

IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

CIVIL APPLICATION NO. 49 OF 1994  
In the Matter of an Intended Appeal

BETWEEN

SHABIR F.A. JESSA.....APPLICANT

AND

RAJKUMAR DEOGRA.....RESPONDENT

(Application for leave to appeal to  
the Court of Appeal of Tanzania from  
the Ruling of the High Court of Tanzania  
at Zanzibar)

(Hamid, C.J.)

dated the 4th day of October, 1994

in

Civil Case No. 22 of 1992

R U L I N G

RAMADHANI, J.A.:

The applicant, Shabir F.A. Jessa, is seeking leave to appeal to this Court after the refusal of such application by the High Court of Zanzibar, (HAMID, C.J.). The applicant is represented by Dr. Lamwai, learned advocate, while the respondent, Rajkumar Deogra, has the services of Mr. Lipiki, learned counsel.

At the hearing, Mr. Lipiki had a preliminary objection that one of the requirements of Rule 46(3) of the Court of Appeal Rules, 1979 has not been fulfilled. Mr. Lipiki pointed out that the applicant is required to file this application together with two other documents in addition to his supporting affidavit. The first document is a copy of the decision which is sought to be appealed from and the other document is a copy of the order of the High Court refusing leave to appeal. The learned advocate pointed out that the first document, that is, a copy of the decision intended to be challenged in appeal, has been attached.

However, he said that a copy of the order refusing leave is missing. Mr. Lipiki contends that this omission is fatal and asked that the application be struck out with costs.

Dr. Lamwai conceded the omission but explained that it was not out of oversight but because such a copy of the order has not been supplied by the High Court though it has been applied for since 14th October, 1994. Dr. Lamwai pointed out further that the decision which is sought to be challenged in appeal was given on 4th October, 1994 and that this notice of motion was filed on 18th October, that is, on the fourteenth day, which, according to Rule 43(b), was the latest day for filing. So, Dr. Lamwai argued, the applicant could not have waited a day longer for a copy of the drawn order. He complained that it is not for the applicant to draw up the order but it is the duty of the High Court to do so and that the applicant should not be penalised for no fault of his. Dr. Lamwai, prayed that the provisions of Rule 3(1) be invoked, that is, this Court may, for the ends of justice, depart from the requirement of Rule 46(3) and order that this application be taken to be valid, even though there is no copy of the order of the High Court refusing leave.

Mr. Lipiki, in reply, said that there ought to have been an affidavit saying that a copy of the order of the High Court refusing leave was requested and that it has not been supplied, otherwise we just have the word of Dr. Lamwai from the bar. Mr. Lipiki went on to warn that it is possible that a copy of the order has already been prepared but that the applicant has not collected it. He repeated his prayer for striking out the notice of motion.

I think it is necessary to explain what transpired in the High Court as can be gathered from the court file, Civil Case 22/92. The applicant is the second defendant in that

suit. After the first defendant gave evidence, their learned advocate, Mr. Kakoti, asked for a commission to take the evidence of the applicant in Dar-es-Salaam. The learned Chief Justice refused that prayer. That was 30th June, 1994. Mr. Kakoti on that date had asked to be excused from entering appearance, according to his letter of 29th June, and he was represented by Mr. Mongi. It would appear that the applicant anticipated the refusal because a notice of appeal to this court was signed on 29th June and was lodged on the very day the learned Chief Justice gave his ruling, that is, 30th June.

It would appear, also, that the applicant and his advocates realised that they needed leave to appeal against that ruling, so, a notice of chamber application before the High Court of Zanzibar was signed on 8th July and was filed on 12th July. When the application came up for hearing on 27th September, a preliminary objection of Mr. Lipiki that the application was out of time was dismissed by the learned Chief Justice. Equally, leave to appeal which was sought by the applicant was refused. Thus the date was 27th September and NOT 4th October as Dr. Lamwai told the court. Mr. Kakoti, for the applicant, asked for an adjournment so that he could advise the applicant to come to Zanzibar to give evidence. The case was adjourned to 20th October. Meanwhile, on 14th October, to be precise, a letter was written on behalf of the applicant requesting a copy of a drawn order of the refusal of leave to appeal. That letter gave the date on which the refusal was made as 4th October. Someone in the High Court of Zanzibar underlined that date and put a question mark in the margin of the letter. Obviously he was questioning the accuracy of that date. Three days later, that is, on 17th October, the applicant signed the notice of motion for this application and filed it on the following day, 18th October.

When the case resumed on 20th October, the applicant was represented by Mr. Mulamula who told the learned Chief Justice that the applicant was not coming to Zanzibar to give evidence. The learned Chief Justice adjourned the case to 30th November for judgment.

The record in the file, Civil Case No. 22 of 1992, reveals that this application is out of time. The learned Chief Justice refused leave to appeal on 27th September, 1994. The applicant, under Rule 43(b), had 14 days in which to file in this Court his application for leave. Thus the applicant had up to 11th October to do so. However, the applicant actually filed his notice of motion on 18th October, that is after twenty-one days. That was out of time, a fact which has obviously escaped the attention of Mr. Lipiki.

I was inclined to use Rule 3(1) and so to depart from the requirement of Rule 46(3) for a copy of the order of the High Court refusing leave to appeal. But because of Mr. Lipiki's observation that the Court was told of the request for such a copy by Dr. Lamwai from the bar, I felt that I should satisfy myself that such request had in fact been made. In the process I came across the above sad revelations. In fact Mr. Lipiki has also been proved to be right, a typed drawn order signed by the learned Chief Justice exists in the case file awaiting collection.

I would like to believe that Dr. Lamwai, out of oversight, and not deliberately, told the Court that leave was refused by the learned Chief Justice on 4th October and that this application was filed on the very last day under Rule 43(b), that is 18th October. However, reason refuses to do so. The letter signed by Dr. Tenga, learned advocate, on 14th October mentioned 4th October as the date on which leave was refused. Was that, too, an oversight? At the beginning of the hearing

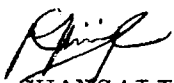
of this application, Mr. Maira, learned advocate, introduced a panel of four learned advocates, three of whom I know to be quite thorough in their work. Mr. Maira told me that Dr. Lamwai was the one to address the Court and that there were also Mr. Marando, Mr. Kakoti and himself appearing for the applicant. I did not conceal my amazement at such high powered team. I cannot help asking myself that if Dr. Lamwai misadventantly gave that wrong date, couldn't Mr. Kakoti remember that the ruling was on 27th September? He was the one who made the application which was refused on the same day in his presence. Then he, on the same day, prayed for an adjournment to advise his client. Were Mr. Maira and Mr. Marando also mistaken on the date? All I can say is that this revelation does not reflect well on the learned advocates.

So, apart from the contravention of Rule 46(3), as pointed out by Mr. Lipiki, which I was prepared to disregard, there is the violation of Rule 43(b) which, to put it mildly, the applicant and his advocates are to this moment unaware of. The notice of motion is, therefore, dismissed with costs.

DATED at ZANZIBAR this 28th day of November, 1994.

A.S.L. RAMADHANI  
JUSTICE OF APPEAL

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

  
(M. S. SHANGALI)  
DEPUTY REGISTRAR