

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

**(CORAM: MKUYE, J.A., KIHWELO, J.A., And MAKUNGU, J.A.)**

**CIVIL APPLICATION NO. 367/18 OF 2021**

**ISON BPO TANZANIA LIMITED..... APPLICANT**

**VERSUS**

**MOHAMED ASLAM .....RESPONDENT**

**(Application for stay of execution of the decree of the High Court of Tanzania  
(Labour Division) at Dar es Salaam)**

**(Mwipopo, J.)**

**Dated the 16<sup>th</sup> day of July, 2021**

**in**

**Labour Revision No. 553 of 2020**

.....

**RULING OF THE COURT**

27<sup>th</sup> October & 4<sup>th</sup> November, 2022

**MAKUNGU, J.A.:**

The applicant through the services of Mr. Peter Paul Ngowi, learned advocate filed a Notice of Motion under Rules 11(3), (4), (5), (6) and 48 (1) of the Tanzania Court of Appeal Rules 2009 as amended ("the Rules") seeking an order of the Court for stay of execution of the decree in the High Court (Labour Division) at Dar es Salaam in Labour Revision No. 553 of 2020 pending determination of an intended appeal. The application is supported

by an affidavit of Ms. Anna Mwakatundu, the Head of Department of Legal Affairs of the applicant.

On 8<sup>th</sup> September, 2021 the applicant's application for stay of execution *ex-parte* was granted by Kairo, JA pending the hearing and determination of this application *interparte* before this Court on a date to be fixed by the Registrar.

The application was initially called on for hearing on 27<sup>th</sup> October, 2022 in the presence of Ms. Glory Venance, learned advocate for the applicant and Mr. Ali Jamal, learned advocate for the respondent.

At the very outset, before we commenced the hearing of the application, Ms. Venance sought leave of the Court to be given time to serve the respondent with the application. She submitted that the applicant failed to serve the respondent in time on the reason that the previous respondent's advocate Mr. Haider Twahir Mwinyimvua refused to receive the notice of motion on the ground that he had no proper instruction from the respondent. She submitted further that the respondent now has engaged a new advocate who can be served with the notice of motion but she could not do so without being granted extension of time from this Court. In the circumstances, she

urged us to find that the given reasons are sufficient to grant extension of time to serve the respondent with the notice of motion.

Mr. Jamal, forcefully resisted to the move by the learned advocate of the applicant. He submitted that the respondent did not file his counter affidavit because he was not served with the notice of motion as required by the Rules. He strongly refuted the claim that the respondent refused to receive the notice of motion as there is no proof brought before the Court. The parties met in another application before Lila, JA but the applicant failed to serve them.

Furthermore, Mr. Jamal urged that this is an application for stay of execution and not for extension of time. The applicant ought to formally apply for extension of time before a single Justice in terms of Rule 10 of the Rules and not before this Court, he added. In the end, he urged us to dismiss the application under Rule 63(1) of the Rules with costs.

Ms. Venance rejoined by conceding that they met in another application but the applicant couldn't serve the new advocate because it was already out of time. She strongly opposed the prayer to dismiss the application under Rule 63(1) of the Rules because that Rule applies only for non-appearance but the applicant is present. She, therefore, reiterated her

earlier submission that the applicant failed to serve the respondent in time due to his unknown address. She prayed her informal application of extension of time be granted.

We gather from the submissions of the parties, the issue for our determination is whether this application is properly before the Court. Having heard both counsel, there is no doubt that the instant application is incompetent before us for contravening Rule 55(1) of the Rules. Rule 55(1) states:-

*"55(1) The notice of motion, affidavit and all supporting documents shall, within fourteen (14) days from the date of filing, be served upon the party or parties affected."*

Guided by the above referred provisions of the Rules, and considering the concession of the applicant that she failed to serve the respondent with the notice of motion, we entertain no doubt that the provisions of Rule 55(1) of the Rules was contravened.

As to the invocation of Rule 10 of the Rules, Mr. Jamal challenged it in that it is invoked where there is a formal application supported by an affidavit. Under the said Rule, extension of time can be granted where the

applicant establishes good cause(s) for the delay and in the case like the one at hand, for failure to serve the respondent the notice of motion and the affidavit in support thereof in time. Ms. Venance from the bar contended that the reason for delay was due to refusal of the previous advocate of the respondent to receive the notice of motion. That at the time she knew the new address, the time required to serve the respondent had lapsed.

In the case of **Republic v. Donatus Dominic @ Ishengoma and 6 others**, Criminal Appeal No. 262 of 2018 (unreported), we drew inspiration from a Ugandan case of **Tansafrica Assurance Co. Ltd v Cimbria (EA) Ltd** [2002] 2 EA, in which, the Court of Appeal of Uganda took the position that, a matter of fact cannot be proved by an advocate in the course of making submission in Court. In the latter case, the said Court stated as follows:

*"As is well known a statement of fact by counsel from the bar is not evidence and therefore, court cannot act on".*

[See also – **Convergence Wireless Networks (Mauritius) Limited and Three others v. WIA Group Limited and Two others**, Civil Application No. 263 "B" of 2015 (unreported)].

Being guided by the above cited cases, we are of the view that this being an application requiring proof of reasons for the delay, ought to have been brought by a formal application supported by an affidavit. Affidavital information being synonymous to oral evidence could not by any means be established by mere submission by the learned counsel from the bar. We, therefore, agree with Mr. Jamal that, it was not proper for the counsel for the applicant to invoke Rule 10 of the Rules to make this informal application and, hence, the reasons for delay given from the bar cannot be acted upon. She ought to have made a formal application in terms of Rules 48(1) of the Rules. In any case the application of that nature will be placed before a single Justice.

All in all, having looked at the totality of the whole matter, we agree with the counsel for the respondent that failure to serve the respondent with the notice of motion and the supporting affidavit to the respondent offended the provisions of Rule 55(1) of the Rules. On this, we are guided by the case of **Ally Moshi Lubangula v. Zulfa Heri**, Civil Application No. 56 of 2015 (unreported) where the Court found that non-compliance of Rule 55 of the Rules was a fatal omission to the application and struck it out.

Even in the instant case, since the applicant failed to serve the respondent with the notice of motion and the supporting affidavit, it rendered the application incompetent. We hereby accordingly strike it out. However, considering the circumstances of the application and the fact that it originates from the labour disputes, we are settled that the interest of justice requires that parties should bear own costs. We so order.

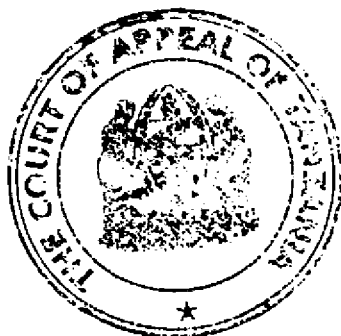
**DATED at DAR ES SALAAM** this 3<sup>rd</sup> day of November, 2022.


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

P. F. KIHWELO  
**JUSTICE OF APPEAL**

O. O. MAKUNGU  
**JUSTICE OF APPEAL**

The Ruling delivered this 4<sup>th</sup> day of November, 2022 in the presence of Mr. Godson Mioge Holding brief of Ms. Mercy Grace Kisinza, learned counsel for the applicant and Ms. Maria Pengo, learned counsel for Respondent is hereby certified as a true copy of the original.



  
**S. P. MWAISEJE**  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**