

IN THE COURT OF APPEAL OF TANZANIA  
AT TABORA

(CORAM: MBAROUK, J.A., LUANDA, J.A., And MZIRAY, J.A.)

CIVIL APPLICATION NO. 212 OF 2016

DAVID ZACHARIA KAFULILA..... APPLICANT

VERSUS

1. HASNA MWILIMA
  2. THE RETURNING OFFICER, KIGOMA  
SOUTH CONSTITUENCY
  3. THE ATTORNEY GENERAL
- ..... RESPONDENTS

(Application for amendment of a notice of appeal to the Court  
of Appeal from the decision of the High Court of Tanzania  
at Tabora)

(Wambali, J.)

dated the 17<sup>th</sup> day of May, 2016

in

Civil Appeal No. 2 of 2015

.....

RULING OF THE COURT

10<sup>th</sup> & 12<sup>th</sup> October, 2016

**MZIRAY, J.A.:**

The applicant filed a Notice of Motion under Rule 111 of the Tanzania Court of Appeal Rules, 2009 seeking to amend the Notice of Appeal lodged on 26<sup>th</sup> May, 2016. According to the Notice of Motion the Applicant intends to amend two portions in the Notice of Appeal. **One**, the Court to allow the applicant to remove the cited **Rule 33(1)** of the

Court of Appeal Rules, 2009 (the Rules) which was inadvertently cited and replacing the same with Rule **83(1) of the Rules**. **Two**, to remove the citation by removing the words "*Election Petition No. 2 of 2015*" and replace the same with the words. "*Miscellaneous Civil Cause No. 2 of 2015*".

In response, the respondents filed their respective affidavits in reply in which they resisted the application and in addition to that the second and third respondents raised a preliminary objection consisting of two points to the effect that:-

- i). *The application is untenable in law for want of Notice of Appeal sought to be amended.*
- ii). *The application is bad in law for want of proper citation of enabling provision of the law contrary to Rule 48(1) of the Court of Appeal Rules, 2009.*

During the hearing, Mr. Musa Kassim, learned advocate with full instructions appeared in Court holding brief of Mr. Mohamed

Tibanyendera, advocate for the applicant. The first respondent, Hasna Sudi Mwilima appeared in person unrepresented, and Mr. Gabriel Pascal Malatta, learned Principal State Attorney represented the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. As a matter of convenience and in order to save time and costs we ordered the preliminary objection and the main application be heard simultaneously.

Arguing the first point of objection if we understood Mr. Malatta properly, which we think we did, he said even if the Court will allow the applicant to amend the Notice of Appeal, still the same will remain defective for failure to include the words "*intend to appeal*" and hence did not conform substantially with Form D in the First Schedule to the Rules the subject matter of Rule 83(6) of the Rules.

The learned Principal State Attorney further contended that, since the notice of appeal was drafted not in conformity to Form D in the First Schedule to the Rules, then, the same is defective. To cement his argument the learned Principal State Attorney cited the case of **Petro Nyasa, Julius Nsambi, Pasi Sani and others Vs. Saimon Domela and 3 others**, Civil appeal No. 29 of 2011 (unreported) and that of **The**

## **Nigerian Army Vs Samuel & Others (2013) LPELR – 20931 (SC)**

as authorities to support his argument.

As to the second point of objection, the learned Principal State Attorney pointed out that, the application is bad in law for being brought under wrong provisions of the law. He argued that the applicant ought to have incorporated Rule 48(1) and Rule 50(1) of the Rules. The learned Principal State Attorney forcefully submitted further that by citing Rule 111 alone is insufficient, as it only gives the Court powers to grant the reliefs sought and at any rate the cited rule is not an enabling provision. Furthermore, the learned Principal State Attorney contended that failure to cite Rule 48(1) and Rule 50(1) of the Rules as enabling provisions amounts to non-citation which makes the application incompetent for which, the same should be struck out with costs. He referred this Court to the decisions in the cases of **Duda Dungali V. R**, Criminal Application No. 5 of 2014 and **Bank of Tanzania Vs Said a. Marinda & 30 others**, Civil Reference No. 3 of 2014 (Both unreported).

On his part, Mr. Musa Kassim, learned counsel for the applicant submitting in reply to the first point of objection argued that the

objection is misconceived and has the effect of pre-empting the application before the Court. On the other hand, the learned counsel in response to non-compliance with the prescribed Form D in the First Schedule to the Rules by not indicating the words "*intend to appeal*" was of the view that the omission was of human error which can be cured by amendment, either through formal or informal application by the applicant. As to the 2<sup>nd</sup> point of objection, the learned counsel submitted in reply that Rule 111 is the most relevant and the only enabling provision moving the Court to grant the prayers sought. He pointed out that Rule 48(1) and 50(1) of the Rules are prescribing Rules which sets out how to bring the application of the nature and that non-citing them will not make the application defective. On that basis, he urged the Court to overrule the objections raised with costs.

On her part, the first respondent who appeared in Court in person, unrepresented, had nothing in substance to add. She rather supported in full the submission by Gabriel Pascal Malatta.

We have keenly listened to the arguments brought forward by the parties in respect of the preliminary objections raised and the main application. As a matter of procedure we will have to determine first the

preliminary points of law and if we find that they do not dispose the application then we will discuss the merits of the main application.

It is obvious in terms of the mandatory nature of Rule 83(6) of the Rules that the Notice of Appeal shall substantially be in Form D to the Rules and that the same shall be signed by or on behalf of the appellant.

The contested Notice of Appeal on the record reads:-

*NOTICE OF APPEAL pursuant to Rule 33(1) of the Tanzania Court of Appeal Rules, GN No. 368 of 2009. TAKE NOTICE that DAVID ZACHARIA KAFULILA being dissatisfied with the decision of Hon. Judge Wambali given at Kigoma on the 17<sup>th</sup> day of May, 2016 intends to (sic) the Court of Appeal of Tanzania against the whole decision.*

We have closely examined the Notice of Appeal in question. Surely, as correctly submitted by Mr. Malatta, learned Principal State Attorney the words "*intends to appeal*" are missing. These are the catch words in the Notice of Appeal at hand in which case then, their omission is

fatal. Without these words, in our view, one can venture to think that the person who filed the Notice of Motion whether he really intend to appeal. So, even if we allow the applicant to amend the two portions explained above without deploying the *words "intends to appeal"* the Notice of Appeal will remain defective. A defective notice of appeal will render the appeal defective.

Much as we understand that each case is to be determined on its own set of circumstances and facts and notwithstanding the fact that the Notice of Appeal does not institute on appeal like in criminal matters, but we seriously think that the basic requirements of Rule 83(6) of the Rules should be complied with, and if the Notice of Appeal does not substantially comply with the mandatory requirement of this rule, is in our view invalid and an appeal or application based on it is incompetent. However, we have to caution that each case is to be determined on its own set of circumstances and facts. Since, there must be a Notice of Appeal lodged in accordance with Rule 83(6) of the Rules and this being not the situation in the case at hand, therefore, on the basis of the decision in the case of **Lous Augustine Mbuya V. Anthony John**

**Kimatare & another** Misc. Civil Application No 3 of 2013 (unreported), in which it was stated that if the notice of appeal is defective there would be no appeal for which, both the application to amend the Notice of Appeal and the appeal itself are to be struck out for being incompetent. We therefore in the circumstance sustain the 1<sup>st</sup> ground of objection.

On the second ground of objection, we are settled that both Rule 48 (1) and Rule 50 (1) are on procedural aspect on the mode of bringing an application for leave to amend a document in Court. The two Rules by their construction are not the enabling provision to bring an application for amendment of a document. The applicable rule which governs this Court's power to amend a Notice of Appeal is Rule 111. This Rule essentially is the one which confer this Court with the jurisdiction to entertain the application. Rule 48 (1) and Rule 50 (1) of the Rules will only supplement Rule 111 and if they are not cited, will not render the application to be defective on ground of non-citation. The distinction between an enabling law or rule and a prescribing rule was well elaborated in the case of **Hassan Sunzu vs Ahmad Uledi**, Civil



Reference No. 8 of 2013 (unreported). We therefore see no merit to the second limb of the preliminary objection, the same is dismissed.

Having sustained the first ground of objection, we think that it is the end of the matter and there is no need to discuss the merits of the application. Accordingly, we strike out the application with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

**DATED** at TABORA this 12<sup>th</sup> day of October, 2016.

M.S. MBAROUK  
**JUSTICE OF APPEAL**

B.M. LUANDA  
**JUSTICE OF APPEAL**

R. E. S. MZIRAY  
**JUSTICE OF APPEAL**

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

  
E.F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**