

**IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR**

CIVIL APPLICATION NO.461/15 OF 2016

CHAVDA HOTEL..... APPLICANT

VERSUS

IBRAHIM PASCAL AND 26 OTHERS..... RESPONDENT

(Application for extension of time to file Application for leave to appeal out of time from the ruling and order of the High Court of Zanzibar at Vuga)

(Sepetu, J.)

dated the 24th day of August, 2015

in

Civil Case No. 8 of 2015

.....

R U L I N G

28th November, & 4th December, 2017

MZIRAY, J.A.:

This application by notice of motion is brought under Rule 10, 48 (1) and 49(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) for extension of time within which to lodge an application for leave to appeal to the Court of Appeal. The application is supported by the affidavit of Mr. Omar Said Shaaban, learned Advocate, who represented the applicant in the High Court and in this Court.

In his affidavit in support of the application Mr. Omar Said Shaaban, learned Counsel, deponed thus:

"1.

2. *That on 15th February, 2016 the deponent being the applicant's legal counsel filed a notice of appeal and a letter requesting for certified copies of proceedings, ruling, the order/decrees, and admitted exhibits to facilitate the intended appeal and application for leave to appeal.*
3. *That the certified copies of Ruling and Drawn Order only were obtained on 22nd March, 2016 the date which falls out of the required period of fourteen days for filing application for leave to appeal before the High Court.*
4. *That the applicant at the first instance filed application No. 13 of 2016 to the High Court of Zanzibar for extension of time to file an application for leave to appeal to the Court of Appeal, the application of which was dismissed by the High Court Ruling pronounced by Hon. Mkusa I. Sepetu Judge on the ground that the affidavit supporting the application did not comply with the requirements of the law governing affidavits.*
5. *That the Applicant is seeking the leave to appeal to the Court of Appeal believing that there are serious points which need the determination of the Court of Appeal."*

It is to be noted that although the respondents were served with a copy of the notice of motion, they did not file any affidavit in reply to the applicant's averments in terms of Rule 56 (1) of the Rules.

When the application was called on for hearing Mr. Omar Said Shaaban, learned counsel appeared for the applicant, whereas Mr. Adam Suleiman Simba, Zonal Secretary of Conservation Hotel Domestic and Allied Workers Union (CHOWADU) appeared for and on behalf of the respondents.

Commenting on the failure of the respondents to file affidavit in reply, Mr. Omar Said Shaaban, learned counsel argued that in practice, any person who does not file an affidavit in reply by all necessary implications concedes to the averments contained in the affidavit in support of the application, hence such failure gives the Court a leeway to proceed determining the application ex-parte. He cited the unreported case of **Patel Trading Company [1961] Ltd and Another V. Bakari Omary Wema t/a Sisi kwa Sisi Panel Beating**, Civil Application No. 19 of 2014, to buttress his argument.

In his reply submission, Mr. Adam was of a different view. He asked the Court to allow him to submit in reply orally contending that the word “*may*” used in Rule 56(1) of the Rules gives him an option to file the affidavit in reply or not to file. He maintained that it is purely in the discretion of the Court.

I have considered and examined the averments of both parties to the point. With great respect, the language used in Rule 56(1) of the Rules is clear. Filing affidavit in reply is purely discretionary. The respondent may elect to file the affidavit in reply or not to file. Should he elect not to file, the disadvantage is that he is barred from challenging or denying the truthfulness of the averments in the applicant’s supporting affidavit. In the circumstances therefore, the respondent’s right of audience is not dependent upon whether he filed an affidavit in reply or not. He would still have the right to respond orally when arguing the merits of the application. On that basis, I don’t buy the argument advanced by the applicant that in the situation where the respondent has not filed affidavit in reply, the remedy available is to allow the applicant to proceed ex-parte. In fact, the remedy is to allow the respondent to respond to the submission of the applicant orally.

Upon the above analysis, I direct the hearing of the application to proceed *inter partes* on merits on a date to be fixed by the Registrar in the ongoing session.

DATED at ZANZIBAR this 29th day of November, 2017.

R.E.S MZIRAY
JUSTICE OF APPEAL

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


E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL