

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

**CIVIL APPLICATION NO. 49 OF 2008**

**THE SENATE OF THE UNIVERSITY  
OF DAR ES SALAAM .....APPLICANT**

**VERSUS**

**EDMUND MWASAGA & FOUR  
OTHERS.....RESPONDENT**

**(Application for extension of time to amend the order  
of the High Court of Tanzania)**

**(Mihayo, J.)**

**dated 27<sup>th</sup> March, 2006  
in  
Misc. Civil Cause No. 90 of 2001**

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**RULING**

**26 September & 20 November, 2008**

**KIMARO, J.A.:**

This is a notice of motion filed under Rules 8, 18(1), 47 (1) & (2), 89(h) and 104 of the Court of Appeal Rules, 1979. The application seeks for the following orders:-

- (a) The Applicant /Appellant be granted extension

**of time** to file a decree signed and dated by a judge and **leave to amend** filed decree by replacement to form part of the record of appeal in the above cited appeal ; in compliance with the law.

- (b) The said decree be filed in Court by way of supplementary record or in such other way as the Court shall direct.
- (c) That the said decree be filed in Court within seven (7) days of being supplied by the Applicant/Appellant by the High Court.
- (d) That the costs of and incidental to this application abide the results of the appeal.

Mr. Winfred Mathias Mnzava, learned advocate filed the motion on behalf of the applicant and his own affidavit supports the same.

The applicant is seeking to amend the drawn order in Civil Appeal No. 61 of 2005 lodged in Court on 18<sup>th</sup> July 2006. He also appeared in Court to argue the application when it was called on for the hearing. Mr. Magessa, learned advocate represented the respondent.

Apparently the drawn order was signed by the Registrar instead of the learned judge who presided over the case.

In terms of the affidavit of the learned counsel for the applicant which supports the application, he noted the defects in the drawn order when he was in the process of preparing himself for the hearing of the appeal. He immediately took steps by filing Civil Application No. 61 of 2006 seeking for leave to file a supplementary record to include a properly drawn order. Unfortunately, the application was found to be incompetent because an improper procedure was used. The Court observed that the procedure was an administrative one, and did not require Court intervention. Apart from that, the affidavit gives a narration of the efforts made by the applicant to have the record of appeal amended so as to allow the applicant be heard on the appeal on merit. He also cited authorities

dealing with circumstances under which an order for stay of execution can be granted and when a supplementary record can be filed.

In support of the application the learned advocate for the applicant said the Rules he cited, read together with the Court decisions filed, give an impression that the record of appeal can be amended. What the applicant is required to do, the learned counsel argued, is to ask for extension of time to make the amendments as well as to seek for leave to that effect. As he read through the Rules he cited (as the enabling provisions for filing the application) Mr. Mnzavas said Rule 18(1) and (3) permits a party to file an amended document upon being granted leave to do so. He cited the case of **M/S Ilabila Industries Ltd; John Momose Cheyo and Mgula Vitalis Cheyo Vs Tanzania Investment Bank, Philemon Mgaya t/a Eric Auction Mart and Court Brokers** CAT Civil Appeal No. 106 of 2005(unreported) to show that what the law forbids is inclusion of new documents which do not form part of the record of

the proceedings in the lower court. He contended that amendment of already filed documents is allowed.

The learned advocate contended further that under Rules 47(1) and 104 of the Rules a party can make an application to amend documents already filed in Court including the memorandum of appeal. In his opinion, the memorandum of appeal can be amended at any time before the hearing of the appeal and on such terms as the Court directs. Mr. Mnzava said a distinction should be drawn between filing a supplementary record of appeal and asking for an extension of time to make amendments to the memorandum of appeal before the appeal is called on for the hearing. He noted that a lot of authorities talk of filing of supplementary records when the appeal is called on for the hearing and this, the Court has not allowed. But before the hearing, the learned counsel argued, the record of appeal can be amended. He cited the case of **Anjum Vicor Saleem Abdi Vs Naseem Akhatar Saleem Zangie** CAT Civil Appeal No.73 of 2003(unreported) to support his contention. In the said case the record of appeal had a defective decree. When the

appeal was called on for hearing, the Court upheld a preliminary objection that was raised, that the decree was defective. However, instead of striking out the appeal, the appellant was allowed to amend the decree. Let me observe here that this position was taken by the Court during the grace period which was given by the Court after the decision of **Tanganyika Cheap Store Vs National Insurance Corp. (T) Ltd.** Civil Appeal No. 37 of 2001 when the Court made a wake up call on who in law, was required to sign the decree.

The learned counsel for the applicant said the Court has already set up a standard that parties should not be penalized for mistakes made by it. He was of a firm view that in the interest of justice the application should be granted as it conforms to the Court of Appeal Rules as well as the standing authorities. He prayed that the application be granted. In addition, he asked the Court to specify the manner in which the amendments should be effected as well as the time for doing so.

On his part, Mr. Magessa, learned counsel, submitted that all the four prayers made by the applicant are untenable. Citing the case of **Haruna Mpangaos and 902 Others V Tanzania Portland Cement Co. Ltd** Civil Appeal No.10 of 2007(unreported) the learned counsel said the applicant can only be allowed to amend a competent appeal. In his opinion, since the memorandum of appeal sought to be amended has no valid order, the appeal is not competent and cannot be amended.

On the prayer for extension of time, Mr. Magessa said under Rule 44 of the Rules, the application has to be filed in the High Court as first instance before coming to the Court. He said it is only in criminal matters that the Court has discretion to grant extension of time for doing any act and that can be exercised suo moto. Commenting on the case of **Aero Helicopters (T) Ltd Vs F.N. Jansen** [1990] TLR 142 which is on the list of authorities filed by the applicant's advocate, (listed as No.2) the learned counsel said the amendment was allowed because the appeal was competent. At this juncture, let me say, and with respect to the learned counsel for the

respondent, that he must have cited a wrong case because the case of **Aero Helicopters** supra, did not deal with **amendments** to a memorandum of appeal. What was before the Court was an application for stay of execution and the issue of amendment of the memorandum of appeal did not arise at all. In that case a preliminary objection was raised to the effect that an application for stay of execution was wrongly before the Court in that it ought to have been made in the High Court in the first instance. The case was cited by the learned counsel for the applicant to support the prayer for extension of time.

Regarding the procedure for effecting the amendment in the event of the prayer for amendment being granted, the learned counsel argued that the same cannot be effected by filing a supplementary record. He said that procedure is not going to work out because in the case of **Mpangaos**(supra) it was rejected. Moreover, the learned counsel contended, a similar application was refused by Kileo, J. A. He requested the Court to dismiss the application.

In a brief rejoinder, the learned counsel for the applicant insisted that since the appeal has not been called on for the hearing and there is no preliminary objection which has been raised so far, the question of the competence of the appeal does not at the moment arise. It will not even arise at the time of the hearing of the appeal if the Court allows the application because by then the defect will have been corrected. On the question of going to the High Court for extension of time, Mr. Mnzavas said the application was filed pursuant to the case of **Mpangaos** which advised the parties to make use of section 8 of the Rules. As for the documents which can be amended, the learned counsel said the law allows even basic documents like the memorandum of appeal to be amended. In the opinion of the learned counsel, where the appeal is before a full bench, a party cannot make a prayer for making amendments. In such a situation, the learned counsel said, the option is to ask for a withdrawal. He prayed that the application be allowed.

The only legal issue before me is the competence or otherwise of this application. The first question one has to ask is what is the

meaning of the word amend. According to BLACK'S LAW DICTIONARY (Second Pocket Edition) BRIAN A. GARNER the word amend means:

1. To make right, to correct or rectify.
2. To change the wording of; specify; to alter (a statute, constitution; etc.) formally by adding or deleting a provision or by modifying the wording.

The next question is whether the drawn order can be amended. The answer to the question lies on the correct interpretation of the Rules relied upon by the applicant in lodging the application; particularly Rules 18(1), 47(1&2) 89(h) and 104.

Rule 18(1) talks of the consequences which follow where leave to amend a document is granted by the Court. The amendments have to be effected accordingly and the document has to be filed in Court. Words deleted from the original document and those added must clearly be shown. Under sub- rule 3 of Rule 18

where any record of appeal includes any amended document, the amendments shall similarly be shown in each copy of the record of the appeal.

From the above rule any amendment to any document already filed in Court must be made with leave of the Court. Rule 47(1) and (2) prescribes the procedure for making a formal application seeking for leave to amend the documents and the period within which the amended version of the documents must be lodged in Court.

On the other hand Rule 104 provides as follows:

“The Court may at any time allow  
amendment of any notice of appeal  
or notice of cross-appeal **or memorandum  
of appeal, as the case may be, or any other  
part of the record of appeal, on such terms  
as it thinks fit.**”

From the submission made by the learned counsel for the applicant and the rules cited; together with the meaning of the word amend, it is certain that the record of appeal can be amended. In **Robert Edward Hawkins and Another Vs Patrice P. Mwaigomole** Civil Application No. 109 of 2007 the applicant filed an application for amendment of the record of appeal. A decree was not included in the record of appeal which was lodged in Court. The Court after indicating the circumstances under which a document could be amended, was satisfied that a record of appeal could be amended. The application however, was rejected because the applicant had not attached to the record of appeal the copy of the decree.

In this application the copy of the drawn order sought to be amended is attached and the rules cited allow amendments to be made. In the event, I allow the applicant to file an amended copy of the drawn order. The same should be filed seven days after obtaining the same from the High Court. Costs to abide by the result of the appeal.

The applicant also asked the Court to give directions on how the amendment should be effected. In my considered opinion it is not the duty of the Court to direct the advocate on how he should file the amended order. That is a task which lies him.

Dated at DAR ES SALAAM this 15<sup>th</sup> day of November, 2008.

N.P.KIMARO  
**JUSTICE OF APPEAL**

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



(P. A. LYIMO)  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**