

TANZANIA / JUDGMENT

CIV

COURT
TANZLIIDECIDED
1 January 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE COURT OF APPEAL OF TANZANIA AT DODOMA CIVIL APPLICATION NO. 1303 OF 2024
MURTAZA MOHAMED RAZA VIRANI.....1st APPLICANT MRS RUBAB
MOHAMED RAZA VIRANI.....2nd APPLICANT VERSUS MEHBOOB HASSANALI
VERSI.....RESPONDENT (Application for extension of time within which
to apply for stay of execution and application for stay of execution of the judgment and decree of
the High Court of Tanzania, Commercial division) (A.R. MRUMA, 3.1 Dated 13th day of December,
2016 in Commercial Case No. 281 of 2002

RULING

4th & 1001 March, 2025 MANSOOR. 3.A.: The applicants seek for a multiplicity of orders through
a notice of motion dated 20th November 2024, filed under Rule 10 and Rule 11 (3), 5

- (a) and (b) and 7 (a), (b), (c) and (d), of the Court of Appeal Rules, 2009, as amended, praying for
two orders, firstly, an order of extension of time within which to apply for stay of execution
of the decree of the High Court, Commercial Division in Commercial Case No. 281 of 2002
pending the hearing and determination of Civil Appeal No. 1105 of 2024 between the parties
herein, and secondly for an order of stay of execution of the same decree. Against the
application, the respondent who is represented by Counsel Thomas Eustace Rwebangira
took an objection that the application is omnibus, thus incompetent. Counsel Rwebangira
submits that the application is omnibus for it contains two prayers governed by different
rules of the Court of Appeal Rules, 2009 and touches on the jurisdiction of the Court. He
further averred that, the first prayer is governed by Rule 10 while the second prayer is
governed by Rule 11 of the Rules. According to him, those prayers cannot be dumped in one
notice of motion because the Court cannot determine the two applications simultaneously.
To buttress his arguments, he cited the case of Rutagatina C. L vs The Advocates Committee
& Another, Civil Application No. 98 of 2010 (unreported) where the Court of Appeal held at
page 8 that; "the effect of lodging an application in an omnibus form renders that
application incurably defective." Counsel Rwebangira argues that the Court does not have
the jurisdiction to determine an application for stay of execution, as firstly, the same
application was determined by the Court and the application was struck out for it was held
to be time barred, and secondly, the court cannot have the jurisdiction to entertain an
application for stay of execution which was filed out of time. According to the Counsel, the

issue of limitation of time is a substantive issue that touches the jurisdiction of the court as once the Court pronounces that the action is time barred, it lacks jurisdiction to entertain it unless the applicant sought and is given the extension of time to file it. Counsel Rwebangira argues that combining of the two prayers in one application, the Court is asked to entertain an action for which it lacks the jurisdiction to entertain it, as the Court cannot entertain an application for stay of execution which was filed out of the prescribed time. He refers to the case of AM Chamani vs Karagwe District Council, Civil Application No. 411/4 of 2017 decided on 6/09/2018, which explains that applications for different reliefs cannot be combined in one application as the reasons for allowing one application is different from the reasons for granting relief of the other application. Counsel Sylvester Shayo for the applicant resisted the preliminary objection. He says, the notice of preliminary objection contravenes Rule 107 (1) of the Rules, which requires a notice of preliminary objection to be filed within three clear days before the date of hearing. That this matter was scheduled for hearing before Hon. Justice Agatho J.A, and parties were ready for hearing but the hearing could not proceed as Hon. Agatho J.A had recused himself from entertaining it. Thus, the counsel for the respondent should have filed the notice of preliminary objection within three clear days before the date of hearing set before Hon. Agatho J.A. Submitting on the competency of the application, Counsel Shayo argues that the application before this Court is proper and the Court has the jurisdiction to entertain both prayers contained in one application, as the prayers interrelates and both prayers can be entertained by a Single Justice. He argues further that, unlike the situations in the cases of Rutaganita, where the Court had held that the prayers were not related as one prayer was to be heard by a Single Justice and another by the Court, in this application the two prayers are related, and subject to the outcome of the first prayer, the second prayer could or could not be entertained. He says further that in the case of Ali Chamani, the Court could not entertain the two prayers as one was to be determined by the High Court and another by the Court of Appeal. He argues further that, in the instant application, the two reliefs can be combined to reduce multiplicity of actions as stated in the case of MIC Tanzania Limited vs Minister for Labour and Attorney General, Civil Appeal No. 103 of 2024 (2000 TZCA 156). I have carefully considered the Preliminary Objection, and considered the submissions of both counsels and the issue that emerge for determination is whether the notice of preliminary objection was filed in accordance to Rule 107 (1) of the Court of Appeal Rules, and whether the Preliminary Objection is meritorious. The Notice of Preliminary objection is anchored on multiplicity of prayers in an application. On what qualifies to be entertained as a Preliminary Objection was well settled in the Mukisa Biscuits Manufacturing Co. Ltd... Vs... West End Distributors Ltd (1969) EA 696 to mean: - "So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. " Further Sir Charles Nebboid, J.A stated that: - "A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by

the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop. "It is evident that a Preliminary Objection, raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if the court is called upon to exercise judicial discretion or to evaluate the evidence on facts. It has also been submitted that the second prayer in the application is statute barred. There is no doubt that the issue of limitation goes to the jurisdiction of the Court and the same does not require ascertainment of facts. The Court is only required to determine what the law says and whether indeed the second prayer in the application is barred by Limitation of Action. All that the Court is expected to do is to determine what the law says and this means that the same raises a pure point of law. Now, whether the raising of the preliminary objection contravened Rule 107 (1), of the rules which provides: "a respondent intending to rely upon preliminary objection to the hearing of the appeal or application shall give the appellant or applicant three clear days' notice hereof before hearing, setting out the grounds of objection such as the specific law, principle or decision relied upon, and shall file five such copies of the notice of the notice with the Registrar within the same time and copies of the law or decision, as the case may be, shall be attached to the notice." The rules clearly require a party who is intending to rely upon the preliminary objection to give the other party three clear days' notice before the date of hearing. He is also mandatorily required to furnish the other party copies of the laws or decisions he intends to rely upon in his submissions. Obviously, the Preliminary Objection which can be entertained by this Court would be an objection of pure point of law as required in Rule 107 (2) of the Rules, an objection which if determined would dispose of the appeal or application. This means even a preliminary objection that touches the jurisdiction of the court would need to follow the requirements of Rule 107 (1) of the Rules, that the notice must be filed in Court within three clear days before the hearing. In the present matter, the hearing was scheduled before Hon. Agatho J.A, and no notice of preliminary objection was filed, and parties were ready to proceed with the hearing if the Justice was comfortable to proceed. The Justice recused himself, and thus the hearing of the matter was halted but not postponed. The hearing did not proceed on the date fixed by Hon. Agatho J.A. Then the file was returned to the Chief Justice for re-assignment, and was assigned to me and the fresh date was fixed by me, and it was given on Friday evening, and the matter was fixed for hearing on Monday. Definitely, the objection could not have been filed within the three clear days as there were no three days given. Under the circumstances of this matter, there would be no contravention of Rule 107

- (1) of the Rules as the notice given for hearing was too short. I agree that rules must be obeyed to avoid chaos, surprises and confusions in the Court, but there are times and situations, it is permitted to relax the rules, and this depends on the circumstances of each case. In this situation, the notice of preliminary objection was filed in accordance with the Rules given the circumstances of the matter. Despite of what I stated above, I am also of the views that,

even if it would have appeared that the respondent contravened Rule 107 (1) of the Rules, the contravention would not be fatal, provided that what was objected is a pure point of law which touches the jurisdiction of the Court and does not require factual investigation. As held in the case of CMA- s CGM Tanzania Ltd vs Justine Baruti (Civil Appeal No.23 of 2020)

[2021] TZCA 256 (15 June 2021) the Court stated that; "White we have affirmed the appellant's entitlement to sufficient notice in terms o f rule 107

- (1) o f the Rules so as to prepare a proper response to the points raised and avoid her being taken by surprise, we think that the respondent's contravention would not vitiate or deflate the substance o f the points raised in the notice. I f Dr. Kapinga needed more time to prepare, he should have pleaded for it and we would have undoubtedly considered the prayer auspiciously. " Secondly, as stated in the case of MIC Tanzania Limited, there is no provision of the law which bars omnibus application and there is no hard and fast rule of practice developed by the Court to discourage combination of two or more distinct reliefs in one application. In the two cases cited by Counsel Rwebangira, the case of Rutagatina, and Ali Chamani, the Court found the applications incompetent for combining two or more distinct reliefs governed by different laws with different yardstick or timelines, or different jurisdiction. But in the case of MIC Tanzania, the same Court encourages combination of one or more reliefs in one application to avoid multiplicity of applications, provided reliefs are not opposed to each other. So omnibus applications are not barred, but there is a test set in all the decisions cited, and the test is to see whether the reliefs sought are related, whether the court has the jurisdiction to determine both prayers in one application and whether they can be determined by the same court, as stated in the case of MIC Tanzania Ltd Versus Minister of 3 Labour and Youth Development and Attorney General Civil Appeal No 103 of 2004 (Unreported), in which the Justices of Appeal had stated at page 9: "There will be a multiplicity o f unnecessary applications. The parties will find themselves wasting more money and time on avoidable applications which would have been conveniently combined. The Courts' time will be equally wasted in dealing with such applications. Therefore; unless there is a specific taw barring the combination o f more than one prayer in one Chamber Summons, the Courts should encourage this procedure rather than thwart it for fanciful reasons. We wish to emphasize, all the same, that each case must be decided on the basis o f its own peculiar facts." Applying the tests given in the cases cited by both counsels, the present action was filed under Rule 10 and 11 of the Court of Appeal Rules, and both prayers contained in the Notice of Motion are determinable by the Single Justice. As prayed, the second relief depends on the outcome of the 1st relief sought and if the extension of time will be allowed, the applicant will be given time, and the time will start to run from the date it is given, time given cannot be made to apply retrospectively. If the Court is satisfied that there are sufficient reasons to allow the applicant the extension of time, then the court will have to give time to the applicant to file the application for stay of execution. In this case, the applicant has already filed an application for stay of execution out of time without the leave of the court. He will need to be given the time first, then, he would have filed the application for stay within the time granted by the court, it is only then, the court will be having

jurisdiction to entertain the application for stay of execution. For at present the court lacks jurisdiction to entertain an application which was filed out of time, without the leave of the court. The Court cannot entertain an application which have been filed out of time. The jurisdiction to entertain the application for stay of execution is only obtained when the application is filed within the prescribed time or within the time so extended. However, I do not agree with the proposition of Counsel Rwebangiira that the previous application which was struck out bars the Court to entertain the similar application. The action which was struck out cannot bar the Court to entertain the subsequent applications. It is trite law that 11 when the application is struck out, it is as if it was never filed in court, and parties return to the same position they were before the matter was filed in court. This court is not functus officio to entertain an application for stay of execution, but it can only be entertained if the applicant is granted more time to file it. That said and for the reasons stated, the Preliminary Objection raised is sustained. The application is incompetent, and it is hereby struck out with costs It is so ordered. DATED at DAR ES SALAAM this 10th day of March, 2025. L. A. MANSOOR JUSTICE OF APPEAL The Ruling delivered this 10th day of March, 2025 in the presence of Ms. Happiness Joseph Mkude, holding brief for Mr. Sylvester Shayo, learned counsel for the Applicants and also holding brief for Mr. Thomas Rwebangiira, learned Counsel for the Respondent is hereby certified as a true copy of the original.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/332715/source_file/20492941ef65f07b/CIV._APPL._NO._1303_OF_2024_-_MURTAZA_MOHAMED_RAZA_VIRANI__ANOTHER_VS._MEHBOOB_HASSANALI_VERSI.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/murtaza-mohamed-raza-virani-v-mehboob-hassanali-versi-extensionoftime-tanzlii-2024--6a3ea52d3b1caa9129826cb0

Prepared on 14 October 2026 · Esheria