IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

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

CIVIL APPLICATION NO. 429/12 OF 2016

ASHA SEIF ---------- 1st APPLICANT

HEMED HUSSEIN ---------- 2nd APPLICANT

AMIRI HAMZA ---------- 3rd APPLICANT

VERSUS

NADA PANGA ---------- RESPONDENT

(Application to strike out the notice of appeal from the decision of the High Court of Tanzania at Tanga)

(Mzuna, J.)

dated the 30th September, 2011

in

Miscellaneous Land Appeal No. 6 of 2010

RULING OF THE COURT

23rd & 27TH April, 2018

MWANGESI, J.A.:

The applicants herein were the respondents in Miscellaneous Land Appeal No. 6 of 2010, which was decided by the High Court in their favour in a decision that was handed down on the 30th September, 2011. The respondent on the other hand, felt aggrieved by the said decision

and as a result, on the 10th October, 2011 did lodge in Court his notice of appeal, which was served to the applicants in terms of the provisions of Rule 84 (1) of the Court of Appeal Rules, 2009 **(the Rules).**

On the 19th September, 2016, the applicants herein lodged the current notice of motion under the provisions of Rules 89 (2), 48 (1) and 49 (1) of **the Rules**, moving the Court to strike out the notice of appeal that was lodged by the respondent on the 30th September, 2011 for the reason that, no essential steps have been taken by the respondent within the prescribed time to institute the intended appeal to date. The notice of motion is supported by an affidavit that was affirmed by the second applicant (Hemed Hussein) only.

The brief facts of the matter as could be gleaned from the records in the case file, this matter originated from the Ward Tribunal of Kibaya, where the current applicants successfully instituted land proceedings against the respondent after he had encroached onto their plots of land. The decision of the Ward Tribunal was upheld by both the district land and housing tribunal for Korogwe, and the High Court of Tanzania at Tanga. It was after his appeal to the High Court had failed, when the

respondent lodged his notice of appeal to this Court, which is the subject of the application under discussion.

When the application was called on for hearing before us on the 23rd day of April, 2018, the applicants did enter appearance in person unrepresented and therefore, fended for themselves, while the respondent had the services of Mr. Philemon Raulensio, learned counsel. Before the hearing of the application could commence, Mr. Raulensio rose to inform the Court that, he had just been engaged by the respondent to represent him. He claimed to have been engaged on the 20th April, 2018, after the learned counsel who had previously been representing the respondent, had contacted long illness that led him to lose his sight, as well as having his leg amputated. Due to time constraint, he failed to lodge a notice of change of advocate.

The learned counsel submitted further that, he was prepared to continue with the hearing of the application today. However, upon going through the documents which he was given by his client, he has noted some serious defects in the documents that were lodged by the applicants. As he had failed to lodge a notice of preliminary objection

due to time constraint as earlier pointed out, he presented a prayer before us under the provisions of Rule 4 (2) (a) and (b) of **the Rules** that, he be permitted to orally argue two points of preliminary objection to the notice of motion which is before the Court. Even though the prayer by the learned counsel for the respondent was strongly resisted by the applicants, we were constrained to turn down the objection for the reason that, what were to be argued in the preliminary objection were questions of law pertaining to the notice of motion that was lodged by the applicants. Leave was therefore granted to the learned counsel.

In arguing the first ground of the preliminary point of objection, the learned counsel submitted that, in terms of the provisions of Rule 48 (4) of **the Rules**, the current notice of motion which was lodged in Court by the applicants on the 19th September, 2011, ought to have been served to the respondent within fourteen days from the date of lodgment. Nonetheless, such a task was never performed by the applicants and thereby, infringing the stipulation of the above named provision of the law.

With regard to the second ground of the preliminary objection, Mr. Raulensio argued that, the notice of motion by the applicants has been supported by an affirmed affidavit of one applicant only on behalf of the other two, who were also present in Court. Since there was no evidence to establish that, the two had sanctioned him to act on their behalf, he opined that the procedure was legally improper.

The learned counsel submitted further that, according to the provisions of Rule 30 (1) of **the Rules**, appearance before the Court is either in person or through an advocate. In that regard, the learned counsel went on to submit that, the affidavit in support of the notice of motion was defective and thereby, rendering the notice of motion which is before the Court to be incompetent. We were therefore urged to strike out the notice of motion and order the applicants to bear the costs.

The response from the applicants in particular by the second applicant was to the effect that, the contentions by the learned counsel for the respondent were unfounded. Responding to the first ground of the preliminary objection he argued that, service was made to the respondent in person and that, he refused service as per the document

which unfortunately was not in his possession at that particular time. On the second ground of the preliminary objection, there was no response for the obvious reason that, it involved a point of law of which, the applicants were not conversant with.

In view of the submissions made by either side above, the issue for determination by the Court is whether or not, the application by the applicants is founded. We will start with the first ground of the preliminary objection. The provisions of Rule 48 (4) of **the Rules** under which the first ground of the preliminary objection by the learned counsel for the respondent has been pegged, bears the following wording:

> *"(4) The application and all supporting documents,* ***shall be served upon the party or parties affected*** *within 14 days from the date of filing."*

[Emphasis supplied]

In the light of the wording in the above quoted provisions of the law, it is correct as argued by the learned counsel for the respondent that, the applicants did bear an imperative duty to ensure that, their

lodged documents were served to the respondent, an obligation which they failed to discharge according to the respondent. However, such contention was strenuously resisted by the applicants, who argued that, the attempt to serve the respondent with the documents was made only that, he turned to be uncooperative by refusing to accept them.

What could be noted from the submissions from both asides above, is the fact that, there is a tug of war between the two rivalry sides of which, its resolution will have to be made through evidence. That being the case, the ground of the preliminary objection which has been raised on behalf of the respondent, does not fall within the purview of a preliminary objection as promulgated in the landmark case of **Mukisa Biscuits Manufacturing Company Limited Vs West End Distributors Limited** [1969] EA 696 and later followed in a number of decisions that include, **Sharifa Twalibu Massala Vs Thomas Mollel and Three Others,** Civil Appeal No. 67 of 2011 and **The Board of Trustees of the National Social Security Fund (NSSF) Vs New Kilimanjaro Baazar Limited,** Civil Appeal No. 69 of 2007 (both unreported).

In line with the holding in the above cited authorities, it is evident that, the first ground of preliminary objection that has been raised by the learned counsel for the respondent is not purely founded on a point of law as it calls for evidence to establish in either side. We therefore hold that, the first preliminary objection raised by the learned counsel for the respondent is not a preliminary point of law so to speak, and we reject it.

As regards the second ground of the preliminary objection, it has been argued by the learned counsel for the respondent that, the affidavit in support of the notice of motion is defective because it has been affirmed by one applicant only, while there are three applicants. Indeed that is the situation. What we had to ask ourselves is whether what was done by the applicants is permissible in law. The procedure for presenting an application in the Court is regulated by the provisions of Rule 48 (1) of **the Rules** that:

> *"(1) Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, every application to the Court* ***shall be by notice of motion supported by***

affidavit. *It shall cite the specific rule under which it is brought and state the ground for the relief sought."*

[Emphasis supplied]

The position is further amplified by the provisions of Rule 49 (1) of **the Rules,** in situations where it is intended that one notice motion be supported by more than one affidavit where it is stated thus:

"(1) Every application to the Court ***shall be supported by one or more affidavits*** *of the applicant or of the applicant or of some other person or persons having knowledge of the facts."*

[Emphasis supplied]

Essentially, an affidavit is evidence which is intended to establish the facts contained in the notice of motion. It is no wonder therefore that, facts in one notice of motion may be established by more than one affidavit. There is however, no provisions of law providing for the vice versa situation that is, one affidavit being used to establish the facts in more than one notice of motion. In that regard, we are in agreement with the learned counsel for the respondents that, the affidavit of Hemed

Hussein could not be used to establish his own facts, as well as the facts in the notices of motion lodged by Asha Seif (first applicant) and Amiri Hamza (third applicant). By necessary implication therefore, the notices of motion by the other two have not been supported by affidavits and thereby, offending the provisions of Rule 48 (1) of **the Rules**.

The provisions of Rule 30 (1) of **the Rules**, which regulates appearance of parties in Court, further cements the stance discussed above. It is stipulated under the rule that:

> *"(1) Subject to the provisions of Rule 31 and 33, a party to any proceedings in the Court may appear in person or by advocate."*

Under the circumstances, the contention by the second applicant (Hemed Hussein) that, he was sanctioned by his colleagues to represent them in the application at hand has no legal basis and therefore, unmaintainable.

In the event, we are persuaded to find merit in the second ground of the preliminary objection raised by the learned counsel for the respondent that, the application which has been preferred by the

applicants suffers a serious legal defect, which renders it not to be maintainable before the Court. We accordingly strike out the application for incompetence. Regard being to the nature of the matter, we make no order as to costs and therefore, we direct that each party shall bear its own costs.

Order accordingly.

DATED at **TANGA** this 25TH day of April, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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