

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

CIVIL APPLICATION NO. 13 OF 2015

**TANZANIA COFFEE BOARD..... APPLICANT
VERSUS
ROMBO MILLERS LTD.....RESPONDENT**

**(An application for Extension of time to serve the Respondents with the
Notice of Appeal arising from the Judgment and Decree of the High
Court of Tanzania Commercial Division at Arusha)**

(Nchimbi, J.)

Dated on the 31st day of October, 2014

in

Commercial Case No. 11 of 2011

RULING

Date 2nd & 6th October, 2015

JUMA, J.A.:

Before me is a Notice of Motion dated 24th March, 2015, filed by the applicant TANZANIA COFFEE BOARD on 2nd April, 2015. The Court is being moved under Rules 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). Citing the ROMBO MILLERS LTD as respondent, the Motion seeks for orders that:-

- 1. That this Honourable Court grant and Order an extension of time to serve/re-serve the Respondents with the Notice of*

Appeal in High Court of Tanzania (Commercial Division) at Arusha Commercial Case No. 11 of 2011 that was filed on 13/11/2014

2. That this Honourable Court grant and Order an extension of time to file/lodge a Record of Appeal arising from the High Court of Tanzania (Commercial Division) at Arusha Commercial Case No. 11 of 2011.

3. That costs be granted in this cause.

4. Any other order that the Court deems just to grant.

The Motion is based on two grounds. First, the applicant basically contends that after filing its notice of appeal on 13/11/2014, the High Court returned it back to the applicant on 11/12/2014 and the applicant served it on the respondent on 12/12/2014. Second, by the time the application for extension of time to serve the respondent with the notice is determined by this Court, the applicant will be out of time within which to lodge its record of appeal.

The brief facts giving rise to the present motion is documented in the supporting affidavits of Mr Meinrad Menino D'Souza the learned advocate engaged by the applicant, and Ms Engerasia A. Mongi, a Senior Legal Officer of the applicant. On 31/10/2014 the High Court of Tanzania at Arusha (Commercial Case No. 11 of 2011) delivered its judgment and decree which was in favour of the respondent. Aggrieved by the outcome of that case, the applicant filed its notice of appeal on 13/11/2014.

The applicant directs all blames at the High Court Registry for returning the signed Notice of Appeal fifteen days after the expiry of the 14 days within which the applicant was required under Rule 84 (1) of the Rules, to serve a copy of its notice of appeal to the respondent. In the sixth paragraph of his affidavit, Mr D'Souza points an accusing finger at the High Court Registry for occasioning the delay to serve the respondent with a copy of the notice of appeal within fourteen days of its filing:

6. That, the Notice of Appeal; was accidentally misplaced during the annual file stock taking and preparation of file returns/reports in the High Court Registry at Arusha that was occasioned by no fault of the Applicants.

Ms Mongi similarly directs blames over the delay at the High Court Registry:

6. That, the delay in being supplied with the Notice of Appeal was occasioned by no fault of the Applicants. And that, on or about 17th November, 2014 I was informed that the said Notice of Appeal was accidentally misplaced during the annual file stock taking and preparations of file returns/reports.

On behalf of the respondent, Mr Elvaison Erasmo Maro, learned advocate, on 22/5/2015 filed two affidavits in reply to affidavits of Engerasia A. Mongi and Meinrad Menino D'Souza, to oppose the application for extension of time. On 25/5/2015 Mr D'Souza, filed the applicant's written submissions. Later on 25/6/2015, Mr Maro, for the respondent, filed written submissions dismissing off the explanations of what caused the delay to serve the respondent with the notice of appeal within the 14 days prescribed by the Rules.

At the hearing of the application, both Mr. D'Souza representing the applicant, and Mr. Maro, representing the respondent, adopted their

respective affidavits and written submissions. They in addition made engaging oral submissions and referred to an array of case law.

Submitting in support of the prayer for extension of time, Mr. D'Souza recalled the diligent step which the applicant took on 13/11/2014 to file the Notice of Appeal, expecting the same diligence from the Arusha Registry of the High Court to return the signed notice of appeal, at least on the same day. According to Mr. D'Souza, the notice of appeal was misplaced by the High Court Registry at Arusha. Ms. Mongi made several follow-ups with the High Court Registry till 11/12/2014 when the notice of appeal was finally sent to the applicant. The following day, on 12/12/2014, the applicant served a copy of the notice of appeal on the respondent. While acknowledging that parties are expected to diligently comply with the rules and prescribed timelines, Mr. D'Souza submitted that there are no system or mechanism in place for the Registrar, after signing such primary documents as the notice of appeal, to notify and invite the parties to come over for collection. Placing reliance in the decision of the Court in **Mabi Auctioneers (T) Ltd vs. NBC Holding Corporation**, Civil Application No. 158 of 2005 (unreported) which underscored the duty of the court to

notify the parties on the date of delivery of judgment, Mr. D'Souza submitted that the time the applicant had to wait for the Registrar to sign and return the notice of appeal, should be excluded from computation of periods prescribed by the Rules. The learned advocate also submitted that the instant application is designed to account the delay of 15 days which was occasioned by the Arusha High Court Registry.

Further, the learned advocate urged the Court in exercise of its discretion under Rule 10 of the Rules, to take into account the fact that if the applicant's grounds of appeal are to go by, the appeal which the applicant intends to file stands great chances of success. He also urged the Court to find that the respondent would not be prejudiced in any way should an extension be granted.

In his reply submissions Mr. Maro attacked the averments that copies of the Notice of Appeal having been filed and signed by the Registrar were then misplaced within the High Court Registry. He submitted further that only court officials can prove that there was in fact the misplacement of the notice of appeal at the Registry, but not the applicant. At very least, Mr Maro submitted, the applicant's learned advocate should have obtained an

affidavit sworn by a court officer to prove if indeed the notice of appeal which the applicant filed was misplaced within the court Registry. Without such an affidavit, the explanation contained in the affidavits of Mr D'Souza and Ms Mongi is, according to Mr Maro, hearsay. To cement his submission that it was imperative for a court official to swear an affidavit to prove misplacement, Mr Maro drew my attention to several decisions of the Court in **Kigoma Ali Malima vs. Abbas Yusuf Mwingamo**, Civil Application No. 5 of 1987 (unreported), **Said Salim Bakhresa vs. Ally Ngume** [1997] TLR 312, **Bushiri Hassan vs. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported), etc.

Apart from the delay blamed on stock-taking, Mr. Maro submitted on another reason why he thinks that the extension should not be granted. He pointed out that by 11/12/2014 when the applicant received the notice of appeal, it was already time barred by 13 days. The learned Advocate expressed his surprise why the applicant had to wait for more than three months until 2/4/2015 to file this motion seeking an extension of time. He challenged both affidavits of Mr. D'Souza and Ms. Mongi for failing to account for the delay of 111 days before this motion was filed. He cited

Bushiri Hassan vs. Latifa Lukio Mashayo (supra) where the Court insisted that:

"...Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."

In his rejoinder, Mr D'Souza, one after another, distinguished **Kigoma Ali Malima vs. Abbas Yusuf Mwingamo** (supra), **Said Salim Bakhresa vs. Ally Ngume** (supra), **Bushiri Hassan vs. Latifa Lukio Mashayo** (supra), etc. which Mr. Maro had earlier placed reliance on to underscore the stance that an affidavit sworn by a court official was needed to confirm the averment made by Ms. Mongi about the stock-taking of case files which occasioned misplacement of the notice of appeal.

Mr. D'Souza advocate further rejoined that each application seeking an extension of time, should be decided on strength of its own special facts. He urged that, while exercising my judicial discretion under Rule 10 of the Rules, I should not be tied down to facts which formed the basis of Court decisions which Mr. Maro cited. In so far as Mr. D'Souza was

concerned, he urged to me to believe the cause of delay averred by Ms. Mongi. Being a lawyer herself, Ms. Mongi surely appreciates the consequences of false affidavit, he submitted.

The learned Advocate reiterated that no injustice will be caused to the respondent if an extension is granted.

From the affidavits, written submissions and oral presentations by the two learned advocates, there are two critical issues that shall guide how I exercise the judicial discretion to extend time under Rule 10 of the Rules.

First is whether the applicant has accounted for all the days of the delay that occurred from 11/12/2014 when the applicant received a copy of the notice of appeal from the High Court Registry, and 2/4/2015 when the applicant finally lodged the instant Motion to seek an extension of time. **Second**, is whether, the explanation that the delay was occasioned by the Registry of the High Court during an annual file stock-taking exercise constitutes good cause to warrant an extension of time. The relevant Rule 10 states:

***10.** The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High*

Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended.

Even if I were to agree with Mr. D'Souza that all the days the applicant had to sit back to wait for the Registrar to sign the notice of appeal should not be accounted for by the applicant, the applicant before me has not accounted for each day of delay from 11/12/2014 when the applicant received a copy of the notice of appeal from the Registrar, to 2/4/2015 when this Motion for extension of time was filed.

The decision of the Court in **Bushiri Hassan vs. Latifa Lukio Mashayo** (supra) which Mr. Maro cited, correctly articulates the settled law that dismissal of the application is the consequence befalling an applicant seeking an extension of time who fails to account for every day of delay. The Court took a similar position in **Crispian Juma Mkude v R.** Criminal Application No. 34 of 2012 (unreported) wherein the Court

referred to its decision in **Bariki Israel vs. R**, Criminal Application No. 4 of 2011 (unreported) where the Court said:-

"...in an application for extension of time, the applicant has to account for every day of the delay. This applicant has failed to do ..."


From the foregoing, no good cause for extension of time can be said to have been shown in the circumstances of this application where, the applicant has not accounted each day of delay after receiving a signed notice of appeal on 11/12/2014 but filed a Motion seeking an extension of time 111 days later on 2/4/2015.

This application is as a result dismissed with costs. It is so ordered.

DATED at **ARUSHA** this 3rd day of October, 2015.

I.H. JUMA
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL