

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 44 OF 2012

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

MSAFIRI PHARMACEUTICALS

& ASSOCIATES LIMITEDAPPELLANT

VERSUS

SHELLYS PHARMACEUTICALS LIMITED RESPONDENT

**(Appeal from the Judgment and Decree of High Court of Tanzania
(Commercial Division) at Dar es Salaam)**

(Makaramba, J.)

dated the 29th day of July, 2011

in

Commercial Case No. 96 of 2009

RULING OF THE COURT

5th February & March, 2017

LILA, J.A.:

Msafiri Pharmaceuticals & Associates Limited, the appellant, instituted the present appeal seeking to challenge the decision of the High Court (Commercial Division) in Commercial Case No. 96 of 2006 (Hon. Makaramba, J.) which was delivered on 29/06/2011. In that case the respondent successfully sued the appellant for breach of the distribution agreement,

payment of Tshs.530,351,247.01, interest and payment of general damages for breach of contract. The trial court ordered the appellant to pay the respondent Tshs.518,548,368.77 being monies owed by the respondent, interest at commercial rate of 18% p.a from the date the debt fell due (23/9/2008) to the date of judgment and thereafter interest at the rate of 12% till date of full payment. Aggrieved, the appellant instituted the present appeal.

On 6/2/2017, the respondent, under Rule 107 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), filed a notice of preliminary objection containing two points of law to the effect that:-

- " i) *The appeal is hopelessly time-barred.*
- ii) *The appeal is incompetent for failure to comply with Rule 106 (1) of the Court of Appeal Rules, 2009, that is, failure to file written submissions. It is now the position of the Court that Rule 106 (1) is a mandatory requirement (see for instance Civil Application No. 94 of 2015: **Edina Mwakapalila v. Fatuma Rashid**; Court of Appeal of Tanzania at Dar es Salaam (unreported)."*

When the appeal was called on for hearing Mr. Michael Ngalo, learned advocate, appeared for the appellant and Dr. Onesmo Michael, learned advocate, appeared for the respondent.

Dr. Onesmo Michael dropped his first point of objection. He accordingly proceeded to argue on the second point of law raised.

Arguing in support of the second point of objection it was Dr. Onesmo's contention that the appeal is incompetent following the appellant's failure to file written submission within sixty days after lodging the appeal as mandatorily required under Rule 106 (1) of the Rules. He pressed that filing of written submission is necessary because they allow the other party know the appellant's case filed in Court. It is because of this, he contended, that parties are, under Rule 106 (12) of the Rules, given only thirty minutes (half an hour) to argue on the matter unless the Court directs otherwise. In support of his arguments he referred us to the Court's decision in **Edina Mwakapalila's case** (supra) where the Court dismissed the application following the applicant's failure to file written submissions under Rule 106 (1) of the Rules.

In opposition, Mr. Michael Ngalo, in the first place, readily conceded that no written submissions in support of the appeal was filed within sixty days after lodging the record of appeal. He, however, was of the view that the appeal cannot be declared incompetent simply because written submissions in its support have not been filed. He, too, admitted being aware of the Court's decision in **Edina Mwakapalila's case** (supra) but he contended that there are conflicting decisions on the consequences of failure to file written submissions under Rule 106 (1) of the Rules. He referred us to the Court's decision in **Khalid Mwasongo v. M/S Unitrans (T)**, Civil Appeal No. 56 of 2011, (unreported) where the Court held that where no prejudice and injustice is occasioned to the other party the Court should proceed to hear the parties so as to deliver substantial justice to the parties.

Mr. Ngalo contended that as Dr. Onesmo did not demonstrate to the Court how his client, the respondent, has been prejudiced or any injustice occasioned by the appellant's failure to file written submission, then the Court should proceed to hear the appeal on merits. He further referred the Court to the decision in **Leonard Magesa v. M/S Olam (T) Ltd**, Civil Appeal No. 117 of 2014 (unreported) on which he commended to have properly interpreted Rule 106 (1) of the Rules. He submitted that, in

Leonard Magesa's case (supra) the Court stated that read in context, Rule 106 (1) is not mandatory and hence failure to file written submissions does not incapacitate the appeal. He accordingly urged the Court not to dismiss the appeal under Rule 106 (9) of the Rules as the Court has discretion to allow the parties to be heard even if no written submissions have been filed. He accordingly prayed that the preliminary objection raised be dismissed with costs.

In his short rejoinder, Dr. Onesmo reiterated his earlier position that Rule 106 (1) is couched in a mandatory manner and that compliance is not optional. He contended that the appellant cannot seek refuge in the Court's decision in **Khalid Mwisongo's case** (supra) because even in it the Court categorically stated that by failing to file written submission, the appellant waived his opportunity to state his appeal to the Court. He said, that is why the appellant was granted extension of time to file his submission instead of the Court ordering the appeal to be heard orally. He accordingly said that decision is not supportive of Mr. Ngalo's argument. Regarding the Court's decision in **Leonard Magesa's case** (supra), Dr. Onesmo argued that the Court has discretion to dismiss the appeal or allow hearing to proceed under Rule 106 (9) of the Rules, but the appellant must have had already filed an

application for extension of time to file submission in which the applicant will have explained the reasons for delay. Otherwise, Dr. Onesmo insisted that the discretion under Rule 106(9) of the Rules will not be exercised and instead the appeal has to be dismissed. He submitted that in **Leonard Magesa's case**, (supra) the appellant gave reasons for failure to file submission and the Court gave him opportunity to file a formal application for extension of time to file submission. He pressed that the appeal should be dismissed with costs.

We have given due consideration to the arguments by counsel for both sides. We commend them for their respective short but focused arguments in support of their two divergent positions on the matter.

The arguments by the counsel invite the Court to determine whether the appeal should be dismissed following failure by the appellant to file written submission in support of the appeal within sixty days after lodging the appeal.

The requirement to file written submission in support of the appeal is governed by Rule 106 (1) of the Rules. For certainty and easy of reference, Rule 106 (1) of the Rule provides:

"106 - (1) A party to a civil appeal, application or other proceedings, shall within sixty (60) days after lodging the record of appeal or filing the notice of motion, file in the appropriate registry a written submission in support of or in opposition to the appeal or the cross-appeal or application, if any as the case may be."

According to Mr. Ngalo, there are two different courses taken by the Court in case a party fails to file submission in support of an appeal within the prescribed period of sixty days. Dr. Onesmo was of a different view. To him there is only one course, that is compliance with the requirement of Rule 106(1) is mandatory and unless a party files an application for extension of time to file written submission before the hearing of the appeal as required under Rule 106 (9) of the Rules, the appeal should be dismissed for being incompetent.

Upon our reading of the various Court decisions on the application of Rule 106 (1) of the Rules and the consequences of non-compliance with it as provided under Rule 106 (9) of the Rules, we are inclined to agree with Mr. Ngalo that there are contradicting positions in respect of the consequences of non-compliance with Rule 106 (1) of the Rules. In **Khalid**

Mwisongo's case (supra) and **Leonard Magesa's case** (supra) cited by Mr. Ngalo, the Court held that failure to file written submission is not fatal. Other cases supporting that position are **VIP Engineering and Marketing Ltd vs. Said Salim Bakhressa Ltd**, Civil Appeal No. 47 of 1996 and **National Bank of commerce (NBC) Limited vs. Sao Ligo Holding Ltd and Another**, Civil Application No. 267 of 2015 (both unreported) which cited with approval the findings in **Leonard Magesa's case** (supra).

On the other hand, apart from the two cases cited by Dr. Onesmo, the other cases supporting the position that filing of written submission is mandatory are **Masunga Mbegete and 2 others v. The Hon. Attorney General and Another**, Civil Application No. 68 of 2010, **Martha Khotwe vs. Miston Mwanjamila**, Civil Application No. 5 of 2014, **Rosemary Stella Jairo vs David Kitundy Jairo**, Civil Application No. 275 of 2015 and **Wambeke Mtumwa Shahame v. Mohamed Hamisi Juma** (Legal Representative of Asha Juma, Deceased), Civil Application No. 124 of 2009 (all unreported).

Besides appreciating the existence of the two conflicting positions on the consequences of non-compliance with Rule 106 (1) of the Rules, we are

of the firm view that the Court Rules are interdependent. They should, therefore, not be read in isolation. To resolve the divergent views by the parties herein, it is our view that Rule 106 (1), (9) and (19) must be read together. Again for easy of reference, we hereunder quote Rule 106 (9) and (19) of the Rules:

*"106 (9) - Where the appellant files the record of appeal or lodges the notice of motion, and **fails to file the written submissions within sixty days prescribed under this Rule and there is no application for extension of time within which to file the submissions**, the Court may dismiss the appeal or application (Emphasis is ours).*

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."

A careful reading of Rule 106 (1) of the Rules would show that it stresses on the need for a party to an appeal or application to file submission in support of the appeal or application. It sets out the time limit for filing submission to be sixty days after lodging a record of appeal or notice of motion. On the other hand, Rule 106 (9) of the Rules, takes care of a situation where a party fails to file written submission within the prescribed time by requiring him to file an application for extension of time and then leave upon the court to decide either to dismiss the appeal or not. It is for this reason, in our view, that a word "*shall*" is used in Rule 106(1) of the Rules to signify that filing of written submission is mandatory. We are fortified in this position by the decision of the Court in **Mechmar Corporation (Malaysia) Berhard Vs, VIP Engineering and marketing Ltd**, Civil Application No. 9 of 2011 (unreported) which was decided prior to the two decisions cited by Mr. Ngalo in which the Court categorically stated that Rule 106(9) of the Court Rules offers a discretion of what follows if Rule 106(1) of the Rules is not complied with. In that case, after satisfying itself that no application for extension of time had been filed by the advocate for the applicant and after declining to exercise the discretion conferred upon it by Rule 106 (19) of the Rules on the ground that no exceptional

circumstances existed, the Court invoked the powers conferred upon it by Rule 106(9) and dismissed the application with costs.

Regarding the discretion of the Court provided under Rule 106(9) of the Rules, it is clear that, that rule gives the Court a discretion to either dismiss or not dismiss the application when no written submission have been filed by the appellant in support of the appeal. For the Court to exercise such discretion the appellant who had failed to file written submission must have filed an application for extension of time to file written submission. Otherwise, as rightly argued by Dr. Onesmo, the Court is enjoined not to exercise the discretion. In simple terms, the Court can only exercise the discretion after the appellant has filed an application for extension of time to file written submission otherwise the Court is enjoined to dismiss the appeal. This was stated by the Court in **Edina Mwakapila's** case (supra) that:

"Similarly, although the Court has discretion under sub-rule (9) and (19) of Rule 106 of the Rules as shown above, such discretion can only be exercised when there is an application made by a party. Since in this case, such application does not exist, there is no material upon which the court's discretion can be exercised."

We think there is a lot of sense in this because, as rightly submitted by Dr. Onesmo, the reasons for delay in filing written submissions will be shown in the application for extension of time. In the absence of such reasons it will be difficult for the Court to judiciously exercise the discretion of either dismissing the appeal or not. It, therefore, goes without saying that where the Court finds that there are good reasons for the delay, the Court will not dismiss the appeal. The opposite will be the case if, in the first place, no application for extension of time to file submissions is filed and secondly, if the reasons in the application for extension of time are deficient to move the Court not to dismiss the appeal.

The immediate issue that arises is what should follow if the Court, in the exercise of its discretion under Rule 106(9) of the Rules, declines to dismiss the appeal or application. Rule 106(9) of the Rules does not provide what should be done where the Court refrains from dismissing the appeal or application following failure by the appellant or applicant to file written submission. It is our view that where the Court declines not to dismiss the appeal or application under Rule 106 (9) of the Rules, the Court should invoke the provisions of Rule 106 (19) of the Rules and adopt either of the options provided therein and thereafter proceed to hear the appeal or

application. The options available are either to waive compliance with the provisions of the Rule (Rule 106 of the Rules) in so far as they relate to preparation and filing of written submission, either wholly or in part and reduce the time limits specified in Rule 106 (1) of the Rules to such extent as the Court may deem reasonable in the circumstances of the case. In short the Court may waive filing of written submissions or give parties opportunity to file submissions but within shorter periods of time. But, more importantly, for the Court to adopt any of these options the Court must be satisfied that there exists exceptional circumstances or grounds compelling the hearing of the appeal be accelerated for the interest of justice. [See **Mwinyishehe A. Mwinyishehe v. Secretary General Bilal Muslim Mission**, Civil Application No. 36 of 2010 (unreported)].

It should also be noted that where a party to an appeal or application fails to file written submission under Rule 106 (1) of the Rules, he can directly seek refuge under Rule 106 (19) of the Rules by showing, to the satisfaction of the Court, exceptional circumstances or reasons why the hearing of the appeal should be accelerated. We are fortified in that position by the decision of the Court in **The Zanzibar Shipping Corporation and**

Another vs. Mohamed Hassan Juma and 5 others, Civil Application No. 8 of 2014 (unreported), where the Court stated:-

"The Court reserves the right under Rule 106 (19) of the Court of Appeal Rules 2009 to make appropriate orders as it deems fit under the circumstances of the case."

Fortunately Rule 106 (19) of the Rules does not tell who specifically should raise such compelling circumstances hence leaving it open to either the appellant to raise or the Court to do so upon perusal of the materials availed to it in the notice of motion or record of appeal. [See **Edina Mwakapila's case** (supra)].

In the present appeal no written submission in support of the appeal was filed by the appellant and Mr. Ngalo readily conceded on this. We have indicated above that filing written submission within sixty days is a mandatory requirement under Rule 106 (1) of the Rules. There is no application for extension of time that has been filed as required under Rule 106 (9) of the Rules. There is therefore nothing that may move the Court to exercise its discretion not to dismiss the appeal under Rule 106 (9) of the Rules. It follows therefore that we cannot invoke the provisions of Rule 106

(19) of the Rules as the appeal stands to be dismissed. We cannot, further, adopt any of the options provided under Rule 106 (19) of the Rules as the appellant has not raised any exceptional circumstances or any need for accelerating hearing of the appeal. We also, upon perusal of the record of appeal, see no any compelling circumstances so as to either waive the filing of the submission or order filing of the same.

For reasons demonstrated above, the appeal is accordingly found to be incompetent for failure to comply with the mandatory requirement of Rule 106 (1) of the Rules. We have no option but to dismiss it with costs.

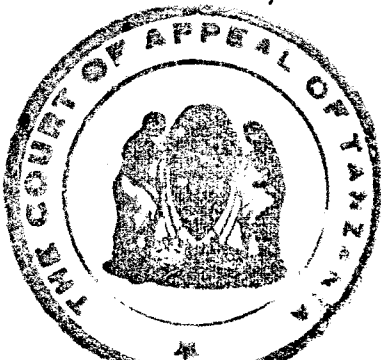
DATED at DAR ES SALAAM this 14th day of March, 2017.


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.




P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL