

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CIVIL APPLICATION NO. 12/01 OF 2018

JULIUS P. K. NKONYA..... APPLICANT

VERSUS

WILLIAM MICHAEL KUDOJA.....RESPONDENT

**(Application for amending the notice of appeal from the
decision of the High Court of Tanzania
at Dar es Salaam)**

(Mkasimongwa, J.)

dated the 15th day of December, 2015

in

Probate and Adm Cause No. 9 of 2012

RULING OF THE COURT

26th September & 17th October, 2018

WAMBALI, J.A.:

The applicant, Julius Peter Nkonya (as the legal representative of the late Canius Mbusa) through the services of Mr. Howa Hiro Msefya, learned advocate has lodged this application under Rule 111 of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking to be granted leave to amend the notice of appeal which was lodged on 21st December, 2015.

In essence the applicant seeks to amend the notice of appeal in order to indicate properly the provision of Rule 83(1) instead of Rule 83 of the Rules and to replace the name of the trial judge of the High Court, Mkasimongwa, J. instead of Mkasimwonga, J. indicated in the said notice of appeal. The application is supported by the affidavit sworn by Mr. Howa Hiro Msefya, learned advocate for the applicant on 16th January, 2016. Mr. Msefya also lodged written submissions in support of the application on the same date.

On the other hand, although the respondent was served with the Notice of Motion supported by the affidavit, he did not lodge the affidavit in reply. Instead through the services of Ms. Oliver Mkanzabi, learned advocate from Gabriel & Co. Attorneys at Law he lodged the reply to the written submissions of the applicant opposing the application.

At the hearing of the application, Mr. Msefya appeared for the applicant while Ms. Mkanzabi appeared for the respondent.

In his submission, Mr. Msefya briefly urged the Court to adopt the affidavit and the written submissions in support of the application for amendment of the notice of appeal. In short, Mr. Msefya reiterated what he

had stated in both the affidavit and written submissions that the wrong citation of Rule 83 instead of Rule 83(1) of the Rules and wrong spelling of the name of the trial judge of the High Court in the notice of appeal was not deliberate but was due to a slip of the pen. He argued that in view of the dispute between the parties the Court be pleased to grant the requisite leave to amend the notice of appeal so that the parties can be heard on appeal as the High Court has granted the applicant leave to appeal since 13 October, 2017.

The learned advocate for the applicant therefore urged the Court to allow the requisite requested amendments for the interest of justice. He further prayed that costs in this application be costs in the cause.

In reply Ms. Mkanzabi learned advocate for the respondent in the absence of a reply to the affidavit, sought leave, which was granted by the Court, to rely on the written submissions in opposing the application. She emphasized that the wrong citation of the proper Rule and wrong naming of the trial judge was due to the negligence of the applicant and that it renders the notice of appeal fatally defective and thus it cannot be cured by amendment as argued by the counsel for the applicant.

In support of her arguments, she relied on the decided cases of this Court in **John Paul Shibunda, Tanzania International Agri Input Co. Ltd v. Nordox Industrier As**, Civil Application No. No. 171 of 2015; **China Henan International Group v. Salvand K. A. Rwegasira**, Civil Reference No. 22 of 2005 (for wrong citation); **Marwa Kaenang'o v. The Republic**, Criminal Appeal No. 84 of 2015 and **Denis Kasege v. The Republic**, Criminal Appeal No. 395 of 2013 (for wrong spelling of the name of the judge), (all unreported).

Ms. Mkanzabi argued further that the amendment of the notice of appeal cannot therefore be sought out of the negligence of the applicant as it will likely prejudice the trial court, this Court and the respondent as various initiatives to prosecute the appeal are already in place. She thus prayed that the application and the notice of appeal should be struck out with costs.

At this juncture, we have no hesitation to state that the notice of appeal lodged by the applicant on 21st December 2015 wrongly indicates that it is preferred under Rule 83 instead Rule 83(1) of the Rules and wrongly refers the trial judge as Mkasimwonga, J. instead of Mkasimongwa, J. The issue we need to determine therefore is whether the Court can grant the

requested amendments. To this end, we think it is important to reproduce the provision of Rule 111 of the Rules in extenso:

" 111. 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 reading of that Rule there is no doubt that the Court has power to order amendment at any time depending on the circumstances of each matter. Moreover, we think it is instructive to state that this Court in **Jaluma General Supplies Ltd v. Stanbic Bank (T) Ltd**, Civil Appeal No. 34 of 2010 (unreported) interpreted the meaning and import of the words "*at any time*" appearing in Rule 107 (1) of the Rules as follows:

"... the expression at any time in Rule 107 (1) means at any time before objection is taken. Upon objection being taken, time is up..."

Furthermore, this Court in **CRDB Bank Ltd v. Issack B. Mwamasika, Registered Trustees of Dar es Salaam International School and EDBP & GD Construction Company Ltd**, Civil Application No. 469/01 of 2017 (unreported), borrowed a leaf from the interpretation in **Jaluma** (supra) and stated that "the expression 'at any time' in Rule 111 means at any time before objection is taken against the amendment sought."

In the present matter the applicant discovered the mistake and lodged this application seeking amendments to the notice of appeal. We note that up to the time the applicant lodged the present application the respondent had not lodged any objection to the propriety of the notice of appeal. Indeed, as we have stated above the respondent did not also lodge an affidavit in reply to oppose the application. He only opposes the application through a reply to the written submission.

In the circumstances, as the application has been made before the appeal has been instituted and no objection was taken by the respondent before the application was lodged, we think the prayer for amendment of the notice of appeal deserves consideration by the Court.

Nevertheless, we are alive to the decisions of this Court which were referred and relied by the respondent's counsel above on the consequences of wrong citation and misnaming of the name of the trial judge. However, we are respectfully of the view that the same are distinguishable with the present matter. This is so because in those matters the Court reached those decisions due to the objections which were raised by the either respondents or the Court *suo motu*. To the contrary, in the present matter there is no objection which has been lodged by the respondent. Indeed, the applicant has brought the application before the appeal has been lodged under Rule 111 of the Rules which empowers the Court to order amendments of the requisite documents including the notice of appeal in deserving circumstances at any time.

In the event, we think, the objection of the respondent through the written submissions has no basis at all. We are of the firm view that at the stage in which the application has been preferred, no injustice will be caused to the trial court, this Court and the respondent as argued by the learned advocate for the respondent.

In the end, we grant the application for amendment of the notice of appeal as requested by the applicant. The amendment should be done within fourteen (14) days from the date of delivery of this ruling. We further order that costs be in the cause.

DATED at DAR ES SALAAM this 10th day of October, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL