension of time to file the written submission. In support of the prayer Dr. Lamwai referred to rule 2 of the Court Rules which enjoins the Court to have due regard to the need to achieve substantive justice in any particular case. The learned counsel also referred to the decision of this Court in **Leonard Magesa versus M/S OLAM (T) Ltd.** Civil Application No. 117 of 2014 (unreported) where the Court after it had heard a preliminary objection on failure to comply with Rule 106 (1) of the Court Rules allowed the appellant (who was a layman) to file a formal application for extension of time to file a written submission. The Court, in this case like in the **Mechmar** case observed that **it is the set of circumstances in each case that would determine which order the Court would give.** (Emphasis provided).

The matter need not detain us. Having given it due consideration we are of the settled mind that even if the Notice of Preliminary Objection was not sustainable, there is no material before the Court that would justify the

exercise of the Court's discretion under Rule 106 (9) or (19) of the Court Rules in favor of the appellant. Dr. Lamwai asked us to invoke rule 2 of the Court Rules to grant his prayer for extension of time to file the written submission. We think to yield to Dr. Lamwai's suggestion in the circumstances of this particular case would be dangerous as it would water down the mandatory duty Rule 106 (1) imposes on applicants and appellants, to file their written submissions within sixty days after lodging the record of appeal or filing the notice of motion.

In the circumstances we find that the appeal as it stands before us is not maintainable and for this reason we strike it out.

Given the circumstances of the case we give no order as to costs.

DATED at **DAR ES SALAAM** this 08th day of December, 2015.

E. A. KILEO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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