

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

CIVIL APPLICATION NO. 68 OF 2015

(In the matter of an intended Appeal Civil Appeal No. 55 of 2013)

1. TANESCOAPPLICANT
2. WILLIAM MHANDOAPPLICANT
3. AMIR MAKUKAAPPLICANT
VERSUS
SALIM KABORA..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Muruke, J.)

Dated 18th day of April, 2013

In

Civil Case No. 53 of 2012

RULING

28th Feb & 8th March, 2017

MWANGESI J. A .:

In terms of the provision of Rule 10 of the Court of Appeal Rules, 2009 (the Rules), the applicants herein have filed an application by notice of motion, moving the Court to be pleased to enlarge time within which, they can file their written submission in opposition to Civil Appeal No. 55 of 2013 wherein, the respondent has lodged to challenge the ruling and order of the High Court of Tanzania at Dar es Salaam (Muruke J.) dated the 18th April 2013. The application has been supported by sworn affidavit of one

Nuhu Mkumbukwa, who happens to be the Counsel representing all applicants. Then, pursuant to the provision of Rule 106 (1) of the Court of Appeal Rules, the learned Counsel for the applicants did file written submissions to amplify the grounds of the application for extension of time.

Upon being served with the notice of motion, by virtue of the stipulation under Rule 107 (1) of the Court of Appeal Rules, the respondent did raise a preliminary objection on points of law premised on four factors namely; first that, the application is not maintainable in law without payment within a fixed time, of security for all costs incurred and likely to be incurred by the respondent. Secondly, that, the application is incompetent in law for introducing into the Court file, written submissions in opposition of the appeal un-procedurally. Third, that, the purported founding affidavit is invalid in that, the legal capacity of the deponent is not alleged (sic) and or established contrary to the laws governing affidavits. And fourthly, that, the founding affidavit is incompetent in law as it contains facts, which the deponent has no personal knowledge in offence to Order XIX Rule 3 of the Civil Procedure Act, Cap 33. It has therefore been the humble prayer of the respondent that, the purported application

by the applicants for extension of time be expunged from the records with the usual consequences as to costs.

In compliance with the stipulation under the provision of Rule 106 (1) of the Court of Appeal Rules, the respondent did file written submissions to expound the points of the preliminary objection, which in return has been responded to by the applicants in a reply submission. When the application was called on for hearing, learned Counsel Dr. Saudin Mwakaje, did enter appearance for the applicants, while on the part of the respondent, there was no appearance of either the applicant himself or by an Advocate. And much as the records in the case file could unfold, service was duly made to the respondent on the 23rd day of February 2017 as can be glimpsed from the affidavit that was sworn by the process server one Salum Edward on the 27th February 2017, to that effect.

In view of the failure by the respondent to enter appearance and prosecute the preliminary objection which he has raised without explanation despite being duly served, by necessary implication infers that, he has failed to prosecute it in line with the stipulation under the provision of Rule 63 (1) of the Court of Appeal Rules, 2009, which reads;

"If on any day fixed for hearing of an application, the applicant does not appear, the application may be dismissed, unless the Court sees fit to adjourn the hearing."

It is common knowledge that, in the instant application, the one who has defaulted appearance on the date when the application came for hearing is the respondent. Nonetheless, the fact that, he was the one who has raised the preliminary objection and therefore, tasked with the duty of prosecuting it, for purpose of the preliminary objection, he did hold the capacity of the applicant in terms of the wording in the above captioned provision. As his non appearance has caused failure to prosecute the preliminary objection, the same is marked dismissed under Rule 63 (1) of the Court of Appeal Rules, 2009.

As regards the application for extension of time to file written submission in opposition to the appeal that has been presented by the applicants, the wording under the provision of Rule 63 (2) of the Court of Appeal Rules, mandates the Court to proceed with the hearing of the

application ex parte. In its own words, the provision stipulates inter alia thus;

"If the applicant appears and the respondent fails to appear, the application shall proceed in the absence of the respondent, unless the Court sees fit to adjourn the hearing."

In the written submission in support of the application for enlargement of time that has been filed by the applicant, which has wholly been adopted by Dr. Saudin Mwakaje learned Counsel for the applicant, there have been listed about four grounds to move the Court to grant the sought reliefs namely; first that, the process of obtaining instructions took longer time than expected. Secondly, that, after receiving the instructions, the learned Counsel for the applicants was preparing for and attending criminal sessions in Criminal Case Number 109 of 2007, before Honorable Rugazia J. as per attached summons. Third, that, the respondent will not be prejudiced by granting this application. And fourthly, that, serious points of law are involved in the appeal at issue, which necessitates the applicant being heard.

What stands for deliberation by the Court therefore, is whether the named grounds above are sound enough sufficing to convince it to grant the sought relief for extension of time. In elaboration to the first ground, it has been argued that, the delay in filing a reply submission was partly occasioned by the fact that, his clients were yet to instruct him to handle the dispute on appellate level. It has further been argued that, there was difficulty in securing the availability of the second applicant after he had resigned from working with the first respondent. With due respect to the learned Counsel for the applicants, such trivial businesses of his clients, who are basically the parties to the matter before the Court, cannot constitute sound bases. It is my understanding that, the period that got fixed by the law for the lodging of the written submissions, did put into consideration all such inconsequential factors that, they could be taken care of within such period. I would therefore reject this ground for being flimsy.

Pertaining to the second ground, it has been submitted on behalf of the applicants that, the instruction to the Counsel to defend the applicants in the appeal, came contemporaneously with Criminal sessions in the High Court of Tanzania at Dar es Salaam before Rugazia J. in the murder case of

sections 73 and 74 as well as Order XL Rules 1 and 2 all of the Civil Procedure Act, Cap 33 and section 5 (1) (b) of the Appellate Jurisdiction Act Cap 141, and or that, leave has not been sought and obtained prior to the lodging of the appeal and thereby offending the provision of section 5 (1) (b) and (c) of the Appellate Jurisdiction Act.

It is to be noted that, in this last ground, the applicants are claiming that, there is illegality in the appeal that has been preferred by the respondent. When the question of illegality is at issue, the position of the Court has normally been to give Chance for the claimed illegality to be deliberated by the Court, so extension of time has normally being granted. In the case of **Principal Secretary, Ministry of Defense and National Service Vs Devram Valambhia** [1992] TLR 185, the holding of the Court was thus;

"Where, as here, the point of law at issue is illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute "sufficient reason" within the meaning of Rule 8 (now 10) of the Rules for extending time."

In yet another case of **VIP Engineering and Marketing Limited and two Others Vs Citibank Tanzania Limited** Consolidated Civil Reference No. 6, 7 and 8 of 2006 CAT (unreported), the holding of the Court was that,

"It is therefore settled law that, a claim of illegality of the challenged decision, constitutes sufficient reason for extension of time under Rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the Rule to account for the delay".

Adopting the foregoing position in the case of **The Registered Trustees of Joy in the Harvest Vs Hamza Sungura** Civil Application No. 131 of 2009 CAT (unreported), Rutakangwa J.A (as he then was), did state that;

"For this reason alone, we are enjoined to grant this application for the purpose of enabling this Court, eventually, to ascertain the existence or otherwise of the alleged illegality."

It is evident therefore in the light of the decisions which I have cited above that, where there has been a contention of illegality on the decision intended to be challenged as it has been the case in the instant application, the legal trend has been for the Court to grant the sought extension of time, to pave way for the alleged illegality to be deliberated by the Court. In that regard therefore, under the mandate conferred to this Court under Rule 10 of the Court of Appeal Rules, 2009 (the Rules), extension of time is hereby granted to the applicants to file their written submission in opposition to Civil Case No. 55 of 2013. The same be done within a period of 21 days. The costs of the application will abide by the outcome of the appeal. It is ordered accordingly.

DATED at DAR ES SALAAM this 2nd day of March, 2017.

S.S. MWANGESI
JUSTICE OF APPEAL

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




E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL