IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 110 OF 2013

MINJINGU MINES FERTILIZERS LTD ..... APPLICANT

VERSUS

MONTERO TANZANIA LIMITED ..... RESPONDENT

(Application to strike out Civil Appeal No. 34 of 2013 arising from the decision of the High Court of Tanzania at Dar es Salaam)

(Makuru J.)

dated the 04th day of May 2011
in
Civil Case No. 176 of 2009

RULING OF THE COURT

14th & 23rd June, 2017

MWANGESI, J.A.:

By way of notice of motion preferred under the provisions of Rule 48 (1) and (2), 89 (2) and 45 (6) of the Court of Appeal Rules, 2009 (the Rules), the applicant is moving the Court to strike out Civil Appeal No. 34 of 2013 on the reason that, the applicant has failed to take an essential step in the proceedings within the time prescribed by law. The application

is supported by an affidavit that was sworn by Mr. Dilip Kesaria. And pursuant to Rule 106 (1) of the Rules, the applicant did file written submissions to amplify the application. On the other hand, the respondent did lodge an affidavit in reply that was sworn by Mr. Henry Sato Massaba. There was however, no written submission, which was filed in reply to the written submission by the applicant in compliance with the stipulation under Rule 106 (8) of the Rules.

When the application was called on for hearing on the 14th June 2017, Mr. Dilip Kesara learned counsel, did enter appearance for the applicant whereas, Mr. Henry Sato Massaba learned counsel, did appear for the respondent. Upon taking the floor to address the Court, Mr. Kessaria learned counsel, did submit before us that, while the affidavit in reply to the application which they lodged in this Court was timely lodged by the respondent, to date, there has never been filed any reply to the written submission, which they did serve to the respondent on the 20th July 2013, in compliance with Rule 106 (8) of the Rules. And the fact that, the requirement in the forenamed Rule is imperative, the failure by the respondent to comply with the same disentitles him the right to defend

himself in the application. The learned counsel for the applicant has therefore, urged us to invoke our discretionary powers under the provision of Rule 106 (10), to permit the hearing of the application to proceed ex parte.

On his part, Mr. Massaba learned counsel, did concede to the contention of his learned friend that, they were indeed served with the written submission by the applicant way back in the year 2013, on a date which he could not ascertain. He did as well concede to the fact that, since then, they have failed to file any written submission in reply for reasons which he could not disclose. Nonetheless, from the fact that, the respondent wishes to defend himself in the application as could be evidenced by the presence of his learned counsel in Court today, he did strongly beseech us to invoke our discretionary powers stipulated under the provision of Rule 106 (19) of the Rules, to allow him to defend the respondent in the application on the reason that, the Court had in numerous occasions in the past, allowed parties to orally argue the application even though they had failed to file the written submissions.

However, the learned counsel did not manage to cite any authority to substantiate his averment.

The brief rejoinder by Mr. Kesaria learned counsel to what got submitted by his learned friend was to the effect that, the mere fact that, the Court has discretion to allow a party who has not filed a written submission to defend an application, cannot be applied as an open cheque to parties who blatantly disregard the salutary rules of procedure that have been put in place, and rely on the discretion of the Court. The failure by his learned friend to neither file the written submission within the time required by the law, nor to apply for extension of time, and further that, while in Court, he did fail to mention any single reason as to why he did not file the written submission as per the requirement of the law is clear indication of laxity on his part. He has thus humbly urged the Court to disregard the prayer of his learned friend and proceed to entertain the application ex parte.

On the date when we heard the submissions of the learned counsel for both sides, we did outright reject the prayer by the learned counsel for the respondent and granted the prayer by the learned counsel for the

applicant to proceed with the hearing of the application ex parte. We reserved our reasons for the ruling, which we hereby give now. The requirement for the respondent to file a reply to the submissions of the appellant has been stipulated under Rule 106 (8) of the Rules, which bears the following wording:

> *"A 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."*

We note that, the catch word which has been used in the above quoted provision is "**shall**", of which its import is that, the obligation imposed to the respondent is imperative. Nonetheless, in a situation where the respondent has failed to comply with the requirement within the prescribed period, there is still a chance for him to apply for extension of time so to do as can be inferred from the provisions of Rule 106 (**10**), which reads:

> *"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 (30) 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."

In the instant matter, after the respondent had been served with the written submissions by the applicant on the 20th July 2013, he neither filed the reply within thirty (30) days as required by the law nor was there any attempt to seek for extension of time so to do. And, even when the learned counsel for the respondent was required by the Court to orally explain, if there were any predicaments encountered, leading to the failure, there was none. The only averment that could be heard from the learned counsel for the respondent, was just the request to the Court, to exercise its discretionary powers to allow him to defend his client in this application on the reason that, it had done so severally in previous instances of the like.

It is correct as argued by the learned counsel for the respondent that, in terms of the provisions of Rule 106 (19) of the Rules, the Court has discretion to allow a party who has not filed written submissions to be heard in respect of the matter that is before it. In its own words the provision reads:

"The Court may, where it considers the circumstances of an appeal or application to be exceptional, or that the hearing of an appeal or application 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."

The issue which stands before us for deliberation is whether, the circumstance of the application at hand suffices to move us to use our discretionary powers under the above quoted sub - rule 19 of Rule 106 of the Rules, in favor of the respondent. Our answer is in the negative. To the contrary, we are of the considered view that, this is a fit case in which the discretion of the Court has to be exercised in the disfavor of the respondent in terms of Rule 106 (10) of the Rules. The failure by the respondent not to use any of the three options that have been discussed above is a clear indicative that, there was deliberate disregard of the law or, gross negligence on the part of the respondent. We fully subscribe to

what the learned counsel for the applicant has submitted that, the fact that, the Court has discretion to give or deny audience to a party, who has not filed written submissions cannot be used as an avenue for negligent or lax parties to deliberately fail to comply with legal requirements and resort to Court's discretion. Or else, the essence of there being procedural rules would be rendered useless. It was on those bases that, we did turn down the prayer by the learned counsel for the respondent, to defend his client (respondent) in this application and thereby, letting the hearing of the application to proceed ex parte.

With regard to the merits of the application, it has been submitted by Mr. Kesaria learned counsel for the applicant that, the ruling and drawn order of the High Court sought to be impugned by the applicant in Civil Appeal No. 34 of 2013, did arise from a preliminary objection that was raised by the applicant to the suit by the respondent against the applicant whereby, the Honourable Judge did sustain it, leading to its being struck out. In the view of Mr. Kesaria learned counsel, the ruling that did strike out the suit and the drawn order thereto, cannot be equated to a judgment and decree, of which the appeal is automatic within the ambits of section 5

(1) (a) and (b) of the Appellate Jurisdiction Act, Cap 141. Conversely, the ruling and drawn order in the said suit, did fall within the realm of section 5 (1) (c) of the Act, of which, leave has to mandatorily be sought and obtained, before an appeal to challenge it can be lodged. Since the appeal under discussion was lodged without leave, it is incompetently before the Court the remedy of which is to get struck out. The learned counsel for the applicant has thus urged the Court to strike out the application with costs. To fortify his stance, he has referred the Court to a number of decisions that include **Hussein Ally Kasweswe Vs Mzee Hamisi Kawsweswe** [1985] TLR 251, **Mechanical Installation and Engineering Company Ltd Vs Abubakar Ndeza Maporo and Another** [1987] TLR **Enock M. Chacha Vs Manager NBC, Tarime** [1995] TLR 270 and others.

In the light of the submission by the learned counsel for the applicant above, we are enjoined to resolve as to whether the appeal which has been lodged by the respondent is competently before the Court. In answering this issue, we shall use paragraph 6 of the affidavit of Mr. Massaba in reply to the affidavit of the applicant as our takeoff. In the same, it was affirmatively deponed by the learned counsel for the

respondent that, the decision of the trial Judge (Hon. Makuru, J.), which is sought to be impugned in the appeal, had the effect of concluding the matter on merit by finding that, the respondent had no cause of action against the first and second defendants in the main suit, which finding is liable for dismissal. After having gone through the said decision, we are in disagreement with such contention of the learned counsel. The ruling did categorically state that, the suit was being struck out as clearly summed up at the foot of the ruling, where in verbatim reads:

> *"For the foregoing reasons, the suit is incompetently misconceived and it is accordingly struck out with costs."*

Striking out a suit as it happened in the instant one, did not conclude the suit on merit as per the affidavit of the learned counsel for the respondent. This is from the fact that, the same suit could be re-instituted upon rectification of the anomalies that led to its being struck out. That being the case, there was no judgment or decree. As such, the order striking out the suit did fall within the realm of section 5 (1) (c) of the Appellate Jurisdiction Act and therefore, it was imperative to obtain leave

before lodging an appeal. In the case of **Hussein Ally Kasweswe** (supra), the High Court did dismiss an application seeking for directions regarding letters of administration that had been issued to the respondent. In dismissing the appeal that had been preferred against such an order of the High Court, the Court did hold that:

> *"The application was not something in the nature of a suit and the ruling of the Court on it was not a decree with a right of appeal but an order and, so as to appeal against the order, there was need to obtain leave to appeal from the High Court."*

In yet another case of **The Executive Secretary Wakf and Trust Commission Mambomsiige Zanzibar Vs Siade Salum Ambar** [1991] TLR 198, the Court echoing the above holding did state that:

> *"Appealing from an order refusing to set aside an ex parte judgment comes under sub-section (c) of section 5 of the Appellate Jurisdiction Act, 1979 (by then) for which it is necessary to obtain leave first. As no such leave was sought and obtained, this intended appeal is incompetent."*

Similar position was taken by the Court in cases having analogous circumstances in the cases of **Enock M. Chacha Vs Manager NBC Tarime** (supra), **Jose X. Ferreira Vs Mbaraka Salum,** Civil Appeal No. 22 of 1994 as well as **Twiga Papers Products Limited Vs The Permanent Secretary Ministry of Works and Another**, Civil Application No. 156 of 2007. In the same vein, the fact that, seeking and obtaining leave was a pre-requisite before the respondent could lodge his appeal in the instant matter, it is our holding that, Civil Appeal No. 34 of 2013 was prematurely lodged, which renders it to be incompetently before the Court. To that end, it is hereby struck out with costs to the applicant.

Order accordingly.

DATED at **DAR ES SALAAM** this 21st 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.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL