

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

(CORAM: MBAROUK, J. A., MUGASHA, J. A. And MWANGESI, J. A.)

CIVIL REFERENCE NO. 9/01 OF 2016

ALPHONCE BUHATWA APPLICANT

VERSUS

JULIETH RHODA ALPHONCE..... RESPONDENT

**(Application for Reference from the decision of Single Justice of Appeal
at Dar-es-Salaam)**

(Lila, J.A.)

Dated the 26th October, 2016

in

Civil Application No. 209 and 210 of 2016

.....

RULING OF THE COURT

16th & 28th June, 2017

MUGASHA, J.A.:

This is a Ruling in respect of an application for reference brought under Rule 62 of the Court of Appeal Rules, 2009(The Rules) whereby the applicant sought to have the decision of a single Judge reversed.

The applicant filed two applications to the Court. **One**, in Civil Application No. 209 of 2016 he sought extension of time to apply for leave to appeal and **Two**, in Civil Application No. 210 of 2016 he sought

extension of time to file notice of intended appeal. The two applications were confronted by the respondent's preliminary points of objection as follows:

1. That the applicant did not comply with Rule 48 (1) of the Court of Appeal Rules (the Rules), having served the application to the respondent on 26/09/2016 which was beyond 14 days from the date (18/7/2016) of filing the application.
2. That, the applicant did not comply with Rule 106 (1) of the Rules having failed to file written submissions.

Responding to the first limb of objection, the applicant contended that, it is not in dispute that, the applications and supporting affidavits were served to the respondent about eighteen (18) days before the hearing of the application. However, Rule 55(1) of the Rules remedied the situation because it requires service to be effected in not less than two clear days before the hearing. As such, the applicant argued that, Rules 48(4) and 55(1) of the Rules must be read together.

On the second limb of objection, the applicant argued the same not qualifying to be a point of objection because it invites the exercise of discretion powers of the Court.

The learned Single Justice upheld the first point of objection on ground that there was no dispute that, the application was filed on 18/7/2016 and it was served to the respondent on 26/9/2016 which is beyond the fourteen (14) days required under Rule 48(4) of the Rules. The Single Justice further found that, none of the cases cited by the applicant barred the raising of the point of objection under Rule 48 (4) of the Rules.

The Single Justice as well upheld the second point of objection on ground that, the discretion given to the Court under Rules 106(9) and 106 (19) of the Rules. It is not the domain of the parties. The single Judge proceeded to dismiss the two applications.

It is against the said backdrop that the applicant has brought this Reference. He is requesting the Court to reverse the decision of the Single mainly on issues that:

- i) Whether it was proper for the Court to uphold a preliminary point of objection

on matters that required the Court to exercise judicial discretion;

- ii) Whether it was proper for the Court to uphold a preliminary point of objection on matters that required the Court to ascertain facts in law under Rule 48 (4) of the Rules; and
- iii) Whether the Single Judge deployed proper and correct interpretation of Rule 55(1) relating to service of notice of motion and affidavits when it is read together with Rule 48 (4) of the Rules.

The applicant was represented by Mr. Martin Rwehumbiza, learned counsel and the respondent appeared in person. Parties filed written submissions for and against the reference earlier on filed and adopted them at the hearing of this application.

We have opted to deal with the first and second issue together on the aspect of what qualifies to be a preliminary point of objection.

In the case of **AYUBU BENDERA AND 10 OTHERS VS A.I.C.C**, Civil Application No. 9 of 2014 (unreported), the Court referred to the celebrated cases of **MUKISA BISCUIT MANUFACTURING COMPANY LTD. VS WEST END DISTRIBUTORS LTD [1969] E.A.696** and **HEZRON NYACHIYA VS TANZANIA UNION OF INDUSTRIAL AND COMMERCIAL WORKERS AND OTHERS**, Civil Application No. 79 of 2001 (unreported). The Court said that, to be considered as a preliminary point of objection, the point concerned must raise 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 is to be ascertained or in what entails the exercise of judicial discretion. This position was expounded by the Court in the case of **TANZANIA TELECOMMUNICATIONS CO. LTD VS VEDASTO NGASHWA AND FOUR OTHERS**, Civil Application No. 67 of 2009 (unreported) to the effect that, a preliminary point of objection must satisfy three conditions namely: **Firstly**, the point of law raised must either be pleaded or must arise as a clear implication from the proceedings. **Secondly**, it must be a pure point of law which does not require close examination or scrutiny of the affidavits and counter affidavits. **Thirdly**, the determination of such point of law in issue must not depend on the exercise of the Court's discretion.

After a careful consideration of the submissions of the parties, we shall be guided by the stated principles to determine on what qualifies to be a preliminary point of objection.

It is settled principle of law that, a preliminary point of law cannot be raised where the matter is related to the exercise of judicial discretion. The question to be answered is whether there is judicial discretion or not on consequences to file written submissions.

It is not in dispute that, under Rule 106 (1) of the Rules, it is mandatory to file written submissions within sixty (60) days from the date of filing an appeal or application. Sub-Rule (9) defines the likely consequences for failure to file written submissions within the required time on the part of the applicant whereby the Court may dismiss the application. Under Rule 109(19) of the Rules, the Court has additional discretionary powers to waive compliance with Rule 106(1) in **“exceptional circumstances”** in the appeal or application before it.

[Emphasis supplied].

The applicant referred us to the case of **PETRO MARK AFRICA LTD AND 5 OTHERS VS KENYA COMMERCIAL BANK (T) LTD**, Civil Appeal No. 134 of 2011 (unreported) where this Court said:

" ... the parties are charged with the duty of filing written submissions or reply submissions, but consequences of default give the Court discretionary powers to penalise the parties or not... in such a situation a preliminary objection can be raised. Looked at as a whole, Rule 106 does not afford any party to raise a preliminary objection..."

It is settled that, consequences of failure to file written submissions gives the Court the discretion to dismiss the application or otherwise. However, in the application which is a subject of this Reference, in our considered view the Single Judge judiciously exercised discretion in dismissing the application after considering both issues raised in the preliminary points of objection as we shall soon demonstrate.

On whether or not a preliminary point of objection could be raised on the non-compliance of Rule 48(4) of the Rules, we wish to repeat what we said in the case of **TANZANIA TELECOMMUNICATIONS CO. LTD VS VEDASTO NGASHWA AND FOUR OTHERS** (supra), that a preliminary point of law must either be pleaded or arise as a clear implication from the pleadings.

In the present matter, it was stated that the application was filed on 18/7/2016. This can be gleaned from the date when the Notice of Motion filed in Court. Service to the respondent was effected on 26/9/2016 which was never disputed by the applicant. As such no facts were required to prove that service was effected beyond 14 days contrary to mandatory requirements of Rule 48(4) of the Rules. In this regard, the preliminary objection was indeed merited.

The third issue is on the compatibility and applicability of Rules 48(4) and 55(1) of the Rules in serving the respondent the notice of motion and affidavits. We have as well considered submission of the parties.

For the sake of having a better understanding of the ensuing discussion, we have found it essential to cite the said two Rules as follows:

Rule 48 (4)

"The application and all the supporting documents, shall be served upon the party or parties affected within 14 days from the date of filing."

Rule 55 (1)

"The notice of motion and copies of affidavits shall be served on all necessary parties not less than two clear days before the hearing"

The Court was confronted with a similar situation in the case of **RASHID TWALIB MAKONYORA (Administrator of Estate of the Late Twalib Rashid Makonyora) and others vs. SALIM TWALIB MAKONYORA (Minor) Suing through ASHURA HAMIS** (next friend) Civil Application No. 21 of 2015. When the application for stay of execution was called on for hearing, respondent raised a preliminary point of objection on a

point of law that, the applicant had served the respondent beyond the 14 days prescribed under Rule 48(4) of the Rules. In reply, the applicant relied on Rule 55(1) arguing that, it requires service to be effected within at least two clear days before the hearing. The Court tackled the propriety of the applicable Rule having said:

"Having read the above Rules carefully we are of settled view that the two are distinct and serve different purposes. Who are all necessary parties as opposed to the party or parties affected as envisaged in those Rules. Our reading and understanding as to the party or parties affected, it refers to the parties in those proceedings, in our case the applicant and respondent. When you refer to all necessary parties it refers to parties who are not parties to the proceedings but their attendance is necessary in order to enable the Court

to effectually and completely adjudicate upon the application in question."

Furthermore, the Court said:

"The idea behind Rule 55(1) of the Rules is to make sure that any interested party not a party to the proceedings to appear and present his case so that the Court can adjudicate the matter once and for all. Applying the above interpretation, we are of the view that Rule 55(1) of the Rules does not apply. The appropriate Rule is Rule 48 (4). The applicant did not serve the respondent within prescribed time of 14 days, the application is incompetent. The same is struck out with costs."

We fully subscribe to what we said in the case of **RASHID TWALIB MAKONYORA** (supra). In the circumstances, the learned Single Justice properly invoked Rule 48(4) of the Rules on glaring facts that, the

applicant delayed to serve notice of motion to the respondent. This was a fatal omission which rendered the application incompetent and it deserved to be struck out.

In view of the aforesaid, this reference is devoid of merits. It is accordingly dismissed with costs.

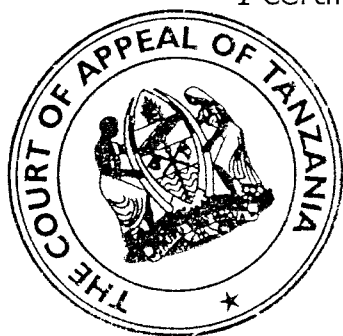
DATED at **DAR ES SALAAM** this 22nd day of June, 2017.


M.S.MBAROUK
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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




E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL