

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

CIVIL APPLICATION NO. 44/08 OF 2017

1. ELFAZI NYATEGA 2. YONA SARYA 3. ANSELEM MROSO 4. SPARROW WAMBURA	} APPLICANTS
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VERSUS

CASPIAN MINING LTD.....RESPONDENT

**(Application for extension of time to file an appeal against the decision of
the High Court of Tanzania at Mwanza)**

(Nyerere, J.)

**Dated the 20th day of July, 2015
in
Misc. Application No. 9 of 2015**

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RULING

1st & 9th October, 2018.

MWARIJA, J. A.:

By a notice of motion instituted on 31/1/2018, the applicants, Elfazi Nyatega, Yonas Sarya, Anselem Mroso and Sparrow Wambura seek an order granting them extension of time to file an appeal against the decision of the High Court, Land Division. In the notice of motion, the applicants indicated that the decision intended to be appealed against was decided on 20/7/2015 by Nyerere, J. According to the record however, the decision of Nyerere, J. is dated 17/3/2015. When the attention of the applicants was drawn to that mishap, they agreed that the decision sought

to be challenged is dated 17/3/2015 and that the same arose from Revision No. 40 of 2014.

The application which was brought under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), is supported by a joint affidavit sworn by the applicants on 31/1/2018.

The respondent, Caspian Mining Ltd., did not file an affidavit in reply. On 28/9/2018 however, it challenged the competence of the application by filing a notice of preliminary objection contending that the application is incompetent for the following three grounds:-

- "i. *The Applicant's (sic) failure to file written submissions contrary to the provisions of Rule 106(9) (sic) of the Court of Appeal Rules, 2009. See the case of :*
 - (a) **National Insurance Corporation of (T) Ltd & Another v. Shengena Limited**. Civil Appeal No. 20 of 2007, Court of Appeal of Tanzania at Dar es salaam (Unreported), and
 - (b) **Mechmar Corporation (Malaysia) Berhard v. VIP Engineering and Marketing Ltd**, Civil Application No. 9 of 2011, Court of Appeal of Tanzania at Dar es salaam (Unreported).
- ii. *Bearing a defective verification Clause contrary to Order XIX Rule 3(1) of the Civil Procedure Code, Act and section 8 of the Notaries Public and Commissioners for Oaths Act, Cap. 12 R.E 2002. See the case of **Darusi Gidahosi vs.***

The Republic, *Criminal Application No. 1 of 2011*
(Unreported).

- iii. *For failure to annex a copy of the Notice of Appeal of the decision intended to be appealed against so as to ascertain on compliances of the prerequisites of an appeal as required under Rule 83(1) of the Tanzania Court of Appeal Rules, 2009.”*

At the hearing of the application on 1/10/2018, all the applicants except Yona Sarya (the 2nd applicant) appeared in person, unrepresented. The 2nd applicant, who was duly served on 27/8/2018, did not enter appearance. Information given in Court by the 4th applicant, Sparrow Wambura that the said applicant had fallen sick, was not substantiated. On its part, the respondent was represented by Mr. James Njelu, learned counsel. As a result of the 2nd applicant's non-appearance, the application proceeded in his absence.

In order to expedite determination of the matter, I decided to hear the preliminary objection together with the application and undertook to incorporate the ruling in the decision of the main application, in case the preliminary objection fails. If the objection succeeded, then the ruling thereon would have disposed of the matter.

Starting with the preliminary objection, in his submission, at first Mr. Njelu abandoned the third ground of the preliminary objection. When his attention was drawn to paragraph 15 of the Tanzania Court of Appeal (Amendments) Rules, 2017, GN No. 362 of 22/9/2017, which amended Rule 106 of the Rules, the learned counsel dropped also the 1st ground of the preliminary objection. He thus argued the 2nd ground only.

Submitting in support of that ground, Mr. Njelu argued briefly that the applicants' affidavit is defective because it offends the provisions of section 8 of the Notaries Public and Commissioners for Oaths Act, (Cap. 12 R.E. 2002) (hereafter Cap. 12) as amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016. According to the learned counsel, the name of the attesting officer does not appear in the proper part of the affidavit as required by the above stated provision of the law. In elaboration, he said that, although the name appears in the jurat of attestation after the words "Before Me", the positioning thereof is incorrect because, the name ought to have been inserted in the part of the affidavit where the attesting officer described his knowledge of the deponents, that is; where he stated that he knew them personally.

The learned counsel stressed that the name of the attesting officer must have been inserted between the words "who were known to" and

“personally/identified to me...”. In support of his argument, Mr. Njelu cited the case of **Darusi Gidahosi v. The Republic**, Criminal Application No. 1 of 2011 (unreported).

The applicants who, as stated above, were unrepresented, did not have much to say on the legal point raised by the respondent’s counsel. The 1st applicant submitted briefly that the name of the attesting officer is stated in the affidavit and therefore, the objection is without merit. He added that, the respondent’s counsel has not substantiated his argument that the name has been inserted at a wrong place in the affidavit. The other applicants joined hands with the 1st applicant. They supported the submission that the preliminary objection is lacking in merit.

I need not be detained much in determining the preliminary objection. After amendment vide the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016, section 8 of the Act now reads as follows:-

*"Every Notary Public and Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act **shall insert his name** and state truly **in the jurat of attestation** at what place and on what date the oath or affidavit is taken or made."*

The provision states clearly that the name of the attesting officer shall be inserted in the jurat of attestation. According to **Osborn's Concise Law Dictionary**, 8th Ed., Sweet & Maxwell (London) 1993, jurat means:-

*"A memorandum at the end of an affidavit stating where and when the affidavit was sworn, followed by the signature and **description of the person before whom it was made.**"*

[Emphasis added].

From this definition it is clear that the name of the attesting officer constitutes part of his description. The affidavit in this case shows that it was attested by Bahati Chitepo, a Resident Magistrate. The name is inserted at the end of the affidavit, that is; in the jurat of attestation. Mr. Njelu's proposition that the name must appear in the part of the affidavit where the attesting officer described his source of knowledge of the deponents, is in my view, based on misinterpretation of section 8 of Cap. 12.

The case of **Darusi Gidahosi** (*supra*) which the learned counsel relied upon, does not support his argument. There is no where stated in that case, that the name must be inserted in the part of the affidavit

suggested by him. What was underscored in that case, is that the name of the attesting officer must appear in the jurat of attestation. The Court stated as follows:-

*"...it is now mandatorily required by law that an authority who administers oath or affidavit has to insert his/her name **in the jurat of an affidavit**. Failure of that mandatory requirement renders the affidavit incurably defective."*

Given the above stated position, there is no gainsaying that the preliminary objection is devoid of merit. The same is thus hereby overruled.

With regard to the application, the applicants did not file their written submission and therefore depended on oral submission, which they agreed to be made by the 4th applicant. In his submission, the 4th applicant started by adopting the affidavit filed in support of the application.

Apart from the contents of the affidavit, the applicants relied on another fact, which is not stated in their affidavit, that their previous advocate, Mr. Gaspar Mwanalyela passed away. The 4th appellant

contended that the death of their advocate hindered the process of filing the intended appeal within the prescribed time.

In reply, Mr. Njelu opposed the application arguing that the applicants have failed to establish that the delay was due to a good cause. He argued that the fact about the death of the applicants' previous advocate ought to have been stated in the affidavit, not in Court during the hearing of the application. The learned counsel stressed that in terms of Rule 10 of the Rules, extension of time can only be granted upon establishment of a good cause, the obligation which has not been discharged by the applicants.

I have duly considered the submissions of the applicants and the learned counsel for the respondent. As submitted by Mr. Njelu, a person who seeks extension of time under Rule 10 of the Rules must show that there was a good cause for the delay. The provision states as follows:-

"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."

What constitutes a good cause and the requirement that the same must be shown by the applicant was stated in *inter alia*, the case of **Oswald Masatu Mwizarubi v. Tanzania Fish Processors Ltd.**, Civil Application No. 13 of 2010 (unreported). In that case, the Court stated as follows:-

*"The term **good cause** is a relative one and is dependent upon the circumstances of each individual case. It is upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion. See, **Ratman vs. Cumarasamy and Another** [1964] 3 All ER 933 and **Reginal Manager Tanroads Kagera vs. Ruaha Concrete Company Limited**; Civil Application No. 96 of 2007 CAT (unreported)."*

In the present application, the applicants have stated generally in paragraph 10 of their affidavit that the delay was due to "many circumstances among them were... preliminary objections...", That paragraph states as follows:-

"That the delay to file an appeal was caused by many circumstances among them were several orders enhanced by ways of preliminary objections and other circumstance, in so doing this application has ever heard on merit, we pray this court to grant extension of time."

Apart from that general statement, the applicants have not accounted for every day of the delay.

The decision intended to be appealed against is dated 17/3/2015. The application was however, filed on 31/1/2018. Even if the reason given in the applicants' affidavit that the delay was caused by preliminary objections as contended in their affidavit, according to the record, the last ruling to that effect is dated 31/3/2016. As for the reason relating to the death of the applicants' previous advocate, that fact is not contained in their affidavit and cannot therefore, be considered with a view of finding how it contributed to the delay.

As stated above, the applicant ought to have accounted for every day of the delay. Underscoring that requirement in the case of **Sebastian Ndaula v. Grace Rwamafe**, Civil Application No. 4 of 2014 (unreported), the Court stated as follows:-

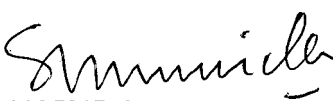
*"The position of this Court has consistently been to the effect that in an application for extension of time, the applicant has to account for every day of the delay: -See **Bariki Israel vs. The Republic**, Criminal Application No. 4 of 2011 (unreported)."*

The applicants have not done so in this case. As a result, there is no material upon which the Court can exercise its discretion under Rule 10 of the Rules to grant the application. In the event, I find that this application is devoid of merit. It is therefore hereby dismissed with no order as to costs.

DATED at MWANZA this 6th day of October, 2018.

A. G. MWARIJA
JUSTICE OF APPEAL

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


S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL