

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

(CORAM: KILEO, J.A., MBAROUK, J.A., And MJASIRI, J.A.)

CIVIL APPLICATION NO. 9 OF 2011

MECHMAR CORPORATION (MALAYSIA) BERHARDAPPLICANT

VERSUS

VIP ENGINEERING AND MARKETING LTD.RESPONDENT

**(Application for Review of proceedings and
Order of the Court of Appeal of Tanzania
at Dar es Salaam)**

(Kileo, J.A., Mbarouk, J.A., And Mjasiri, J.A.)

**dated the 8th day of December, 2010
in**

Civil Application No. 179 of 2008

RULING OF THE COURT

2 June 2011

MBAROUK, J.A.:

This is an application for review. By notice of motion, the Court is moved under Rule 66 (1) (b) and Rule 48 (1) and (2) of the Court of Appeal Rules, 2009 and Article 13 (6) (a) of the Constitution of the United Republic of Tanzania on the ground that:-

1. The Court erred in dismissing Civil Application No. 179 of 2008 without giving the applicant an opportunity to be heard on the matter, particularly given the fact that at the material time, the applicant was sufficiently represented by a lawful authorized attorney in the person of Martha Kaveni Renju, the receiver, in terms of Rules 30 (2) of the Court of Appeal Rules, 2009.

This matter has had a chequered and protracted history, which in our view is not relevant at this juncture to narrate it. The record shows that, after this application was filed on 25/1/2011, the respondent through their advocates on 2/5/2011 filed a notice of preliminary objection under Rules 107 (1) and 4 (2) (a) (b) and (c) of the Court of Appeal Rules, 2009 on the following grounds:-

1. That the Applicant has admitted failing to file its written submissions **within 60 days from the date it filed its Notice of motion for Review on 25th January 2011** and even until now no Competent

Written Submissions have been filed by the Applicant in Civil Application No. 9 of 2011 in violation of **Rule 106 (1) of the Court of Appeal Rules, 2009.**

2. That the Applicant is also in breach of **Rule 106 (9) of the Court of Appeal Rules, 2009** for failure to apply for extension of time within which to file the mandatory written submissions in support of its notice of Motion filed in this Hon. Court since **25th January 2011.**
3. That the Applicant cannot demonstrate any exceptional circumstances or irregularities in the decision of the high Court (ORIYO, J. as she then was) dated **31st October 2008** to give the Court of Appeal discretionary revisional jurisdiction: so, even if the Court of Appeal had not struck out Civil Application No. 179 of 2008, it shall have had to dismiss it for being in breach **of section 5 (2) (d) of the Appellate Jurisdiction Act Cap 141 (R.E. 2002).**

4. That the action by MECHMAR CORPORATION (MALAYSIA) BERHARD (MECHMAR) of transferring its shares in Independent Power Tanzania Ltd. (IPTL) to MARTHA KAVENI RENJU in the year 2010 without leave of the High Court of Tanzania, after the winding up of IPTL had commenced since **25th February 2002**, was null and void to all intents and purposes as it violated **section 172 of the Companies Ordinance Cap 212**.
5. That MARTHA KAVENI RENJU had no right of being heard through the back door by the Court of Appeal of Tanzania in Civil Application No. 179 of 2009 whether as purported Receiver of the MECHMAR shares in IPTL or otherwise.
6. That the Hon. Court did not dismiss Civil Application No. 179 of 2008 as alleged in ground No. 1 of the notice of motion but the Hon. Court struck out the Application with costs.

7. That the Application confirms MECHMAR's determination to perpetuate continued abuse of Court process intended **to confuse and to delay the compulsory winding up of IPTL by the High Court of Tanzania.**

At the hearing of the preliminary objection, Ms. Fatma Karume, learned advocate represented the applicant, whereas the respondent was represented by Mr. Cuthbert Tenga assisted by Mr. Michael Ngalo and Mr. Raspiscius Didace, learned advocates.

In support of the grounds of the preliminary objection, Mr. Didace submitted that Rule 106 (1) of the Court of Appeal Rules, 2009 (the Rules) was breached by the applicant as no written submissions have been filed by the time they filed their notice of preliminary objection. He said, Rule 106 (1) mandatorily gives sixty (60) days after lodging the record of appeal or notice of motion for the written submissions to be filed. Mr. Didace further contended

that, no extension of time has been applied by the applicant. He thus urged us to invoke Rule 106 (9) of the Rules and dismiss the application.

On her part, Ms. Fatma Karume strongly argued that, even if Rule 106 (1) directs that written submissions are to be filed within sixty (60) days after lodging the record of appeal or notice of motion, but the same should not be read in isolation. She contended that Rule 106 (1) should be read together with Rule 3 (on interpretation of court vacation), Rule 8 (on computation of time) and Rule 9 (on court vacation). She further submitted that, according to Rule 8 (d) computation of time begins to be calculated one day after the lodging of a record of appeal or notice of motion. In addition to that court vacation days are to be excluded as per Rule 9. She said, the notice of motion was filed on 25/1/2011 and she thereafter filed her written submission on 1/4/2011. She urged us to start a computation of time as from 1/2/2011 after excluding court vacation days as stated by Rule 9. It was her contention that, having excluded the court vacation days as per Rule 3, she is well within time for the filing of

the written submissions. For that reason, she urged us to over-rule the objection with costs.

In his re-joinder submission, Mr. Tenga joined forces and submitted that, the learned advocate for the applicant wrongly interpreted the provisions of the law. He further submitted that, Rule 9 does not in any way point out that court vacation days are to be excluded in the process of the computation of time. He said, what is stated therein is that a court vacation shall not be reckoned unless that day is the last day of that time. Mr. Tenga added that, the learned advocate for the applicant failed to state the last day she was supposed to file her written submissions. Mr. Tenga was of the view that, as far as the notice of motion was filed on 25/1/2011, the last day for filing the written submissions was supposed to be on 25/3/2011. Mr. Tenga further submitted that, court registries, are accessible even when courts are on vacation except for Saturdays, Sundays and public holidays. For that reason, Mr. Tenga said, the advocate for the applicant could have filed her written submissions within time if she correctly considered the requirements of the

provisions of the law referred. He then reminded the Court that, the Rules are handmaidens of justice, hence we have to abide by them. Finally, he urged us to dismiss the application with costs.

At this juncture, we wish to point out that, even if the notice of preliminary objection contains a total of seven grounds of objection, but in our views, the only grounds capable of being taken as preliminary objections are grounds 1 and 2. As it was correctly pointed out by Ms. Fatma Karume grounds 3, 4, 5, 6 and 7 can not taken to be grounds of preliminary objection. In support of her argument she cited to us the case of **Mukisa Biscuit Company Ltd. v. West End Distributors Ltd.** [1969] E.A 696.

On this point, we fully agree with the learned advocate for the applicant that the only grounds capable of being taken as preliminary objection are grounds one and two. The case of **Mukisa Biscuits** (supra) has defined the term preliminary objection as:-

“a point of law which has been pleaded, or which arises by clear implication out of a pleadings and which if agreed as a preliminary point may dispose of the suit.”

In the instant application apart from grounds 1 and 2, we are of the considered opinion that, ground 3, 4, 5, 6 and 7 all require facts to be argued and ascertained, hence not capable of being strictly preliminary points of law.

Leaving aside those other grounds, what remains for our attention is to examine grounds 1 and 2 as submitted by the learned advocates from both sides.

Basically, the preliminary objections on grounds No. 1 and 2 are on non compliance with Rule 106 (1) of the Court Rules concerning the applicant's failure to present her written submission within sixty (60) days after the lodging of the notice of motion. Rule 106 (1) states as follows:-

“A party to a civil appeal, application or other proceeding, 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.”

The underlying issue for our consideration in this application is based on the point of the computation of time provided by Rule 106 (1) of the Rules and see whether the applicant is in compliance with it. Under the 2009 Rules, Rule 8 is the one governing the issue of the computation of time, and the same states that:-

Rule 8. Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions –

- (a) a period of days from the happening of an event or the doing of an act or thing shall be

deemed to be exclusive of the day in which the event happens or the act or thing is done;

- (b) if the last day of the period is a court vacation the period shall include the next following day not being a court vacation;
- (c) where, by these rules or by any order of the Court any step is required to be taken in connection with any cause, appeal, or matter before the Court that step shall, unless the context otherwise requires, be taken in the Registry; and
- (d) where any particular number of days is prescribed by these rules, or is fixed by an order of the Court in computing the same, the day from which the said period is to be reckoned shall be excluded, and if the last day expires on a day

when the Court is closed, that day and any succeeding days on which the Court remains closed shall also be excluded.

Therein Rule 8 (b) the issue of court vacation arises. We are of the opinion that we need to examine how the term court vacation is being defined by the Rules. Rule 3 defines court vacation as follows:-

“Court vacation” means a Saturday, Sunday or a public holiday, including the 15th December to 31st January and from the second Saturday before Easter to the first Tuesday after inclusive, and any other day on which the Registry is closed.”

However, looking at closely, we agree with Mr. Tenga that Rule 9 does not in any way point out that court vacation days are to be excluded. It has to be born in mind that during court vacation days the Court registries are open for service. It is only during Saturdays,

Sundays and public holidays where court registries are closed, hence a party can not be able to file his/her documents. We do not think that it was ever intended that all court vacation days be excluded from the computation of the period provided for in the Rules. If it were so it would mean unnecessary delay in dispensation of justice given the fact that some court vacation days run continuously for 1½ months – i.e. December, 15th – January 31st . We are of the settled mind that it is only if the last day within the sixty (60) days provided for filing the written submissions expires on a day when the Court is closed, then that day is to be excluded. Rule 8 (d) put it more clearly where it states that:

“(d) where any particular number of days is prescribed by these rules, or is fixed by an order of the Court in computing the same, the day from which the said period is to be reckoned shall be excluded, and, **if the last day expires on a day when the Court is closed, that day and any succeeding days on which the Court remains closed shall also be excluded.**”

(Emphasis added).

In the instant application, the application was filed on 25/1/2011. In compliance with Rule 106 (1) the advocate for the applicant was supposed to file her written submission by 28/3/2011 as the last day expired on 26/3/2011 when the Court is closed.

Rule 106 (9) of the Court Rules offers a direction of what follows if Rule 106 (1) is not complied with, where it states:

Rule 106 (9)

“Where the appellant files the record of appeal or lodges the notice of motion, and fails to file the written submissions within sixty days prescribed under this rule and there is no application for extension of time within which to file the submissions, the Court may dismiss the appeal or application.”

No application for extension of time has been filed by the advocate for the applicant. We could have used our discretion

conferred upon us by Rule 106 (19) of the Court Rules, but bearing in mind that each case has to be decided according to its circumstances, we are not convinced that there are exceptional circumstances which would allow us to extend time. Having given due consideration to all the circumstances of the case which has been in the courts since 2002, and bearing in mind that justice delayed is justice denied, we are constrained to uphold the Preliminary Objection raised.

In the event, and for the foregoing reasons, we invoke the powers conferred upon us by Rule 106 (9) and dismiss the application with costs.

DATED at DAR ES SALAAM this day of 2011.

JUSTICE OF APPEAL

JUSTICE OF APPEAL

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