

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

CRIMINAL APPLICATION NO. 3 OF 2015

BENEDICT KILEMBE APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

**(Application for extension of time from the decision of the Court of Appeal
of Tanzania at Mbeya)**

(Nsekela, Msoffe, And Oriyo JJJ.A.)

dated the 29th day of November, 2010

in

Criminal Appeal No. 170 of 2009

.....

RULING

13th & 19th April, 2016

MZIRAY, J. A.:

By way of notice of motion filed on 17/7/2014, the applicant Benedict Kilembe lodged an application seeking to enlarge time within which to file an application for review out of time. The application is made under Rule 10 of the Court of Rules, 2009 (the Rules). When the application was called on for hearing, Ms. Mwajabu Tengeneza, learned State Attorney for the respondent/Republic raised a preliminary objection, notice of which was filed

on 8/4/2016. The said notice of preliminary objection relates to the following points of law:

- (1) That the application is defective for non citation of the law.
- (2) The notice of motion is defective for citing non existing judgment.

Submitting on the 1st ground of objection, the learned State Attorney argued that in the notice of motion, the applicant has cited Rule 10 of the Court of Appeal Rules as the enabling provision of the law. She submitted that the cited provision of the law deals with extension of time but that provision alone is not sufficient to move the Court in an application of this nature. She pointed out that the applicant ought to have included Rule 48(1) of the Rules, which is the appropriate provision to move the Court to hear application of the nature. Submitting on the second ground of objection, the learned State Attorney pointed out that the judgment in which the applicant is referring in his application does not exist. She stated that the applicant wrongly cited in his notice of motion a judgment dated 29/11/2010 while the correct judgment on record is dated 26/11/2010. On that ground the learned State Attorney submitted that, the application is incompetent and she urged this Court to struck out the same in terms of Rule 4(2)(a) of the Rules.

The applicant on his party, being a lay person, and unrepresented, had nothing useful to submit in reply. He only stated that since the objection raised is a technical issue which required legal knowledge he left it to the Court to decide.

In determining the first ground of objection our starting point is to look at the contents of Rule 10 and 48(1) of the Rules.

We will begin with rule 10 which provides;

"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act, and any reference in these rules to any such time shall be construed as a reference to that as so extended."

Next, Rule 48(1) provides;

"Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, every application to the Court shall be by notice of motion"

supported by affidavit. It shall cite the specific rule under which it is brought and state the ground for the relief sought.”

With greatest respect to the learned State Attorney, the provision of Rule 48(1) of the Rules provide for a general format and procedure for filing application designed for this Court. Looking at the notice of motion, it is quite obvious that the provision of Rule 48(1) of the Rules though not specifically in the application, the same was complied with.

However, it should be pointed out here that rule 10 quoted herein above is an enabling provision of the Court to grant parties an extension of time, for the doing of any act authorized or required by the Rules. The applicant therefore was quite correct to cite only Rule 10 in the application for extension of time which gives the Court jurisdiction. Non citing of the provision of Rule 48(1) of the Rules will not render the application defective as alleged by the learned State Attorney because this Rule only prescribe how to bring a matter before a Court. Its non-citation cannot in any way affect the substance of the application.

In **Civil Reference No. 8 of 2013 Hassan Sunzu vs Ahmad Uledi**

the Court made a distinction between an enabling law or rule and prescribing rule and stated as follows:

"....enabling provision/law is the one that gives jurisdiction to the Court to entertain and determine a matter brought before it. But a prescribing rule, is one which sets out how to bring a matter before a Court, which has jurisdiction. Once the Court has jurisdiction, a party intending to take up a matter in that court must do so in a prescribed manner. In such a case, while it is essential to cite prescribing rule provided its conditions are substantially complied with, although it may be desirable to do so."

That said and on the basis of presiding authority cited, the first ground of objection must fail.

As to the second ground of objection, I am in total agreement with the learned State Attorney that the applicant referred in his notice of motion the judgment dated 29/11/2010 which does not exist. The judgment we have

on record is that dated 26/11/2010. On that basis therefore, the applicant made reference to a non existing judgment. Such defect as correctly submitted by the learned State Attorney renders the Application incompetent. I therefore sustain the second limb of the preliminary objection raised. I find the notice of motion to be incurably defective and accordingly the same is struck out.

DATED at MBEYA this 18th day of April, 2016.

R.E. MZIRAY
JUSTICE OF APPEAL

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



E.Y. Mkwizu
E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL