

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 158 OF 2015

MOHAMED SALMIN APPLICANT

VERSUS

JUMANNE OMARY MAPESA RESPONDENT

**(Application for extension of time within which to lodge an
Application for revision from the Judgment of the
High Court of Tanzania at Dar es Salaam)**

(Kente, J.)

dated the 22nd day of November, 2012

in

Misc. Application No. 7 of 2012

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RULING

1st Dec. 2015 & 10th March, 2016

MMILLA, J. A.:

The applicant, Mohamed Salmini who is being represented by Dr. Masumbuko Lamwai, learned advocate, filed Misc. Civil Application No. 43 of 2009 before the High Court of Tanzania at Dodoma praying for extension of time within which to file an appeal to that Court against the decision of the District Court of Dodoma in Civil Case No. 27 of 2003. The High Court (Shangali J) dismissed the application with costs after it found

that the applicant failed to show sufficient cause for the delay. That decision aggrieved the applicant. He lodged in that same Court Misc. Civil Application No. 43 of 2009 for the leave to appeal to the Court of Appeal of Tanzania against that decision. On 22.11.2012, the High Court (Kwariko J) struck out that application for being incompetent. The applicant was once again aggrieved. He filed an application for revision intending to challenge that decision. However, upon realizing that he was out of time to lodge an application for revision before this Court, he preferred the present application, seeking this Court's indulgence to grant him an order for extension of time. This application is by way of notice of motion made under section 11 of the Appellate Jurisdictions Act Cap.141 of the Revised Edition 2002(**the AJA**), Rules 10 and 60 (1) of the Tanzania Court of Appeal Rules, 2009 (**the Rules**). It is supported by an affidavit sworn by the applicant.

The notice of motion has two main grounds; **one** that, the applicant's earlier application for revision to wit, Civil Application No. 4 of 2013, was struck out for being incompetent but denies that he was negligent, and **two** that, the applicant was sick hence he could not give instructions to his advocate in time.

On the other hand the respondent, Jumanne Omary Mapesa through the services of R. K. Rweyongeza & Co. Advocates, contested the application by lodging an affidavit in reply and also, a notice of preliminary objection to the effect that the notice of motion is bad in law for citing some of inapplicable provisions of law.

When the matter was called on for hearing, Mr. Deus Nyabiri, learned advocate, who represented the respondent, prayed to withdraw the preliminary objection and preferred to continue with the hearing of the main application. Dr. Lamwai had no objection. In the circumstances, the Court granted the prayer and the preliminary objection was marked withdrawn.

Notwithstanding the fact that Mr. Nyabiri has withdrawn the preliminary objection he had earlier on raised, I find that it is appropriate to point out in the passing that the provisions of section 11 of the AJA and Rule 60 (1) of the Rules are irrelevant and/or cited out of context because they do not confer power to the Court to extend time in which to still file an application for revision. Had they been the only provisions relied upon, I would not have hesitated to strike out this application for non-citation of the enabling provision as contemplated under Rule 48 (1) of the Rules.

Fortunately however, there was also cited Rule 10 of the Rules which is the enabling provision.

However, before submitting on the main application, Dr. Lamwai informed the Court that in terms of Rule 106 (1) of the Rules he was required to have had filed the written submissions in respect of the application within the period of sixty (60) days after the filling of the notice of motion. He submitted however, that he did not comply with that requirement because he was very much involved in the High Court Sessions at Dar es Salaam which were conducted under the program of **"Big Results Now."** In the premises, he asked the Court to invoke its powers obtaining under Rule 106 (19) of the Rules and waive such a requirement and allow him to proceed in the absence of the written submissions.

In response to Dr. Lamwai's request, Mr. Nyabiri opposed the prayer because according to him, for the Court to invoke Rule 106 (19) of the Rules, it must be satisfied that **"exceptional circumstances"** exist. He contended that in the circumstances of this case, there was none. He submitted further that the allegation by Dr. Lamwai that he was busy with the High Court Sessions at Dar es Salaam is unfounded because he did not

furnish evidence to that effect. He contended that even Rule 4 (2) (b) of the Rules cannot apply for the same reasons. He therefore invited the Court to invoke Rule 106 (9) of the Rules and dismiss the application with costs.

In a brief rejoinder, Dr. Lamwai submitted that since this is an oral application, he could not prepare the documentary evidence to support his allegations. He also said that Rule 4 (2) (b) of the Rules may be applied by the Court either on its own motion or where a party so requests. Dr. Lamwai submitted in the alternative that if the Court may think otherwise, they be granted an order extending time for his client to file the written submissions.

After carefully considering the rival submissions of the advocates for the parties, I am convinced that resolve of the matter necessitates revisiting the provisions of Rule 106 (1), (9) and (19) of the Rules. To begin with, Rule 106 (1) thereof **mandatorily** requires the applicant to file the written submissions in support of his application within 60 days after the filing of the notice of motion. That Rule provides that:-

*"A party to a civil appeal, application or other proceeding, **shall** within sixty (60) days after lodging the record of appeal or filing the Notice of Motion, file in the appropriate registry a written submission in support of or in opposition to the appeal or the cross-appeal or application, if any, as the case may be."*[Emphasis provided].

Where the applicant fails to comply with that requirement and there is no any application of extension of time preferred, the Court may, under sub-rule (9) thereof, dismiss the application. Sub-rule (9) reads as follows:-

"Where the appellant files the record of appeal or lodges the notice of motion, and fails to file the written submissions within the 60 days prescribed under this rule and there is no application for extension of time within which to file the submissions, the Court may dismiss the appeal or application."

Dr. Lamwai has admitted that they did not file the written submissions, so also that they did not apply for an extension of time. He has asked the Court to invoke its discretion under Rule 106 (19) of the Rules and waive the requirements under Rule 106 (1) thereof.

Certainly, the Court has discretion under Rule 106 (19) of the Rules to waive the requirement under Rule 106 (1) of the Rules. However, as correctly submitted by Mr. Nyabiri, the Court can only exercise the discretion under that sub - rule to waive the requirements under Rule 106 (1) thereof if "**exceptional circumstances**" are shown. Rule 106 (19) of the Rules provides that:-

*"The Court may, **where it considers the circumstances of an appeal or application to be exceptional, or that the hearing of an appeal must be accelerated in the interest of justice,** waive compliance with the provisions of this Rule in so far as they relate to the preparation and filing of written submissions, either wholly or in part, or reduce the time limits specified in this Rule, to such extent as the Court may deem reasonable in the circumstances of the case."*[Emphasis provided].

It is obvious from the provision that whether or not to exercise the discretion there-under is dependent upon the party seeking such chance to show that there were "**exceptional circumstances**" which precluded him/her from doing what ought to have been done, or where "**the**

hearing of an appeal and/or application must be accelerated in the interest of justice."

In the case of **Mechmar Corporation (Malaysia) Berhard v. VIP Engineering and Marketing Ltd**, Civil Application No. 9 of 2011 CAT (unreported) the Court declined to exercise its discretion under sub-rule (19) of Rule 106 of the Rules because there was no exceptional circumstances for the Court to consider. The Court observed that:

*"...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 there 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 added].*

See also the case of the case of **Mohamed Enterprises (T) Ltd. v. CMA CGM Tanzania Ltd**, Civil Appeal No. 69 of 2013, CAT (unreported).

In this case, Mr. Nyabiri contended that his learned friend failed to establish that any **"exceptional circumstances"** existed because he failed to produce evidence to support his allegations that he was busy with the High Court sessions at Dar es Salaam. I hasten to say that I agree with him.

Though it is certain that Dr. Lamwai's application to waive the requirement under Rule 106 (1) of the Rules has been made orally, still he ought to have come up with some evidence to support his allegation that he was busy with High Court Sessions under the "Big Results Now" program because he knew he was going to raise such an excuse. Nothing could have barred him from producing in Court evidence to that effect in order to fortify his argument. So also, that he did not establish that the hearing of this application needed to be accelerated in the interest of justice. To have not done so clearly entitles the Court to decline to exercise the discretion under Rule 106 (19) of the Court Rules.

I further agree with Mr. Nyabiri that even Rule 4 (2) (b) of the Rules cannot apply for the same reasons that the Court cannot depart from its usual practice without cause. Dr. Lamwai ought, as aforesaid, to have

assigned reasons for moving the court to invoke the discretion under that Rule too. I am saying there is no sound reason assigned.

In the upshot, the application is struck out under Rule 106 (9) of the Rules for failure to comply with Rule 106 (1) of the Rules. Costs provided to the respondent.

DATED at DAR ES SALAAM this 8th day of March, 2016.

B. M. MMILLA
JUSTICE OF APPEAL

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




E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL