

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

**(CORAM: MUSSA, J. A., MKUYE, J. A. And WAMBALI, J. A.)**

**CIVIL REFERENCE NO. 12 OF 2016**

<b>1. REV. DR. GETRUDE RWAKATARE</b> <b>2. THE REGISTERED TRUSTEES OF</b> <b>MIKOCHENI ASSEMBLIES OF GOD</b>	}	..... <b>APPLICANTS</b>
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**VERSUS**

**ZITHAY KABUGA ..... RESPONDENT**

**(Application for reference from Decision of the single Justice of the Court of  
Appeal of Tanzania, at Dar es Salaam.)**

**(Mziray, J. A.)**

**dated the 2<sup>nd</sup> day of December, 2016**

**in**

**Civil Application No. 204 of 2016**

.....

**RULING OF THE COURT**

28<sup>th</sup> September & 17<sup>th</sup> October, 2018

**MUSSA, J.A.:**

This matter originates from an *ex parte* judgment of the High Court (Land Division) which was pronounced (Ndika, J., as he then was), on the 23<sup>rd</sup> January, 2015. A good deal later, on the 16<sup>th</sup> June, 2015 the applicants herein preferred an application before the same court seeking extension of time within which to lodge a Notice of Appeal so as to impugn

the *exparte* judgment. Incidentally, the application was placed before the same High Court Judge who, having heard the parties on the merits, dismissed it with costs in a Ruling which was handed down on the 24<sup>th</sup> June, 2016. Dissatisfied, on the 11<sup>th</sup> July, 2016 the applicants lodged a Notice of Motion which goes thus:-

**"NOTICE OF MOTION**

**(Made Under Rules 10, 47 and 48 (1) of the Court of Appeal Rules, 2009)**

**TAKE NOTICE** that on ..... the ..... Day of ..... 2016 at ..... O'clock in the morning/afternoon or as soon thereafter as he can be heard. Mr. Barnaba Luguwa Advocate for the above named applicants, will move the Court/ a Judge of the Court for orders that:

- i. This Honourable Court be pleased to extend time for filing Notice of Appeal against *ex-parte* judgment and decree in Land Case No. 127/2008.
- ii. This Honourable Court be pleased to extend time for filing application for leave to appeal to this Court against *ex-parte* judgment and decree in Land Case No. 127/2008.

*iii. This Hon. Court be pleased to extend time to take any other steps incidental to the intended appeal.*

***On the ground that:***

- i. The High Court which heard and eventually (sic) Land Case No. 127/2008 had no jurisdiction as subject matter was time-barred.*
- ii. The respondent told contradictory facts in the plaint, evidence and submission in opposition to the application for leave.*
- iii. The trial judge illegally amended the names of the parties.*
- iv. The delay was not inordinate."*

The Notice of Motion was accompanied by a verbose affidavit of Mr. Emmanuel Augustino who happens to be the learned Advocate of the applicants.

As it were, the Notice of Motion was placed before a single Justice, Mziray, J. A. and, at the hearing, the applicants had the services of Messrs Barnabas Luguwa and Emmanuel Augustino, learned Advocates, whereas the respondent was represented by Mr. Daniel Ngudungi and Ms. Delphine Kimbori, also learned Advocates.

In the course of the hearing of the application, it transpired that the applicants had not filed written submissions as required by Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). To remedy the shortcoming, Mr. Luguwa urged the single Justice to invoke Rule 106 (19) of the Rules so as to waive the requirement of filing written submissions. For purposes of clarity, we deem it apt to reproduce the provisions of sub-rule 19 as hereunder:-

*"The court may, **where it considers the circumstances of an appeal or application to be exceptional**, or that the hearing of an appeal must be accelerated in the interest of justice, waive compliance with the provisions of this Rule in so far as they relate to the preparation and filing of written submissions, either wholly or in part, or reduce the time limits specified in this Rule, to such extent as the Court may deem reasonable in the circumstances of the case."*[Emphasis supplied].

In his submissions, Mr. Luguwa sought to impress the single Justice that inasmuch as the High Court decision was tainted with illegalities, that

alone was sufficient cause to constitute "*exceptional circumstances*" in the appeal so as to deserve a waiver under sub-rule 19 of the Rules.

The prayer was resisted by Mr. Ngudungi the more so as, according to him, the learned counsel for the applicants had not assigned sufficient cause to enable the Court to dispense with the requirement of filing written submissions.

In the upshot, having heard the parties on the issue of the non-filing of written submissions, on the 30<sup>th</sup> November, 2016 the learned single Justice concluded the matter thus:-

*"Since there is no convincing exceptional circumstances shown in the case at hand to warrant this Court to invoke the provisions of Rule 106 (19) of the Rules, I am therefore, enjoined to make no other order but to dismiss the application under Rule 106 (9) of the Rules with costs."*

Discontented, the applicants presently lock horns with the decision of the learned single Justice by way of a reference which was duly taken by a letter to the Registrar of the Court of Appeal pursuant to Rule 62 (1) (b) of the Rules.

At the hearing before us, the applicants retained the services of Messrs Luguwa and Augustino, whereas Mr. Ngudungi was just as well retained for the respondent.

Mr. Augustino who addressed us on the merits of the application, criticized the learned single Justice for refusing to waive the requirement of filing written submissions. The learned counsel for the applicants replicated the argument to the effect that "exceptional circumstances" contemplated by sub-rule 19 of Rule 106 of the Rules were sufficiently constituted by illegalities which tainted the decision by the court below. In reply, Mr. Ngudungi, once again, defused the claim with a counter argument that such are not "exceptional circumstances" contemplated by the sub-rule that would have entitled the applicant to a waiver of the requirement of filing written submissions.

Quite aside from the subject of written submissions, we prompted the learned counsel from either side to comment on whether or not the application was, in the first instance, properly laid before the single Justice. Our concern arose from the fact that the application presented before the single Justice was seemingly duplex or omnibus in that, through the Notice of Motion, the applicant was seeking to be granted two distinct prayers:

**First**, he was seeking extension of time within which to lodge a Notice of Appeal against the impugned *ex parte* judgment and; **second**, he was, simultaneously, seeking extension of time within which to lodge an application for leave to appeal against the impugned judgment.

After a brief dialogue, Mr. Luguwa conceded that the Notice of Motion was bad for duplicity and that the application was not properly placed before the single Justice. On the score, the learned counsel for the applicant advised us to strike out the application and, quite understandably, this prayer was seconded by Mr. Ngudungi.

As we settled to determine the matter, it came to our attention that the Court was confronted with a similar situation in the unreported Civil Application No. 6 of 2015 – **Selemani Seif versus Yahaya Delo and Another**. As it were, a single Justice (Luanda, J.A.) paid homage to Rules 46 (1) and 83 (4) of the Rules which, respectively, provide thus:-

*"46 (1) Where an application for a certificate or for leave is necessary, **it shall be made after the notice of appeal is lodged.**"* [Emphasis supplied].

*"83 (4) When an appeal lies only with leave or on a certificate that a point of law is involved, **it shall not be necessary to obtain the leave or certificate before lodging the notice of appeal.**"*

Having culled from the foregoing provisions, the learned single Justice continued:-

*"The record of appeal is clear that two applications were combined. It is my considered opinion that the procedure to combine the two is not proper. The application for extension of time to file notice of appeal should come first as the prior existence of the notice of appeal duly lodged is the condition precedent for lodging an application for leave or a certificate on a point of law ... In view of the foregoing therefore the combination of the two applications is misconceived. The same is struck out with no order as to costs."*



In similar vein, the application giving rise to the reference at hand is bad for duplicity and the same is, accordingly, struck out but, since the shortcoming was raised by the Court *suo motu*, we give no order as to costs.

**DATED** at **DAR ES SALAAM** this 11<sup>th</sup> day of October, 2018

K. M. MUSSA  
**JUSTICE OF APPEAL**

R. K. MKUYE  
**JUSTICE OF APPEAL**

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

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

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