**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 209 OF 2016**

**ALPHONCE BUHATWA ..... APPLICANT**

**VERSUS**

**JULIETH RHODA ALPHONCE ..... RESPONDENT**

**(Appeal from the Ruling and Order of the High Court of Tanzania at Dar es Salaam)**

**(Mruke, J.)**

**Dated 28th day of January, 2013**
**in**
**Civil Appeal No. 95 of 2010**

# RULING

12th & 26th October, 2016

## LILA, J.A.:

By way of notices of motion supported by affidavits sworn by Alphonce Buhatwa, the applicant has filed two applications seeking to move the court to grant extension of time to do two things. **One**, to enable the applicant lodge an application for leave to appeal out of time. This is Civil Application No. 209 of 216. **Two**, to enable the applicant to file notice of intended appeal out of time. This is Civil Application No. 210 of 2016.

The Grounds for reliefs sought in the two applications are well stated in the respective notices of motion.

Before the two applications could be heard, the respondent filed notices of preliminary objection in both applications comprising of two similar points of objection. The points of objection run thus;

1. That the applicant has failed to comply with Rule 48 (4) of the Tanzania Court of Appeal Rules, 2009
2. That the applicant has failed to comply with Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009.

I heard the parties in Civil Application No. 209 of 2016. Then followed Civil Application No. 210 of 2016. It was noted that the two notices of points of preliminary objections raised in both applications actually referred to the applicant's failure to serve the respondent with the applications and all supporting documents within 14 days from the date of filing and failure by the applicant to file written submissions within 60 days after lodging of the notices of motion. Such similarity prompted Mr. Chacha Murungu, learned advocate who represented the applicant to urge the Court to consolidate the hearing of the Notices of preliminary objection in the two applications (Civil Application No. 209 of 2016 and 210 of 2016) and therefore the submissions of the parties in Civil Application No. 209 of 2016 be used to determine the points of preliminary objection in the two

applications. Ms. Julieth Rhoda Alphonce, the respondent, who appeared in person, unrepresented, was also of the same view. Considering that the points of objection are the same and they relate to the same subject matters though in two different applications, I, for interest of justice, acceded to the prayer and accordingly consolidated the hearing of only the points of preliminary objection in the two applications. That being the case, this ruling is consequently in respect of the points of objection in both Applications.

Amplifying on the points of objection, the respondent, a laywoman and unrepresented, had very little to tell the court. In respect of the first point of objection, she said while the two applications were filed on 18/7/2016, she was served with the same on 26/9/2016 and there is no reason for the delay because the applicant has a lawyer. She thus attributed the delay with the tactics to delay justice as then when the applications were lodged execution process was on.

Regarding the second point of objection, the respondent had it that there is again no reason for the applicant to fail to file written submission within time because he has an advocate. She said at the High Court and

the Court of Appeal they are served with copies of the decision immediately after delivery.

In response, Mr. Murungu, learned advocate, vehemently disputed such non-compliances. In respect of the first point of objection, he contended that the applicant complied with the requirement to serve the respondent with the notices of motion and supporting affidavits as provided under Rule 55 (1) of the Court of Appeal Rules, 2009 (the Rules) which requires service be done within two clear days before the hearing of the application. He insisted that this is the applicable Rule not rule 48 (4) of the Rules. He went further and argued that there is apparent contradiction between Rule 48 (4) and 55 (1) of the Rules in respect of the time within which to serve the respondent with the applications and supporting affidavits as they provide for different periods of time. He urged this court to appreciate existence of such contradictions and do justice to the parties by allowing the applications be heard on merits. In support of this he referred this court to the decision in the case of **Tina & Co. Ltd and 2 others vs Eurafrican Bank (T) Ltd**, Civil Application No. 86 of 2015 (unreported) a copy of which he supplied the Court. He said the respondent was served with the applications and supporting affidavits

about 18 days before the hearing of the application. He further contended that Rule 48 (4) and 55 (1) of the Rules should be read together otherwise the court will be required to satisfy itself when was the respondent served and the time of delay. If this is the case, he said, then the points of objection raised by the respondent will not quality to be points of objection. He said his argument finds support in the decision of **Mukisa Biscuits Manufacturing Co. Ltd vs Waste End Distributors Ltd** [1969] EA 694 at page 700 which was repeatedly cited in the case of **Leornard Magesa vs M/S Olam (T) Ltd**, Civil Appeal No. 117 of 2014, **African Development Bank vs M/S East African Development and Another**, Civil Application No. 122 of 2010 (all unreported) which stated that where the preliminary objection requires facts to prove it then it does not qualify to be a preliminary point of objection. He concluded by saying that the first point of preliminary objection is therefore misconceived and should, citing the case of **Perto Mark Africa Ltd and 5 others vs Kenya Commercial Bank (T) Ltd**, Civil Appeal No. 134 of 2012 (unreported), be overruled with costs.

Responding in respect of the second point of preliminary objection, Mr. Murungu stated that he complied with the requirement to file written

submissions as provided under Rule 34 (2) (c) of the Rules which requires lodgement of written submissions be done at least forty eight hours before the application is due to be heard. He said the applicant lodged the written submissions on 3/10/2016 accompanied with the list of authorities and the same were served to the respondent on 4/10/2016. He, again, argued that Rule 34 (2) (c) and 106 (1) of the Rules provides for different time limits within which to file written submissions. Further, Mr. Murungu argued that as the respondent filed her submissions, then she was not prejudiced as the purpose of filing submissions was observed. He said therefore the objections raised miss legs upon which to stand. To bolster his argument he referred me to the case of **Khalid Mwisongo vs M/S Unitrans (T) Ltd**, Civil Appeal No. 56 of 2011. He urged me to invoke Rule 2 of the Rules and allow the applications be heard on merits. Finally, Mr. Murungu argued that the alleged preliminary point of objection does not qualify to be so. He referred me to the decisions in Khalid Mwisongo (*supra*), Perto Mark (*supra*) and Mukisa Biscuits (*supra*).

I have considered the arguments by both sides on the points of preliminary objection.

The first point of default raised by the respondent, is that the applicant did not comply with Rule 48 (4) of the Rules. The complaint is that the applicant did not serve the respondent with the applications and all supporting documents within 14 days from the date of filing the applications. Comprehensively looked at Mr. Murungu's arguments clearly indicate that the applicant was, indeed, not served with the application and supporting documents within 14 days from the date of filing as mandatorily provided under Rule 48 (4) of the Rules. He, instead, insisted to have had served the respondent with such documents within time as provided under Rule 55 (1) of the Rules which mandatorily requires the notice of motion and copies of al affidavits be served not less than two clear days before the hearing.

During the hearing the respondent said she was served with the applications on 26/9/2016 while the applications were filed on 18/7/2016. On the other hand Mr. Murungu said according to the record, the application was filed on 18/7/2016 and the respondent was served on 24/9/2016 not 26/9/2016 as alleged by the respondent. He accordingly said the respondent was, under Rule 55 (1) of the Rules, served almost 18 days before the date of hearing of the applications. He insisted that it is

not only Rule 48 (4) of the Rules which govern service of application to the respondent but also Rule 55 (1) of the Rules. He said the two Rules must be read together otherwise the Court should note that the two Rules contradicts each other in respect of the time within which to serve the respondent with the applications and other documents.

I have carefully read the two Rules – Rule 48 (4) and 55 (1) of the Rules. In my view they are clear and distinct. For certainty, I hereunder quote them:-

> *"48 (4) The application and all supporting documents, shall be served upon the* ***party or parities*** *affected within 14 days from the date of filing.*
>
> *55 (1) The notice of motion and copies of all affidavits shall be served on* ***all necessary parties*** *not less than two clear days before the hearing."*
>
> (Emphasis supplied).

It is apparent, the import of the above Rules is that Rule 48 (4) of the Rules govern service of the application and all supporting documents **to the party or parties only** while Rule 55 (1) of the Rules govern service

of the notice of motion and copies of all affidavits to **all necessary parties**. A party or parities to the case who are at times referred to as proper parties are different from a necessary party or necessary parties. Simply stated, necessary and proper parties are different. The Academic's Legal Dictionary by S. L. Salvan and U. Narang, 22nd Edition, 2012 page 240 explicitly provides the distinction:-

> *"**Necessary and Proper parties** – A necessary party is one without whom no order can be made effective and a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings."*

The Authors continue at page 260:-

> *"Party – In a judicial proceeding a litigant (plaintiff or defendant); a person directly interested in the subject matter of the thing or case; one who could assert a claim, make a defence, control*

*proceedings, examine witnesses or appeal from the judgment...*

***Necessary party*** *– One whose interest will be affected by the suit or without whom complete relief cannot be granted.*

***Proper party*** *– One who has an interest in the subject matter of the litigation, but without whom, unlike a "necessary party", a substantial decree may nevertheless be issued, though such decree will not settle all questions at issue in the controversy with respect to such party."*

Going by the above definition and elaboration, the respondent in the present application is a proper party. She was a party to the proceeding which culminated in the filing of these two applications. Service to her of the applications and other supporting documents is therefore governed by Rule 48 (4) of the Rules. Service to the respondent under Rule 55 (1) of the Rules is thus improper.

All said, it is clear that the applicant did not serve the respondent with the requisite documents for the applications within 14 days from the date of filing as provided under Rule 48 (4) of the Rules. There is therefore, no contradiction and/or confusion between Rules 48 (4) and 55 (1) of the Rules.

I will pause here and proceed to determine two other issues raised by Mr. Murungu in the course of hearing. These are **one**, whether a point of objection can be raised where there is non-compliance with Rule 48 (4) of the Rules and **two**, whether the respondent was prejudiced and if not whether the court should invoke the provisions of Rule 2 of the Rules and not dismiss the application but, instead, allow the same be heard and determined on merits. Mr. Murungu is of the view that a point of objection cannot be raised under Rule 48 (4) of the Rules and that as the respondent was served and filed the affidavits in reply in the two applications then she was not prejudiced. He accordingly urged the court not to dismiss the applications but rather allow them be heard and be determined on merits. To fortify his arguments he cited the cases of **Mukisa Biscuits Manufacturing Co. Ltd vs Waste End Distributors Ltd** [1969] EA 696 page 700 which is cited in **Leornard Magesa vs M/S Olam (T) Ltd**, Civil

Appeal No. 117 of 2014 and **African Development Bank vs M/S East African Development Bank and Another**, Civil Application No. 122 of 2010 (unreported).

In the first place, in neither of the cases cited by Mr. Murungu the Court categorically stated that a point of objection cannot be raised under Rule 48 (4) of the Rules. All that is insisted is that to qualify to be a point of objection, there must not be facts in dispute which would require court's determination, where the court is asked to exercise discretion and the point of objection must be on a point of law capable of disposing of the suit. In the present application there is nothing disputable. The dates of lodging the applications are clearly indicated by the Registrar to be 18/7/2016 and Mr. Murungu was open that the respondent was served on 24/9/2016. Although the respondent said it was 26/9/2016 she did not however dispute the date she was served with the application. Again the Rule (48 (4)) is coached in a mandatory manner requiring strict compliance the failure of which therefore renders the application incompetent. I am therefore of a strong view that the preliminary point of objection was properly raised. And, as the Rule requires strict compliance, the issue of whether or not the respondent was prejudiced by failure to be served

within the prescribed time does not arise. In the circumstances, the first point of objection is upheld.

I now turn to consider and determine the second point of preliminary objection as raised by the Respondent.

Basically, the arguments by the parties in respect of the second point of objection raise two crucial issues for determination. These are:-

1. Which is the applicable Rule in filing written submissions in support of an application?
2. Is an objection raised under Rule 106 (1) of the Rules qualify to be a legal point of objection.

I will start resolving issue number one above.

As hinted above, the respondent alleges that the applicant did not comply with Rule 106 (1) of the Rules because he failed to file written submissions in support of the applications within the prescribed period of sixty (60) days after lodging the notices of motion. Mr. Murungu is of the view that he complied with the requirement to file written submissions in support of the notice of motion by filing the same more than forty eight (48) hours before the application was due to be heard as provided under Rule 34 (2) (c) of the Rules. This issue need not detain me. This Court

faced a similar issue in the case of **The Managing Director, Tanzania Breweries Company Limited vs Boniface Kakiziba and Another,** Civil Application No. 14 of 2010 (unreported) and exhaustively dealt with it. Mr. Mbwambo, learned advocate for the applicant filed submissions in support of the application under Rule 34 (1), (2) and (3) instead of Rule 106 (1) of the Rules. Mr. Kashumbugu, learned advocate representing the respondent filed a notice of objection that the applicant failed to file submissions in support of the application as required under Rule 106 (1) of the Rules. The Court, after considering at length the arguments by the parties, stated:-

> *"On the issue of which Rule is applicable in filing written submissions to support an appeal or application, we think the position of the Rules is clear. We agree with Mr. Kashumbugu that the relevant Rule applicable in filing written submission to support an appeal or application is 106. The rule is very specific. The marginal notes talks of presentation of written submissions. The body of the rule then goes on to give the details on how*

*and when the respective parties in the appeal or application should file the submissions. On the other hand, the marginal notes for rule 34 specifically talks of list of authorities and copies of judgments to be referred to in an appeal or application. The body of the rule gives the number of copies required to be filed by the parties and the time of filing the list of the authorities. Therefore, the two rules govern two distinct events in an appeal or application."*

After having solidly laid down the legal position, the court appreciated the apparent confusion brought about by the wording in Rule 34 (2) (c) of the Rules which Mr. Murungu have herein termed as contradictions. The Court said:-

*" On the face of Rule 34 it appears that what brings confusion is rule (c) of Rule 34 (2) which says that:-*

*"the **submissions** shall be lodged at least forty eight hours before the appeal or application is due to be heard."*

The Court resolved the confusion by saying that:-

*" But a through reading of the two rules will clearly show that rule 34 governs list of authorities and rule 106 governs filing of written submissions. The confusion in Rule 34 (2) (c) is brought in lay the use of the word **submission** instead of the words **list of authorities**. Otherwise a parity who reads the two rules carefully, would definitely realize that they govern two distinct events which cannot be confused."*

I fully subscribe myself with the above legal position. All that was required to be done by the applicant and/or his advocate was to carefully read the two Rules. Had that been done, definitely the applicant would have filed the written submissions in support of the two applications in accordance

with the requirement of Rule 106 (1) that is within sixty (60) days after filing the notice of motion.

In the present applications Mr. Murungu conceded filing submissions in support of the notices of motion on 3/10/2016 while the Notices of Motion were lodged on 18/7/2016. The submissions were thus filed about 75 days after the Notices of Motion were lodged. The applicant was thus late in filing written submissions by about 15 days and there is no application for extension of time filed.

I now turn to the second issue Mr. Murungu argued that the alleged point of objection raised does not quality to be so briefly because Rule 106 (1) of the Rules invites exercise of judicial discretion. He cited various case decision to support his arguments. The cases cited are Khalid Mwisongo, Perto and Mukisa Biscuits (*supra*). My reading of the above cited case decisions and particularly Perto Mark (*supra*) in which several decision of the Court are cited have engaged my mind considerably. What is, however, apparent is that Rule 106 (1) makes it mandatory for the parties to file written submissions in support of an appeal or application within sixty (60) days from the lodgment of the record of appeal or filing of the notices of motion and filing of reply submissions within thirty (30) days

from the date of service (Rule 106 (8)). It is also apparent that he direction given under Rules 106 (9) and 106 (19) of the Rules is given to the Court only and not to the parties (see Perto case (*supra*)). No facts other than the court stamps and indications by the Registrar showing when the written submissions were filed are required. No further evidence is required to prove that. This being the case the point of preliminary raised under Rule 106 (1) of the Rules qualified the test set in Mukisa Biscuits (*supra*).

Having stated as above, the second point of preliminary objection is upheld.

The immediate issue that arises is what are the consequences of upholding the second point of preliminary objection.

The provisions of Rule 106 (9) of the Rules give the Court a direction to either dismiss or not dismiss the application when it finds that no written submissions were filed within sixty days. At the same time Rule 106 (19) of the Rules, gives discretion to the Court to, where it considers the circumstances of the application to be exceptional, waive compliance with the provisions of Rule 106 relating to filing of submissions wholly or in part or reduce the time limits to file submissions. In my view the two sub rules

must be read together because Rule 106 (9) of the Rules does not provide what should be done where the Court refrains from dismissing the application following failure by the applicant to file written submissions within the prescribed time. It is my considered view that where the application is not dismissed under Rule 106 (9) of the Rules, the Court should invoke the provisions of Rule 106 (19) of the Rules and adopt either of the options provided therein and thereafter proceed to hear the appeal or application. But for the court to exercise any of the discretions intimated under Rule 106 (19) of the Rules, there must exist exceptional circumstances to be considered by the Court. Fortunately, the sub rule does not tell who should raise such compelling circumstances. It is my considered view that it is left open not without a purpose. It definitely gives allowance to either the appellant to raise such exceptional circumstances or the Court to do so upon perusal of the materials availed to it in the application or record of appeal.

As it can be seen, Mr. Murungu did not raise any exceptional circumstances to warrant this Court waive the requirement to file written submissions. I also do not see such wanting circumstances. In the

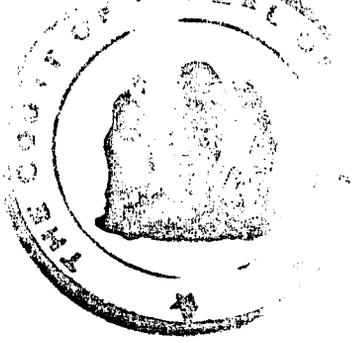
circumstances I will have no better options than to dismiss the two applications under Rule 106 (9) of the Rules.

All said, the two points of preliminary objection raised by the respondent in the two applications are upheld. It follows therefore, as day following the night, that the two applications are incompetent. I hereby accordingly dismiss them with costs.

**DATED** at **DAR ES SALAAM** this 20th day of October, 2016.

S. A. LILA
**JUSTICE OF APPEAL**

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



B. R. NYAKI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**