

TANZANIA / JUDGMENT

# alphonce buhatwa vs julieth rhoda

## alphonce 2016 tzca 753 16 march 2016

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM fCORAM: KIMARO, J.A., ORIYO. 3.A. And MWARIJA, J.A.^ CIVIL APPLICATION NO.19 OF 2013 ALPHONCE BUHATWA..... APPLICANT VERSUS JULIETH RHODA ALPHONCE.....RESPONDENT (Application for extension of time within which to file notice of appeal from the decision of the High Court of Tanzania at Dar es Salaam.) (Muruke, J.) Dated the 28th day of January, 2013 In Civil Appeal No. 95 of 2010 RULING OF THE COURT 3rd March & 30th 2016 MWARIJA, J.A.: The applicant, Alphonce Buhatwa was the appellant in the High Court Civil Appeal No. 95 of 2010. He was aggrieved by the judgment of that court handed down on 29/7/2011 and thus intended to appeal. Since however, he was time barred, he applied for extension of time to file a notice of intention to appeal. He also applied for extension of time to file the following 1

- (i) An application for leave to appeal, (ii) An application for certificate that a point of law is involved in the intended appeal and (iii) An application for stay of execution pending hearing and determination of the intended appeal. His application was unsuccessful and has thus come to this Court for a second bite. In his notice of motion filed on 7/2/2013, the applicant is seeking for the same orders which he had applied in the High Court. The application has been brought under rules 4(2) (a) and (b), 10, 11, 45(b), 48 and 83 (1) and (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Apart from the application for extension of time, the applicant has also made a second application couched in the following words:- "Secondly, the Court be pleased to allow the applicant herein file a notice of appeal, application for leave to appeal and for a certificate that a point of law is involved plus application for stay of execution on the grounds to be stated in the affidavit in support of the notice of motion." The application was resisted by the respondent, Julieth Rhoda Alphonce who was also the respondent in the High Court. At the hearing of the application the applicant was represented by Mr. Francis Mgare, learned counsel while the respondent appeared in person and unrepresented by a counsel. Both the learned counsel and the respondent had duly filed their respective written submissions in compliance with rule 106 of the Rules. Each of them did not have any oral submissions to make. They instead relied on their written submissions which were mainly confined to the application for extension of time. At that stage, we reserved our ruling. Before we composed the ruling however, we

deemed it appropriate, upon our deliberations on the matter, to re- open the hearing so that the parties could address us on the vital issue concerning the competence or otherwise of the application. We were prompted to take that move by what appeared to us a mix up nature of the application. In his submission on the issue, Mr. Mgare argued that the notice of motion consists of two applications firstly, an application for extension of time and secondly, the one in which the applicant seeks to be granted the applications for which extension of time is sought, that is; leave to appeal, a certificate that a point of law is involved and stay of execution of the High court judgment. When prompted to comment on whether or not that second application is contained in the notice of motion, the learned counsel conceded that the same is not there. He conceded further that from the wording in the notice of motion, that application is superfluous because once the application for extension of time is granted, the applicant would not be required to make another application seeking to be allowed to institute the notice of appeal and the other applications (the main applications) for which an extension of time is sought. The learned counsel contended however that from his written submission, what was shown to be the second application in the notice of motion, was intended to be an application asking the Court to grant the main applications but the same was mistakenly shown as an application in which the applicant is seeking to be allowed to file a notice of intention to appeal and the main applications. As a way forward however, Mr. Mgare submitted that since the main applications have not been filed, the court may consider to strike out the second application and proceed to determine the first one; the application for extension of time. On her part, the respondent did not have anything to submit as regards the issue raised by the Court and in response to the submission made by the learned counsel for the applicant. For reasons which will be apparent herein, we will not consider the application on merit. As stated by Mr. Mgare, the intention of the applicant was to be granted firstly, extension of time to file the following; notice of intention to appeal, an application for leave to appeal, an application for an order that a point of law is involved and an application for stay of execution. According to the learned counsel, after grant of extension of time, the Court is furthermore, moved to consider to grant the main applications. He said that, although in the notice of motion, the second application is superfluous, the applicant intended to move the court to grant the said applications. He stated as follows in his written submission: 5 "Further the applicant is seeking this Court to allow him file a notice of appeal, grant application for leave and for a certificate that a point of law is involved and stay of execution pending the intended appeal". (Emphasis added) Mr. Mgare, conceded however, that since the main applications have not been filed, even if extension of time is granted, the Court cannot entertain the second application because the same is misconceived. It is certain to us that even if the main applications would have been filed, the same would be incompetent because they could not be instituted unless a notice of appeal is lodged first. This requirement is stated under rule 46(1) as follows:- "46 - (1) where an application for a certificate or for leave is necessary, it shall be made after the notice of appeal is lodged." {Emphasis added}. It is out of these defects that, as stated above, Mr. Mgare suggested that the Court should consider to strike out the second application and proceed to determine the first one. We do not, with respect, agree with his proposition. We

think that, to do so would amount to splitting the notice of motion thereby assisting to cure the defects, the most glaring one being the irregularity of bringing the applications in an omnibus form. As pointed out above, the application was brought under different provisions of the Rules. It is trite that each one of the cited rules serves a different purpose. While, for example, rule 10 empowers the Court to extend the time limited by the Rules for doing of any act authorized or required to be done, rule 11 empowers the court to stay execution of a decree, judgment, order or sentence pending determination of an appeal. In that regard, whereas under rule 60(2) (b), the power of hearing an application for stay of execution is vested in the Court, hearing of an application for extension of time is, under rule 60(1), within the jurisdiction of a single Justice. The latter provision states as follows:- "60 - (1) Every application other than an application included in sub-rule (2) shall be heard by a single Justice save that application may be adjourned by the Justice for determination by the Court." There is no gain saying therefore that the notice of motion is defective for having been brought in an omnibus form. In the case of Rutagatina C.L. v. The Advocates Committee & Anr., Civil Application No. 98 of 2010 (unreported), after having considered the general scheme of the Rules, particularly rules 44 - 66, the Court observed that these rules refer to an application not applications and further that, each rule provides for a particular nature of an application. In the application, the applicant had combined an application for extension of time to which a single Justice has jurisdiction to hear and determine and an application for leave to appeal which is within the mandate of the Court to hear and determine. The Court held as follows: "... in terms of Rules 60 (1) of the Rules an application for extension of time is heard by a single Justice whereas under sub-rule (2) (a) thereto an application for leave is determined by the Court. In the totality of the foregoing, we are satisfied that the Rules do not provide for an omnibus application." The effect of filing an application in an omnibus form is to render that application incurably defective. In *Mohamed Salimin v. Jumanne* 8 stated as follows:- "As this Court has held for time(s) without number an omnibus application renders the application incompetent and is liable to be struck out. . . ." In the present case, by citing the rules which provide for different applications in the notice of motion, the applicant has rendered his application incurably defective for being an omnibus application. In the event, the same is hereby struck out with costs. DATED at DAR ES SALAAM this 23rd day of March, 2016 N.P.KIMARO JUSTICE OF APPEAL K.K.ORIYO JUSTICE OF APPEAL A.G.MWARIJA JUSTICE OF APPEAL I certify that this is a true copy of the original. J.R. KAH^ZA REGISTRAR COURT OF APPEAL 9

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