

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

CIVIL APPLICATION NO. 43 OF 2015

EXIM BANK (T) LIMITED.....APPLICANT

VERSUS

**ZAWADI ALLY MSALLA (as Administratrix of
the Estate of LUSEKELO S. MWANDENGA)..... RESPONDENT**

**(Application for extension of time within which to give Notice of Appeal
from the decision of the High Court of Tanzania
(Commercial Division) at Arusha)**

(Mwambegele, J.)

**Dated 20th day of February, 2015
in
Commercial Case No. 12 of 2014**

RULING

11th & 16th February, 2016.

MUSSA, J.A.:

On the 2th February, 2015 the Commercial Division of the High Court (Mwambegele, J.) pronounced an *exparte* judgment in favour of Lusekelo Samson Mwandenga who was the plaintiff in a suit in which the applicant herein was the defendant. It is common ground that the former had sued the latter over sums of monies allegedly withdrawn from his account without authority. Unfortunately, the decree holder passed away before realizing the fruits of the litigation and, in the aftermath, the respondent herein, who is

the administratrix of the estate of the late Mwandenga, took over and was impleaded into the proceedings.

In the meantime, the applicant approached the same court seeking to set aside the *ex parte* judgment, but her request was ultimately dismissed on the 21st August, 2015. Aggrieved, on the 7th September, 2015 the applicant was, again on the corridors of the High Court in an application for extension of time within which to lodge a Notice of Appeal so as to impugn the February 20th decision. But, as fate would have it, the High Court (Mansoor, J.) was disinclined to grant the prayer on account that an appeal does not lie against the decree sought to be impugned and the applicant's quest was, once again, shown the exit door. Undaunted, the applicant presently seeks to refresh his bid for extension of time by way of a second bite to this court.

At the hearing before me, the applicant entered appearance through Mr. Beatus Malima, learned Advocate. The respondent was absent but, in this regard, it is pertinent to observe that the notice of hearing was duly served on a firm of Lawyers operating in the name of "Fortis Attorneys". The

Notice was acknowledged with the firm's official stamp but the receiver who endorsed it added a detail to this effect

"We have not received instructions yet from the respondent"

It is noteworthy that throughout the proceedings below the respondent was represented by that firm of lawyers and, much as the respondent had not given a different subsequent address, I should suppose, the Notice of hearing was properly served to Fortis Attorneys. For his part, Mr. Malima informed the Court that, apart from the Notice of hearing, the respondent's firm of lawyers were also earlier served with the Notice of Motion of which they acknowledged receipt without demur. In the circumstances, counsel urged, the Court should proceed with the hearing of the application in the absence of the respondent.

With respect, I was minded of the same view, the more so as I take the position that if the respondent's Advocates had no instructions, they had a duty to indicate so the moment they were served with the Notice of Motion and, additionally, they were obliged to provide an alternative address of their client. To the extent that the respondent's Advocates acknowledged both the

Notice of Motion and the Notice of hearing, I was of the settled view that the respondent was duly served and, accordingly, I allowed the applicant to proceed with the matter in terms of Rules, 63 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

In support of the application, Mr. Malima fully adopted the Notice of Motion, its accompanying affidavit and his written submissions in support thereof. In essence, the applicant contends that the delay was occasioned by the time spent by the applicant, first, in seeking an order to set aside the *ex parte* decree, second, the time spent to implead the respondent in the proceedings and, third, the time spent in prosecuting the application for extension in the High Court which was refused.

It is trite law that in terms of Rule 10 of the Rules, it is entirely in the discretion of the Court to either grant or refuse an application for extension of time. This unfettered discretion has to be exercised judicially and the overriding consideration is that there must be "good cause" for so doing. What amounts to "good cause" has not been defined but from decided cases, a number of factors have to be taken into account including the promptness of the application, the length and reasons for the delay and the lack of

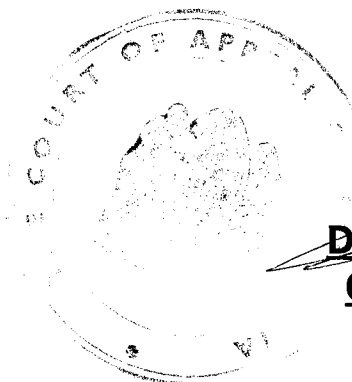

diligence on the part of the applicant. (See **Civil Application No. 6 of 2001 – Tanga Cement Co. Ltd Vs. Jumanne Masangwa and Another (unreported)**)).

In the matter under my consideration, it cannot be doubted that the applicant was throughout diligent and promptly made this application. The reasons for the delay are just as well fully explained. The respondent did not make any reply to the affidavital assertions of the applicant. To this end, I find this application to be meritorious and I, accordingly, grant the requested extension. The applicant should lodge the Notice of Appeal within thirty (30) days from the date of the delivery of this Ruling. I give no order as to costs.

DATED at ARUSHA this 15th day of February, 2016.

K. M. MUSSA
JUSTICE OF APPEAL

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

A circular stamp of the Court of Appeal is visible on the left side of the page. The text "COURT OF APPEAL" is partially visible around the perimeter of the stamp.
A handwritten signature of E. Y. Mkwizu is written over the printed name and title.
E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL