

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 117/17/2017

AMINIEL MBWAMBO ..... APPLICANT

VERSUS

OMARY MCHENGULE & OTHERS .....RESPONDENTS

(Application for restoration of Civil Application No. 66 of 2016 for extension of time to file an application for review of the decision of the High Court of Tanzania at Dar es salaam)

(Nchimbi, J.)

dated the 10<sup>th</sup> day of October, 2012

in

Land Case No. 13 B of 2009

RULING

10<sup>th</sup> & 16<sup>th</sup> November, 2017

MWANGESI, J.A.:

In application No. 66 of 2016, the applicant herein did apply for extension of time within which he could lodge an application for review of the decision of the Court (Mwarija, J.A.), that was delivered on the 8<sup>th</sup> February, 2016. When the application was called on for hearing on the 13<sup>th</sup> February, 2017, the applicant failed to enter appearance for no any apparent reasons. In the circumstances, the application was dismissed for

want of appearance in terms of the provisions of Rule 63 (1) of the Court of Appeal Rules, 2009 (the Rules).

In an attempt to have the application restored after being dismissed, the has lodged the current Notice of motion under the provisions of Rules 63 (3) of the Rules, and has been couched in these words thus:

*"NOTICE OF MOTION*

*(Made under Rule 63 (3) of the Court of Appeal Rules, 2009 GN 368 of 2009.*

*Take a notice that; on the --- day of ---- O'clock in the morning/afternoon or soon thereafter when the applicant can be heard upon this application on the following orders:-*

- 1. That this Honourable be pleased to comply with the applicant's application subject to rule 63 (3) of the Court of Appeal Rules, 2009.*
- 2. An order that application No. 66 of 2016 be reheard and determined to its finality subject to Rule 63 (3) of the Tanzania Court of Appeal Rules, 2009.*
- 3. An order that the cost of and incidental to this application abide by the result of the said appeal and any other order or reliefs as the Court may deem fit and just to grant and any other ground to be adduced during the hearing of this application.*

*The application will be supported by the affidavit of Aminiel Mbwambo, the application sworn in the ----- day of ----- 2017.*

When the application was called on for hearing on the 10<sup>th</sup> day of November, 2017, the applicant entered appearance in person fending for himself, whereas, the first respondent had the services of Mr. Mohamed Mkali learned counsel. Upon the applicant being asked by the Court to take the floor and present his application, he did ask the Court to permit him to argue the application by way of written submissions.

On the other hand, Mr. Mohamed Mkali learned counsel for the first respondent, did resist the request by the applicant on two reasons. First, it was the submission of the learned counsel that, the prayer by the applicant is untenable because he did fail to comply with the mandatory requirement under the provisions of Rule 106 (1) of the Rules in that, he did not file written submissions to amply his grounds of the application. As the requirement was mandatory, the failure by the applicant to do so did render the application to be incompetently before the Court.

On the second reason, the learned counsel for the first respondent did argue that, in the application at hand by the applicant, there are more than two respondents his client inclusive. Nonetheless, the whereabouts of the other respondents was not known and there was no any explanation by the applicant to that respect. That being the case, the learned counsel did implore the Court to hold that, the applicant has failed to comply with the requirement under the provisions of Rule 48 (4) of the Rules, the remedy of which is to strike out the application. He did add that, this was the second time for the applicant to repeat the same mistake which he had previously done in Civil Application No. 96 of 2015 involving the same parties in the same suit, whereby this Court (Mwarija, J.A.) did strike out the application on similar reasons. It would appear, the applicant is not willing to learn from the previous experience, the learned counsel did conclude.

In view of what has been submitted above, the issue for the Court to resolve is whether the application at hand is tenable. The provisions of Rule 106 (1) of the Rules which are alleged by the learned counsel for the

first respondent not to have been complied with by the applicant bears the following wording that is:

*"A party to a civil appeal, application or other proceedings, **Shall** within sixty 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 cross - appeal or application, if any, as the case may be."*

*[Emphasis supplied]*

It is to be noted that, the catch word which has been used in the provisions is '**shall**', meaning that, compliance is mandatory. In the circumstances, the failure by the applicant in the instant application to comply with the named requirement was therefore, fatal.

It was further submitted by the learned counsel for the first respondent that, the applicant did as well fail to comply with the

mandatory requirement under the provisions of Rule 48 (4) of the Rules, which reads thus:

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

*[Emphasis supplied]*

Again the catch word that has been used in the provisions is **shall**, meaning that, compliance was mandatory. Nonetheless, in the instant application, where there are more than two respondents, it is only the first respondent, who entered appearance, whereas, the whereabouts of other respondents was never made known to the Court by the applicant. The same therefore means that, the applicant did fail to discharge his responsibility under the provisions of Rule 48 (4) of the Rules aforesaid and thereby, rendering the application incompetently before the Court.

In the light of the anomalies pointed out above, it is evident that, the application at hand is incompetently before the Court and without any further ado, I hereby join hands with learned counsel for the first respondent to hold that, the application by the applicant is incompetently before the Court and it is hereby struck out for want of competency with costs to the first respondent.

Order accordingly.

**DATED at DAR ES SALAAM this 14<sup>th</sup> day of November, 2017.**

**S. S. MWANGESI**  
**JUSTICE OF APPEAL**

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



**A.H. MSOMI**  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**