

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

CIVIL APPLICATION NO. 31 OF 2013

1. Ms. HENRY LEONARD MAEDA 2. Ms. JUSTIN MAEDA	} APPLICANTS
VERSUS		
1. Ms. JOHN ANAEL MONGI 2. AICHI LEONARD MAEDA	} RESPONDENTS

**(Application for extension of time to include in the record of
appeal Exhibits A-1, Exhibit R-2 and R-3 against the
decision of the High Court of Tanzania
at Arusha)**

(Sambo, J.)

**Dated 11th day of May, 2012
in
Land Appeal No. 64 of 2010**

RULING

16th & 22nd October, 2014.

MBAROUK, J.A.:

In this application, the applicants, Ms. Henry Leonard Maeda and Ms. Justin Maeda have moved the Court under Rule 10, 96 (1) (d) (k), (6) and Rule 4 (2) (a) and (b) of the

Tanzania Court of Appeal Rules, 2009, and G.N. No. 368 of 2009. The applicants are seeking for the following orders:-

*"1. That, time within which to include
in the record of appeal Exhibits A-
1 collectively, Exhibit R-2 and R-3
which Exhibits are not part of the
record of appeal, be extended."*

The affidavit in support of the application was sworn by Elvaison Erasmo Lyawere Maro, learned advocate for the applicants.

In order to appreciate the gist and essence of the application I feel it prudent to reproduce in extenso Mr. Maro's affidavit in support of the application. It reads:-

*"2. That on or about the 21st day of
May, 2012 our law firm received
instructions from the applicants*

and the brief was assigned to myself.

- 3. That on the 24th day of May, 2012 after perusal of the relevant documents the requisite Notice of Intention to Appeal, a letter applying for appeal documents inclusive of the exhibits were issued and filed with the court and served on the other party.*
- 4. On the 25th day of May, 2012 an application for leave to appeal to the Court of Appeal was lodged with the High Court and registered as Miscellaneous Civil Application number 39 of 2012.*

5. That leave to appeal was granted on the 22nd day of April, 2013, subsequent thereafter on the 21st day of June, 2013 the appeal documents were supplied and on the 16th day of July, 2013 the appeal was lodged in the Court of Appeal and registered as Court of Appeal Civil Appeal No. 66/2013.

6. That while in the cause of preparing the submissions in support of the appeal on the 6th day of September, 2013 we came to realize that in fact Exhibits A-1 collectively as well as Exhibits R-2 and R-3 were not supplied to us by the court on the 21st day of June, 2013.

7. That we immediately made a follow up with the High Court Registry at Arusha with a view of obtaining the requisite Exhibits, we then learnt that the original tribunal record along with the High Court records had already been submitted to the Court of Appeal main Registry in Dar es Salaam.

8. That on or about the 10th day of September, 2013 we advised our clients of the missing Exhibits, they were only able to avail us with photocopies retained in their records.

9. *That we compiled the submission and filed the same in court on the 12th day of September, 2013.*
10. *That on or about the 16th day of September, 2013 our clients were advised of the dire need to obtain copies of the actual exhibits from the Tribunal record. On the 19th day of September, 2013 a Thursday our clients then instructed us to follow up the documents with the court in Dar es Salaam and provided resources for the said exercise.*
11. *On the 24th and 25th day of September, 2013 I had a two days trial in Commercial Case No. 11 of*

2011 parties been Ms. Rombo Milers Company Limited vs M/S. Tanzania Coffee Board before His Lordship Mr. Justice Nchimbi, at Arusha Registry. On 20th and 23rd day of September, 2013 I was busy preparing for the said trial and I had witness to lead for the plaintiff one Ms. Mayasa Khalfan on the 24th day of September, 2013 and on the 25th day of September, 2013 the defence case was then heard and closed. I was then able to travel to Dar es Salaam on the 26th day of September, 2013 and followed up copies of the missing exhibits, the same supplied to us

*on the 27th day of September,
2013.*

*12. That our law firm did not represent
the applicant in the trial tribunal
nor in the substantive appeal in the
High Court, we were disadvantage
in terms of appreciation of the
proceedings and exhibits
tendered."*

Whereas in his affidavit in reply, Mr. John Faustin Materu, learned advocate for the respondent, noted the contents of paragraphs 1, 2, 3, 4, 5 and 9 of the affidavit of the applicant's counsel and disputed paragraphs 6, 7, 8, 10, 11 and 12 of that affidavit.

At the hearing, Mr. Maro submitted that, the requirement under Rule 96 (6) of the Court of Appeal Rules,

2009 (the Rules) to include in the record of appeal the omitted documents referred to in Rule 96 (1) and (2) of the Rules was not complied with. Elaborating on the delay, Mr. Maro submitted that, the applicants lodged their appeal on 16-7-2013 but the 14 days requirement to lodge the omitted documents without leave expired. He further contended that it took about thirty six days when they realized while in the cause of preparing their submissions in support of the appeal on 6th September, 2013 that some documents are missing in the record of appeal. He named the missing documents as Exhibit A-1 collectively as well as Exhibit R-2 and R-3 which were not supplied to them by the court on 21st June, 2013.

Mr. Maro then gave four reasons why he did not realize at an early stage that some exhibits were missing. The reasons are as follows:-

- (1) The inability by the applicants counsel i.e. M/S Maro and company, Advocates did not take part in the proceedings in the trial tribunal nor in the High Court, they were therefore disadvantaged in terms of quick appreciation of the proceedings and exhibits produced. Mr. Maro named one Mr. Shayo as an advocate who represented the applicants at that earlier stage in the tribunal as well as in the High Court.
- (2) The three exhibits which were omitted did not form the basis of the pending appeal in the application for leave to appeal to the Court of Appeal. Even in the written submissions in support of the application for leave to appeal, no reference was made to any of those exhibits. That is why, there was no immediate occasion for the

applicants advocate to realize that some of the missing exhibits were missing.

- (3) Some of the said exhibits were included in the record of appeal as annextures to the pleadings. For example Exhibit R-1 (trading licence) found at page 22 of the record of appeal and Exhibit R-2 found at page 24 of the record of appeal. He said, that fact mitigates against total omission to include them in the form of exhibits.
- (4) Some of the omitted exhibits, for example Exhibit R-1 (TIN Certificate) and Exhibit R-3 (Mkataba wa mapatano baina ya Justin Maeda/Gilbert Maeda) were not part of the pleadings in the Tribunal. That is why Mr. Maro said they failed to immediately detect the omission. Having given those reasons which contributed to the delay in detecting the omission.

Mr. Maro then urged the Court to find that this is a case of inadvertency and not a case of negligence.

In showing that the applicants were diligent, Mr. Maro gave a detailed account of tireless efforts taken by them. Starting from the **6th September, 2013 (Friday)** when the omission was detected by the applicants' advocate while compiling submissions in support of the appeal, he immediately attempted to access the documents at the High Court, Arusha Registry. However, he learnt that, the relevant records had already been sent to the Court of Appeal main Registry in Dar es salaam. On **10th September, 2013 (Tuesday)** Mr. Maro drew the attention of his clients (the applicants) to the fact that Exhibit A-1, R-1 and R-2 were not supplied by the Court and the relevant court record have been sent to the Court of Appeal Registry in Dar es salaam. Thereafter, Maro said, he continued to compile the

submissions and filed them in court on **12th September, 2013 (Thursday)**. Then, on **16th September, 2013 (Monday)** Mr. Maro had another meeting with the applicants and explained them the need to follow the omitted documents in Dar es salaam. Two days after on **19th September, 2013 (Thursday)**, the Applicants instructed Mr. Maro to follow up the documents in Dar es salaam and provided him resources for the trip. Unfortunately, Mr. Maro had a two days trial preparation of a commercial case before His Lordship Mr. Justice Nchimbi at the Arusha, High Court, Commercial Division and spent the **20th September, 2013 (Friday)** to **23rd September, 2013 (Monday)** for the preparations of the trial. The hearing proceeded on **24th and 25th September, 2013**. The following day on **26th September, 2013** Mr. Maro said he rushed to Dar es salaam and the following day on **27th September, 2013 (Friday)** he was able to peruse the Court record and obtained the missing

exhibits. Having obtained the missing exhibits on **27th September, 2013**, the applicants through Mr. Maro lodge the current application within five working days on 7th October, 2013.

Mr. Maro then submitted that, the sequence of events stated above, clearly demonstrate that once they detected the omission on 6th September, 2013, they took every possible step to rectify the omission. He said, that shows how the applicants and their advocate were diligent in the process of rectifying the omission. In support of his submission, Mr. Maro cited the decisions of this Court in the case of **Royal Insurance Tanzania Limited v. Kiwengwe Strand Hotel Limited**, Civil Application No. 111 of 2009, **Al Outdoor Tanzania Limited & Another v. Alliance Media Tanzania Limited**, Civil Application No. 178 of 2008 and **Tanzania Revenue Authority v. Tango Transport Company Ltd.**, Civil Application No. 5 of 2006 (All unreported).

In the final analysis, Mr. Maro humbly prayed for their application to be granted.

On his part, Mr. Materu from the outset prayed to adopt the affidavit in reply sworn by him and the reply to the applicants' written submission filed by him as part of his submission. He then vehemently resisted the applicants' application for its failure to show good cause as required under Rule 10 of the Rules. This is because, he said, there is no evidence in the record showing that those documents were missing. He added that, there should have been an affidavit of an officer of the court from either Arusha or Dar es salaam to substantiate that those documents were missing in the record of appeal. To support his argument Mr. Materu cited the case of **John Chuwa v. Anthony Ciza** [1992] TLR 233.

Secondly, Mr. Materu submitted that, the applicants and their advocate were not careful in the preparation of the record of appeal which was certified by Mr. Maro to be correct. He said, as shown in paragraph 3 of the affidavit in reply, the applicants and their advocate were duty bound to see that the record of appeal contained all relevant documents including Exhibit A-1 collectively, Exhibits R2 and R3. Mr. Materu further added that, the alleged missing documents were requested by the Law firm of Maro and Co. Advocates vide letter dated 24-5-2012 and it was upon the said law firm to make sure that all documents requested were supplied to them as per the relevant letter.

Mr. Materu urged the Court to find that, the delay in filing the missing documents in the prescribed time of 14 days after lodging the record of appeal was a negligent act on the side of the applicants and their advocate. He then

distinguished the case of **Al Outdoor Tanzania Limited & Another** (*supra*) cited by Mr. Maro from this case, because, he said in that case the issue was concerning a wrongly dated decree, whereas this case is concerning the issue of a missing documents.

Lastly, Mr. Materu prayed for the application to be dismissed for want of merits.

Let me commence by pointing out that, there is no flicker of doubt that the applicants' record of appeal omitted to include some allegedly vital documents. Also it is a fact that the 14 days period kept under Rule 96 (6) of the Rules which allows an applicant to include in the record of appeal the omitted documents expired. That is why the applicants preferred this application so as time to include the missing documents in the record of appeal be extended.

Under Rule 10 of the Rules, the Court has been conferred with a wide discretion to extend the time even where the prescribed time has expired upon "good cause" shown. As to what amount to "good cause", this Court in the case of **Jumanne Hassan Bilingi v. The Republic**, Civil Application No. 23 of 2013 (unreported) stated that:-

"In essence, what amounts to good cause is upon the discretion of the Court and it differs from case to case. But, basically, various judicial pronouncements defined good cause to mean reasonable cause which prevented the applicant from pursuing his action within the prescribed time."

Having examined what amounts to good cause let me also examine what are the factors to be looked upon by the

Court in the course of exercising its discretion. In the decision of this Court in the case of **Henry Muyaga v. Tanzania Telecommunication Company Ltd.**, Civil Application No. 8 of 2011 (unreported) stated as follows:-

"... in considering an application under the rule, the courts may take into consideration, such factors as, the length of the delay, the reason for the delay, the chance of success of the intended appeal, and the degree of prejudice that the respondent may suffer if the application is granted."

The list of factors stated above is not exhaustive. See also, the decision of this Court in the case of **The Attorney General v. Twiga Products Ltd.**, Civil Application No. 28 of 2008 (unreported).

In the instant case, the applicants were late by thirty six days before they realized through their advocate that in their record of appeal there were some missing exhibits relevant to be included therein. According to the affidavit of the advocate for the applicants, he gave four reasons which contributed to the delay in detecting the omission. As pointed earlier by Mr. Maro those reasons are, **first**, that, the applicants' advocate did not take part in proceedings in the tribunal and in the High Court. **Second**, that, the three missing exhibits did not form the basis of the pending appeal in the application for leave. **Third**, some of the missing exhibits were included in the record of appeal as annextures to the pleadings. **Fourth**, some of the missing exhibits were not part of the pleadings in the Tribunal.

Immediately after having noted the omission, on 6th September, 2013 to 27th September, 2013, paragraphs 6, 7,

8, 9, 10 and 11 of Mr. Maro's affidavit has clearly shown every possible step taken in order to rectify the omission.

Apart from the factors stated in the case of **Henry Muyaga** (*supra*), I am of the considered opinion that a point of being diligent is another factor which can lead the Court exercise its discretion to grant extension of time. However, this will depend upon the circumstances of each case. As pointed out earlier the list of factors is not exhaustive. To bolster its importance, this Court in the case of **Royal Insurance Tanzania Limited** (*supra*) endorsed that factor of being diligent when it held as follows:-

"we are satisfied that the applicant has diligently and persistently been in and out of the courts corridors in search for justice particularly after discovering the defect himself and attempting to cure it before anybody else."

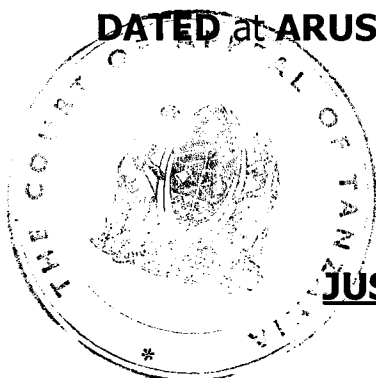
With due respect to the learned advocate for the respondent I do not see the rationale that the delay to include those exhibits was a purely negligent act, instead I think the applicants and their advocate persistently and diligently took essential steps to rectify the omission themselves before anybody attempted to cure the omission.

I am of the considered opinion that the applicants and their advocate gave plausible reasons which amount to "good cause" to warrant me exercise my discretion. This is for the reason that, the learned advocate for the applicants gave acceptable reasons for the delay and he was diligent and persistently taking essential steps immediately after discovering the defect and attempted every possible step to rectify the omission.

For that reason, and upon the discretion conferred upon me under Rule 10 of the Rules hereby grant extension of time

to include in the record of appeal Exhibit A-1 collectively, Exhibit R-2 and R-3. The applicants are given fourteen (14) days from the date of the delivery of this Ruling to comply with this order. It is so ordered.

DATED at **ARUSHA** this 22nd day of October, 2014.



M. S. MBAROUK
JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read "F. J. Kabwe", is written over a horizontal line.

F. J. KABWE
DEPUTY REGISTRAR
COURT OF APPEAL