

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

MISC. CIVIL APPLICATION NO. 136/13 OF 2020

BAHATI M. NGOWI..... APPLICANT

VERSUS

PAUL AIDAN ULUNGIRESPONDENT

**(Application for extension of time to file an application for leave to appeal
against the decision of the High Court of Tanzania, District Registry at Iringa)**

(Feleshi, J.)

dated the 10th day of October, 2017

in

DC Civil Appeal No. 15 of 2016

RULING

15th & 16th August, 2023

KEREFU, J.A.:

The applicant, Bahati M. Ngowi, has lodged this application seeking an order for extension of time within which to lodge an application for leave to appeal against the decision of the High Court of Tanzania at Iringa, (Feleshi, J.) dated 10th October, 2017 in DC Civil Appeal No. 15 of 2016. The application is brought by way of notice of motion under Rules 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The Application is supported by an affidavit of one Musa Mhagama, learned counsel for the applicant. On the other hand, the respondent has filed an affidavit in reply, taken by his learned advocate one Mwamginga Jessey Samuel, opposing

the application. In addition, the said counsel has raised a notice of preliminary objection to the effect that:

- (a) The applicant's application is improperly constituted as it does not fall under Rule 45 (b) of the Rules to allow it to be a second bite; and*
- (b) The applicant's notice of motion and a supporting affidavit thereof were served to the respondent after expiry of mandatory period and no leave has been sought and obtained to serve the same upon the respondent out of time.*

When the application was placed before me for hearing, Mr. Cosmas Kishamawe and Mr. Jassey Mwamgiga, both learned advocates entered appearance for the applicant and the respondent respectively, through video conference linked to the High Court of Tanzania at Iringa.

At the outset and before inviting the learned counsel to submit on the points of preliminary objection raised by the respondent, I wanted to satisfy myself on whether the application was competent on account of it not being supported by an affidavit as required by Rules 48 (1) and 49 (1) of the Rules. More particularly, although the prayer sought by the applicant in the notice of motion is extension of time within which to lodge an application for leave to appeal to this Court, the affidavit in support of the

application is on the extension of time to serve the respondent with the notice of appeal out of time. Thus, being at variance with the applicant's prayers indicated in the notice of motion, it cannot be vouched that the said affidavit is in support of the application. As such, I invited the counsel for the parties to address me on that issue.

In response, apart from conceding that the application was lodged contrary to the requirement of Rule 48 (1) and 49 (1) of the Rules, as the affidavit attached to is at variance with the prayers sought by the applicant in the notice of motion, Mr. Kishamawe decided to leave the matter to the Court to decide.

On his part, Mr. Mwamgiga also readily conceded that the application was improperly before the Court. That, while in the notice of motion the applicant is seeking for an order to extend time to file an application for leave to appeal to this Court, the affidavit is on the extension of time within which to serve the notice of appeal to the respondent out of time. The learned counsel submitted further that, since the application was lodged contrary to the requirement of Rule 48 (1) and 49 (1) of the Rules, it deserves to be struck out with costs.

Rejoining on the issue of costs, Mr. Kishamawe prayed for his client to be spared from it.

Having examined the record of the application and the oral submissions advanced by the counsel for the parties there is no doubt that the application before me is incompetent for being filed contrary to the requirement of Rules 48 (1) and 49 (1) of the Rules which provides that:

*"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 way of notice of motion supported by affidavit** and shall cite the specific rule under which it is brought."*

Likewise, Rule 49 (1) of the same Rules thereof provides that:

***"Every formal application to the Court shall be supported by one or more affidavits** of the applicant or of some other person or persons having knowledge of the facts."* [Emphasis added].

Pursuant to the above cited provisions of the law, it is clear that, for an application of this nature to be proper and competent before the Court, it should be made by way of a notice of motion supported by an affidavit.

The application can also be supported by one or more affidavits of the applicant or of some other person or persons who are knowledgeable about the facts at issue.

Now, having perused the content of the instant application, there is no doubt that the same was made contrary to the requirement of the above provisions. As correctly submitted by both learned counsel for the parties, the attached affidavit in support of the application do not support the prayers sought by the applicant in the notice of motion. The said omission had rendered the application not to be supported by an affidavit as required by the law. For ease of reference, I find it apposite to reproduce the contents of paragraphs 7, 8 and 9 of the said affidavit:

*"7. That, **the applicant failed to serve the respondent with the notice of appeal on time** due to the fact that she was sick for a long period hence unable to make follow ups of her case and there was no another person to do it on her behalf;*

*8. That, another reason is the advocate engaged to process the appeal by reasons known to himself **failed to serve the respondent within time** which cannot penalize the applicant who still has the intention to pursue the appeal; and*

9. That, the applicant after legal consultation and perusal of court file, ***it was found that the applicant never served the respondent with the notice of appeal within time specified by the law hence this application.***” [Emphasis added].

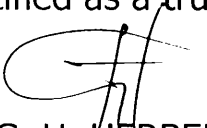
Therefore, there is no doubt that the omission by the applicant to support the application with an affidavit had rendered the entire application incompetent before the Court. Consequently, the incompetent application is hereby struck out. Since the matter leading to the struck out of this application was raised *suo motu* by the Court, I make no order as to costs. It is so ordered

DATED at SONGEA this 15th day of August, 2023.

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 16th day of August, 2023 in the presence of Mr. Jassey Mwamgiga holding brief for Mr. Cosmas Kishamawe, learned Advocate for the Applicant and Mr. Jassey Mwangiga. Learned Advocate for the Respondent, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL