

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO.89 OF 2006

QUALITY GROUP LIMITEDAPPLICANT

VERSUS

PETER MASAU.....RESPONDENT

**(Application for correction of notice of appeal to Court of Appeal from
the Judgment of the High Court of Tanzania at Dar es Salaam)**

(Mihayo,J.)

**Dated 5th day of June, 2005
in
Civil case No. 63 of 2005**

.....

R U L I N G

13th & 20th October, 2006

MSOFFE, J. A:

This is an application for amendment of a notice of appeal filed on 12/ 6/ 2006 so that its title "IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) CIVIL CASE NO. 63 OF 2005" may be deleted and replaced by a title "IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM." The application is made under Rule 104 of the Court of Appeal Rules, 1979. It is supported by the

affidavits of Agnes Makongoro and Odhiambo Kobas, a secretary and an advocate respectively, working in a law firm known as The Professional Centre (Advocates) based in Dar es Salaam. In order to appreciate the essence of the application I reproduce hereunder the relevant paragraphs of the affidavits in question. Paragraphs 2,3,4 and 5 of the affidavit deponed to by Agnes Makongoro read as follows:-

2. *That on the 9th June, 2006 I was amongst other things assigned to type the Notice of Appeal **as per the draft that was prepared by Mr. Odhiambo Kobas, an advocate in the firm of The Professional Centre, Advocates.***
3. *That while I was typing the said Notice of Appeal I pasted from the computer file where all documents relating to this case are saved the words "IN THE HIGH COURT OF TANZANIA DAR ES SALAAM (DISTRICT REGISTRY) AT DAR ES SALAAM CIVIL CASE NO. 63 OF 2005" which is the title of the case in the High Court.*
4. ***That I have been informed by Mr. Odhiambo Kobas, which information I verily believe to be true, that in the draft he had used the words "IN***

THE COURT OF APPEAL OF TANZANIA, AT DAR ES SALAAM” and not the High Court Case title which I pasted on the Notice of Appeal I was given to type.

5. *That in typing the pertinent document I pasted the title from the computer file believing that the title of the case was to be like in all previous occasions because all along I was using that title in typing the documents relating to this case and there had not been any reported problem.*

(Emphasis supplied)

As for the affidavit sworn by Odhiambo Kobas paragraphs 3,4,5,6 and 7 read as follows:-

3. ***That I prepared the draft in accordance with form D provided for under Rule 76 of the Tanzania Court of Appeal Rules 1979 and took it for typing to our secretary, one Agnes Makongoro.***
4. *That I have been told by the said Agnes Makongoro, which information I verily believe to be true, that while she was typing she pasted the words IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM. CIVIL CASE NO. 63 OF*

2005 in the place where I had written IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM.

5. *That when she brought the draft for proof reading I was preparing to leave for church to open Sabbath, **I read it** but could not immediately notice the said error as the substance was correctly typed I believed she had typed as per the draft I gave her.*
6. *That I immediately **signed** the document and handed it over to the Chamber Clerk for filing on 12th June 2006 and left for Sabbath opening. A copy of the notice of appeal filed on 12th June is attached hereto Marked QGL forming part of this affidavit.*
7. *That it was on 6th July 2006 while I was preparing the application for stay of Execution that I discovered the said clerical error.*

(Emphasis supplied)

In arguing the application Mr. Matunda, learned advocate for the applicant, canvassed a number of points notably that after noticing the error remedial steps were taken immediately by filing this application. He cited this Court's decision

(Kisanga, J.A.) in **Michael Lessani Kweka Versus John Eliafye** (1997) TLR 152 where extension of time to serve the respondent a copy of the notice of appeal and a copy of the letter to the Registrar applying for proceedings in the case was granted in favour of the applicant after it was shown that he was diligent in correcting the error immediately upon discovery and that his conduct warranted consideration for enlargement of time. In the instant case, according to Mr. Matunda, this application was filed immediately after discovering the error. So, in his view, this would be a fit case for allowing the application in favour of the applicant. Mr. Matunda went on to say further that in this case the notice sought to be corrected conforms substantially to Form D in the First Schedule to the Court Rules.

Mr. Maira, learned advocate for the respondent, did not enter an appearance. Instead, Mr. Marando, learned advocate, appeared and opposed the application on his behalf. Mr. Marando contended that the reasons given by Agnes and Odhiambo in their respective affidavits amount to gross negligence. Negligence is not a good cause to allow the

amendment sought in the application, he emphasized. He cited a passage from **Umoja Garage Versus National Bank of Commerce** (1997) TLR 109 where at page 112 the Court (Kisanga, J.A.) commented on negligence of counsel as follows:-

“On the other hand it is quite apparent that counsel for the applicant is the one to blame for what happened. Had he exercised the minimum degree of diligence he would have noticed at once that the Registrar’s certificate of exemption accompanying the copy of the proceedings sent to him was not what he wanted for the purpose of processing his appeal against the judgment of Mrema, J. He would, no doubt, have asked for the appropriate certificate, and the Registrar would certainly have obliged. Counsel did not do that, and so he can only have himself to blame for the ill consequences flowing from the failure.”

A number of points arise in this application. To start with, it is clear from the affidavits of Agnes and Odhiambo that the draft notice of appeal was prepared by the latter. In the circumstances, all that was required to be done by Agnes was simply to "copy type" the draft. It was not necessary for her to "paste" from the documents saved in the computer. Her failure to do so in this regard amounted to gross negligence, to say the least.

In similar vein, it is evident from the affidavit of Odhiambo that the draft was brought to him for proof reading. He duly read the document and then signed it. It defeats reason that he, as an advocate, could read and sign the document without noticing the obvious and glaring error appearing on the said document! Yet again, to say the least, Odhiambo was also negligent in handling the document.

The crucial issue is whether the negligence exhibited by Agnes and Odhiambo will be good cause to allow the application in the light of the undisputed fact that the application was filed almost immediately after noticing the error. I have given careful consideration to this point. In the end, I am satisfied that inspite of

the diligence in filing the application there is no basis for allowing this application. In saying so, I am aware of this Court's decision in **Michael Lessani Kweka**. However, inadvertence in **Kweka** was exhibited by a clerk. Here, the situation is different in that Odhiambo, an advocate, was part of the negligence exhibited in the matter. If Odhiambo had taken a few seconds or minutes of his time to read the document **carefully** he would, no doubt, have noticed the error apparent on the said document. He is himself to blame for the failure to do so and for the ill consequences flowing from the failure.

At this stage I wish to address myself to the point raised by Mr. Matunda that the notice sought to be corrected substantially conforms to Form D. With respect, I do not see the sense behind this point. If the document substantially conforms to Form D one wonders why this application for amendment of the document was filed at all! At any rate, Mr. Matunda is not entirely correct in saying that the document substantially conforms to Form D. A look at the document will show that it is not indicated whether the applicant intended to appeal to the Court of Appeal of Tanzania. Instead, the notice shows that the applicant intended to appeal without specifying

exactly the Court sought to prefer the appeal to. The wording of Form D shows that the words "intends to appeal **to the Court of Appeal of Tanzania**" (my emphasis) are clearly reflected therein. Furthermore, as is also evident from the spirit behind the application, the document is wrongly headed. Therefore, the cumulative effect of these points is that the document does not substantially conform to Form D.

In the end, I am satisfied that considering the application as a whole, there is no basis for allowing the amendment. In my view, to allow the amendment would, in a sense, be tantamount to encouraging negligence. I dismiss the application with costs.

DATED at DAR ES SALAAM this 20th day of October, 2006.

J. H. MSOFFE
JUSTICE OF APPEAL

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

S. M. RUMANYIKA
DETUPY REGISTRAR