

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
CIVIL APPLICATION NO. 218 OF 2016

MWAITENDA AHOBOKILE MICHAEL APPLICANT

VERSUS

INTERCHICK COMPANY LTD. RESPONDENT

(Application for extension of time for respondent to file written submission
from the decision of the high Court of Tanzania, at Dar es Salaam.)

(Mipawa, J.)

dated the 25th day of March, 2014

in

Civil Appeal No. 37 of 2016

.....

RULING

28th November & 13th December, 2016

MUGASHA, J.A.:

This applicant, **MWAITENDA AHOBOKILE MICHAEL** by notice of motion under Rule 10 of the Court of Appeal Rules, 2009, (the Rules) is seeking for extension of time to file written submissions in opposition of Civil Appeal No. 37 of 2016 which is pending before the Court. The ground upon which the application is sought is to the effect that, after the appeal was filed and served to the applicant, due to illness, he could not file written submissions within time as required under Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The application is

supported by the affidavit of **MATHEW SIMON KAKAMBA**, learned counsel for the applicant.

The application is opposed by respondent through the affidavit in reply of her advocate, **BENJAMIN MWAKAGAMBA** who in addition has filed notices of preliminary objections. The initial preliminary objection filed on 28/9/2016 attacks the competence of the application on two fronts: **One**, that, the application is accompanied by a defective affidavit, and **two**, that the Court is wrongly moved because of the incorrect description of the parties in the notice of motion. However, the first limb of the objection was withdrawn at the hearing and it was so marked. The second notice of preliminary objection which was filed on 24/11/2016 challenges the applicant's failure to file written submissions contrary to Rule 106(1) of the Rules.

Arguing the first objection on the incorrect description of the parties in the notice of motion, Mr. Mwakagamba pointed out that, in the present application **MWAITENDA AHOBOKILE MICHAEL** is the actual respondent but it is not so reflected in the notice of motion. He argued that, since

MWAITENDA AHOBOKILE MICHAEL is neither appellant nor applicant, the application is not competent and the Court is wrongly moved to grant what is sought.

On the failure to file the written submissions in respect of the application at hand, Mr. Mwakagamba contended that, since **MWAITENDA AHOBOKILE MICHAEL** has not filed written submissions pursuant to Rule 106(1) of the Rules, the application should be dismissed. Mr. Mwakagamba prayed to the Court to uphold the two points of objections and proceed to strike out the application with costs.

On the other hand, Mr. Kakamba submitting on the misdescription as an oversight, he contended that, **MWAITENDA AHOBOKILE MICHAEL** is the respondent/applicant and not appellant as purported in the notice of motion which was an oversight. However, he argued, save for the oversight, the rest of the motion indicates what the applicant seeks to be granted. As such, he viewed the omission not fatal since it has not prejudiced the respondent who has filed an affidavit in reply in response to the notice of motion. To back his argument, Mr. Kakamba relied on the case of **VIP ENGINEERING AND MARKETING LTD VS SAID SALIM**

BAKHRESSA LTD, Civil Application No. 47 of 1996 (unreported) and urged the Court to overrule the preliminary objection.

On the failure to file written submissions, Mr. Kakamba submitted that since he was the one seized with the conduct of the matter, he could not prepare the written submissions timely because of unstable health characterized by sporadic High Blood pressure. He urged the Court instead of dismissing the application, to exercise its judicial discretion and waive the requirement of filing written submissions by invoking Rule 106 (19) of the Rules.

In a brief rejoinder, Mr. Mwakagamba reiterated that on the essence of clarity of the position of the parties in the notice of motion. He did not dispute the illness of the applicant's counsel, but argued that the discretion referred under Rule 106 (9) and (19) must be exercised judiciously. He viewed the case of **VIP ENGINEERING AND MARKETING LTD VS SAID SALIM BAKHRESSA LTD** is distinguishable from the present application. He reiterated his earlier prayer that, the preliminary objections be sustained and the application is incompetent be struck out.

I opt to begin by the second limb of objection on the applicant's failure to file written submissions. Considering the submissions made by counsel for and against the preliminary objection, it is imperative to see the requirements of Rule 106 (1) of the Rules which provides:-

" A party to a civil appeal, application or other proceeding, shall within sixty days(60) days after lodging the record of appeal of filing the notice of motion, file in the appropriate registry a written submission in support of or in opposition to the appeal or cross appeal or application, is any, as the case may be."

I am very much aware of the provisions of Rule 106 (9) of the Rules which clothes the Court with discretionary power on the consequences of noncompliance of the requirements of Rule 106(1) of the Rules depending on the circumstances of each case. However, I am of a considered view that Rule 109 (19) of the Rules gives a wider discretion to the Court if exceptional circumstances are shown. Rule 106 (19) of the Rules states as follows:

"The Court may, where it considers the circumstances of an appeal or application to be exceptional, or that the hearing of an appeal must be accelerated in the interest of justice, waive compliance with the provisions of this Rule in so far as they relate to the preparation and filing of written submissions, either wholly or in part, or reduce the time limits specified in this Rule, to such extent as the Court may deem reasonable in the circumstances of the case."

In **DEBORA NALUMASI VS MARKO KAMUGISHA LWIZA**, Civil Application No. 45 of 2011, the Court was faced with scenario where illness prevented the applicant from complying with the time frame within which to file written submissions. On account of illness, the Court was prepared to grant extension when it stated:

" .. The provisions of Rule 106 (19) give the Court discretion, where it considers the circumstances of an application, such as this one, to be exceptional, to invoke the said discretion and in the interest of substantive justice (Rule 2) to waive compliance with the provisions of

this Rule in so far as they relate to the filing of written submissions.....”

Since the applicant’s counsel avers to have failed to file submission within time because of illness which was not disputed by Mr. Mwakagamba, which constitutes exceptional circumstances warranting the Court to exercise its discretion under Rule 106 (19) of the Rules. In this regard, taking into account the accelerated hearing of the application and in the interest of justice, it is imperative that the applicant be given time to file written submissions. As such, the preliminary objection is without basis and it is overruled.

The second ground of preliminary objection is essentially on the mis-description of the parties in the notice of motion. The operative part which is a subject of attack is as follows:-

***"IN THE COURT OF APPEAL OF TANZANIA
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AND
INTERCHICK COMPANY LTD..... RESPONDENT

From the outset, this clearly indicates to be an application and as such, it obvious that the parties thereto are supposed to be the applicant and respondent. Apparently, it is unfortunate that, the description of the applicant in the notice of motion missed the eye of the Deputy Registrar who endorsed the motion as it is. Had he/she made a prompt intervention, the preliminary objection on the mis-description of the applicant as appellant would not have been raised.

The mis-description of the applicant is not a reflection of the correct record has the effect on the Notice of Motion not substantially complying with 48 (2) of the Rules, which provide:-

"A notice of motion shall be substantially in Form A in the First Schedule to these Rules and shall be signed by or on behalf of the applicant"

In **VIP ENGINEERING AND MARKETING LTD VS SAID SALIM BAKHRESSA LTD**, no grounds were cited in the notice of motion. It was brought to the attention of the Court that the grounds were stated in the affidavit of the applicant. The Court was invited to hold that, the respondent was not materially prejudiced by the failure bearing in mind that the respondent's counter affidavit had responded to the grounds of the application as stated in the affidavit. The Court made a following observation:

*"There can be no rational dispute over the fact that procedural Rules are enacted to be complied with. Usually there is a legal principle behind every procedural Rule. But those Rules differ in importance. Some are vital and go to the root of the matter; these cannot be broken. **Others are not of that character and can, therefore, be overlooked provided there is substantial compliance with the Rules read as a whole provided no prejudice is occasioned.**"*

[Emphasis supplied]

This observation and test in the above cited case befits in the present application and the question to be addressed is whether the respondent was prejudiced by the mis-description of the applicant in the notice of motion.

I have considered the submissions of counsel for and against the preliminary objection on the mis-description of the applicant in the notice of motion. The response of **INTERCHICK COMPANY LTD** through the affidavit in reply of its advocate Mr. Mwakagamba, evidences that he was not at all prejudiced by the misdescription of the parties. Besides, at the hearing of the preliminary objection Mr. Mwakagamba did not make any submission as to how his client was prejudiced besides indicating that, the notice of motion must bear a true reflection of the parties. As to the way forward, I wish to repeat what the Court cautioned in **VIP ENGINEERING AND MARKETING LTD VS SAID SALIM BAKHRESSA** that:

" ..While the importance of litigants complying with the Rules of procedure cannot be overemphasized, it must not be forgotten that there is a danger of consumers of justice losing confidence in the courts if judicial officers are obsessed more with strict compliance with procedural

Rules than what the merits of the dispute before them are. To stray into that error is to aid the judicature's grave diggers"

In my considered view, notwithstanding that the present notice of motion does not substantially complying with Rule 48 (2) of the Rules, with respect, **INTERCHICK COMPANY LTD** cannot be said to have been prejudiced by the mis-description of the applicant as appellant in the notice of motion. As such, I invoke Rule 4(2) of the Rules, to allow the applicant to amend the Notice of Motion. The amendment shall be deemed to have been made at the time of filing the present application.

In view of the aforesaid, I dismiss the preliminary objections and hereby order as follows:

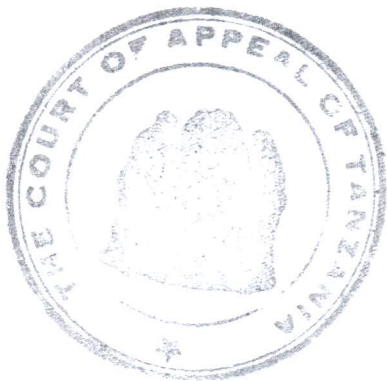
- (1) The applicant to amend the Notice of Motion not later than fourteen days from the date of this order.
- (2) In terms of Rule 106 (19) of the Rules, the applicant is given thirty (30) days to file written submissions from the date of this Ruling

- (3) The hearing of the application is adjourned to next convenient session of the Court.
- (4) Bearing in mind the basis of dismissal of the preliminary objections, I make no order as to costs.

DATED at **DAR ES SALAAM** this 2nd day of December, 2016.

S. E. A. MUGASHA
JUSTICE OF APPEAL

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



A handwritten signature in black ink, appearing to read "B. R. Nyaki".

B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL