

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

CIVIL APPLICATION NO. 161 OF 2015

MOHAMED ENTERPRISES (T) LTD APPLICANT

VERSUS

MUSSA SHABANI CHEKECHEARESPONDENT

**(Application for extension of time within which to lodge a
supplementary record of Appeal in Civil Appeal No. 64 of
2015 from the decision of the High Court
of Tanzania at Tabora)**

(Mkasimongwa, J.)

dated on 27th day of November, 2014

in

Civil Appeal No. 6 of 2009

.....

RULING

19th & 25th October, 2016

MZIRAY, J.A.:

Before me is an application by notice of motion which was brought under Rule 4(1), 10, 96(6), 106 (1) and 106(9) of the Court of Appeal Rules, 2009 GN 368 of 2009. It is supported by an affidavit of Dr. Masumbuko Roman Mahunga Lamwai, learned counsel for the applicant. He is moving the Court for the following orders:-

- (1) The Honourable Court may be pleased to grant the Applicant an extension of time within which to prepare and lodge a supplementary record of Appeal in Civil Appeal No. 64 of 2015.
- (2) The Honourable Court may be pleased to grant the Applicant an extension of time within which to lodge written submissions in support of its appeal in Civil Appeal No. 64 of 2015.

The application is strongly opposed by the respondent through the services of Mr. Mtaki, learned advocate. At the hearing of the application, Dr. Masumbuko Lamwai, learned advocate appeared for the applicant whereas Mr. Mugaya Mtaki, learned advocate represented the respondent. Dr. Lamwai submitting in support of his application started by adopting his written submissions. He further submitted that the Notice of Appeal in Civil Appeal No. 64 of 2015 was prepared and filed by Mr. Kayaga who was the advocate in the conduct of the Applicant's defence in Tabora District Registry High

Court Civil Case No. 6 of 2009. He submitted that subsequent to the lodging of the Notice of Appeal, he was instructed to prepare the record of appeal and that Mr. Kayaga handed him the copies of judgment, decree and proceedings two weeks before the expiry of the period of filing the appeal.

However, he noticed that the certificate of delay was not dated and signed. Also page 11 of the judgment was missing. The learned counsel submitted that despite the glaring defects, he prepared and filed the record of appeal in time knowing that he had 14 days within which to file a supplementary record containing the missing page of the judgment and undated certificate of delay in terms of Rule 96(6) of the Rules. Meanwhile, the learned counsel wrote a letter to the Deputy Registrar requesting for the missing page of the judgment and the proper certificate of delay but the same was not supplied to him within 14 days as he expected. He was supplied with the same on 28th July, 2015. On that basis therefore the applicant seeks

extension of time to file the supplementary record and written submissions.

On the other hand, Mr. Mtaki resisted the application by first adopting his written submission. He submitted that the application is incompetent in that, it has been supported by defective affidavit. He pointed out the defects, that at paragraph 3 of the affidavit, the Applicant does not show when Civil Appeal No. 64 of 2015 was filed. Also, since it was deponed at paragraph 6 of the affidavit that it was the Manager who informed him about the misplaced court record, then the Manger or Deputy Registrar ought to have deponed to substantiate the same, otherwise that would be hearsay. The other defect pointed out was that the verification was defective. The learned counsel stated that in the affidavit it was averred that all what was stated was in his personal knowledge while some of information was supplied to him from the Manager as indicated in paragraph 6 of the affidavit in support of the application. This defeated the issue of personal knowledge, he argued. In this, he referred the

court to the case of **Phantom Modern Transport (1985) Ltd Vs D.T. Dobbie (Tanzania) Ltd, Civil Appeal Reference No. 15 of 2011 and 3 of 2002** (unreported). Basing on that the learned counsel argued that the supplementary record can not cure the defect. To support his argument he cited the case of **Shamsa Manji Vs Betty Richard, Civil Application No. 13 of 2009** (unreported).

In addition to that the learned counsel argued that if the applicant was given an incomplete record, he should have not filed the appeal and in this regard he cited the Case of **AG & another V Dr. Aman Walid Kabouru**, Civil Application No. 59 of 1994 (unreported).

In his rejoinder submission, Dr. Lamwai reiterated his submission in chief and added that the documents in relation to Civil Appeal No. 64 of 2015 are already in Court in which case then, there was no need to have mentioned it in his affidavit. However, paragraph 5 read together with paragraph 4 of the applicant's affidavit shows that

the appeal was to be filed by 15/6/2015. Apart from that, the learned counsel submitted that since the first limb of objection by Mr. Mtaki, learned counsel require further proof, then that defeats the purpose of preliminary objection.

As to the contents of paragraph 6 of the affidavit, the learned counsel submitted that there is nowhere in the paragraph suggesting that he was informed by the Manager. He submitted that he was the one who instructed the Manager to make a follow up of the matter in court and that the letter, "*annexture A 4*" from the Deputy Registrar was in response to his request to the missing document. Under the circumstance, the learned counsel submitted that the argument by Mr. Mtaki, learned counsel on the point is without merit.

The learned counsel however distinguished the decision in Shamsa Manji's Case (*supra*) and said that the case was not applicable in the circumstance of this case. He pointed out that in that case the application was to remove the whole record while in our case at hand, the

application is seeking extension of time to file supplementary record. The learned counsel argued that the most relevant recent decision applicable is that of this Court in **National Housing Corporation and two others v. Jing Lang Li**, Civil Application No. 180 of 2016(unreported).

On that basis therefore he prayed that his application be granted.

I have carefully considered the submissions by the learned counsels both in support and against the application. With due respect, the first limb of the preliminary objection depended on the ascertainment of the fact, whether Civil Appeal No. 64 of 2015 was filed on 15/06/2015 or not, this in my humble considered view did not meet the test of a preliminary objection as laid down in **Mukisa Biscuits Manufactories Ltd vs Western Distributions Ltd** [1969] E.A. 696 which decision has been followed by this Court in its several decisions that a preliminary objection can only be valid if it is focused on

purely point of law and not otherwise. That being the position, the argument by Mr. Mtaki learned counsel on the first limb of the objection must fail. The same is without merit.

With regard to the second limb of the objection, I have carefully gone through the contents of paragraph 6 of the affidavit in support of the application. Surely, there is nowhere in the paragraph suggesting that the deponent was informed by the applicant's manager about the misplaced file as alleged by Mr. Mtaki. It is stated in that paragraph that despite instant follow ups by the manager they did not receive the missing documents because the original file had been misplaced. It is further stated that the Deputy Registrar wrote him a letter in response to his letter dated 11th June, 2015 informing him that the missing documents were ready for collection and that he promptly caused them to be collected from the court and transmitted to him on 28th July, 2015.

According to those paragraphs, it appears that the deponent had knowledge of what was taking place. Thus, the complaint that the averment by the deponent was of hearsay has no basis. The second ground of objection also fails.

Coming to the application, I wish to be guided by the decision in the case of **The National Housing Corporation & two others v. Jing Lang Li**, Civil Application No. 180 of 2016 where the single justice of this Court observed:-

"..... the respondents in appeals have more latitude under Rule 99 for filing supplementary record of appeal where the record of appeal earlier filed by the appellant concerned is insufficient or defective. The appellants have very limited latitude of fourteen (14) days under Rule 96(6) within which to file supplementary record of appeal."

Dr. Lamwai submitted that having been handed over with the copies of judgment, decree and proceedings two

weeks before the expiry of the period of filing the appeal, he discovered that the Certificate of Delay issued was neither dated nor signed and also, that page 11 of the judgment was missing. Despite the discovered anomaly he prepared and filed the record of appeal believing that by virtue of Rule 96(b) of the Rules, he had 14 days to file supplementary record in which the proper documents will be included and that on 11th June, 2015 he wrote a letter to the Deputy Registrar of The High Court at Tabora requesting for the missing page and proper Certificate of Delay. But, he was availed the same on 28th July, 2015 after the period of 14 days for the appellant to file supplementary record of Appeal had expired.


From that explanation, I am satisfied that there is sufficient reason for extending time. The application is therefore allowed. The applicant should prepare and file a supplementary record of appeal in Civil Appeal No. 64 of 2015 as well as the written submission in support of the

appeal within 21 days from the date of this ruling. Costs to be in the cause.

DATED at **TABORA** this 23rd day of October, 2016.

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