

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 160 OF 2015

1. RICHARD MLAGALA
2. SIFA P. NANYARO
3. AIDAN KUNYANJA
4. JULIANA PALANGYO
5. JOHN SANDE
6. EMIL LAGATE
7. ROGASIAN LASWAI
8. ERNEST MAEMBE
9. LUPAKISYO MWANG'ONDA
10. SAMWEL NDIRANGE

.....APPLICANTS

1. AIKAEL MINJA
2. HAMIS MSUYA
3. A. RUMAYA
4. A. MAGOTI

.....REPOENDENTS

(Application for Extension of Time from the decision of the High Court of Tanzania at Dar es Salaam.)

(Twaib, J.)

Dated the 18th day of February, 2011

In

Civil Appeal No. 85 of 2010

RULING

2nd & 16th December, 2015.

MZIRAY, J.A.:

By notice of motion made under rule 10, 96 (1) (d), (g) and (k), 96 (2), 111 and 60 (1) of the Court of Appeal Rules, 2009, the Court is moved for an order that the applicants be granted extension of time within which to make an application for leave to supplement the record of appeal in Civil

Appeal No. 94 of 2013 by including the judgment of the District Court and the exhibits produced at the hearing thereof and upon such extension the applicant be granted leave to supplement the record of appeal accordingly and be granted leave to amend the whole record of appeal by binding it in the proper chronological order. The application is supported by affidavits sworn by David Alexander Ntonge, the Advocate for the applicants and his legal officer one Martin Vitalis. The reasons for the failure to rectify the defect in time is as deponed in the two affidavits and amplified by Dr. Masumbuko Lamwai, learned Advocate who appeared to argue the application on behalf of the applicants.

According to Dr. Lamwai, the respondents through their Advocate Mr. Luguwa were served with the notice of motion on 13/8/2015 but instead of filing an affidavit in reply as required by the law, Mr. Luguwa filed a preliminary objection on 9/10/2014 in Civil Appeal No. 94 of 2014 pointing out the irregularities the subject matter of the rectification applied in this application. Dr. Lamwai contended that the filing of the preliminary objection was a deliberate move by the counsel to defeat the rectification process sought in this application hence the Court should disregard the preliminary objection and proceed to determine the application in favour of the applicant.

In his submission, Dr. Lamwai admitted to have not complied with Rule 106 (1) of the Rules which required the applicants to have filed submission in Court, latest be on 9/10/2015. He stated that the delay in filing the submission was not out of sheer negligence but due to existence of peculiar circumstances on which Mr. Ntonge Advocate fell seriously sick, while on the other hand the Advocate who had come to rescue him, Dr. Lamwai, was already committed and fully engaged in other Courts. He therefore prayed the Court to exercise its discretion under Rule 106 (1) and (19) of the Rules and rule that there exists exceptional circumstances in this application which renders in the interest of justice for the Court to waive the requirement of Rule 106 (1) and apply its discretion for the application to proceed without the written submissions, or in the alternative allow for extension of time to file the written submissions. Further to that in resolving the predicament, the learned counsel invited the Court to consider the provisions of Rule 2 of the Rules which provides that in administering the Rules, the Court shall have due regard to the need to achieve substantial justice in a particular case. That was all what Dr. Lamwai had to tell the Court.

As the record reflects, Mr. Luguwa, learned Advocate was duly served with a copy of the notice of motion to appear for the hearing of the

application but failed to do so without assigning any reason and due to that failure the Court had no other option but to invoke the provisions of Rule 63(2) of the Rules and proceeded to determine the application in the absence of the respondents' counsel.

With respect, I have considered the merits and likely demerits of this application by examining the averments in both affidavits in support of the notice of motion together with the medical chits attached thereto. I have also taken into account the arguments advanced by Dr. Lamwai in support of the application.

Deducing from the documents filed and the submission made by Dr. Lamwai, learned Advocate, it is clear in my mind that what the applicants need in this application is to supplement the record of appeal in Civil Appeal No. 94 of 2013 by including the judgment of the District Court and exhibits tendered thereto and if the Court is satisfied that there are good reasons given to justify the application, then to proceed to grant leave to amend the whole record of appeal. Dr. Lamwai has brought to the attention of the Court that the requirement of presentation of written submission within 60 days as envisaged under Rule 106(1) of the Rules was not complied with by the applicants on reasons already stated by the learned Advocate and he now want the Court to exercise its discretionary

powers conferred under sub—rule 19 of the said Rule by waiving the requirement related to the preparation and filing of written submission; or in the alternative to allow for extension of time to file the written submission.

The reasons given for the non-compliance of Rule 106 (1) are that one of the Applicants' Advocate, Mr. Ntonge was seriously ill and the other Advocate, Dr. Lamwai, was already committed in other Courts. The issue which stem from the above is whether the applicants' Advocate has advanced good cause to warrant the calling in aid of Rule 106 (19) of the Rules. I have no doubt in my mind that sickness of an Advocate or commitment of an Advocate is another Court if well backed by concrete reasons can amount to sufficient cause /good ground for failure to file written submission but such reasons in my view does not amount to exceptional and peculiar circumstances calling for need to invoke the provisions of Rule 106 (19) and waive compliance with the provisions of sub rule 1 of Rule 106 related to filing of written submission. Likewise, in the instant matter, it will not also serve the interest of justice if the provisions of sub rule 9 of Rule 106 are invoked and the application is dismissed. Taking into account the circumstances pertaining in this application, it is my considered view that in order to accord justice to the

parties by giving both of them equal opportunity to be heard as envisaged under Rule 2 of the Rules, the second alternative proposed by Dr. Lamwai is most appropriate. In **Leonard Magesa v. M/S Olam (T) Ltd, Civil Appeal No. 117 of 2014** (unreported), which had similar facts to the instant application, the appellant failed to file his written submission on ground of ill health and this Court considered it to be a good cause and gave extension of time to account for the delay.

Accordingly I order that the applicant file a formal application for extension of time to file the written submission. There shall be no order as to costs.

DATED at **DAR ES SALAAM** this 10th day of December, 2015.

R.E.S. MZIRAY
JUSTICE OF APPEAL

I certify that is a true copy of the original.


E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL