IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 81/16 OF 2019

ATTORNEY GENERAL ..... APPLICANT

VERSUS

MKONGO BUILDING AND CIVIL WORKS

CONTRACTORS LTD ..... 1ST RESPONDENT

NAMTUMBO DISTRICT COUNCIL .....2ND RESPONDENT

(Application for Extension of time to apply for Revision of the Final Award and Decree of the High Court of Tanzania

(Commercial Division) at Dar es Salaam)

(Mruma, J.)

dated 12th day of March, 2018

in

Commercial Case No. 409 of 2017

RULING

21st June, & 12th July, 2019

MKUYE, J.A.:

This is an application for extension of time filed under Rule 10, 4(2) (b) and 48(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) as amended; and section 6(a), 8(1) (f) and 17(1) (a), (2) (b) of the Attorney General (Discharge of Duties) Act, 2005 (Act No. 4 of 2005) as amended. The applicant is moving this Court for an order to extend time within which to file an application for revision of the final award and decree of the High

Court (Commercial Division) (Mruma, J.) dated 12/3/2018 in Misc. Commercial Case No. 409 of 2017. It is supported by an affidavit affirmed by Rehema Mtulya learned State Attorney. The respondent did not file an affidavit in reply.

When the said application was called on for hearing, the applicant was represented by Mr. Benson Hoseah learned State Attorney and the respondent had the services of Mr. Barnabas Luguwa learned advocate. The 2nd respondent did not enter appearance though there is proof that she was duly served on 10/4/2019.

From the outset, Mr. Luguwa brought to the attention of the Court that the applicant has not served the 1st respondent with the notice of motion and the affidavit in support of the application. This he said, contravened the provisions of Rule 55(1) of the Rules. He, therefore, prayed to the Court to dismiss the application.

On his part, Mr. Hoseah, readily conceded that indeed, the respondents were neither served with the notice of motion nor the affidavit in support of it. However, he contended that the reasons for failure to

serve the respondents within time was due to the restructuring of the Office of Attorney General which led to mixing up of documents culminating to their failure to locate the document for serving the respondents. In that regard, he prayed for leave under Rules 48(3) and 10 of the Rules to serve the respondents with the relevant documents out of time as he was of the view that the respondent would not be prejudiced.

Mr. Luguwa, forcefully resisted to the move by the learned State Attorney. He also challenged reliance on Rule 48 of the Rules since the matter was not yet in course of hearing. He contended that, in order for the provisions of Rule 48(3) to be employed, both parties must consent to the application which may be made informally by a letter by either party. He added that, even Rule 10 of the Rules cannot apply at this stage as it applies where there is a formal application before the Court. In the end, he reiterated for his prayer to be granted.

I wish to preface by Rule 48 of the Rules which deals with forms of applications to the Court. Sub rule (1) of the said Rule requires every application to the Court to be made by way of notice of motion which is supported by an affidavit. However, sub rule (3) of the same Rule provides

for an exception allowing informal applications to be made in the course of hearing. The said sub rule provides as follows:

> *"(3) The provisions of this Rule shall not apply –*
>
> *(a) to applications made in the course of hearing, which may be made informally; or*
>
> *(b) to applications made by consent of all parties which may be made informally by letter."*

The issue which emerges here is whether hearing had commenced. This Court was once confronted with a similar issue in the case of **Tina and Co Limited and 2 others v Euroafrican Bank (T) Limited,** Civil Application No. 86 of 2015 (unreported). In the said case, the Court stated as follows:-

> *"According to Oxford Advanced Learner's Dictionary 7th Edition, the meaning of the words "in the course of" is: "going through a particular process". In this case, the application had been called for hearing when the learned counsel for the applicants made his informal application for extension of time. The hearing process had therefore commenced. In that,*

contexts, it is my considered view that an application under Rule 48(3) of the Rules may ***be made at anytime after the case has been called for hearing, not necessarily at the stage where actual hearing has taken place".***

[Emphasis added]

On the basis of the above cited authority, I am satisfied that hearing of this case had commenced and hence, the provisions of Rule 48(3)(a) of the Rules were applicable. Though I agree with Mr. Luguwa that the provisions of paragraph (b) of sub rule (3) of Rule 48 requires the consent of all the parties to be made informally by letter, I find that it does not apply in the matter under consideration.

As to the invocation of Rule 10 of the Rules, Mr. Luguwa challenged it in that it is invoked where there is a formal application supported by an affidavit. Under the said Rule, extension of time can be granted where the applicant establishes good cause(s) for the delay and in the case like the one at hand, for failure to serve the respondent the notice of motion and the affidavit in support thereof in time. Mr. Hoseah submitted form the bar

that the reason for the delay was due to the mixing up of the documents during the restructuring of Attorney General's Office. That at the time they relocated the same, the time required to serve the respondents had lapsed.

In the case of **Republic v. Donatus Dominic @ Ishengoma and 6 Others,** Criminal Appeal No 262 of 2018 (unreported), we drew inspiration from a Ugandan case of **Transafrica Assurance Co. Ltd v. Cimbria (EA) Ltd** [2002] 2EA, in which, the Court of Appeal of Uganda took the position that, a matter of fact cannot be proved by an advocate in the course of making submission in Court. In latter case, the said Court stated as follows:

> *"As is well known a statement of fact by counsel from the bar is not evidence and therefore, court cannot act on."*

[See also - **Convergence Wireless Networks (Mauritius) Limited and Three others v. WIA Group Limited and Two others**, Civil Application No. 263 "B" of 2015 (unreported)].

Being guided by the above cited cases, I am of the view that this being an application requiring proof of reasons for the delay, ought to have been brought by a formal application supported by an affidavit. Affidavital

information being synonymous to oral evidence could not by any means be established by mere submission by the learned counsel from the bar. I, therefore, agree with Mr. Luguwa that, it was not proper for the counsel for the applicant to invoke Rule 10 of the Rules to make this informal application and, hence, the reasons for delay given from the bar cannot be acted upon. He ought to have made a formal application in term of Rule 48(1) of the Rules.

All in all, having looked at the totality of the whole matter, I agree with the counsel for the first respondent that failure to serve the respondents with the notice of motion and the supporting affidavit to the respondent offended the provisions of Rule 55(1) of the Rules. On this I am guided by the case of **Ally Moshi Lubangula v Zulfa Heri,** Civil Application No. 56 of 2015 where the Court found that non-compliance of Rule 55 of the Rules was a fatal omission to the application and struck it out.

Even in this case, since the applicant failed to serve the respondents with the notice of motion and the supporting affidavit, it rendered the

application incompetent. Hence, I hereby accordingly strike it out with costs.

DATED at **DAR ES SALAAM** this 10th day of July, 2019.

R. K. MKUYE
JUSTICE OF APPEAL

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

B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL