

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

CIVIL APPLICATION NO. 255/08 OF 2021

- 1. CHARLES TITO NZEGENUKA**
- 2. PAUL CHARLES**
- 3. MICHAEL OBAY**

(Suing on behalf of 184 Others

..... **APPLICANTS**

VERSUS

- 1. MINISTER FOR WORKS**
- 2. THE ATTORNEY GENERAL**

..... **RESPONDENTS**

**(Application from the Judgment and Decree of the High Court of Tanzania
at Mwanza)**

(Matupa, J.)

Dated the 9th day of March 2018

in

Land Case No. 7 of 2012

RULING

9th & 17th February, 2022

MAKUNGU, J.A.:

The applicants have lodged this application seeking an order for extension of time within which to file notice of appeal to the Court of Appeal of Tanzania against the judgement and decree of the High Court of Tanzania at Mwanza (Hon. Matupa, J. as he then was) in Land Case No. 7 of 2012 dated 9th March, 2018. The application is brought by way of notice of motion under Rule 10 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). The application is supported by a joint affidavit of the applicants.

The background of this matter is that, the applicant one Charles Tito Nzegenuka and 2 others (suing on behalf of 184 others) had sued the respondents in the High Court of Tanzania at Mwanza in Land Case No. 7 of 2012 seeking, among other things, to be declared lawful owners of their property land. They further sought to have payment of Tsh. 2,182,012,099 as compensation for their lost property and general damages. Upon hearing both parties, the High Court found the claim time barred as of 2012 at the time when the suit was filed. It dismissed the suit.

Aggrieved, the applicants instead of lodging a notice of appeal in time, decided to apply to the Minister of Constitution and Legal Affairs for extension of time to file a representative suit on behalf of 184 others, but their application was struck out as the matter was already before the Court. Following that rejection, the applicants filed at the High Court at Mwanza Misc. Land Application No. 78 of 2020, but the same was struck out by Mashauri, J for wrong citation of the provisions of law. Then, the applicants lodged a similar application Misc. Land Application No. 11 of 2020 which was also dismissed for want of merit by Rumanyika, J. (as he then was) on 13th March, 2021.

Now the applicants have filed this application for extension of time within which to lodge a notice of appeal before this Court.

Consequent for the foregoing, the respondents, through their State Attorneys, filed two notices of Preliminary Objection. The first one on 4th February, 2022 to the effect that *the application is defective for including 184 unknown applicants* and the second one on 7th February, 2022 on the ground that *the notice of motion is fatally defective for contravening the mandatory provision of rule 48(1) of the Court of Appeal Rules, 2019 for not containing grounds on which it is based.*

When the application was called on for hearing before me, the applicants appeared in persons, unrepresented; whereas the respondents had the services of Mr. David Kakwaya, learned Principal State Attorney assisted by Ms. Sabina Yongo, learned State Attorney.

As the practice demands, I have to dispose of the preliminary objection first. Mr. Kakwaya during hearing abandoned the first complaint in the preliminary objection on the inclusion of 184 unknown applicants, but strongly submitted on the second one that disclosure of grounds of the application in the Notice of Motion is mandatory and failure makes it incompetent attracting consequences of being struck out. Further, he submitted that the Notice of Motion should substantially

reflect the face of Form "A" appearing in the 1st schedule to the Rules as provided for under Rule 48 (2). He made reference to the decision of this Court in **Ahmed Mbaraka v. Abdul Hamad Mohamed Kassim & Another**, Civil Application No. 23 of 2011 (unreported).

Given the above submission by the learned Principal Attorney, the 1st Applicant on behalf of others had nothing useful to respond. He told the Court that they were laypersons who did not know the Court's procedures. He prayed to be given time to make amendments on their Notice of Motion to include those grounds because they were in the affidavit.

In his rejoinder submission, Mr. Kakwaya insisted that an affidavit which is the supporting document of the Notice of Motion does not cure that defect. He argued further that in this application there are no exceptional circumstances which would warrant an order for amendment.

The substantive part of the Notice of Motion whose correctness is being challenged runs as under:-

"... the Applicant will move the Court/Judge of the Court for an order that (1) That honourable Court may be

pleased to extend time to file Notice of Appeal to the Court of Appeal of Tanzania.

(ii) That the honourable Court be pleased to grant any other order that it considers just and convenient to grant.

(iii) And for an order that costs incidental to this application abide the result of the said application.

This application will be supported by the joint affidavit of 1 Charles Tito Nzegenuka 2. Paul Charles 3. Michael Onony suing on behalf of 184 Others.”

Mr. Kakwaya argument was that the applicants notice of motion omitted grounds for the application which is contravening the mandatory provision of Rule 48 (1) of the Rules and thus makes the application incompetent before this Court.

Rule 48 (1) of the Court of Appeal of Tanzania Rules, 2009 provides as under:-

*"48 (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 and shall cite the specific rule under which it is brought and **state the ground for the relief sought.**" [Emphasis added].*

For easy understanding the real meaning of Rule 48 (1) above, Rule 48 (2) of the Rules may assist, that Rule states:-

"(2) A notice of motion shall be substantially in the Form "A" in the first schedule to these Rules and shall be signed by or on behalf of the applicant."

Form "A" referred to above, among others, requires a notice of motion to contain the following:-

*"...Mr. Advocate for the above named applicant, will move the Court/Judge of the Court for an order that
On the grounds that"*

[Emphasis added].

One of the key elements in the Form "A" is the ground upon which the application is brought. This is vividly brought out in the part thereof I have quoted. And this goes on to cement its mandatory nature expressed in Rule 48 (1) and obviously insisted upon under Rule 48 (2).

Next I turn to the submission of the applicants that their grounds of application are not included in the notice of motion but it is in the affidavit which is a supporting document of the notice of motion and that therefore omission of the grounds in the notice of motion is cured by having the same in the affidavit. Alternatively, this Court should allow

time for the applicants to make necessary amendment in their notice of motion to include the same.

As rightly pointed out by Mr. Kakwaya, an affidavit is just a supporting document and for purposes of effectiveness, each (Notice of Motion and affidavit) stands on its own. To avoid possible confusion, exposed by the current controversy, the legislators went further to indicate in Rule 48 (2) where the grounds should be indicated in the notice of motion as per Form "A". both subrules should be read together.

Lastly, I turn to **Ahmed Mbaraka** case relied upon by Mr. Kakwaya to bolster his arguments. I have read the case and I found that the Court when discussing this matter considered that fact that the respondent (Mr. Morando) made reference to the decision of this Court in **Miroslav Katic Versa Paradin Ingra v. Ivan Makabrad**, Civil Application No. 66 of 1998 (unreported). This case relied upon by both counsel but each approaching the same from what he perceives to be a vantage point.

In its analysis, the Court in that case made reference to decisions of this Court in **Giafer & Another v. Ital African Transport Ltd**, Civil Application No. 4 of 1994; **Atlantic Electric Limited v. Morogoro**

Region Cooperative Union (1984) Ltd, Civil Application No. 26 of 1990 and **V.I.P Engineering & Marketing Ltd v. Said Salum Bakhressa Ltd**, Civil Application No. 47 of 1996, upholding findings therein that to indicate grounds in the Notice of Motion is mandatory and failure is fatal. Let the Court's very wording paint the picture:-

"In our understanding, the Court in its decisions in these cases has consistently held the view that the irregularities and omissions involves in these cases were not merely procedural, they were of fundamental nature going to the root of the matter. In that situation the Court has further held, the non-conforming with rule 45 (1) would be a breach of a mandatory requirement."

On Rule 45 which is the current Rule 48 (with minor modification) the Court cemented the finding thus:-

*"From these provisions, our understanding of rule 45 (1) and (2) is that the grounds of the application are matters of substance, they go to the very root of the matter. For that reason and as the wording of sub-section (1) of rule 45 indicates, **it is a mandatory requirement to state the grounds in the notice of motion substantially in the manner indicated in Form "A". it being a mandatory requirement under this rule, it goes without saying that failure***

to state the grounds in the notice of motion is, as contended by Mr. Mselem, fatal to the application.” [Emphasis added].

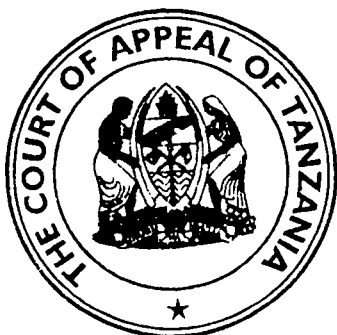
In my respectful view, failure to include in a notice of motion grounds justifying the application being made, a mandatory requirement under the Rules, renders the application incompetent attracting only an order striking it out. I am unable to find special circumstances in this application to order for amendment.

For reasons stated, the application being deplorably incompetent, is struck out accordingly.

DATED at MWANZA this 16th day of February, 2022.

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 17th day of February, 2022 in the presence of the three (3) Applicants in persons Suing on behalf of 184 others and Ms. Sabino Yongo State Attorney for the 1st and 2nd Respondents is hereby certified as true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL