

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

CIVIL APPLICATION NO. 10 OF 2015

**NGAO GODWIN LOSEROAPPLICANT
VERSUS
JULIUS MWARABURESPONDENT
(Application from decisions of the High Court of Tanzania
at Arusha)**

(Dr. Opiyo, J.)

**Dated the 6th day of March, 2015
in
Misc. Application No. 179 of 2014**

RULING

17th & 24th May, 2016

MZIRAY, J.A.:

This is an application for leave to appeal to this Court after a similar application has been unsuccessfully lodged in the High Court. The application is against the decision of the High Court of Tanzania at Arusha in Misc. Application No. 179 of 2014 dated 6th March, 2015 refusing to grant leave to appeal to this Court. When the application was called on for hearing the applicant was

represented by Mr. Severin John Lawena, learned advocate while the respondent appeared in person, unrepresented.

The respondent has filed a notice of preliminary objection on points of law as hereunder:-

- (i) *That copy of letter applying for court records and notice of appeal lodged in Court on 9th March, 2015 were never served to the respondent as required by the Court of Appeal Rules, 2009.*
- (ii) *That copy of Notice of Motion filed in Court on 25th March, 2015 was served to the respondent on 15th April, beyond time provided by the Court of Appeal Rules, 2009.*

When asked to argue the preliminary objection, the applicant had nothing useful to add apart from praying this Court to uphold the preliminary objection raised. On the other hand Mr.

Lawena, learned advocate arguing in reply contended that the preliminary objection raised is misconceived and untenable in law as the respondent was served in time by one Jonathan Lesian, the Court Process Server. The learned Counsel pointed out that service was effected on 16/3/2015 at Mianzini, Arusha but the respondent refused service. An affidavit dated 17/3/2015 was placed in Court as a proof to that effect.

In his rejoinder, the respondent submitted that it is not true as alleged that he refused service and that all what is averred in the affidavit by the Court Process Server is not true.

I have carefully considered the argument advanced by both parties. The preliminary objection raised concerns with the process of the court on service of summons on which the respondent allege that he was not served with the copy of the letter applying for court records and the notice of appeal lodged in Court on 9/3/2015 and further that the notice of motion filed in Court on 25/3/3015 was served to the respondent on 15th April,

beyond time provided by the Court of Appeal Rules. He want this Court to treat the alleged fault as a preliminary objection and strike out the notice of appeal and the notice of motion filed.

For a matter to fall under the purview of a preliminary objection it must consist of a pure point of law as per the case of **Mukisa Biscuit Manufacturing Company Limited v. West End Distributors Limited** (1969) EA 696 at page 700. In that case the Court of Appeal for Eastern Africa explained what a preliminary objection will consist.

It said that:-

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arise by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection of the Court or a plea of limitation, or submissions that the parties are bound by the

contract giving rise to the suit to refer the dispute to arbitration”

The Court went on to state:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion”

The above views about a preliminary objection have been cited with approval by this Court in numerous decisions. (See: ***Sharifa Twahibu Massala v. Thomas Mollel & three others***, Civil Appeal No. 67 of 2011, ***The Board of Trustees of the National Social Security Fund v. New Kilimanjaro Bazaar Limited***, Civil Appeal No. 69 of 2007., ***Eusto Ntagalinda v. Tanzania Fish Process Ltd***, MZA, Civil Application No. 8 of

2011, and Dunia Worldwide Trading Company Limited v. Consolidated Holding Corporation, Civil Application No. 61 of 2008. (All unreported).

From the above decisions, there is no doubt that a preliminary objection must raise a purely point of law, otherwise the Court cannot entertain such a motion. In the instant matter, as rightly pointed by Mr. Lawena, learned advocate, the preliminary objection raised is untenable in law because the respondent was served by the Process server one Lesian and there is an affidavit deposed to prove service of the summons. The allegation therefore that service was not effected to the respondent is misconceived and the notice of preliminary objection raised does not meet the test of the decisions of this Court I have afore mentioned.

Additionally, in the two points of objection raised, the respondent has alleged that the Tanzania Court of Appeal Rules, 2009 have been contravened but in his submission he did not

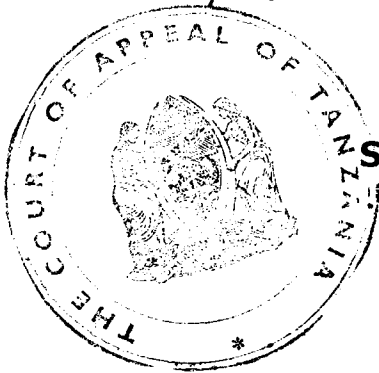
specifically mention which particular rule was breached in respect of the service of the notice of appeal and the notice of motion. As there is proof of service and the respondent has failed to show which specific Rule has been breached in the Tanzania Court of Appeal Rules, 2009 then the preliminary objection is untenable and cannot be allowed to stand.

All said and done, for the reasons stated herein above, I am constrained to dismiss the preliminary objection for being misconceived. In the event, the preliminary objection is hereby dismissed. Costs to be in the course.

DATED at ARUSHA this 19th day of May, 2016.

R.E.S. MZIRAY
JUSTICE OF APPEAL

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




P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL