IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPLICATION NO. 134 OF 2015

TANZANIA UNIFORMS AND CLOTHING

CORPORATION LIMITED.....APPLICATION

VERSUS

1. **NIRMAL t/a BHOGAL METAL ENGINEER**
2. **SITEL SINGH**

.....RESPONDENTS

(Application for extension of time to institute an application for revision from the decision of High Court of Tanzania at Dar es Salaam)

(Longway, J.)

Dated the 19th day of August, 2009

in

Land Case No. 41 of 2006

RULING

26th February & 4th April, 2016

MWARIJA, J.A.:

The applicant has by a notice of motion, brought this application seeking to be granted extension of time to file an application for revision of the decision in Land Case No. 41 of 2006 passed on 19/08/2009 by the High Court of Tanzania (Land Division), at Dar es Salaam. The application is supported by the affidavit of the applicant's Advocate, Mr. Benjamin Mwakagamba.

When the application was called on for hearing, the applicant was represented by Mr. Benjamin Mwakagamba, while Mr. Julius Kalolo Bundala, learned counsel appeared for the respondents. Before the matter proceeded to hearing, Mr. Mwakagamba raised an issue concerning compliance with rule 106 (10) of the Tanzania Court of Appeal Rules, 2009 (the Rules). He submitted that after he had lodged the application, he filed his written submission in support thereof in compliance with rule 106 (1) and thereupon served a copy to the learned counsel for the respondents. He contended however, that the respondents have not served him with a copy of a reply submission as required by a sub-rule (10) of rule 106. He argued therefore that the application should proceed *ex parte* under rule 106 (10) because of the respondents' failure to file a reply to the applicant's written submission.

In reply, although he started by expressing his discontent with the move taken by the applicant's counsel to raise the point at the hearing stage instead of raising it earlier as a preliminary objection, Mr. Kalolo Bundala opposed the prayer that the application should be heard *ex parte*. He argued firstly, that even if the respondents did not file written submission in reply to the applicant's written submission, the omission is

not fatal because the Court has discretion to proceed *ex parte* or otherwise. He argued further that the effect of a failure to comply with the requirement of filing written submission differs between the applicant and the respondent. That, he said, is apparent form the provisions of rule 106 (10) which vest the Court with discretion to proceed *ex-parte* or otherwise when the respondent fails to comply with rule 106 (10). Mr. Kalolo Bundala went on to argue that in some cases, the Court has taken the position that where a party fails to file written submission and the omission did not prejudice the other party, the omission would not affect the party's right to be heard. In addition, he relied on the provisions of Art 107 A (1) (e) of the Constitution of the United Republic of Tanzania which enjoins the Court to dispense justice without being unduly tied up with technicalities.

Secondly, it was the learned counsel's submission that he actually filed his reply submission under rule 34(1) of the Rules. He contended that the written submission filed under that provision serves the same purpose as that which is filed under rule 106 of the Rules.

In rejoinder, Mr. Mwakagamba argued that since filing of reply submission is a mandatory requirement, he raised that point so that it could be established whether or not the requirement had been complied

with by the respondents. For that reason, he argued, there was nothing irregular in raising it at the hearing stage of the application because the matter could even be raised by the Court *suo motu* so as to ascertain whether or not the requisite procedure has been complied with before it proceeded to hear the application. On the effect of non-compliance with rule 106(10), the learned counsel argued that the omission is fatal because filing of reply submission is a mandatory requirement. On that stance, he submitted that the respondent cannot resort to Art. 107 A (e) of the Constitution.

As to the submission that the respondents have complied with the requirement of filing reply submission, Mr. Mwakagamba argued that the submission made under rule 34 (2) does not serve the purpose envisaged under rule 106(10). He argued further that although the Court has discretion to proceed to hear the application inter parties, that discretion must be exercised judicially.

The issues which arise from the point raised by the learned counsel for the applicant are not complex. They are, firstly whether or not the respondents have filed written reply to the applicant's written submission in support of the application and secondly, if they have not done so, whether

or not the application should proceed *ex-parte*. Both learned counsel have sufficiently addressed the Court on the two issues. The fact that the point was raised at the hearing of the application has not, therefore prejudiced the respondent.

With regard to the first issue, the contention by Mr. Kalolo Bundala is that by filing their written submission under rule 34 (2), the respondents duly complied with the requirement of rule 106(10). I do not, with respect, agree with that argument. As argued by Mr. Mwakagamba, the two provisions; rules 34 and 106 of the Rules serve different purpose. Whereas rule 34 provides for matters relating to filing of list of authorities which an advocate intends to rely on at the hearing of an appeal or application, rule 106 provides for matters relating to filing by an appellant or applicant of written submission in support of the appeal or application and filing by the respondent, of reply submission thereto. Rule 34(2) relied on by the respondent's counsel states as follows:

"34 – (1).....

(2) The written submissions in respect of appeal or application shall be accompanied by a list of authorities which shall be –

(a) In the case of an appeal, a minimum of eight copies or such other number as the circumstances of the case may require.

(b) In the case of an application a minimum of four copies or such other number as the circumstances of the matter may require; and

(c) The submission shall be lodged at least forty eight hours before the appeal or application is due to be heard."

On the other hand rule 106 (10) provided as follows:

"106 – (1) – (9) .....

(10) where the respondent who has been served with a copy of the submission of the appellant or applicant fails to file ***a reply*** *within thirty days prescribed under this rule and no extension of time has been*

sought, the Court may proceed to determine the appeal or application ex-parte "[Emphasis added].

It is clear from the two provisions that whereas what is envisaged under rule 106 is **reply submission,** rule 34 stipulates the requirement that the written submissions in respect of an appeal or application must be accompanied by a list of authorities and that such written submission accompanied by list of authorities in a specified number of copies, must be filed within fourty eight hours before the date of hearing the appeal or application.

The written submission relied upon by the learned counsel for the respondents is titled

"RESPONDENTS' SUBMISSION IN SUPPORT OF LIST OF AUTHORITIES (Under Rule 34 (2) of the Court of Appeal Rules, GN 368 of 2009)".

Although, in my consider view, that title may not be correct because, as stated above, rule 34 (2) requires the written submission to be accompanied by a list of authorities, not that a written submission must be

filed in support of that list, the contents of the document do not show that the submission is a reply to the written submission filed by the applicant's counsel. For these reasons therefore, I find that the respondents have failed to comply with the requirement of filing reply submission. The answer to the first issue is thus in the negative.

With regard the second issue, the position, as submitted by Mr. Kalolo Bundala is that despite the omission by the respondents, the Court has jurisdiction to decide to proceed *ex-parte* or otherwise. Rule 106(10) as reproduced above which applies to a respondent is, like sub rule (1) of rule 106 which applies to an applicant, permissive, not mandatory. As argued by the respondent's counsel, there are decisions in which the Court exercised its discretion under the latter provision and ordered the hearing to proceed inter parties despite the appellant's failure to file written submission under r. 106 (1). In the case of **Khalid Mwisongo v. Ms. Uniforms (T) Ltd,** Civil Appeal No. 56 of 2011, the respondent had raised a preliminary objection to the effect that the appeal should be dismissed under rule 106 (9) because of the appellant's failure to file written submission. The Court held as follows:

"As the failure to file a written submission did not prejudice the case of either party, we find no merit in the preliminary objection."

There are however, other cases which were dismissed on the ground that the failure to file written submission is a fatal omission. (See for example. **Mechamar Corporation (Malaysia) Benhard v. VIP Engineering and Marketing Ltd ,** Civil Application No. 9 of 2001.) With regard to the respondents' failure to file reply submission, in the case of **Geita Gold Mining Limited v. Twalib Ally**, Civil Application No. 14 of 2012, the Court granted the applicant's prayer to proceed *exparte* under rule 106 (10) after the counsel for the respondent had failed to give reasonable explanation for failure to comply with the requirement of filing reply to the applicant's written submission.

In the application at hand, the issue is whether the Court should exercise its discretion and order that the matter be heard inter parties despite the respondent's failure to file reply submission. Having considered the circumstances of the case, I am of the settled view that there is no material upon which the Court's discretion can be exercised. Apart from his argument that the requirement of filing reply submission

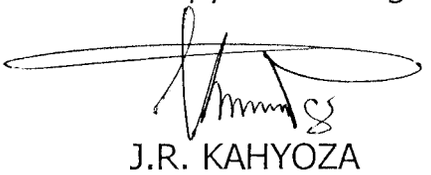
was complied with, the argument which I have declined to agree with, the learned counsel did not make any submission stating the grounds for his prayer that the application be heard inter parties notwithstanding the respondents' failure to comply with the mandatory requirement of filing reply submission. As argued by Mr. Mwakagamba, although the Court has discretion, that discretion must be exercised judicially.

On the basis of the reasons stated above, since the respondents have failed to file reply submission, the application shall proceed *ex-parte* under rule 106 (10) of the Rules. Cost shall abide the outcome of the application.

DATED at **DAR ES SALAAM** this 29th day of March, 2016.

A.G. MWARIJA
JUSTICE OF APPEAL

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



J.R. KAHYOZA
REGISTRAR
COURT OF APPEAL