

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

CIVIL APPLICATION NO. 6 OF 2014

FESTO SUDI APPELLANT

VERSUS

IHOMBE VILLAGE COUNCIL RESPONDENT

**(Application for extension of time from the decision of the High Court of
Tanzania at Mbeya)**

(Mroso, J.)

Dated 9th April, 2003

In

Civil Application No. 8 of 2001

.....

RULING

13th & 18th April, 2016

MGASHA, J.A.:

This is an application by notice of motion under Rule 10 of the Court of Appeal Rules, 2009 (the Rules). The applicant is seeking extension of time to apply for a reference against the "*ruling of the Court dated 9th April, 2003 by Mroso, J. in Civil Application No. 8 of 2001*". The affidavit of Festo Sudi, the applicant is in support of the application.

The applicant was unrepresented and Mr. Mika Mbise learned counsel represented the respondent.

When the matter was called on for hearing, Mr. Mika Mbise, learned counsel for the respondent rose to argue three points of preliminary objection notice of which had earlier on been filed. The points of objection are to the effect that:

- (1) The Notice of Motion offends mandatory provisions of Rule 48(1) and (2) of the Tanzania Court of Appeal Rules, 2009.*
- (2) The application offends mandatory provisions of Rule 60(1) of the Tanzania Court of Appeal Rules, 2009.*
- (3) The affidavit in support of Notice of Motion is invalid in that it contains hearsay and inadmissible evidence from undisclosed source."*

Submitting in elaboration of the three points of preliminary objection Mr. Mika Mbise was brief and to the point. **Firstly**, he argued that the application is not competent as the Court is not properly moved because the applicant has not cited rule 60(1) of the Rules, which is a specific provision dealing with reference while the cited rule 10 is a provision of general

application. Mr. Mbise was of the view that, for the Court to be properly moved, the applicant ought to have cited both rules failure of which rule 48(1) is violated. **Secondly**, he argued that the notice of motion is not substantially in form 'A' as the applicant indicates to seek reference against the decision of Mroso, J. instead of Mroso, JA. Besides, it is not clear if the applicant intends to move the Court or a single Judge. **Thirdly**, there is no proper affidavit in support of motion because paragraph 5 of the affidavit is hearsay because the applicant's deposition that the Court Clerks informed him about the withdrawal is not supported by the affidavit of any of the clerks. As such, he urged the Court not to rely on hearsay which lacks evidential value. To support this ground he cited **Civil Application No. 7 of 2007 between JESTINA GEORGE MWAKYOMA and MBEYA-RUKWA AUTOPARTS & TRANSPORT LIMITED.**

On the other hand, the applicant resisted the preliminary objection on ground that, the notice of motion does not offend the law and that, what is deposed by the applicant in his affidavit is not hearsay evidence but the averments are from the applicant's own knowledge and belief. Furthermore,

he lamented to be a lay person but he is aware of a right of appeal because he is aggrieved. Thus, having nothing useful to add he left the matter to be determined by the Court.

I shall commence my discussion on the first point of objection which in essence hinges non citation of rule 60(1) of the Rules in addition to the already cited rule 10 of the Rules which Mr. Mbise learned counsel views as a provision of general application and when solely cited it does not suffice to properly move the Court.

In an application for extension of time, where the applicant has demonstrated good cause, the Court is warranted to exercise judicial discretion under rule 10 which states as follows:

*"The Court may, **upon good cause shown**, extend the time limited by these Rules or by any decision of the High Court or tribunal, **for the doing of any act authorized or required by these Rules**, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be*

construed as a reference to that time as so extended."

In HENRY MUYAGA vs. TTCL, Application No. 8 of 2011 (unreported)
the Court interpreted judicial discretion among other things, as follows:-

"The discretion of the Court to extend time under rule 10 is unfettered...."

Rule 48(1) of the Rules categorically states:

*"Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, every application to the Court shall be by notice of motion supported by affidavit, **it shall cite the specific rule under which it is brought** and state the ground for the relief sought"[Emphasis supplied].*

In **JOHN DAVID KASHEKYA VS THE ATTORNEY GENERAL, CIVIL APPLICATION NO. 1 OF 2011**(unreported), the Court observed among other things that:

"There is now a requirement to cite a specific rule under which an application is made. It is no longer a question of practice of the Court but a requirement

of the Rules. The current rule 10 is dealing with applications for extension of time."

In the light of the stated position of the law, an application seeking reference to the Court against the decision of a single Justice need not cite rule 60(1) of the Rules because it states as follows:

"Every application other than an application included in sub rule (2) shall be heard by a single Justice save that application may be adjourned for determination by the Court."

The cited sub-rule creates the mandate of a single Justice to determine applications not falling under sub-rule (2). The provision is not an enabling provision to be invoked by one seeking extension of time to file reference against the decision of a single justice. In my considered view Mr. Mbise learned counsel, cited rule 60(1) out of context and the first preliminary objection is unmerited and it is hereby dismissed.

As to the second limb of objection on a point of law, Mr. Mika Mbise correctly submitted that, the Notice of Motion is in violation of rule 48(2) of the Rules which requires:

"A notice of motion shall be substantially in the Form A in the First Schedule to these Rules and shall be signed by or on behalf of the applicant."

One of the essential prerequisites is the identity of the matter which is a subject of the intended application and in this particular matter, stating the Justice who determined the matter against which the intended reference is sought. In the current application Notice of Motion indicates as follows;

"Application for extension of time to apply for reference against the Ruling of this Court. Hon. Mroso, J in Civil Application No. 8 of 2001."

The Ruling which is annexed to this application clearly shows that, the impugned Ruling was determined by Mroso Justice of Appeal and not as Judge of the High Court as it is purported by the applicant in the Notice of Motion. In this regard, can it be safely said that, the Notice of Motion has substantially complied with Form A of the First Schedule to the Rules?

The answer is in the negative as it was reiterated in the case of **DPP VS ACP ABDALLAH ZOMBE AND 8 OTHERS, CRIMINAL APPEAL NO 254 OF 2009**. The respective appeal was preceded by a notice of appeal indicating

that the trial Judge was Mr. Justice Massati, Justice of Appeal. The Court observed that, it was erroneous for the DPP in an appeal before the Court to indicate that she was appealing against the decision of the Justice of Appeal because Justice Massati decided the case in his capacity as Justice of Appeal as shown in the notice of appeal. The Court further stated that:

"It was accordingly grave error in the law for the appellant to lodge in the Court a notice of appeal purporting to institute an appeal against judgment of "Honourable Massati, the Justice of Appeal". Such a judgment, we firmly believe, does not exist, and accordingly a notice of appeal was incurably defective. The DPP ought to have lodged notice of appeal clearly indicating that he was instituting an appeal against the Judgement of Massati, JK. So far, there is no such notice of appeal before us..... As long as the notice of appeal on record is purporting to institute an appeal against a non-existent judgment, it is incurably defective and cannot..... Being incurably defective we find it incapable of instituting

a competent appeal..... We hold that there is no appeal....The purported incompetent appeal is accordingly struck out....”

I fully subscribe to the above decision. Since Civil Application No. 8 of 2001, was determined by Mroso as Justice of Appeal, the decision reflected in the Notice of Motion does not exist and accordingly the Notice of motion is not competent. Under the circumstances, I have no option but to sustain the second leg of the Preliminary Objection. The Notice of Motion is incompetent and, I hereby strike it out with costs. Having reached this conclusion, it is not necessary to determine the third ground of complaint.

DATED at MBEYA this 14th day of April, 2016.

S.E.A. MUGASHA
JUSTICE OF APPEAL

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




E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL