

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

CIVIL APPLICATION NO. 2 OF 2015

(CORAM: KIMARO, J.A., MMILLA, J.A., And MZIRAY, J.A.)

**OTHINIEL AHIA AND 52 OTHERS APPLICANTS
VERSUS**

**L. M. INVESTMENTS LIMITED RESPONDENT
(Application from the decision of the High Court of Tanzania
Land Division at Moshi)**

(Hon. Mgaya, J.)

**dated the 30th day of July, 2014
in
Land Appeal No. 23 of 2009**

RULING OF THE COURT

20th & 27th May, 2016

MMILLA, J. A.:

Civil Application No. 2 of 2015 was filed by Ms Shayo, Jonathan & Company, Consulting Advocates, on behalf of Othiniel Ahia & 52 others. It is an application for stay of execution of the judgment and decree of the High Court of Tanzania (Land Division) at Moshi in Land Appeal No. 23 of 2009. The application has been brought by way of notice of motion, and is anchored on the provisions of Rule 11 (2) (b) and (c) of the Tanzania Court

of Appeal Rules, 2009 (the Rules). It is supported by an affidavit sworn by one Costa Othiniel Ahia.

Before us, Mr. Peter Shayo, learned senior advocate from Ms Shayo, Jonathan & Company, Consulting Advocates, appeared for the applicants, while Mr. Eliakunda Kipoko, learned advocate appeared for the respondent, L. M. Investments Limited. Apart from filing the affidavit in reply, Mr. Kipoko filed as well a notice of preliminary objection which is premised on three grounds as follows:-

1. That the application is incompetent for wrong and non-citation of the law to wit, citing of Rule 2 (c) of the Rules, while it is not relevant as by the time of filing the application for stay of execution the time allowed to appeal had already expired.
2. That, the applicant has failed to cite Rule 11 (2) (d) as a necessary provision providing for grounds and conditions upon which the prayer is to be considered.
3. That, the written submissions in support of the application were filed outside the 60 days period after the filing of the notice of motion, thus contrary to the

provisions of Rule 106 (1) of the Rules, that is counting from 9th March, 2015 when the notice of appeal was filed to 7th May, 2015 when the submissions were filed which was after 60 days had elapsed.

In the course of hearing the application on 18.5.2016, Mr. Kipoko dropped the first ground, thus remaining with the second and third grounds to be proceeded with. It is also appropriate to point out at this juncture that Mr. Shayo had earlier on conceded that there was merit in the third ground of preliminary objection in that he filed the written submissions out of time. That left on record only the second ground of preliminary objection to be proceeded with by Mr. Kipoko.

While he prayed the Court to ignore the applicants' written submissions in view of Mr. Shayo's concession thereof, Mr. Kipoko submitted in respect of the second ground that the citing of Rule 11 (2) (b) and (c) was not enough in the circumstances of this matter, but that for sake of completeness the applicants ought to have also cited clause (d) of Rule 11 (2) of the Rules. Mr. Kipoko contended that the omission to cite

clause (d) was fatal, rendering the application incompetent. He pressed the Court to strike it out with costs.

In response to that, Mr. Shayo defended that the citing of Rule 11 (2) (b) (c) of the Rules without more was proper in the circumstances of this application, and that clause (d) of Rule 11 (2) was merely auxiliary and/or secondary. He invited the Court to find no merit in that ground and dismiss it.

As regards the third ground to which he conceded, Mr. Shayo prayed the Court to waive the requirements of Rule 106 (1) and allow him to proceed with the hearing of the application without the written submissions.

In a brief rejoinder, Mr. Kipoko insisted that failure to cite clause (d) of Rule 11 (2) in the circumstances of this application is fatal because the Court is not properly moved. He reiterated his request for the Court to uphold this ground and strike out the application.

We had reserved the ruling with anticipation of notifying the parties of the outcome at a later date. However, in the course of discussing the rival submissions of the advocates for the parties, we discovered that there

was one more legal point which ought to have been put to the advocates for the parties for their comments. We directed the Senior Deputy Registrar to re - summon the learned advocates to appear before us on 20.5.2016.

When they appeared before us on 20.5.2016, the Court ***suo mottu*** asked them to address us on whether it was proper for the names of the 52 other “applicants” to have not been shown in the notice of motion and the notice of appeal; also whether it was proper for the application to have been supported by only the affidavit of Costa Othiniel Ahia in the circumstances of this application.

On his part, Mr. Shayo submitted that the affidavit made by Costa Othiniel Ahia should be held to be properly supportive of the application because as shown in paragraph 2 of that affidavit, he deponed on his own behalf and on behalf of the 52 others. As regards the exclusion of the names of the 52 others from the notice of appeal, Mr. Shayo admitted that it was improper to have omitted them, but he prayed for leave to amend both, the notice of motion and the notice of appeal.

On the other hand, Mr. Kipoko submitted that the omission to list the names of the 52 other applicants in the notice of motion and the notice of

appeal is a fatal defect entitling the Court to strike out the application. As regards the other point, Mr. Kipoko submitted that because there is nothing in the record to show that this was a representative suit, it is improper for Costa Othiniel Ahia to purport that he deponed on behalf of those 52 “applicants” too. He invited the Court to find the application incompetent and strike it out with costs.

We have carefully considered the competing arguments of the learned advocates for the parties on these points. After weighing the scales thereof, we have decided to begin with the grounds raised by the Court ***suo mottu*** touching on the competency or otherwise of the notice of motion and the notice of appeal which we believe, if upheld, is capable of conclusively disposing of this application.

There is no debate that according to the record, this application is being prosecuted by 53 applicants, but the notice of motion and the notice of appeal have revealed the names of only one of them, Othiniel Ahia. The names of the rest of them have not been disclosed. Even, the said application is supported by an affidavit sworn by the said Costa Othiniel Ahia who purported in paragraph 2 of his affidavit that he had also

deponed on behalf of the others, but there is no evidence that he had leave to represent the other 52 applicants.

On our part, we think that it improper to exclude the names of the other applicants in the notice of motion and the notice of appeal. We wish to be guided by the case of **Bernard Masaga, Merchant K. Ikungura & Others v. National Agricultural and Food Corporation & 2 Others**, Civil Application No, 177 of 2006, CAT (unreported). In that case, it was indicated that Merchant K. Ikungura was prosecuting the application on behalf of himself and **others** who were not disclosed. One of the issues was whether a notice of motion which did not list down all the applicants was competent. A single justice of the Court held that:-

*"As it is, no information was forth coming to show who those **others** are, and whether there was leave granted to Mr. Ikungura to represent them. In the light of the failure to disclose who those **others** are, it will be fair to say that, strictly speaking, there is no proper application before the Court in terms of Rule 46 (1) (now Rule 48 (1) of the Rules)."*

*amend something which does not exist. We accordingly
strike out the appeal."*

For the reasons we have assigned, the application is struck out for being incompetent. We make no order as to costs.

DATED at ARUSHA this 25th day of May, 2016.



N. P. KIMARO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R. E. MZIRAY
JUSTICE OF APPEAL

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


P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL