

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

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

CIVIL APPLICATION NO. 103 OF 2015

FORTUNATUS NYIGANA PAULAPPLICANT

VERSUS

- 1. THE PERMANENT SECRETARY
MINISTRY OF HOME AFFAIRS RESPONDENT**
- 2. THE ATTORNEY GENERAL.....RESPONDENT**

**(Application for review from the decision of the Court of Appeal
of Tanzania at Dar es Salaam)**

(Kimaro, Mbarouk, Juma, J.J.A.)

dated 22nd day of April, 2015

in

Civil Case No. 37 of 2014

RULING OF THE COURT

10th & 18th October, 2017

MBAROUK, J.A.:

By way of notice of motion made under Rule 66 (1) (a) of the Court of Appeal Rules, 2009 (the Rules), the applicant is seeking an order of this Court to review its decision dated 22nd April, 2015 in Civil Appeal No. 37 of 2014. In support of the notice of motion, the affidavit of Fortunatus Nyigana Paul is appended thereto.

The genesis which gave rise to this review application can be gathered from the following paragraphs of the affidavit in support of the notice of motion, namely:-

"2. I appealed before this Honorable Court against the High Court decision in Civil Case No. 87 of 2009.

3. The appeal was scheduled for hearing on 15/4/2015.

4. Prior to the hearing of the appeal the Attorney General acting on behalf of the 1st and 2nd Respondents raised an objection that he was not served with a copy of the letter applying for the proceedings and ruling of the High Court decision.

5. The Attorney General in his objection referred to page 141 of the record of appeal that I had filed jointly with my memorandum of appeal.

6. This court upheld the objection on the ground that there is no indication/or proof of service having been made to the Respondents.

7. That the Attorney General was served with a copy of the letter in dispute dated 2nd June, 2011 on 9th June, 2011.

8. That the Attorney General was served with the letter dated 12th November, 2013 on 29th November, 2013 and the letter dated 30th December, 2013 on 31st December, 2013.

9. That the copy of the letter dated 2nd June, 2011 filed in the records of appeal was a faint one for having been produced by a poor photocopier machine and it did not show the endorsement of the Respondent's rubber stamp and the date of service.

10. I did not notice the problem until the same was revealed or discovered during the hearing of the Preliminary Objection.

11. That I personally and physically served the letter in dispute and other letters on the Respondents.

12. The decision called for this review referred to page 142 of the records of appeal instead of page 141 that was disputed.”

In this application, the applicant appeared in person and opted to argue his application on his own as his advocate by the name of Barnaba Luguwa informed the Court by a letter dated 9th October, 2017 that he was bereaved of his brother's wife and scheduled to travel to Mlimba, Morogoro for burial services on the day this application was set for hearing.

On the other hand, Mr. Hangi Chang'a, learned State Attorney represented the respondents.

At the hearing, the applicant prayed to adopt his written submissions, notice of motion and the contents of the affidavit

appended thereto as part of his submissions. In his elaboration, the applicant briefly and concisely submitted that, it was unfortunate that when Civil Appeal No. 37 of 2014 was called on for hearing, he was taken by surprise to be served with a preliminary objection and required to furnish evidence of proof of service promptly. He added that, it was very unfortunate as he was not aware that the original copies which bore the endorsement of the respondent's rubber stamp will be required at the hearing. He further submitted that, failure to see the endorsement in the letter applying for copies of proceedings and ruling was due to the fact that, the same was too faint. He further contended that, he was unable to furnish promptly the proper document which were endorsed, because they were at home and had no sufficient time to furnish them, hence that failure led his appeal to be struck out for being incompetent. The applicant added that, he came to realise later that, the letter to be supplied with the proceedings contained in the record of appeal was served to the respondents, he therefore urged us to find that this is a fit

case to review our decision in Civil Appeal No. 37 of 2014 which was based on a manifest error on the face of the record resulting in the miscarriage of justice. He then prayed for costs.

On his part, Mr. Chang'a initially opposed the application, but he later changed his mind after he compared and contrasted the initial faint letter applying for copies of proceeding and the one brought by the applicant having the rubber stamp of the Attorney General's Chamber - the respondent. Having noticed that evidence, he therefore agreed that the requirements under Rule 90 (2) of the Rules to serve the respondent with the copy of the letter applying for copies of proceedings was complied with.

As on the issue of costs, the learned State Attorney urged us not to grant costs as the anomaly which led to strike out the appeal was occasioned by the applicant himself.

As pointed out earlier on, in Civil Appeal No. 37 of 2014 we struck out that appeal after we upheld the preliminary objection which was to the effect that the appeal was

hopelessly time barred as service of the letter to apply for copies of proceedings was not served to the respondents as required by Rule 90(2) of the Rules. It is a fact that at the hearing of the appeal, a letter applying for proceedings dated 2nd June, 2011 appended to the record of appeal was very faint not showing a rubber stamp impression that the office of the Attorney General's Chambers was served. The applicant claimed not to have had sufficient time to search for the original copies, but having been able to find the copies showing the rubber stamp and the signature of a person who received that letter, he has found it pertinent to file this review application claiming that the decision to strike out his appeal was based on a manifest error on the face of the record and has resulted to miscarriage of justice.

After having sufficient time to search for original copies the applicant has realized that it was similar to the requisite letter served to the respondents as required under Rule 90(2) of the Rules.

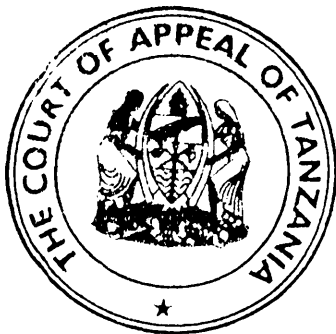
Having looked at the evidence brought by the applicant, we are fully satisfied and agree with the applicant that this is a fit case to grant him his prayer for us to review our former decision in Civil Appeal No. 37 of 2014, because it has been fully established that the respondents were served with a letter applying for copies of proceedings and ruling as the rubber stamp and signature of the officer who acknowledged receipt of the said letter clearly show that the said letter was served and received by the office of the Attorney General's Chambers in compliance with Rule 90(2) of the Rules. That fact has been conceded by the learned State Attorney who represented the Respondents in this application.

For that reason, we are constrained to grant the application for review, reverse our decision of 22nd April, 2015 and substitute it with the order of overruling the preliminary objection raised by the respondents therein that the provisions of Rule 90 (2) of the Rules were violated. We therefore order that Civil Appeal No. 37 of 2014 to be restored and set for hearing in the next available convenient session. As it was the

applicant himself who included a faint copy of the letter in the record of appeal, we order that each party to bear its own costs of this application.

It is so ordered.

DATED at DAR ES SALAAM this 12th day of October, 2017.



M. S. MBAROUK
JUSTICE OF APPEAL

S. E. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read "A.H. Msumi".

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL