

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
CIVIL APPLICATION NO. 538/17 OF 2020

ALEX MSAMA MWITA.....APPLICANT

VERSUS

EMMANUEL NASUZWA KITUNDU.....1st RESPONDENT

WWF TANZANIA PROGRAM OFFICE.....2ND RESPONDENT

(Application for extension of time to file revision from the ruling of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Mohamed, J.)

dated the 7th day of June, 2019

in

Misc. Land Application No. 66 OF 2019

.....

RULING OF THE COURT

4th & 20th October, 2022

KIHWILO, J.A.:

In this application, Alex Msama Mwita (the applicant), is seeking an order for extension of time within which to lodge an application for revision from the decision of the High Court of Tanzania (Land Division) at Dar es Salaam (Mohamed, J.) dated 07.06.2019 in Misc. Land Application No. 66 of 2019. The notice of motion is made under Rule 10 of the Tanzania Court of

Appeal Rules, 2009 (the Rules). It is supported by an affidavit affirmed by the applicant.

The applicant has raised four main grounds as basis of the application, however, for reasons to be apparent shortly, I will not reproduce them here but essentially, the applicant is challenging the enforcement of the Deed of Settlement in respect of the property situated at Plot No. 126 Msasani Beach Area, Kinondoni Municipality, Dar es Salaam with Certificate of Title No. 22284.

Before me, the applicant was represented by Mr. Augustine Mathern Kusalika, learned advocate. On the other hand, the first respondent, Emmanuel Nasuzwa Kitundu was represented by Mr. Samuel Shadrack and the second respondent, WWW Tanzania Program Office who is resisting the application was represented by Mr. Alex Mgongolwa, learned counsel.

When the appeal was due for hearing, Mr. Alex Mgongolwa through the services of Excellent Attorneys, Advocates raised a preliminary point of objection notice of which was filed on 21.09.2022 under rule 107 (1) of the Rules to the effect that:

"That the notice of motion filed by the applicant be struck out for contravening rule 55 (1) of the Tanzania Court of Appeal Rules, 2009 as amended which mandatorily requires the notice of motion to be served within the prescribed

period of 14 days thus renders the application incompetent”.

As it is a customary practice of this Court that where there is a notice of preliminary objection raised in an appeal or application, the Court hears the preliminary objection first before allowing the appeal or application to be heard on merit. Hence, I allowed the preliminary objection to be argued first, before the hearing of the appeal on merit.

At the very outset, Mr. Mgongolwa, was very brief and focused, he first of all prayed and was granted leave to amend rule 48 (4) of the Rules so as to read rule 55 (1) of the Rules and argued that the application lodged by the applicant contravenes rule 55 (1) of the Rules in that, the notice of motion was filed on 18.12.2020, however, on record, there is no proof of service despite the fact that it was required to be served within fourteen (14) days from the date of filing. He went on to argue that, failure to serve the notice of motion is fatal and the application becomes incompetent hence it requires to be struck out. Reliance was placed in the case of **Enerico Kakala v. Mohamed Mussa (Administrator of Estate of the Late Ahmed Zahoro Ahmed)** [2017] TLR 71 to facilitate his proposition. He then rounded off his submission by urging me to struck out the application with costs.

On the adversary, Mr. Kusalika, learned counsel for the applicant prefaced his submission by contending that rule 48 (4) of the Rules which was earlier on cited by the applicant is inapplicable and that the proper and applicable rule is rule 55 (1) of the Rules and therefore argued that the preliminary objection is not meritorious.

Arguing further in response to the preliminary point of objection, Mr. Kusalika contended that, the applicant duly served upon the respondents. However, he admitted that there was no proof of service and curiously submitted that since the respondents were not served, then they can be served and that will not prejudice the respondents.

When he was probed by the Court regarding the requirement to serve the notice of motion within fourteen (14) days after filing, Mr. Kusalika was fairly brief, he urged the Court to invoke the overriding objective principle. In further submission, Mr. Kusalika curiously urged further the Court to depart from its decision in **Enerico Kakala** (supra).

On his part Mr. Samuel, learned counsel for the first respondent was very brief and submitted that, the first respondent was dully served with the notice of motion and the supporting affidavit and by necessary implications he did not support the preliminary point of objection.

In rejoinder submission Mr. Mgongolwa contended that Mr. Kusalika invited the respondents to ignore the leave which was earlier on granted by the Court to amend rule 48 (4) of the Rules so as to read Rule 55 (1) of the Rules. In his considered opinion, Mr. Mgongolwa argued that, the arguments by counsel for the applicant was overtaken by events in the wake of the overriding objective principle and decisions of this Court to the effect that non-citation or wrong citation of the section or subsection of the law is no longer fatal. What is required is merely to state it and that we need not belabor much on this.

I wish to interpose here and point out that, this matter was addressed when the applicant prayed for and was granted leave to amend rule 48 (4) of the Rules so as to read rule 55 (1) of the Rules and therefore, it will be an exercise in futility to discuss it.

In his further rejoinder, Mr. Mgongolwa submitted that, the applicant has not served the second respondent as required by the law and therefore has not discharged the duty to prove that service was done upon the second respondent as the applicant sought the Court to believe and relying upon the cited case of **Enerico Kakala** (supra), he reiterated that the application should be struck out for being incompetent.

Arguing in response to the invitation to rely upon the overriding objective principle, and disregard the failure by the applicant to serve the second respondent as required by the law, Mr. Mgongolwa submitted that, the overriding objective principle cannot be applied blindly in total disregard of the mandatory provisions of the law and in particular those which go to the root of the matter, and that this Court has pronounced itself on this issue. Mr. Mgongolwa finally, submitted that, Mr. Kusalika has invited this Court to depart from its previous decision, but this was not an appropriate avenue for the Court to depart from its own decision and finally he reiterated his earlier prayer that the preliminary objection be upheld and the application be struck out with costs.

I have dispassionately considered the submission by the learned counsel for both the appellant and the respondents in response to the preliminary point of objection raised by the second respondent and I find it appropriate to digress a bit the relevant provision of rule 55 (1) of the Rules which deals with service of notice of motion on a person affected;

"55-(1) The notice of motion, affidavit and all supporting documents shall, within fourteen (14) days from the

date of filing, be served upon the party or parties affected”.

Clearly, my reading of the record, it is quite obvious that the applicant did not serve upon the second respondent notice of appeal and the supporting affidavit within fourteen (14) days contrary to the requirement of rule 55 (1) of the Rules which is couched in mandatory terms as the word “shall” is used. Undoubtedly, the applicant was duty bound to effect service within fourteen days from the date of filing the notice of motion but this was not done. Surprisingly, and for an obscure cause, there is no evidence of service of the notice of motion as required by the law despite the fact that Mr. Kusalika alleged that the respondents were duly served, but my reading of the record reveals conspicuously that, there is no evidence of service of the notice of motion and therefore, I find considerable merit in Mr. Mgongolwa’s proposition that the applicant failed to discharge the burden of proving service.

Admittedly, the provision of rule 55 (1) of the Rules, does not expressly state the consequences of the failure to serve notice of motion within the prescribed fourteen (14) days from the date of filing the application. Luckily, incidents of failure by parties to serve the other party or parties notice of motion upon filing of the application are not new and the

Court has pronounced itself on the consequences. In the case of **Enerico Kakala** (supra), while discussing non-compliance with rule 66 (4) of the Rules on failure to serve the notice of motions in the application for review, we took inspiration from the case of **Sadallah I. Sadallah v. SBC Tanzania Limited**, Civil Application No. 7 of 2009 (unreported) in which we discussed failure to comply with rule 48 (4) of the Rules and we decidedly held that:

"The requirement to serve the notice of motion within the prescribed period is mandatory and its failure to comply with the requirement renders the application incompetent and the application be struck out."

Corresponding observations were made in the case of **Shirika la Meli la Zanzibar and Another v. Mohamed Hassan Juma and 5 Others**, Civil Appeal No. 56 of 2006 (unreported).

It is, I think, appropriate in the circumstances of the present application to state that, the applicant did not comply with the mandatory requirement of the law which requires service of the notice of motion to be done within fourteen (14) days from the date of filing and this omission as we have pronounced ourselves in the previous cases, renders the application incompetent.

Before, I part with this application, I wish to observe that, the applicant sought to invite this Court to invoke the overriding objective principle and gloss over the omission. It bears reaffirming that, the overriding objective principle cannot be applied blindly in total disregard of the mandatory provisions of the law such as the one in the instant application. This position has been stated in numerous decisions of this Court and I need not cite one.

In the result, I uphold the preliminary objection. The application is struck out with costs.

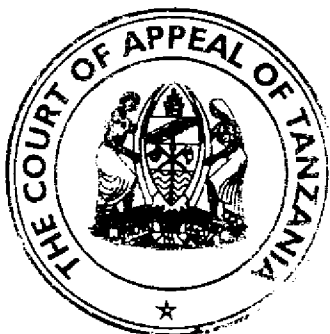
It is so ordered.

DATED at DAR ES SALAAM this 20th day of October, 2022.

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered this 24th day of October, 2022 in the presence of Mr. Ms. Lujjaina Mohamed learned counsel for the 2nd Respondent also holding brief for Mr. Augustine Kusalika, learned counsel for the Applicant and in the absence of the 1st Respondent, is hereby certified as a true copy of the original.

FSDA




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL