IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 656/01 OF 2021

(CORAM: NDIKA, J.A., MWANDAMBO, J.A. And KENTE, J.A.)

JACKLINE HAMSON GHIKAS ..... APPLICANT

VERSUS

MLLATIE RICHIE ASSEY ..... RESPONDENT

[Application from the judgment and decree of the High Court of Tanzania at Dar es Salaam]

(Mgonya, J.)

Dated the 12th day of November, 2021
in
Matrimonial Appeal No. 53 of 2021

RULING OF THE COURT

5th & 18th July, 2022

KENTE, J.A.:

In disposing of this application, we have found it instructive to observe at the outset that, the best way to start off this ruling is with a statement of an indubitable truth that, the holding by the erstwhile Court of Appeal for East Africa in the classic case of **Mukisa Biscuit Manufacturing Company v. West End Distributors Limited** [1969] E.A 696 on what constitutes a preliminary objection has stood the test of time, can never be gainsaid. Speaking through its very learned President Sir Charles Newbold, the said Court which is the predecessor of this Court, put it clearly and is frequently quoted to have held that:-

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct.* ***It can not be raised if any fact has to be ascertained*** *or what is sought is the exercise of judicial discretion." [Emphasis added]*

The above-quoted principle of law which is still regarded with much respect provides a roadmap on how we should go about determining the question which forms the subject of contention in this application. The said question essentially turns on the test of what in law constitutes a preliminary objection and it addresses the point raised by Mr. Elisa Msuya, learned counsel for the respondent to the effect that, the present application in which the applicant one Jackline Hamson Ghikas has moved the Court to issue an order staying execution of the decree of the High Court of Tanzania, (sitting at Dar es Salaam) in Matrimonial Appeal No. 53 of 2021, is incompetent for being violative of rule 55 (1) of the Court of Appeal Rules 2009, (hence-forth "the Rules"). The notice of preliminary objection was issued pursuant to rule 107(1)(2) and (3) of the

Rules. Rule 55 (1) of the Rules with which the applicant is accused of having violated provides that:-

> *"The notice of motion, the affidavit and all supporting documents shall, within fourteen days from the date of filing, be served upon the party or parties affected."*

Given the above-quoted provisions of the law, Mr. Msuya invited us to strike out the application for allegedly being incompetent. The learned counsel was vehement that the applicant did not serve the respondent with the notice of motion and the copy of affidavit within the prescribed fourteen days of the filing of the application. In support of his position, Mr. Msuya relied on our decision in **Alphonce Buhatwa v. Julieth Rhoda Alphonce,** Civil Reference No. 9/01 of 2016 (unreported).

However, instead of being argued by presentation of legal arguments which is now the procedural norm, in an unexpected turn of events, the preliminary objection gradually morphed into a subject of factual contentions and arguments between the two counsel. In a relatively lengthy wrangle that ensued, each counsel sought to lead evidence from the bar showing the date on which the

respondent was allegedly served with the notice of motion and the copy of the supporting affidavit.

Whereas Mr. Msuya vacillated and contended that the respondent was not served at all or was served rather belatedly, Mr. Nehemia Nkoko, learned counsel representing the applicant submitted in a forceful style that, the respondent was duly served on 21st December, 2021 at the couple's matrimonial home where he lives with the applicant. He went on claiming that, that was the same day the respondent was served with a copy of the ex-parte order issued by this Court staying execution of the High Court decree pending hearing and determination of the present application *inter partes.* He thus urged us to find no merit in the preliminary objection and dismiss it so as to pave the way for the hearing of the application for stay of execution *inter partes*. In the alternative Mr. Nkoko invited us, correctly so in our respectful opinion, to follow our two decisions in **Arusha International Conference Centre v. Edwin William Shetto,** Civil Application No. 69 of 1998 and **Hasmat Ally Baig v. Baig & Butt Construction Ltd (AR)** Civil Application No. 9 of 1994 (both unreported) where we held that, if the Notice of Motion is not served on the other side, it only means

that it cannot proceed to hearing, but the validity of the motion remains unaffected.

Submitting in rejoinder, Mr. Msuya was emphatic but quite respectful as could be expected. He argued that it was the applicant's duty to prove that she had served the respondent with the application within the prescribed timeline and that such proof could not be by way of mere assertions from the bar as purportedly done by Mr. Nkoko. Confronted by Mr. Nkoko who urged us to invoke the overriding objective principle, disregard the preliminary objection raised and go on to hear and determine the application on merit taking into account that the parties are spouses who have been caught up in a protracted state of matrimonial unrest, Mr. Msuya was relatively very brief. He submitted that, the rules of procedure must be adhered to even when the dispute involves parties who are closely related such as in a matrimonial dispute. He argued that, notwithstanding their marital relationship, parties to this application were bound to exercise due diligence in prosecuting their case irrespective of the principle of overriding objective. He urged us to sustain the preliminary objection and strike out the application for being incompetent.

Given the above-paraphrased arguments and counter arguments by the two learned counsel each pulling in a different direction, definitely the question as to whether the respondent was served or was not served with the notice of motion and the supporting affidavit within the time limit prescribed by the law, cannot be determined without recourse to first and foremost ascertaining some facts. In other words, as there was a rival claim on the date when the respondent was served with the application, that is a hitherto unascertained fact. As a consequence therefore, we are of the respectful view that, inasmuch as proof of service on the respondent requires the parties to lead some evidence showing the particular date on which the said service was effected, the point raised by Mr. Msuya does not fall within the realm of the preliminary objection properly so called as to deserve our determination. It can only be rejected for the failure to attain the threshold prescribed by law. Notably in so holding we are not in exploration of an uncharted territory. There are cases galore providing the same position to this akin situation. We have in mind for instance what we held in **Tanzania Telecommunications Company Limited v. Vedasto Ngashwa & 4 Others,** Civil Application No. 67 of 2009 (unreported). Reaffirming with greater emphasis the position taken

by the Court of Appeal for East Africa in **Mukisa Biscuits** (supra), we categorically said that, a preliminary objection must satisfy three conditions viz; **one,** the point of law raised must either be pleaded or must arise as a clear implication from the proceedings; **two**, that it must be a pure point of law which does not require close examination or scrutiny of the affidavit and counter affidavits and **three,** the determination of such a point of law in issue must not depend on the court's discretion.

As stated earlier, there is no gainsaying here that the determination of the question as to whether or not the respondent was served with the notice of motion and the affidavit in the instant application, requires the parties to lead evidence and the Court to go through and evaluate the said evidence before reaching to the conclusion as to whether or not, in the context of rule 55(1) of the rules, the applicant had violated the law. Needless to say, going by that, such an exercise of looking at the evidence as a basis for determining a preliminary objection would offend the principle enunciated in **Mukisa Biscuit** (supra).

While we are mindful of the need to interpret the law in line with the changing socio-economic conditions and therefore to run

fast so as to keep up with the law which goes on apace and does not stand still, we cannot be moved to outrun the law as to thereupon disturb the firmly established principles of jurisprudence which have existed for decades and which we cherish and hold in high esteem. The bottom line still remains as it was enunciated in 1969 by the now defunct Court of Appeal for East Africa that, a preliminary objection cannot be raised if any fact has to be ascertained. It is fortunate that, that is what has been held by this Court times out of number. We should also say as obiter dicta that, even if there had been a consensus that the respondent was served with the motion out of time, we would not have made a hasty decision that the application was *ipso facto* incompetent. This is so because, as stated in the above-cited cases, the purpose of rule 55(1) of the rules is to ensure that the opposite party has reasonable opportunity to consider the application, and if so desired, to file a reply. Our position is further bolstered by the fact that the respondent in the case under scrutiny has already filed an affidavit in reply and therefore he cannot be heard to complain that he was not accorded the opportunity to consider the application and take the necessary action.

In the upshot therefore, we hold without demur that on account of the reasons given above, the preliminary objection raised by the respondent is incompetent and we accordingly reject it. We order for the application for stay of execution to be heard on merit on a date to be fixed and notified to the parties by the Registrar. We make no order as to costs.

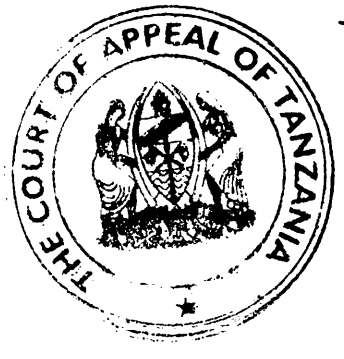
DATED at **DAR ES SALAAM** this 15th day of July, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 18th day of July, 2022 in the presence of Mr. Nehemia Nkoko, Counsel for the Applicant and Mr. Elisa Msuya, learned Counsel for the Respondent, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL