

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 420 OF 2013
(From Civil Case No.81 of 1999)**

MUSSA M. RAFIKI APPLICANT

versus

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| 1. THE MANAGING DIRECTOR,
NATIONAL INSURANCE CORPORATION LTD... | 1ST RESPONDENT |
| 2. PRESIDENTIAL SECTOR
REFORM COMMISSION | 2ND RESPONDENT |
| 3. CONSOLIDATED HOLDINGS CORPORATION... | 3RD RESPONDENT |

Date of Last Order: 4th September, 2015

Date of Ruling: 13th November, 2015

RULING

FELESHI, J.:

This is a ruling in respect of an application made by the applicant on 13/12/2013 by way of chamber summons in terms of section 11(1) of the Appellate Jurisdiction Act, [CAP. 141 R.E, 2002] for extension of time for the applicant to file Notice of Appeal against a decision of the High Court dated 26/10/2007 and for the applicant to be afforded time within which to file record of appeal afresh after the same was struck out on technical point of law. Besides, he prays for costs of the application. The Chamber Summons was supported by an affidavit affirmed by the applicant in person.

In his affidavit, the applicant averred that, aggrieved by Judgment of the High Court (anonymous), he preferred an appeal to the Court of Appeal

of Tanzania vide Civil Appeal No. 89/2008 which was struck out for being incompetent on ground of time limitation to lodge Notice of Appeal to the Court of Appeal. With immediate effect after struck out order of the Court of Appeal, the applicant lodged an application in the High Court for extension of time to file an appeal to the Court of Appeal which was again struck out on legal technical points. He has thus preferred this application in remedial to have his appeal heard by the Court of Appeal.

On 17/07/2015, the 2nd and 3rd respondents under the services of the office of the Attorney General Chambers raised five (5) Points of Preliminary Objection namely that:-

- (i) The application for extension of time to file Notice of Appeal is time barred.**
- (ii) The application for extension of time to file record of appeal is time barred.**
- (iii) The application is bad in law for being omnibus.**
- (iv) The application to file record of appeal is pre-mature.**
- (v) The affidavit in the application is incompetent for containing a lie and hearsay.**

The hearing of the Preliminary Points of Objection was by way of Written Submissions where parties complied with, hence, this Ruling. To argue for the Preliminary Points of Objection, the applicant engaged the services of Ganrichie & Co. Advocates while the 2nd and 3rd respondents were represented by the Attorney General. For some obvious reasons that the Preliminary Points were raised by the 2nd and 3rd respondents, the 1st respondent did not file her written submission in respect of the raised Preliminary Points of Objection.

In their submissions, the learned State Attorney for the 2nd and 3rd respondents argued for the 1st and 2nd Preliminary Points of Objection that the application in favour of the remedies sought is bad in law for contravening item 21 of Part III to the schedule of the Law of Limitation Act, [CAP. 89 R.E, 2002] that requires such applications to be made within 60 days. The learned State Attorney argued that, the application is thus time barred having been filed after the lapse of 113 days thus urged this Court to dismiss the same in terms of section 3(1) of the Law of Limitation Act, Cap.89 R.E.2002.

Regarding the 3rd Preliminary Point of Objection, the learned State Attorney for the 2nd and 3rd Respondents submitted that, the reliefs sought in the chamber summons have been sought in omnibus in contravention of Order XLIII Rule 2 of the Civil Procedure Code, [CAP. 33 R.E, 2002] which require every application to be made by way of Chamber Summons supported by an affidavit. He thus argued that the application is incompetent.

Regarding the 4th Preliminary Point of Objection, the learned State Attorney argue that, in terms of Rule 90(1)(b) of the Court of Appeal Rules, 2009, record of appeal to the Court of Appeal has to be lodged within 60 days of the date when the Notice of Appeal was lodged. Being the case, it was her contention that the application for extension of time to lodge record of appeal was premature thus urging the same to be overruled.

As to the 5th Preliminary Point of Objection, the learned State Attorney submitted that, Order XIX Rule 3(1) of the Civil Procedure Code (supra) requires affidavits to be confined only into facts unlike arguments and points of law. Citation was made to the decision of the Court of Appeal of Tanzania in the case of **YUSSUF VUAI ZYUMA vs. MKUU WA JESHI LA ULINZI TPDF & 2 OTHERS**, Civil Appeal No. 15 of 2009 (Zanzibar Registry) (Unreported) where the Court stressed that, failure to observe that renders the affidavit incurably defective and consequently, the application will ultimately be rendered incompetent, hence, struck out.

In reply, the applicant's counsel submitted in respect of the 1st and 2nd Preliminary Points of Objection that, vide the provisions of section 19(2) of the Law of Limitation Act (supra), the application is proper before this Court for the time used to obtain the requisite copies from Court for the purposes of lodging the respective application is excluded.

Regarding the 3rd Point of Preliminary Objection, the applicant's counsel submitted that, the two sought prayers are inseparable and unworthy to be sought in different applications. He thus maintained that, the application is properly filed before this Court. As to the 4th Preliminary Point of Objection, the applicant's counsel submitted that, Rule 90(1)(b) of the Court of Appeal Rules (supra) is only applicable when there is a Notice of Appeal already filed in Court. In respect of the 5th Point of Preliminary Point of Objection, the applicant's counsel argued that, what is stated in paragraph 6 of the applicant's affidavit is just an express of the facts of what happened and not arguments and or points of law as argued.

From the above, I will start with competency of the application at hand. Though counsel for the 2nd and 3rd respondents did not address their minds on the *jurat* of attestation, clearly, the same is fatally defective for it does not state whether the deponent was either known or identified to the Commissioner for Oaths, and if so, by whom. Such disclosure is crucial because an affidavit is evidence worth reliance by a Court of law in determining rights of parties to a suit or application in a Court of law.

Such position was made clear by the Court of Appeal of Tanzania in **SIMPLISIUS FELIX KIJUU KISAKA vs. THE NATIONAL BANK OF COMMERCE LIMITED**, Civil Application No. 24 of 2003 where the Court underscored with certainty to the effect that:-

"The affidavit does not show whether the Commissioner for Oaths knew the applicant personally or whether the applicant was identified to him by somebody whom the Commissioner for Oaths knew personally. This is contrary to the requirement of section 10 of the Oaths (Judicial Proceedings) and Statutory Declaration Act No. 59 of 1966. This being the case, it is evident that the applicant's affidavit in support of the Notice of Motion is defective. The crucial issue is as to what is the effect of a defective affidavit in support of a notice of motion. In my view, a defective affidavit in support of a Notice of Motion renders the application incompetent. It leaves the application without legs on which to stand. Since the application is incompetent for being supported by a defective affidavit, it must be struck out"

From the above, the affidavit by the applicant is fatally defective in law. Having so held, I find no reason to dwell into the other Preliminary Points of Law for they will not salvage the situation because competency of an application goes into the roots of the respective application. Consequently, the application is struck out for being incompetent. Considering the circumstances of the case, I make no order as to costs.

Order accordingly.

**E.M. FELESHI
JUDGE
13/11/2015**

Ruling delivered in chamber this 13th day of November, 2015 in presence of the Applicant in person and Ms. Pauline Mndeme, the learned State Attorney for the 2nd and 3rd Respondents and in the absence of the 1st Respondent. Right of appeal is explained.

**E.M. FELESHI
JUDGE
13/11/2015**