

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

CIVIL APPLICATION NO. 2 OF 2015

**1. GUARDIAN LIMITED
2. PRINTA AFRIQUE LIMITED** } **APPLICANTS**

VERSUS

JUSTIN NYARI **RESPONDENT**

**(Application for extension of time to file appeal from the judgment of
High Court of Tanzania at Arusha)**

(Sambo, J.)

dated 23rd February, 2009

in

Civil Appeal No. 35 of 2001

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RULING

17th & 24th May 2016

KIMARO, J.A.:

In Civil Reference No. 1 of 2013 the Court granted the applicants an extension of 45 days within which to file the appeal they intended to file. The order was made on 12th December, 2014. The applicants were not able to file the appeal within the limitation period allowed by the Court.

The applicants have filed another application under Rule 10 of the Court of Appeal Rules 2009 seeking for further extension. The ground given to support the application is that the applicants were not able to get the

relevant documents necessary for filing the appeal because the Registrar informed the applicants that the original case file for Civil Case No.35 of 2001 could not be traced so that the applicants could be supplied with the documents. That information was communicated to Mr. Colman Ngalo, learned advocate representing the applicants on 5th February, 2015. This is what is deposed in paragraph 9 of the affidavit he has sworn in support of the application. The application was filed on 11th February, 2015. The period of extension that was granted by the Court expired on 27th January, 2015. By the time Mr. Ngalo was informed that the case file could not be traced so that he could be supplied with the documents he had requested, the time had expired.

When I heard this application on 17th May 2016, Mr. Colman Ngalo learned advocate, entered appearance for the applicants. The respondent was represented by Mr Loomo Ojare, learned advocate. Mr. Loomo Ojare, learned advocate representing the respondent raised a preliminary objection of law under Rule 4 (2) (a) of the Court of Appeal Rules 2009 to the effect that the application is fatally defective for citing a wrong and inapplicable rule.

The hearing started with the preliminary objection. Mr. Ojare submitted that unlike the repealed 1979 Court of Appeal Rule which allowed the Court to grant extension of time for decisions given by the Court under Rule 8, Rule 10 of the Court of Appeal Rules, 2009 does not provide for such power. He said the Rule covers only decisions of the High Court and the tribunal. He said since the established principle of law is in any application filed in the Court is that the applicant has to cite the enabling provision to move the Court, and Rule 10 which has been cited by the learned advocate for the applicant is inapplicable in this application, the preliminary objection should be upheld and the application be struck out for being incompetent. He cited the cases of **Nicholaus Hashin and 1013 others V Tanzania Shoe Co. Ltd and Another** Civil application No. 5 of 2004 (unreported) and that of **Edward Bachwa and 3 others v the Attorney General and Another** Civil Application NO. 128 of 2006 (unreported) to support the preliminary objection. Indeed the two cases cited support the position of the law which the learned advocate has pursued on wrong citation of the law to move the Court. There is no doubt on the matter.

The learned advocate for the applicants, Mr. Ngalo said the omission in Rule 10 in the 2009 Court of Appeal Rules to include decisions of the Court

would not oust the jurisdiction of the Court in dealing with the application. He said that would have been absurdity because that is the only provision in the Court of Appeal Rules 2009 dealing with extension of time. He said the inconsistency in the 1979 and 2009 Rules can be reconciled. In this respect the learned advocate said Rule 10 of the 2009 Court Rules was properly cited in filing the application. He agreed with Mr. Ojare that there are a lot of authorities by the Court on wrong or non-citation of provision to move the Court but in as far as his application is concerned, said Mr Ngalo, it is in order. He requested the Court to make use of Rule 2 of the Court of Appeal Rules in order to achieve substantive justice if the Court will find that Rule 10 is not applicable. He opined that the intention of the Rules is not to shut the door to the applicant particularly in his case where he could not get the necessary documents in time and without being in fault. He prayed that the objection be overruled and the hearing of the application be ordered to proceed on merit.

In rejoinder, the learned advocate for the respondent insisted that Rule 10 is clear. He said Rule 2 is not applicable because there is no lacuna in the law because there is Rule 4 (2) (a) which apply when there is no specific provision in the Rules covering the situation in issue. He said the applicant

is not facing a situation where he would be denied justice. He cautioned that rules of procedure are fundamental and the Court should strictly enforce them.

Indeed there is no controversy that the 1979 Court of Appeal Rules which were repealed had Rule 8 which allowed the Court to grant extension of time even for its own decision. Rule 10 of the 2009 Court Rules has omitted decisions of the Court. Rule 10 of the Court of Appeal Rules 2009 provides that:

“The Court may upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or the tribunal, for the doing of any act authorized or requires 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 so extended.”

The difference in the 1979 is the that the words used are “sufficient reason” while the 2009 Rules use the words “good cause” and the omission

to include the decisions of the Court. Otherwise there is no marked departure from the 1979 Rules. Rules 8 of the 1979 Rules read as follows:

*“The Court may for sufficient reason extend the time limited by these Rules or **by any decision of the Court** of the High Court 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 act, and any reference in these Rules to any such time shall be construed as a reference to that time so extended.”*

Mr. Ngalo pointed out correctly that Rule 10 is the only Rule in the 2009 Court Rules which deals with extension of time. He said Rule 4 (2) (a) of the Rules would not apply. But Mr. Ojare insisted that it was the proper Rule which his colleague had to rely upon.

In this application I am doubtful whether the omission to include decisions of the Court was deliberate or there was a problem with the printing of the Rules. In saying so I have in mind an application for Reference under Rule 62 (1). That will be a decision of the Court. If the applicant is

delayed in filing the reference within the period of seven days does it mean that he will be barred by Rule 10 from seeking extension to file the Reference out of time? In my considered opinion it will not be so. I hesitate to agree with Mr. Ojare that Rule 4 (2) (a) would apply under the circumstances where there was a specific Rule dealing extensions and the former rules included the decision of the Court. I do not see the omission in Rule 10 being deliberate. I see it as an error of printing. Under the Constitution of the United Republic of Tanzania 1977, Article 107A, the Judiciary is entrusted with the duty and power of administration of justice. This means that accessibility to justice must always be guaranteed. As pointed out by Mr. Ngalo, Rule 2 requires the Court to have regard to the need to achieve substantive justice. It was not his fault that he failed to comply with the order of extension he was granted earlier by the Court. According to him, the information given to him by the Registrar is that the Court file for Civil Case No. 35 of 2001 could not be traced.

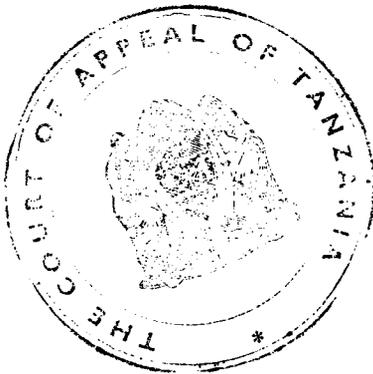
From the views I have expressed that the omission to mention the decision of the Court in Rule 10 of the Court of Appeal Rules 2009 could have been a printing error, I will dismiss the preliminary objection as having no

merit and order the application to proceed to hearing on merit. Costs to be abide by the results of the main application.

DATED at ARUSHA this 20th day of May 2016.

N. P. KIMARO
JUSTICE OF APPEAL

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




P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL