

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

CIVIL APPLICATION NO. 298/01 OF 2016

1. THE REGISTERED TRUSTEES OF ROMAN CATHOLIC CHURCH DIOCESE OF MOROGORO }APPLICANTS
2. PRIEST IN CHARGE ROMAN CATHOLIC CHURCH BAGAMOYO PARISH }

VERSUS

TRAVELLERS LODGE COMPANY LIMITED.....RESPONDENT

**(Application for Extension of time to lodge written submissions
in Civil Appeal No. 45 of 2014 from the decision of the
High Court of Tanzania at Dar es Salaam)**

(Mihayo, J.)

**dated the 25th day of April, 2008
in
Civil Case No. 221 of 2003**

RULING

12th June & 11th July, 2017

MKUYE, J.A.:

The applicants, the Registered Trustees of Roman Catholic Church – Diocese of Morogoro and the Priest Incharge Roman Catholic Church Bagamoyo Parish have, through the services of Dr. Lamwai learned advocate, brought the present application seeking extension of time to file written submission in reply out of time in Civil Appeal No. 45 of 2014. The application is by way of Notice of Motion made under rules

4(1), 10, 106(1) of the Tanzania Court of Appeal Rules, 2009, (the Rules). It is supported by an affidavit sworn by Dr. Masumbuko Roman Mahunga Lamwai filed on 29/9/2016. The grounds for the application are that the applicant's advocates' bag containing the record of appeal and the appellant's submission was stolen from the motor vehicle; and the applicant's advocate's movement to the new office caused him to lose track of some documents.

What can be gleaned from the Court record is that, until 23/11/2016 when this application was called on for the first time for hearing before this Court, the respondent had not yet filed her affidavit in reply and Dr. Lamwai was also yet to file the written submission in support of the application. This prompted both counsel to pray for extension of time and each was granted 14 days by the Court (Hon. Juma, J.A. as he then was) to file their respective pleadings. While Mr. Huruma Ntahena filed an affidavit in reply on 28/11/2016 and served it on the applicants, Dr. Lamwai did not file the written submission within 14 days thereafter as was scheduled. On 9/6/2017, the respondent's counsel filed a notice of preliminary objection to the effect that:

"The applicants have failed to comply with rule 106 of the Court of Appeal Rules, 2009."

When the matter was called on for hearing on 12/6/2017, the applicants were represented by Mr. David Ntonge while holding brief for Dr. Lamwai who was reported being bereaved and the respondent had the services of Mr. Huruma Ntahena, learned counsel. Since as stated above, a preliminary objection had been raised, the same had to be determined first.

Submitting on the point of preliminary objection, Mr. Ntahena argued that, though both the applicants and the respondent had, on 23/11/2016 when this matter came up for hearing, prayed and were each granted 14 days to file an affidavit in reply and written submission respectively, the applicants have failed to comply with the Courts order. That, he said, as the respondent had filed the affidavit in reply and served a copy thereof to the applicants on 30/11/2016, then they ought to have filed their written submission within 14 days thereafter which ended on 14/12/2016. For that reason, Mr. Ntahena contended that failure by the applicants to file written submission within the time prescribed by law and during the time extended by the Court to do so

was fatal. He, therefore, prayed that the application be dismissed under rule 106(9) of the Rules with costs. The learned counsel referred to me the case of **Alphonse Buhatwa v. Julieth Rhoda Alphonse**, Civil Application No. 209 of 2016 in support of his argument. He contended further that the only exception would have been where the applicants advance good reason for extension of time to file written submission as they did earlier on 23/11/2016 but they have not done so. To him the subsequent failure to file written submission was even more fatal.

In response, Mr. Ntonge readily conceded that the applicants have never filed written submission up to the date of hearing. He, however, in a manner that seemed to argue the application itself, attributed such failure to reasons alluded in Dr. Lamwai's affidavit in that the necessary materials for preparation of written submission were stolen from his motor vehicle which was broken into; and that his movement to another office from Coronation Building to Haidery Plaza led to the disorganization of his documents. While relying on the case of **Richard Mlagala & Others Vs. Aikael Minja**, Civil Application No. 160 of 2015, Mr. Ntonge contended that non-compliance with rule 106(1) of the Rules could for good reasons be dispensed with in order to serve the

interest of justice. He went further to pray that he be allowed to argue the application without written submission or alternatively, time be extended to enable them file their written submission for the interest of justice. With regard to the case of **Alphonse Buhatwa** (*supra*) cited by the respondent, he argued that it is distinguishable and prayed to the Court to dismiss the preliminary objection with costs.

In rejoinder, Mr. Ntahena declined to respond on the reasons advanced by the applicant, as he contended that, they supported the application rather than the preliminary objection raised. For that matter, he argued that the applicants have failed to advance reasons for failure to file their written submission after being given extension of time on 23/11/2016 to file it. As regards to the case of **Richard Mlagala** (*supra*) which was cited by the applicant, he argued, it was distinguishable to the case at hand.

Looking at the point of Preliminary Objection which was raised by the respondent together with the rival arguments of counsel for both parties, the issue which arises is whether the preliminary objection raised is meritorious.

The governing law on filing written submissions is rule 106 of the Rules. Subrule (1) of the said rule mandatorily requires the written submission in support of appeal or application to be filed within 60 days after filing the appeal or notice of motion. The said rule states as hereunder:

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

It is without question that the applicants filed this application on 29/9/2016. According to rule 106(1) of the Rules, the applicants were required to file their written submission within 60 days from the lodgment of the application which means they ought to have filed it latest by 28/11/2016. When the application was called on for hearing on 23/11/2016, which was five days before the deadline, the applicants had not yet filed their written submission in support of the application. On that date, this Court (Hon. Juma, J.A. as he then was) upon informal

application by each party, granted extension of time of 14 days to the respondent to file an affidavit in reply and 14 days to the applicants to file written submission after being served with affidavit in reply. Still, even after being served with that affidavit in reply on 30/11/2016, the applicants did not file their written submission as scheduled as was readily conceded by Mr. Ntonge that the applicants had never filed their written submission.

The applicants' advocate has argued that theft of the relevant materials for preparation of the written submission and shifting their office from Coronation Building to Haidery Plaza Building contributed to the failure to file the same. However, as was submitted by Mr. Ntahena I think, those reasons do not in anyhow relate to the preliminary objection raised but rather they relate to the main application which is not at issue at this stage. The averments in Dr. Lamwai's affidavit in support of the application explain the reason why he was not able **to file written submission in reply in Civil Appeal No. 45 of 2014** which was filed in 2014. They do not offer any explanation on failure to file written submission in relation to the application at hand (Civil Application No. 298/01 of 2016) within 60 days as required by rule

106(1) of the Rules or during the period of 14 days which was extended by the Court on 23/11/2016. On this, I would go along with Mr. Ntahena's arguments that the applicants have failed to advance good reason for their failure to file their written submission and this could be by sheer applicant's negligence.

I am aware that Mr. Ntonge has submitted that non-compliance with rule 106(1) can be accommodated by the Court in the interest of justice on the authority of **Richard Mlagala's** case (*supra*). In that case Hon. Mziray, J.A. invoked subrule (19) of rule 106 and granted all parties an opportunity to be heard notwithstanding that the applicant had not filed written submission. However, after having gone through the said case, I have observed that it is distinguishable in the sense that in that case, the learned counsel had assigned reason of ill health and the Court considered it to be a good cause.

In this case, apart from relying on the reasons for failure to file written submission in relation to Civil Appeal No. 45 of 2014, as advanced by Dr. Lamwai, the applicant's counsel has not adduced any reason albeit a reasonable one for their failure to file written submission

in support of the application at hand. Conversely, the reasons advanced to justify failure to file the written submission in 2014 might not be relevant in 2016 when this application was lodged in Court, more so, when taking into account that a long period of time had already elapsed. On the other hand, the applicants were expected to have made efforts to procure documents from other sources.

I am alive that rule 106(9) of the Rules provides for discretionary powers to the Court to dismiss the appeal or application if no written submission is filed within 60 days as required by subrule (1) of the said rule and no application for extension of time within which to file the written submission out of time has been lodged. Nevertheless, rule 106(19) of the Rules gives the Court power to waive the requirement or compliance with the provisions of the rule in so far as it relates to preparation and filing of written submission wholly or in part or reduce the time limits for filing it, where it considers the circumstances of the appeal or application to be exceptional. (See also **Alphonse Buhatwa Vs. Julieth Rhoda Alphonse** (*supra*)).


I have anxiously scrutinized the matter to see whether there is/are any exceptional circumstance(s) but have failed to see any. Neither does the applicants' counsel advanced any such exceptional circumstances to enable the Court exercise its discretionary power and waive the requirement of filing the written submission.

From the foregoing analysis, I agree with Mr. Ntahena that the applicants have failed to comply with the provisions of rule 106 of the Rules and sustain the preliminary objection. Consequently, I dismiss the application with costs.

DATED at DAR ES SALAAM this 5th day of July, 2017.

R. K. MKUYE
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL