IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MMILLA, J. A. AND LILA, J.A.)

CIVIL APPLICATION NO. 260 OF 2016

UAP INSURANCE TANZANIA LTD ..... APPLICANT

VERSUS

NOBLE MOTORS LIMITED ..... RESPONDENT

(Application for stay of execution from the decision of the High Court of Tanzania at Dar es Salaam

(Mwambegele, J.)

dated 25th day of July, 2016

in

Commercial Case No. 131 of 2015

RULING OF THE COURT

15th May & 5th June, 2017

MMILLA, J. A.:

The applicant, UAP Insurance Tanzania Limited lodged in Court an application for stay of execution of the decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam dated 27.7.2016 in Commercial Case No. 131 of 2015, pending the hearing and determination of the intended appeal; notice of which was lodged on 31.8.2016. The application is brought under Rule 11 (2) (b), (c), (d) (i) (ii) and (iii) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The application is

supported by the affidavit sworn by Michael Emmanuel, the Principal Officer of the applicant company.

When this application came for hearing before the Court on 15.5.2017, Mr. Peter Swai, learned advocate, appeared for the applicant and the respondent, Noble Motors Limited, enjoyed the services of Mr. Alex Mgongolwa, assisted by Mr. Ndulumah Majembe, learned advocates.

At the outset, it transpired that the respondent's advocates did not file a reply to the written submissions of the applicant in terms of sub rule (8) of Rule 106 of the Rules. Mr. Mgongolwa rose and prayed for permission to submit orally.

Before the Court could respond to Mr. Mgongolwa's prayer, Mr. Swai promptly intervened and submitted that in view of the respondent's default to file the written submissions in reply, it was open to the Court to order the hearing of that application to proceed *ex - parte* in terms of sub-rule (10) of Rule 106 of the Rules. He added that pursuant to sub-rule (11) of that same Rule, when the schedule for the written submissions has been completed, the Court is mandated to fix a date of hearing. He contended that the respondent has no right to address the Court orally. He reiterated his request for the Court to order the hearing of the application to proceed *ex - parte*.

Mr. Swai informed the Court similarly that he was aware of the provisions of sub-rule (19) of Rule 106 of the Rules under which the Court is authorized to waive compliance with the provisions of Rule 106 of the Rules in certain circumstances; however, he added, the intention of sub – rule (19) of Rule 106 of the Rules is to accelerate the hearing of the matter before the Court in relation to preparation and filing; and that it does not refer to discretion of not to file the submissions. In those circumstances, he went on to submit, there is no room under that sub rule for the respondent's advocates to seek waiver, and that to do otherwise would be nothing less than an attempt to circumvent the true import of that sub rule.

Apart from that, Mr. Swai submitted likewise that the respondent's advocates have not assigned any special circumstances for the Court to invoke sub rule (19) of Rule 106 of the Rules. He repeated his prayer that the Court takes the option of ordering the hearing of the application to proceed *ex – parte* as envisaged by Rule 106 (10) of the Rules.

In response to his learned friend's submission, Mr. Mgongolwa contended that Rule 106 (10) of the Rules upon which Mr. Swai relies to persuade the Court to order *ex parte* hearing is discretional in nature in so far as the word **"may"** is used. In such circumstances, he went on to

submit; the Court is enjoined to act judiciously, meaning to make a decision with a sense of justice, the test of which is whether or not failure to file written submissions in reply has occasioned a miscarriage of justice to the applicant.

In his view, the answer is in the negative, because by any stretch of imagination the applicant will not be prejudiced; firstly, because they filed an affidavit in reply, therefore that the applicant knows the respondent's stand in the matter; secondly, because the remedy for the order of stay of execution under Rule 11 (2) (d) of the Rules is a guided remedy, and the issues involved in such applications are quite clear.

In addition to the reasons advanced above, Mr. Mgongolwa hinted that his learned friend conveniently avoided to tell the Court the purpose of written submissions. In his view, the written submissions are merely intended to afford the parties and the Court a better understanding of the issues before hand and to enable their justly determination, but are not at all evidence. Relying on the case of **Khalid Mwisongo v. M/s Unitrans (T) Ltd,** Civil Appeal No. 56 of 2011, CAT (unreported), Mr. Mgongolwa added that at any rate, allowing the hearing to proceed inter parties will not prejudice the applicant, instead, he added, it will vouch denial of the right to be heard.

With regard to sub-rule (19) of Rule 106 of the Rules, Mr. Mgongolwa submitted that the interpretation made by his learned friend in respect of that sub rule is not correct, and that sub-rule (11) of Rule 106 of the Rules does not thwart the application of sub rule (19) of Rule 106 of the Rules. The learned advocate pressed the Court to order the hearing of the application to proceeds inter parties.

In a brief rejoinder, Mr. Swai repeated his prayer for the Court to order the hearing to proceed *ex parte*, and cautioned that to allow the respondent's advocates to submit orally will take them by surprise. He insisted that the Rules must be followed.

We have carefully considered the rival arguments of the advocates for the parties. It is incontrovertible that after the applicant's advocate had complied with the provisions of Rule 106 (1) of the Rules, he dutifully served a copy of the written submissions to the respondent in compliance with sub - rule (7) of Rule 106 of the Rules. However, the respondent's advocates did not file the written submission in reply within a period of thirty (30) days; also they did not apply for extension of time as contemplated by Rule 106 (8) of the Rules. That sub rule provides that:-

"106 (8): The respondent shall file a copy of a reply to the submissions of the appellant not later than thirty (30) days from the date of service by the appellant upon him."

The consequences for default to comply with the provisions of Rule 106 (8) of the Rules are stipulated under sub rule (10) of that same Rule. Sub rule (10) thereof provides that:-

"106 (10): Where the Respondent who has been served with a copy of the submissions of the appellant or applicant fails to file a reply within thirty days prescribed under this rule and no extension of time has been sought, the Court ***may*** *proceed to determine the appeal or application ex parte.. "* [Emphasis provided].

However, it is beyond controversy that the word **"may"** in this sub rule entails that the Court has **discretion** to either proceed ***ex-parte*** or to direct otherwise – See the interpretation of the word **"may"** in section 53 of the Law of Interpretation Act, Cap 1 Revised Edition, 2002. It is explained under that section that when the word **"may"** is used in the provision of the law, it imports discretion.

Applying that to the present case, it means that failure to file written submissions in terms of Rule 106 (10) of the Rules does not always result into the Court ordering the matter before it to proceed *ex parte.*

It is certain that sub rule (10) of Rule 106 of the Rules has given only one option; that is to order the application to be heard *ex parte* if the Court deems it fit upon the respondent's failure to file the written submissions in reply, but it is **silen**t on what are the other options. This explains why the advocates for the respondent have asked the Court to resort to the options stipulated under sub rule (19) of Rule 106 of the Rules. That Rule provides that:-

> *"106 (19): The Court **may**, where it considers the circumstances of an appeal or application to be exceptional, or that the hearing of an appeal must be accelerated in the interest of justice, **waive compliance** with the provisions of this Rule in so far as they relate to the preparation and filing of written submissions, either wholly or in part, or reduce the time limits specified in this Rule, to such extent as the Court may deem reasonable in the circumstances of the case."*
>
> [Emphasis provided].

It is beyond dispute that the **"waiver"** referred to in the above quoted sub rule covers Rule 106 of the Rules generally, and not any one particular sub rule under it.

We wish to underscore the point that the **"waiver"** in that regard is in relation to the preparation and filing of written submissions, either wholly or in part, or reducing the time limits specified in this Rule, to such extent as the Court may deem reasonable in the circumstances of the case. However, the said **waiver** is conditional upon two aspects; **one** that there must be exceptional circumstances; and **two** the need for the hearing to be accelerated in the interest of justice.

As already pointed out, the respondent's advocates in the present matter have already filed an affidavit in reply to the affidavit in support of the application. As we know, an affidavit is a written declaration of facts, confirmed by an oath or affirmation of a party making it, expressing a positive ground of the declarant's beliefs. In the circumstances of the present application, the affidavit in reply has raised several points on the basis of which the respondent's advocates are resisting the application. For example, the respondent is vehemently challenging the contents of paragraph 6 the affidavit in support of the application; also that as between the two of them, it is the respondent who will suffer irreparable

loss in the event the decretal sum is executed and not otherwise. Given such a situation, we hold firm that it will not be a just course to ignore the respondent's affidavit in reply, in favour of a direction for the hearing of this application to proceed *ex parte*. Indeed, that will be an improper exercise of judicial discretion.

We think it is opportune at this juncture to re-state the principles that underlie the concept of discretion.

Judicial discretion signifies the exercise of judicial powers judicially, which means the decision based on sound reasons – See the case of **Shah v. Mbogo and Another** (1967) E.A.116 in which the Court emphasized that such discretion must be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy.

In the course of consulting the scales of justice on how to exercise such power, it is sometimes necessary to pose questions such as, in the circumstances of our case; whether or not failure to file a written submission in reply has occasioned a miscarriage of justice to the applicant.

There is no uncertainty in the circumstances of the present case that no miscarriage of justice has been occasioned; **firstly,** because they filed an affidavit in reply, therefore the applicant knows the respondent's stand in the matter; **secondly,** because the remedy for the order of stay of execution under Rule 11 (2) (d) of the Rules is a guided remedy, and the issues involved in such applications are quite clear. We have in mind the provisions of sub rule (2) (d) (i), (ii) and (iii) of Rule 11 of the Rules which provides that:-

> *"11 (2) (d) no order for stay of execution shall be made under this rule unless the Court is satisfied-*
>
> *(i) that substantial loss may result to the party applying for stay of execution unless the order is made:*
>
> *(ii) that the application has been made without unreasonable delay: and*
>
> *(iii) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him."*

We have also felt that it is important to give past examples in which the Court had occasion to exercise its discretion in diverse circumstances on failure to file written submissions either by the applicant or the respondent in line with the problem facing us in the present case.

In the case of **Khalid Mwisongo v. M/s Unitrans (T) Ltd,** (supra) which was cited to us by Mr. Mgongolwa, the Court exercised its discretion to wholly waive the filing of submissions and elected to proceed with the hearing of the matter before it in the absence of written submissions.

In that case, the advocate for the respondent contended that the appellant had a mandatory obligation to file written submissions in support of his appeal within a period of 60 days in terms of Rule 106 (1) of the Rules, 2009, but defaulted. In view of that default, he urged the Court to dismiss the appeal under Rule 106 (19) (sic: (9) of the Rules.

On the other hand, the advocate for the appellant conceded default, but maintained that it did not occasion miscarriage of justice to the respondent. He pressed the Court to order the hearing of the appeal to proceed on merit. In overruling the preliminary objection the Court stated that:-

> *"We are constrained to agree with the appellant. One,* ***the purpose of filing a written submission is to enable the Court to better understand the nature of the appeal, the issues involved, and ultimately adjudicate upon and determine the appeal properly****.... Such omission does not prejudice the case of the other*

parties, here the respondent company. As the failure to file a written submission did not prejudice the case of either party, we find no merit in the preliminary objection. Under the circumstances, we overrule the preliminary objection with costs. We order that the appeal proceeds to hearing on a date to be fixed by the Registrar."

Another example is the case of **Amos Fulgence Karungula v. Kagera Co-operative Union [1990] LTD,** Civil Application No. 02 of 2013, CAT (unreported),. In that case, the respondent did not comply with the demands of Rule 106 (8) of the Rules in that it failed to file the written submission in reply after having been served by the applicant. The applicant prayed to be heard *ex-parte* pursuant to sub-rule (10) of Rule 106 of the Rules. The Court exercised its discretion in whole by refusing to order the hearing to proceed *ex-parte*, instead it allowed oral submissions and the application was heard on merit. See also the case of **Mwinyshehe A. Mwinyishehe v. Secretary General Bilal Muslim Mission**, Civil Appeal No. 36 of 2010, CAT (unreported) in which the Court extended the time in which to file written submissions.

A worse scenario happened in the case of **Rutagatina CL v. Advocate Committee & Clavery Mtindo Ngalapa,** Civil Appeal No. 46 of 2012, CAT (unreported). In that case, despite the respondent's failure to

file the written submissions, he also did not appear in Court when the case was scheduled for hearing. The applicant's advocate pressed the Court to allow the appeal to be heard *ex parte*. However, the Court declined to grant the prayer sought; instead it exercised its discretion in whole by adjourning the matter to the next session and directed for the appeal to proceed inter parties on the sole reason of affording opportunity to the respondent to be heard.

The above decisions vindicate the fact/truth that there is no uniform approach by the Court on how to exercise the discretion. However, one thing must be clear that the latitude of individual choice is necessarily according to/ is influenced by the particular surrounding circumstances. Also, it is proper to point out that in matters of discretion authorities are not of much value since no two cases are exactly alike and even if they were, the Court cannot be bound by the previous decision to exercise discretion in a particular way because that would be in effect putting an end to the discretion. See the case of **Evans v. Bartlam** [1937] AC 473.

In the upshot, considering the circumstances of the present case, particularly that the respondent has filed an affidavit in reply to the affidavit in support of the application, hence that the applicant will not be prejudiced, we are compelled to exercise our discretion by allowing the

respondent to file the written submissions in reply at the shorter time of 21 days from the date of this ruling to pave way for the hearing of the application to proceed inter parties on the date to be fixed by the Registrar. We strongly believe that this move will also vouch the possibility of taking the applicant and his advocate by surprise.

We order accordingly.

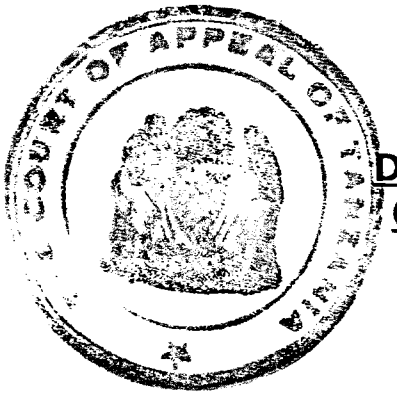
DATED at **DAR ES SALAAM** this 30th day of May, 2017.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. MMILLA
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