

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 177 OF 2004

In the Matter of an Intended Appeal

SAID ISSA AMBUNDA..... APPLICANT

VERSUS

TANZANIA HARBOURS AUTHORITY..... RESPONDENT

(Application for extension of time from the decision of the High Court of Tanzania at Dar es Salaam)

(Ihema, J.)

**dated the 27th day of February, 2004
in**

Civil Appeal No. 42 of 1998

R U L I N G

KAJI, J.A.:

There was a case in the High Court at Dar-es-Salaam between the applicant Said Issa Ambunda and the respondent Tanzania Harbours Authority, which was, on 19.6.2000, ruled to be Res-Judicata. The applicant was dissatisfied with the decision.

A month later, that is, on 19.7.2000, the applicant attempted to file a notice of appeal but was refused by the Registry on the ground that it was out of time, and that he was required to apply for enlargement of time within which to file it.

The applicant disappeared into the unknown until almost three years later, that is, on 23.6.2003, when he emerged and applied for the following

orders:-

1. That the court be pleased to enlarge time for the applicant to file a fresh notice of appeal and an application for leave to appeal to the Court of Appeal of Tanzania out of time.
2. That costs of the application be met by the respondent.
3. Any other and further relief the court deems fit and just.

On 27.2.2004, that application was dismissed for want of merit. Sixteen days later, that is, on 15.3.2004, the applicant applied for the same orders in this Court, apparently under Rule 43 of the Court Rules, 1979. But under Rule 43 (b) that application was required to be filed within fourteen days from the date when the High Court had refused that application. Thus the applicant was late by two days. On 10.12.2004 that application was struck out by a single Judge of this Court, Mroso, J.A., not for that reason of being late but for failure to cite the relevant provisions of law under which the application was made. On 23.12.2004 the applicant filed the present application praying for the same reliefs.

Unfortunately the applicant did not state specifically in his affidavit

the reason(s) for the delay from 27.2.2004 when his application was refused by the High Court till on 23.12.2004 when he filed this application.

On 13.7.2005 the applicant applied for and was granted leave to file a supplementary affidavit stating specifically the reason for the delay from 27.2.2004 to 23.12.2004. He was granted seven days within which to file the same. That leave was granted under Rule 46 (2) of the Court Rules, 1979. But for unexplained reason the applicant filed the supplementary affidavit within eight days. He was late by one day. He was required to obtain leave of the court to file it out of time. He had neither applied for nor was granted the said leave. So, on 28.7.2005 the said supplementary affidavit was expunged from the record whereby the applicant, through his advocate Mr. Ukwonga, intimated that he would make a formal application for extension of time within which to file it. Later he applied for the same orally. He advanced two grounds for the delay. One, that he was pursuing the order by Mroso, J.A. dated 10.12.2004. Two, that he miscalculated the days whereby he thought seven days from 13.7.2005 would expire on 21.7.2005. Mr. Mchome, learned counsel for the respondent, contended that those reasons are not sufficient to justify the delay.

I have carefully considered the arguments and submissions by learned counsel for both parties. There is nothing suggesting that the applicant was pursuing a copy of the order by Mroso, J.A. dated 10.12.2004. I say so because there is no letter to the Registrar asking to be supplied with the same. Mr. Ukwonga has contended that, since the

applicant was a party in the case before Mroso, J.A., (Civil Application No. 31 of 2004) he was entitled to be supplied with a copy of the order even if he had not asked for it. I find this reasoning to be unreasonable. Any prudent advocate or party would not simply sit down and wait to be supplied with a copy of the order simply because he is a party who is entitled to be supplied with the same even if he does not ask for it. The applicant did not annex a copy of the said order because he had simply decided to remain idle. The respondent's advocate Mr. Mchome annexed a copy of the said order in his reply.

The second ground that the applicant's advocate miscalculated the days is also not reasonable. It is not the duty of the Court in cases of this nature to teach parties simple mathematics.

For the above reasons I refuse to extend time within which to file a supplementary affidavit.

The applicant's affidavit accompanying the notice of motion does not state specifically the reasons for the delay from 27.2.2004 when the applicant's application was refused by the High Court till on 23.12.2004 when he filed this application. The applicant is merely complaining against the refusal by the High Court to grant the reliefs sought. The affidavit is not very much different from a memorandum of appeal. In fact that affidavit does not even state anywhere that there was a similar application in this Court which was struck out on 10.12.2004. The supplementary

affidavit was supposed to fill up the gaps by explaining the grounds for the delay from 27.2.2004 when the applicant's application was refused by the High Court till on 23.12.2004 when he filed this application in this Court. Since leave to file it has been refused, the gaps have been left unfilled.

A notice of motion seeking orders for enlargement of time within which to file a notice of appeal and for enlargement of time within which to apply for leave to appeal to this Court must be accompanied by an affidavit bearing the grounds for the delay. If the affidavit does not contain the grounds for the delay, the application is incompetent. It is incompetent for being accompanied by an improper affidavit.

In the instant case the affidavit accompanying the notice of motion does not state the grounds for the delay from 27.2.2004 when the applicant's application was refused by the High Court till on 23.12.2004 when he filed this application in this Court. It is an improper affidavit. The impropriety cannot be cured by arguments or submissions at the hearing, because parties can only argue what is pleaded in the pleadings. They are not allowed to argue outside their pleadings. The impropriety could only have been cured by the intended supplementary affidavit if leave to file it out of time would have been granted.

The instant application which is accompanied by an improper affidavit is incompetent. Under Rule 3 (2) (a) of the Court Rules, 1979 the application is hereby struck out with costs.

DATED at DAR ES SALAAM this 23rd day of September, 2005.

S.N. KAJI
JUSTICE OF APPEAL

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL.

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR