

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RAUADHANI, J.A., INZAVAS, J.A., And MFALILA, J.A.)

CIVIL APPEAL NO. 47 OF 1994

BETWEEN

TANZANIA SPRING INDUSTRIES
AUTOPARTS LIMITED APPELLANT

AND

ESSEN INVESTMENT LIMITED RESPONDENT

(Appeal from the Ruling and Decree
of the High Court of Tanzania at
Dar es Salaam)

(Mackanja, J.)

dated the 28th day of June, 1994

in

Misc. Civil Cause No.150 of 1993

JUDGMENT OF THE COURT

RAUADHANI, J.A.:

This is an appeal against the ruling of the High Court of Tanzania at Dar es Salaam (MACKANJA, J.) refusing the appellant, Tanzania Spring Industries Auto-parts Ltd., extension of time to file a counter-affidavit in Misc. Civil Application No. 150 of 1993.

In that application, the present respondent, Essen Investment Ltd., is the applicant and the present appellant is the third respondent. Thus there are two other respondents. Those two other respondents filed together a preliminary objection by way of a counter-affidavit to the affidavit of the applicant. The present appellant had not been served with a copy of that counter-affidavit and has not filed his counter-affidavit.

So, on 12/5/1994 MAGANJA, J. gave the following order:

"3rd Respondent be served with counter-affidavit.

3rd Respondent to file his counter-affidavit by 1st June, 1994. Hearing on 24th June, 1994."

On 26/6/1994 Mr. Manabar, learned counsel, held the brief for Mr. Chandoo, learned advocate for the third respondent, that is, the appellant. The counter-affidavit of the appellant had not yet been filed. Mr. Manabar, from the bar, informed the Court that Mr. Chandoo had gone to the U.S. for treatment and that he had returned the previous day. He also told the Court that they had been served with a copy of the counter-affidavit of the first and the second respondents just the previous day. Mr. Manabar asked for extension of time within which to file a counter-affidavit. That prayer was opposed by Mr. Malunga, learned counsel for the applicant, that is, the present respondent.

MAGANJA, J. gave his ruling, refusing extension of time on 28/6/1994 and Mr. Chandoo asked for and was given leave to appeal.

Mr. Chandoo appeared before us in this appeal with a memorandum of appeal containing eight grounds of appeal. He also presented a written submission in which he elaborately argued those grounds of appeal. It is our

considered opinion that the eighth ground alone is sufficient to dispose of this appeal. So, we shall not touch on the other seven grounds.

In that ground Mr. Chandoo contended that the learned judge erred in not using his discretion to extend time within which the appellant had to file his counter-affidavit. Mr. Kalunga, learned counsel for the respondent, argued that it was correct that the discretion was not exercised. He pointed out that on 12/5/94 the appellant was given time to file his counter-affidavit on 1/6/94. As the appellant failed to do that then from 1/6/94 to the date set for the hearing he should have applied for extension of time and that he should not have waited to do so on the day of the hearing.

Ordinarily we would agree with Mr. Kalunga that the appellant ought to have made an application for extension of time before the date set for the hearing. But we are convinced that the situation obtained here is out of the ordinary.

The learned judge made this finding in his ruling rejecting extension of time:

"I am persuaded, however, that Mr. Chandoo went abroad for treatment and that Mr. Kanabar received him at the Airport when he returned in the country a day before these submissions were made."

Elsewhere the learned judge observed:

"I would say that there might be evidence to establish that the journey was an emergency and that he could not have had time to advise his clients to seek other legal counsel to do what he was supposed to do."

But then, the learned judge posed a question:

"... was Mr. Chandoo's trip to the United Kingdom sufficient ground for his failure to comply with a court order?"

The answer to that question would appear to be this:

"If the courts are to dispense justice with a sense of duty, it will be unfair to the litigants if in so doing the courts are fettered by the convenience of advocates."

The learned judge then refused to extend time because that would be accommodating "the convenience" of Mr. Chandoo.

Now, if the learned judge was persuaded that "Mr. Chandoo went abroad for treatment" and if he formed the opinion that "there might be evidence to establish

that the journey was an emergency", we ask whether that is convenience or necessity. An emergency trip to London for treatment is an absolute necessity and accommodating that is not fettering the dispensation of "justice with a sense of duty" by the courts.

We are at one with the learned judge's agreement with the passage he quoted from the judgment of Lord Guest in *Ratnam v. Gularasamy And Another* [1964] 3 All ER 933 at 935. However, we wish to emphasize two things which Lord Guest said:

"The rules of court must prima facie be obeyed and in order to justify extending the time during which some step in procedure requires to be taken there must be some material on which the court can exercise its discretion ..."
(emphasis is ours).

If the rules "must prima facie be obeyed," it means then, that there are occasions when there will be departure from the rules. Those instances will depend on the existence of "some material on which the court can exercise its discretion". Had the learned judge formed the opinion that an emergency trip abroad for treatment is not a convenience, but is a sheer necessity, he would have found that to be some material on which to use his discretion.

We therefore allow the appeal. We extend time and order the appellant to file his counter-affidavit to the affidavit of the respondent in this appeal, within fourteen days from the date of this judgment. Costs to follow the event.

DATED AT DAR ES SALAAM THIS 23RD DAY OF JUNE, 1995.

A.S.L. RAYADHANI
JUSTICE OF APPEAL

M. S. INZAYAS
JUSTICE OF APPEAL

L. H. MPALILA
JUSTICE OF APPEAL

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

(M. S. SHANGALI)
DEPUTY REGISTRAR