IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK,J.A.,MWARIJA,J.A.,And LILA, J.A.,)

CIVIL APPLICATION NO. 40 OF 2011

ENERICO KAKALA .....APPLICANT

VERSUS

MOHAMED MUSSA (Administrator of estate of the late Ahmed Zahoro Ahmed) .....RESPONDENT

(Application for review from the decision of the Court of Appeal of Tanzania at Dar es Salaam)

(Kileo, J.A, Mandia, J.A, Oriyo, J.A.)

dated 25th day of February, 2011
in
Civil Appeal No. 7 of 2010

RULING OF THE COURT

17th February & 24th March, 2017

LILA, J.A.:

This ruling is in respect of a preliminary objection raised by Mr. Daniel Ngudungi, learned advocate, representing Mr. Mohamed Mussa, the administrator of the estate of the late Ahmed Zahoro Ahmed, the respondent. The objection is to the effect that the notice of motion filed by Enerico Kakala, the applicant, on 21st day of April, 2011, be struck out with costs for the reason that it contravenes the provisions of Rule 66(4) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

When the application was called on for hearing on 17th February, 2017, Mr. Daniel Ngudungi, learned advocate, appeared for the respondent while Mr. Charles Semgalawe, learned advocate, appeared for the applicant. We ordered the preliminary point of objection be heard by way of written submissions and a schedule for filing the same was set. Counsel for both parties complied with the schedule except that the counsel for the respondent did not file rejoinder submissions as it was scheduled. We take it that he had nothing to submit in rejoinder.

Submitting in support of the preliminary point of objection, Mr. Ngudungi stated that while the applicant lodged his application on 21st April, 2011, the respondent was served with the notice of motion on 17th May, 2011. He contended that Rule 66(4) of the Rules mandatorily requires that the notice of motion be served on the other party or parties within fourteen days from the date of filing the notice. He pointed out that in the present application they were served with the notice of motion almost 28 days after the required time had lapsed. In support of his submissions that compliance with

Rule 66(4) of the Rules is mandatory, he cited the case of **Shirika la Meli la Zanzibar and Another Versus Mohamed Hassan Juma and 5 others,** Court of Appeal of Tanzania at Zanzibar, Civil Appeal No. 56 of 2006 (unreported) where the Court stated that:

> *"This Court in cases referred to before has held that compliance with Rule 83 (1) is mandatory. The appellants had ample time within which to apply for enlargement of time under rule 8 in order to serve the respondents. To conclude we wish to draw the attention of litigants before the Court to our observations made in* ***Civil Appeal No. 38 of 1996, Leonsi Ngalai and (1) Hon. Justice Alfred Salakana (2) The Attorney General*** *(unreported) regarding the adherence to rules. We stated as follows, for the avoidance of doubts, we must emphasize, that this right of appeal, like all other rights of appeal to this Court, has to be exercised in accordance with procedural rules regulating appeals*

to this court. In the event, we uphold the preliminary objection and strike out the appeal".

In all Mr. Ngudungi urged the Court to strike out the notice of motion with costs.

In his submissions opposing the preliminary point of objection, Mr.Semgalawe, in the first place, raised his concern that the respondent, who raised a preliminary objection under Rule 107(1) of the Rules, is required to attach to the notice of preliminary objection copies of the specific law or decision relied on. He submitted that the respondent did not do so. He submitted that, under the circumstances, the Court is empowered to invoke Rule 107(2) and refuse to entertain the preliminary point of objection.

Regarding the preliminary objection that the notice of motion was not served to the respondent within the prescribe time, Mr. Semgalawe submitted that the former position of the Court to apply the Rules strictly contained in the Tanzania Court of Appeal Rules, 1979 has been changed in the current Tanzania Court of Appeal Rules, 2009 (the Rules) as the Court is now governed by Rule 2 of

the Rules which states that in administering these Rules, the Court shall have due regard to the need to achieve substantive justice in the particular case. He was of the view, therefore, that to order that the notice of motion be struck out amounts to denying the applicant the right of being heard in support of the prayers made in the notice of motion. He further stated that if the notice of motion is ordered to be heard the respondent will not be deprived of any right as he will be heard accordingly. He brushed off the holding in the cited case of **Shirika la Meli la Zanzibar** (supra) on account that it was decided before the current Rules were made containing Rule 2 of the Rules. He finally urged the objection be dismissed.

We propose to begin with the merits of the concern raised in the submissions by Mr. Semgalawe that the notice of preliminary objection filed by Mr. Ngudungi is wanting for failure to attach copies of the law or decision relied on. On that account, we will first examine Rule 107(1) of the Rules which reads:-

> *"107(1) – a respondent intending to rely upon preliminary objection to the hearing of the appeal shall give the appellant three clear days' notice*

thereof before hearing, setting out the grounds of objection such as the specific l aw, principle or decision relied upon, and shall file five such copies of the notice with the Registrar within the same time and ***copies of photostat of the law or decision, as the case may be shall be attached to the notice.*** "(Emphasis is ours).

Indeed, attaching to the notice of preliminary objection copies or photostat of the law or decision relied on in a notice of preliminary objection is a requirement of the law. The Rule is couched in mandatory terms as the word "shall" is used. It is insisted, under section 53(2) of the Interpretation of Laws Act (Cap 1 R.E.2002) that when the word 'shall" is used in any written law, in conferring a function, such word shall be interpreted to mean the function must be performed. However, in its decision in the case of **Leonard Magesa versus M/S Olam (T) LTD**, Civil Application No.117 of 2014 (unreported), the Court stated that it is not always that whenever the word "shall" is used it will connote that it is mandatory, instead, the relevant section or rule must be read in context so as to

extract the intent of the Legislature. In the present situation, we are, for reasons soon following, prompted to find that this is a clear case where the word "shall" does not necessarily mean that it is imperative. It seems to us that the purpose of Rule 107(1) of the Rules is to let the party or parties against whom the objection is raised know, at a glance, exactly what will be the respondent's legal contention against the application or appeal being heard on merits. The notice of preliminary objection is, under this Rule, thereby required to give necessary details to enable the opponent know the huddles he is going to encounter in order to prepare his case in answer. Therefore, the whole purpose of a notice of preliminary objection is to bring parties to the distinct legal issue and thereby prevent the issue from being enlarged by letting the parties know the real point to be discussed and decided. In fact, it narrows the parties to definite legal issues and thereby diminish the amount of time required on either side at the hearing. In all, therefore, it is a good thing that a notice of preliminary objection avails the other party with the necessary information before the hearing of the application or appeal. To this extent, Rule 107 (1) of the Rules is very useful. But,

we are not persuaded that failure to file copies or photostat of the relevant law and reported decisions to be relied on have such serious effects to the party against whom the objection is raised. Laws are contained in our law statutes while reported decisions are contained in Law Reports which are easily accessible and readily available to the public. A diligent litigant, for that matter, can easily be able to search for and find a certain law or a reported decision. Their non-inclusion in the notice of preliminary objection is, therefore, not fatal.

As opposed to laws and reported decisions, we are of the view that, unreported decisions, foreign laws and decisions as well as subsidiary legislations which are hard to trace, are necessary documents to be attached to the notice of preliminary objection. We are inclined to this position by the spirit contained in Rule 34(3) of the Rules which states, in part, that:-

> *"34(3)-An advocate who intends at the hearing of an application or appeal, to rely on the judgment in any unreported case or decision from a foreign jurisdiction shall, at the time of filing the headnotes or written submission, produce and attach to the*

submission eight copies certified or Photostat copies of that judgment...."

We therefore, by parity of comparison, find that, as for unreported cases or decisions, foreign laws and decisions as well as subsidiary legislations are concerned, failure to attach them in the notice of preliminary objection is a fatal omission.

In the present notice of preliminary objection the law relied on is Rule 66 (4) of the Rules. The Court of Appeal Rules, GN No. 368 of 2009 (the Rules), is readily available and easily accessible to the parties. So, although it is desirable to attach the photostat copy of Rule 66 (4) of the Rules in the notice of preliminary objection, its failure to attach is not fatal. For the reasons we have demonstrated above we, therefore, find the notice of preliminary objection in record to be proper.

We now revert to the merits of the preliminary objection raised.

As demonstrated above the respondent has raised an objection to the effect that the applicant did not serve him with the notice of motion within fourteen days since it was lodged in Court hence

contravening Rule 66(4) of the Rules. According to him, service was done 28 days after lapse of the prescribed period. In his submissions, above summarized, the applicant did not come out to controvert that fact, instead, he prayed the Court, in order to achieve substantive justice, the Court should invoke the provisions of Rule 2 of the Rules not to strike out the application but hear the parties and determine the application. For clarity we wish to reproduce the provisions of Rule 66(4) of the Rules. It states:-

> *"66(4) copies of the notice of motions for review* ***shall be served on the other party or parties as the case may be within fourteen days from the date of filing. The party filing the notice shall file proof of service with the Court."*** (Emphasis is ours).

It is apparent that the provisions of Rule 66(4) of the Rules are couched in mandatory terms. As such, compliance with the Rule is mandatory. The Rule bears out two conditions both of which must be complied with by the applicant after filing the notice of motion for review. These are:-

(1). The applicant must serve the respondent with the notice of motion within fourteen days after filing the same with the Court, and,

(2) The applicant must file with the Court proof of service.

In the instant application, despite the applicant seemingly avoiding to directly admit that service of the notice of motion was not effected to the respondent within the prescribed period, the record is clear that service was effected on 17/5/2011 while the notice of motion was filed on 21/4/2011. Under Rule 66(4) of the Rules, service ought to have been done on or before 4/5/2011. Further, there is no proof of service filed by the applicant as mandatory required under Rule 66(4) of the Rules. We accordingly agree with Mr. Ngudungi that service was effected to the respondent outside the prescribed time.

Now as to what are the consequences of failure to serve the respondent with the notice of motion within the prescribed time is an immediate issue that follows for determination.

Incidents of failure by parties filing notices of motion to serve the other party or parties are not new. The Court faced an almost similar issue in the case of **Sadallah I. Sadallah versus SBC Tanzania Limited,** Civil Application No. 7 of 2009 (unreported). In that application, the applicant did not serve the respondent with the notice of motion within fourteen days as required under Rule 48(4) of the Rules which states:-

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

The Court, in that case, held that the requirement to serve the notice of motion within the prescribed period is mandatory and its failure to comply with the requirement rendered the application incompetent and the application was struck out.

Taking inspiration from the finding of the Court in the above case which dealt with the above quoted provision which is almost similar to Rule 66(4) of the Rules, we consequently hold that the applicant's service of the notice of motion to the respondent after

lapse of the prescribed period contravened the mandatory provisions of Rule 66(4) of the Rules. That was fatal.

For these reasons, we sustain the preliminary objection. The contravention renders the application incompetent. As a result we hereby accordingly strike it out with costs.

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

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

A. H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL