

TANZANIA / JUDGMENT

20110218 TZCA Arusha

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,.! " I ~ ~ , , ! IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA (CORAM: NSEKELA, J.A., KIMARO; J.A., And MBAROUK, I.A.) CIVIL APPLICATION NO. 112 OF 2010 ABDALLAH MOHAMED AND 71 OTHERS APPELLANTS · VERSUS SUPA FOOD CORPORATION LTD AND ANOTHERS RESPONDENTS (Application to Determine the Appeal Ex Parte from the Decision of the High Court of Tanzania at Arusha) (Mchome, J.) dated the 20th day of September, 2007 in Civil Application No. 10 of 2003 RULING OF THE COURT 14 & 25 February, 2011 NSEKELA, J.A.: On the 30.9.2010, the applicants Abdallah Mohamed and 71 others acting through Makange Chambers, Advocate, filed a Notice of Motion under Rule 106(1) and (10) Court of Appeal Rules, 2009 (Court Rules), seeking an order to proceed ex parte the hearing and determination of Civil Appeal No. 59 of 2010, in which the parties in this appeal are the same now before us in this application. The application is supported by an affidavit sworn by Herbert Eliakunda Samweli Makange, learned advocate, appearing on behalf of the applicants. Mr. Makange averred in his affidavit that, on the 28.7.2010 he filed in the Court Civil Appeal No. 59 of 2010 between Abdallah Mohamed and 71 others v (1) Supa Food Corporation and (ii) John Misana, The Receiver Manager, Tanzania Food Corporation. On the 16.8.2010 he filed written submissions and served them upon the respondents on the 19.8.2010. Apparently, the respondents had not filed their replies within the prescribed thirty (30) days. In view of this non-compliance with the prescribed procedure, the learned advocate submitted that the appeal should be heard and determined ex parte. This is the thrust of Civil Application No. 112 of 2010. Both Civil Appeal No 59 of 2010 and Civil Application No. 112 of 2010 were cause-listed for hearing on the 14.2.2010. We ordered that Civil Application No. 112 of 2010 should be heard and determined first before Civil Appeal No. 59 of 2010. 2 · , At the commencement of hearing the Notice of Motion, it transpired that the 2nd Respondent, John Misana, Receiver Manager, Tanzania Food Corporation, had not entered appearance. Mr. Makange prayed that the matter should proceed on to hearing under Rule 63(2) of the Court Rules. We granted the prayer to proceed in the absence of the 2nd respondent under Rule 63(2) since the 2nd respondent had been served with notice of the hearing date through Northern Law Chambers on the 21.1.2011. Mr. Elvaison Erasmo Maro, learned advocate for the 1st respondent, filed a counter affidavit. Paragraphs 5, 6, and 7 provide in part as follows:- "5. That the contents of paragraphs 4 and 5 are denied as being misleading and without a grain of truth. The first respondent duly filed its submission with court on the 21st day i.e on 1st day, i.e. on 1st day September, 2010. Such submissions were filed vide Exchequer receipt number 40172527

6. That upon being served with the copy of the submissions by the appellant in Civil Appeal number 3 59/2010 the first appellant did engage the services of M/s Maro and Company, Advocates along with another law firm styled Albert Msando Legal Consultants, Advocates..... .
7. That on the 1st day of October, 2010 the two , law firms to wit M/s Albert Msando Legal Consultants, Advocates and M/s Maro and Company, Advocates, filed a Notice of Change of Advocates with the Court. .. " In view of paragraph 5 above, it is evident that the applicants complaint that the 1st respondent did not file its written submissions is without foundation. Mr. Makange, did not challenge the authenticity of Exchequer Receipt No. 40172527 dated the 17.9.2010 evidencing payment for written submission from Maro & Company Advocates, in respect of Civil Appeal No. 59 of 2010. This ground of complaint is devoid of merit. The prayer th^t the applicants/ appellants proceed ex parte for the purported failure to file a reply within thirty (30) days is accordingly rejected. 4 The parties made extensive submissions on the validity of the Notice of Change of Advocates, which is Annexure SUPA 4 to the counter- affidavit sworn by Mr. Elvaison Erasmo Maro in respect of Civil Application No. 112 of 2010. The Notice of Motion filed on the 30.9.2010 is in the following terms- "TAKE NOTICE that on..... the day of 2010 at 09.00 o'clock in the morning or as soon thereafter as he can be heard, Mr. Herbert f,S. Makange, Advocate for the above-named applicants, will move the Court for an order that the Court proceeds to determine the appeal ex parte on the grounds that the respondents who have been served with a copy of the submissions of the appellants have each failed to file a reply within thirty days as prescribed under Rule 106 sub- Rule 10 of the Tanzania Court of Appeal Rules, 2009'~ 5 This takes us to Rule 48(1) of the Court Rules which states- "Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, every application to the Court shall be by notice of motion supported by affidavit. It shall cite the specific rule under which it is brought and state the ground for the relief sought." The relief sought in the notice of motion is to determine the appeal ex parte for failure to comply with sub-rule 10 of Rule 106 of the Court Rules. Can we go further and determine the validity of the Change of Advocates under Rule 32(1) of the Court Rules? We have read the affidavit in support by Mr. Makange and there is no averment therein even remotely inviting us to decide on Rule 32(1). The question of change of advocate was gratuitously introduced by Mr. Maro in his counter-affidavit. It was not in response to any statement by Mr. Makange in his affidavit in support of the application. 6 The question of change of Advocate is not an issue in Civil Application No. 112 of 2010, according to the Notice of Motion. In the result, we dismiss the application with costs. DATED at ARUSHA this 18th day of February, 2011. ~~-~---- H. R. NSEKELA 0 f ~AP p" _is< JUSTICE OF APPEAL J ,; 11\ \ i~; ;{ ,., >, ~} . \ ~ ,f ""{ i l .i&J ,r N.P. KIMARO JUSTICE OF APPEAL M.S. MBAROUK JUSTICE OF APPEAL I certify that this is a true copy of the original. Z.A.M~A DEPUTY REGISTRAR COURT OF APPEAL 7

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