

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

CIVIL APPLICATION NO. 10 OF 2005

**THE NATIONAL HOUSING CORPORATION.....
APPLICANT**

VERSUS

**ETIENES HOTEL.....
RESPONDENT**

**(Application for Extension of time to lodge Notice of Appeal
from the decision of the High Court of Tanzania at Dar es
Salaam)**

(Ihema, J.)

**dated the 7th day of September, 2000
in
Civil Case No. 139 of 1999**

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R U L I N G**

MUNUO, J.A.:

The National Housing Corporation, through the services of Mr. Kamara, learned advocate, is seeking extension of time to file a Notice of Appeal against the decision in Civil Case No. 139 of 1999 in the High Court of Tanzania at Dar-es-Salaam. The application is supported by an affidavit deponed to by Mr. Kaluwa, a legal officer of the applicant corporation which affidavit counsel for the applicant fully adopted at the hearing. At paragraph 4 of the said affidavit, Mr. Kaluwa stated that there are material irregularities apparent on the face of the record of Civil Case No. 139 of 1999 in that the counter-claim's cause of action arose in 1978, twenty one years back, thence rendering the said

counter-claim time barred causing the trial High Court to lack jurisdiction over the same. Hence the application to extend the period of appeal to enable the applicant to challenge the counter-claim and decree thereof on appeal.

Mr. Nyange, learned advocate for the respondent, filed a notice of preliminary objection comprising five grounds. At the commencement of the hearing, he abandoned grounds 2, 3, 4 and 5 and argued only ground one of the preliminary objection. He contended that the application is incompetent for non-compliance with the provisions of Rule 52 (1) of the Tanzania Court of Appeal Rules, 1979, in that the Notice of Motion was not served on the respondent not less than 2 days before the hearing. He stated that he was served 12 hours before the hearing in contravention of the provisions of Rule 52 (1) of the Court Rules so the application should be struck out with costs. Counsel for the respondent cited the cases of **Grace Ngowi versus Frank Ngowi** (1984) TLR 120; and **Stephen Wassira versus Joseph Sindi Warioba** (1997) TLR 205; wherein the Court held that non-compliance with the Court Rules would result in the matter being dismissed or struck out.

Furthermore, counsel for the respondent argued, the decree of the material counter-claim was issued by the High

Court on 7th September, 2000, almost five years prior to the hearing of the application, and yet the applicant took no step to file a Notice of Appeal which meant that the applicant waived its right of appeal on the counter-claim and the decree thereon. Urging the Court not to grant extension of time to file a Notice of Appeal at this late stage, counsel for the respondent cited the case **of Walden versus Debath** (1887) Vol. III Times Law Report 446 in which the court held that a party seeking extension of time must do so diligently and make a disclosure of all the facts which the applicant's counsel failed to do because he did not disclose that counsel for the respondent went to collect the Notice of Motion and accompanying documents at the chambers of the applicant's counsel on the 17.11.2005 at 11.26 a.m., some 12 hours before the scheduled hearing.

With regard to the preliminary objection on non-compliance with Rule 52 (1) of the Court Rules, counsel for the applicant conceded the same but maintained that the omission is a curable irregularity which does not go to the root of the application so it ought to be overruled because the respondent was served a day before the hearing.

Urging the Court to allow the application for extension of time, counsel for the applicant contended that the

counter-claim and decree thereon are illegal because the cause of action arose in 1978, about 21 years before the counter-claim was filed in 1999 which shows that the said counter-claim was hopelessly time barred and as such is not sustainable in law. He observed that if the counter-claim was based on breach of a tenancy agreement by the applicant landlord, it should have been filed with a period of six years commencing 1978. In view of the invalidity of the counter-claim and decree, counsel for the applicant argued that non-compliance with Rule 52 (1) of the Court Rules, a mere procedural irregularity, should give way to substantive justice on the issue of the limitation period of the counter-claim. He cited, among other cases, the case of **D.T. Dobie (Tanzania) Ltd. versus Phantom Modern Transport (1985) Ltd.**, Civil Application No. 141 of 2001, Court of Appeal of Tanzania (unreported) in which the Court observed that -

--- It has always been that rules of procedure are handmaids of justice and I take this to mean that they should facilitate rather than impede decisions on substantive issues.

In the said case, the Court further observed that in the case of *Cropper versus Smith* (1884) 26 CL. D.700 at page

710:-

--- It is a well established principle that the object of courts is to decide the rights of the parties and not to punish them for mistakes they made in the conduct of their cases by deciding otherwise than in accordance with their rights. ... I know of no kind of error or mistake which if not fraudulent or intended to overreach, the court ought to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy. [Lord Bowen]

To synchronize the principle of delivering substantive vis-a vi technical justice by regarding rules of procedure as handmaids of justice, in the above **Phantom** case, the Court also referred to Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977, which imposes on the Courts, an obligation to refrain from being bogged down by technicalities at the expense of substantive justice. Article 107A (2) (e) states:

- 1) ---
- 2) Katika kutoa maamuzi na mashauri ya madai na jinai kwa kuzingatia sheria, mahakama zitafuata kanuni zifuatazo, yaani:

(e) kutenda haki bila ya kufungwa kupita kiasi na masharti ya kiufundi yanayoweza kukwamisha haki kutendeka.

Meaning -

107A (1) ---

(2) In determining Civil and Criminal Matters court shall:

(e) Administer justice without undue technicalities.

That the courts should refrain from giving technicalities undue consideration was also recognized in the case of **General Marketing Co. Ltd. versus A.A. Shariff** (1980) TLR 61 at Page 65 wherein Biron, J. held that -

Rules of procedure are handmaids of justice and should not be used to defeat justice.

The same principle was also asserted in the cases of **Rawal versus Mombasa Hardware** (1968) E.A 392; and **Manji Ltd. versus Arusha General Stores** (1991) TLR 165.

In view of the above, I am satisfied that non-compliance with Rule 52 (1) of the Tanzania Court of Appeal Rules, 1979 does not go to the root of the application so it is indeed a mere curable procedural irregularity. It was cured when the respondent was served the day before the hearing of the application. For that reason the preliminary objection lacks merit. I accordingly overrule the preliminary objection.

On the merits of the application, I am satisfied that the issue of the period of limitation of the counter-claim is a serious triable point of law in the intended appeal. Under the circumstances, the issue of limitation constitute

sufficient ground for granting extension of time in order to establish whether or not the counter-claim and decree therefrom are sustainable in law.

For the reasons stated above, I grant extension of time to lodge a Notice of Appeal against the decision in Civil Case No. 139 of 1999 in the High Court of Tanzania at Dar-es-Salaam. The Notice of Appeal to be filed by the 30th December, 2005.

DATED at DAR ES SALAAM this 16th day of December, 2005.

E.N. MUNUO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S.M. RUMANYIKA
DEPUTY REGISTRAR