

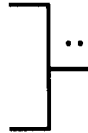
IN THE HIGH COURT OF TANZANIA

Dar es Salaam Main Registry

At Dar es Salaam

Miscellaneous Civil Application No 108 of 2005

THOMAS D. KIRUMBUYO
ABASS S. MHANGA



..... APPLICANTS

VS

TANZANIA TELECOMMUNICATION CO. LTD..... RESPONDENT

RULING

Date of last Order: 24-02-2011

Date of Ruling: 28-02-2011

JUMA, J:

This is an application which the applicants THOMAS D. KIRUMBUYO and ABASS S. MHANGA have filed under Rules 9 (2) (b), 43 (a) and (b), 46 (1) and (5), 47 (1) of the Tanzania Court of Appeal Rules, 1979. The applicants are asking for leave of this Court to enable them to lodge an appeal to the Court of Appeal of Tanzania against the Ruling of High Court (Mlay, J.) dated 22 February 2007 in HC Miscellaneous Civil Cause No. 108 of 2005. Thirteen days after that Ruling (on 7th March 2007) the applicants filed their

chamber application supported by an affidavit. The applicants later filed what they described as a supplementary affidavit which was sworn by Thomas D. Kirumbuyo on behalf of the applicants.

The background to this application is a Ruling of this Court (Mlay, J.) who had dismissed the HC Miscellaneous Civil Cause No. 108 of 2005 because the applicants by not filing their written submissions they had failed to prosecute their twin applications for extension of time to enable them to file an application for leave to apply for prerogative orders of Certiorari and Mandamus; and their application for the leave to apply for the two prerogative orders. When this application was mentioned before me on 6th October 2010 I directed the hearing of the application be by way of written submissions. Applicants were directed to file their submissions by 21st October, 2010 and respondent by 4th November 2010. Rejoinder by the applicants if any, were to be filed by 11th November 2010.

While the applicants filed their submissions on 19th October 2010 well within the time frame scheduled by Mlay, J., the respondent did not see it fit to lodge in any written submissions. The failure by the respondent to present its submissions did not prevent the applicants from filing their rejoinder which they filed on 12th November 2010. Apart from established principles of law, my determination of the issue whether the applicants should be allowed leave to appeal to the Court of Appeal will rely solely on

the Ruling of this Court (Mlay, J.) and written submissions which the applicants filed in compliance with the order of this Court.

After carefully considering the submissions of the applicants and the Ruling of this Court (Mlay, J.) certain salient facts are not in dispute. The applicants filed the Miscellaneous Civil Cause No. 108 of 2005 to seek an extension of time to enable them to file an application for leave to apply for prerogative orders of Certiorari and Mandamus. Also in the same application, the applicants wanted to apply for the leave to apply for the two prerogative orders. On 4th July 2006 in the presence of the 1st applicant and Ms Sahel (the learned State Attorney) this Court (Mlay, J.) ordered the hearing of the twin applications should be by way of written submissions. According to the Ruling of this Court, the applicants who were directed to file their written submissions by 25th July 2006 did not comply. Instead, on 10th July 2006 the 1st applicant requested a copy of an order granting the applicants leave to apply for prerogative orders.

The salient question for determination is whether the applicants have satisfied the conditions for the granting of the leave to appeal to the Court of Appeal of Tanzania. There are several decisions providing guidance on how High Court should invariably exercises its jurisdiction when considering applications for leave to appeal to the Court of Appeal of Tanzania. In the case of **SIMON KABAKA DANIEL v MWITA MARWA NYANG'ANYI AND 11 OTHERS** 1989 TLR 64 (HC) Mwalusanya J. (as he then was) provided a

guidance to the effect that in an application for leave to the Court of Appeal the applicant must demonstrate that there is a point of law involved for the attention of the Court of Appeal. In **SAIDI RAMADHANI MNYANGA v ABDALLAH SALEHE 1996 TLR 74 (HC)** Msumi, J. (as he then was) stated that where a matter raises contentious issues of law it becomes a fit case for further consideration by the Court of Appeal. Again the Court of Appeal through NSEKELA, JA in the case of **BRITISH BROADCASTING CORPORATION Vs. ERIC SIKUJUA NG'MARYO, Court of Appeal CIVIL APPLICATION NO. 138 OF 2004** stated that in granting the leave to appeal to the Court of Appeal, this Court should consider whether the grounds of intended appeal raise issues of general importance or a novel point of law or where the grounds of appeal show a prima facie or arguable appeal.

The aforementioned principles of law will guide my determination of present application. In his Ruling dismissing the Miscellaneous Civil Cause No. 108 of 2005, Mlay, J. stated on page 6,

"The consequences of failure to file the written submissions on the application are the same as the consequences of failing to appear on the date set for hearing of the application, which is dismissal of the application."

I am of the considered opinion that the question whether failure by the applicants to file their written submissions was sufficient to dispose of the application by Mlay, J. is contentious and worth consideration by the Court of Appeal of Tanzania. I came across one decision of the High Court and another of the Court of

law governing the issue whether failure to file written submissions invites dismissal of a suit or an application is not settled. Nsekela, J. (as he then was) in **Tanzania Venture Capital Fund Ltd vs Igonga Farm Ltd. HC (Commercial Division) at Dar Commercial Case No. 14/2000** was not aware of any provision in the **Civil Procedure Code, 1966** governing the presentation of written submissions to the court. He described it as a practice of the court – a very good practice at that which should be encouraged and supported by both the Bench and the Bar.

The question whether failure to file written submissions as directed is synonymous with being absent on the hearing date without notice was raised by one of the counsel but the Court of Appeal of Tanzania did not direct itself to that question: (Msoffe, J.A, Kaji, J. A; And Rutakangwa, J. A.) in **National Insurance Corporation of (T) LTD, & Parastatal Sector Reform Commission Vs. Shengena Limited- Civil Application No. 20 OF 2007.**

From the foregoing it is clear to me that the question whether the failure to file the written submissions on the application is same as failure to appear on the date set for hearing of the application and should be dismissed is a contentious question worth the attention of the Court of Appeal of Tanzania. It is also an issue of law which is not quite settled requiring further consideration by the Court of Appeal of Tanzania. Applicants are hereby granted leave to appeal to the Court of Appeal. No order is made with respect to costs.

Orders accordingly.

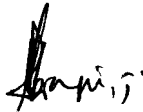


I.H. Juma

JUDGE

28-02-2011

Delivered in Court Chambers in the presence of: **Mr. Thomas D. Kirumbuyo (Applicant), Mr. Rwijage, Advocate (for Respondent) and Mr. Mwakitalu (State Attorney for Attorney General as an Interested Party).**



I.H. Juma

JUDGE

28-02-2011