IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 285/01 OF 2016

NOBLE MOTORS LIMITED ..... APPLICANT

VERSUS

UMOJA WA WAKULIMA WADOGO
BONDE LA KISERE (UWABOKI) ..... RESPONDENT

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

(Mwarija, J.)

dated the 7th day of September, 2016
in
Civil Application No. 173 of 2016
.....

RULING

13th June & 30TH August, 2019

MWARIJA, J. A.:

This application arises from the decision of a single Justice dated 7/9/2016 made in Civil Application No. 173 of 2016. In that application, the applicant applied for extension of time to institute an appeal against the decision of the High Court of Tanzania at Dar es Salaam, in Civil Case No. 49 of 2011.

At the hearing of that application, Mr. Massawe, learned counsel who represented the respondents, Umoja wa Wakulima Wadogo, Bonde la Kisere (UWABOKI), raised a point of law concerning the applicant's failure to file

written submission within the prescribed time of sixty days from the date of filing the application as provided for under Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Mr. Kibatala, learned counsel who appeared for the applicant, Noble Motors Limited conceded that the submission was filed out of time. He however, prayed to the Court to exercise its discretion under Rule 106 (19) of the Rules and proceed to hear the application instead of dismissing it. He went on to narrate the events which he relied upon to be the cause of the delay in filing the submission and urged the Court to waive compliance with the requirements of filing the submission.

The Court did not accede to Mr. Kibatala's prayer for the reason that, the matters of facts relied upon by the learned counsel did not constitute exceptional circumstances warranting a waiver of compliance with Rules 106 (1) as envisaged under Rule 106 (19) of the Rules. The application was consequently dismissed under Rule 106 (9) of the Rules.

The applicant was dissatisfied with the dismissal order and therefore filed this application for review. The application which is supported by an affidavit sworn by Mr. Peter Kibatala, was brought under Rule 66 (1) (a), (b), (e) and (2) of the Rules. It is predicated on the following grounds:

"(i) That, this Honourable Court acted in a manifest error that has resulted in a miscarriage of justice having dismissed the applicants application for extension of time to file an appeal in Civil Application No. 173 of 2016 consequently to the applicants failure to file written submission within time as per Rule 106 (1) of the Court of Appeal Rules, 2009 based on a point of law from the Bar and without there having been filed any notice of Preliminary objection and without any written submission in support thereof in accordance with the very same Rules. The Court exercised its discretion in permitting the respondent to pursue the notice of objection without assigning any reasons why such discretion was being exercised while at the very time refusing to exercise its discretion to permit the applicant to proceed without written submission in support of the application.

(ii) That, this Honourable Court acted in a manifest error that has resulted in a miscarriage of justice having wrongly construed the meaning and import of Rule 109 (19) of the Court of Appeal Rules, 2009 to mean a party has to file an application for extension of time to file written

submissions and that no reasons from the bar that constitute "good cause" can be submitted.

(iii) That, the Ruling and Orders of this Court are a nullity for having conflicting dates of delivery and extraction such that there not Ruling and Order in law.

(iv) That, by denying the applicant the right to be heard on the application without written submissions, this Court denied itself the right to be addressed on the De-Registration of the respondent and therefore submissions on the point of law that led to the dismissal were by a non-existent party."

At the hearing of this application, the applicant was represented by Mr. Alex Mgongolwa, learned counsel while the respondent was represented by Mr. Fulgence Massawe, learned counsel. Mr. Mgongolwa prefaced his submission by giving the background facts leading to the filing of this application for review. On the substance of the application, he based his arguments mainly on grounds (i), (ii) and (iv) of the review which he argued together. He abandoned ground (iii) of the review. He contended that the impugned decision, which dismissed the application for extension of time to

institute the intended appeal, is erroneous because the dismissal order had the effect of denying the applicant the right to be heard.

According to the learned counsel, since the application was supported by an affidavit of the principal officer of the applicant company, the single Justice should have acted on the contents of that affidavit and consider whether or not there were exceptional circumstances warranting a waiver of the requirement of filing written submission under Rule 106 (1) of the Rules and if satisfied, allow the applicant's counsel to make oral submission.

The applicant's counsel argued further that, the impugned decision is erroneous because in other cases of a similar nature, the Court was of the view that failure to file written submission is not a fatal omission. He cited as an example, the case of **Khalid Mwisongo v. M/s Unitras (T) Limited,** Civil Appeal No. 56 of 2011 (unreported). In that case, after having considered the purpose of filing written submission, the Court observed that the omission did not prejudice any of the parties and thus proceed to determine the appeal on merit.

Mr. Mgongolwa argued in conclusion that the dismissal order occasioned a miscarriage of justice and thus rendered the impugned decision

a nullity. He prayed that this application be allowed so that the dismissed application is reinstated and heard on merit.

In response, Mr. Massawe argued that the application giving rise to the impugned decision was filed in 2016 when there were already some conflicting decision of Court on the effect of a failure by an appellant or applicant to file written submission. He submitted that, in the circumstances, in deciding the application, the single Justice was at liberty to take any of the two positions he deemed appropriate. The learned counsel argued further that the grounds of the review are not tenable because the errors complained of by the applicant are not in the nature envisaged under Rule 66 of the Rules. According to the learned counsel, the applicant is in essence moving the Court to reconsider it's decision. He argued that, even though the application was supported by an affidavit, the Court could not have proceeded to determine it in the absence of written submission. He opposed the argument that the applicant was denied the right of hearing arguing that, it denied itself that right by breaching the provisions of Rule 106 (1) of the Rules, by failing to file written submission.

In rejoinder, the applicant's counsel argued that the application has met the threshold stipulated under Rule 66 of the Rules as the applicant has

shown that there are apparent errors in the impugned decision. He added that the errors have resulted in the miscarriage of justice on the part of the applicant. The learned counsel reiterated his argument that the Court should have acted on the supporting affidavit and invoke the provisions of Rules 106 (19) of the Rules to waive the requirement of filing written submission and proceed to determine the application on merit instead of dismissing it.

As pointed out above, the application was brought under *inter alia* Rule 66 (1) (a), (b) and (e) of the Rules which states as follows:

> *"66 – (1) The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds -:*
>
> *(a) The decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; or*
>
> *(b) A party was wrongly deprived of an opportunity to be heard;*
>
> *(c) The Court's decision is a nullity; or*
>
> *(d) The Court had no jurisdiction to entertain the case; or*
>
> *(e) The judgment was procured illegally, or by fraud or perjury.*

The errors complained of in ground (i) of the review is firstly, that it was improper for the single Justice to entertain the point of law which was raised informally by the learned counsel for the respondent at the hearing of the dismissed application and secondly, that it was erroneous to refuse to waive compliance with Rule 106 (1) of the Rules. As for ground (ii), it is contended that the single Justice misconstrued the provisions of Rule 106 (19) of the Rules while in ground (iv) the applicant's contention is that by dismissing the application, the applicant was denied the right to be heard.

On ground (i), it is contended in the notice of motion that the point of law ought to have been raised formerly by filing a notice of preliminary objection as required under Rule 107 (1) of the Rules. On this point, I wish to state at the outset that, the contention is not tenable. Mr. Kibatala, learned counsel, who appeared for the applicant at the hearing of the dismissed application, did not raise any objection as regards the stage at which the point of law was raised. He readily conceded that he filed his written submission out of time and proceeded to make a prayer for waiver of compliance with the requirement of Rule 106 (1) of the Rules. There is no gainsaying therefore, that the contention in the notice of motion, that the point of law was wrongly entertained, is an afterthought.

As for the arguments made by Mr. Mgongolwa, on the other limb of ground (i) that, the single Justice should have exercised his discretion and permit the applicant to proceed without written submission and ground (ii) that, the single Justice misconstrued the provisions of Rule 106 (19) of the Rules, I find, with respect, that the complained errors, if any, do not constitute the errors envisaged under Rule 66 of the Rules. It was after the learned counsel for parties were heard on the prayer for waiver of compliance with Rule 106 (1) of the Rules that the Court made its decision. The relevant part of the decision states as follows:

> *"From the wording of the above quoted provision [Rule 106 (19)], compliance with Rule 106 (1) of the Rules may be waived as regard an application where existence of exceptional circumstances has been established. In his submission, Mr. Kibatala tried to give reasons for the delay in filing the submission, not existence of exceptional circumstances. In any case, his submission was based on matters of fact which cannot be proved by an advocate from the bar....* ***The proper forum for considering these issues could have been in an application for extension of time.*** *Apart from the arguments of the learned counsel for the applicant which relate to*

the cause of delay, there has been no material upon which the Court can consider to exercise its discretion under Rule 106 (19) of the Rules."

[Emphasis added].

The emphasis on the above quoted passage appears to be the basis of ground (ii) of the grounds of review which in my view, is misconceived. The import of those words is clear, instead of endeavouring to establish existence of exceptional circumstances warranting waiver of the requirements of filing written submission, the arguments made by Mr. Kibatala centered on establishing the cause for the delay in filing the submission, stating matters which would have been relevant in an application for extension of time. The Court did not state that in order to invoke Rule 106 (19) of the Rules, a party has to file an application for extension of time to file written submission.

As to the contention that the decision is based on errors apparent on the face or the record, since as shown in the quoted part of the Court's decision, the finding was based on the reasons which were arrived at after hearing the learned counsel for the parties, in effect, the applicant is challenging correctness of the impugned decision. This is apparent from the applicant's contention that the single Justice erred in dismissing the application instead of exercising his discretion to waive compliance with Rule

106 (1) of the Rules and proceed to hear the application on merit. In his submission, the applicant's counsel relied on the decisions of the Court bearing a different position as regards the effect of non-compliance with Rule 106 (1) of the Rules. He cited the case of **Khalid Mwisongo** (supra) in which, the Court decided that failure to file written submission was not fatal because the omission did not prejudice any of the parties.

In the dismissed application however, the Court relied on the decisions which decided to the contrary, the cases of **Ally Suleiman v. Asuna Ally**, Civil Application No. 4 of 2010, **Juma Mashaka and Another v. Attorney General**, Civil Application No. 141 of 2010 and **Mechmar Corporation Malaysia Berhard v. VIP Engineering and Marketing Ltd**, Civil Application No. 9 of 2011 (all unreported). It is clear therefore that going by the position of the law as regards the Court's review jurisdiction, the grounds of the review are not based on errors which are apparent on the face of the record. The same are in effect, intended to challenge the merits of the decision. They are therefore, not in conformity with the provisions of Rule 66 of the Rules. As stated in the case of **Karim Kyara v. The Republic**, Criminal Appeal No. 4 of 2007 (unreported):

> "A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected (See **Thungabhadra Industries v. Andhra Pradesh** (1964) SC 1372 as cited in MULLA, 14th Ed. Pp. 2335 – 36).... The principle underlying review is that the Court would have not acted as it had if all the circumstances had been known."

As pointed out above, in the present case, the decision was arrived at after considering the arguments made by both learned counsel for the parties; firstly on the point of law raised by the counsel for the respondent and secondly, on the prayer by the applicant's counsel for waiver of compliance with the requirement of filing written submission. If the applicant was dissatisfied with the reasons for the decision, then filing of an application for review was not a proper avenue because, as stated in the **Karim Kyara case** (supra), a review is not an appeal in disguise.

I am supported further in that view by a persuasive decision of the Court of Appeal of Kenya in the case of **Nyamongo and Nyamongo Advocates v. Kogo** [2001] EA 173 in which that Court stated as follows:

> *"There is a real distinction between a mere erroneous decision and an error on the face of the record.*

Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal."

Given the above stated position, I agree with Mr. Massawe that in the present case, by raising the grounds which seek to challenge the merits of the decision, the application is misconceived because an error which is discernable after a long process of reasoning does not constitute the type of errors envisaged under Rule 66 of the Rules.

It was argued further in ground (iv) that by hearing the applicant's counsel on the prayer for waiver of compliance with Rule 106 (1) of the Rules after declining to hear the application for want of written submission, the Court acted on the submission made by a non–existent party. With respect,

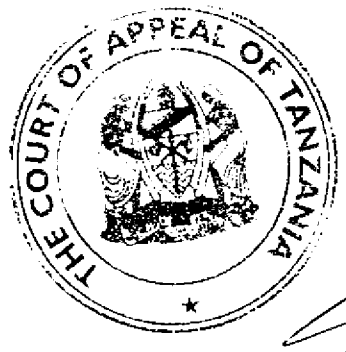
that proposition is a novel one. The applicant did not cease to be a party to the application merely because it filed its written submission out of time. That contention is, in my view, devoid of merit.

On the basis of the reasons stated above, this application must fail. It is hereby dismissed for want of merit. The applicant shall bear the costs.

DATED at DAR ES SALAAM this 27th day of August, 2019.

A.G. MWARIJA
JUSTICE OF APPEAL

The ruling is delivered on 30th day of August, 2019 in the presence Mr. Alex Mushumbusi counsel for the applicant and Mr. Rashidi Mohamedi present in person, is hereby certified as a true copy of the original.



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL