

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 403/16 OF 2018

SUMRY HIGH CLASS LTD }
SUMRY BUS SERVICE LTD } **APPLICANTS**

VERSUS

MUSA SHAIBU MSANGI **RESPONDENT**

**[Application for Extension of Time to include missing pages in the
transcribed proceedings in the record of appeal in Civil Appeal
No. 14 of 2015 from the High Court (Commercial Division)
at Dar es Salaam]**

(Nyangarika, J.)

Dated the 13th day of August, 2014
in
Commercial Case No. 20 of 2012

RULING

5th & 25th October, 2018

MWAMBEGELE, J.A.:

The applicants are appellants in Civil Appeal No. 14 of 2015 pending in the Court in which the respondent is also the respondent. Having realized that there were some missing pages of the transcribed proceedings of the trial court in the record of appeal, and having discovered that shortcoming after expiry of fourteen days within which they could include the same in the record of appeal without leave of the

court as provided by rule 96 (6) of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (hereinafter referred to as the Rules), they now, by a notice of motion taken out under rules 10 and 96 (6) of the Rules, seek the indulgence of the Court to grant an extension of time within which to file the same. The notice of motion is supported by an affidavit of Hamoud Mohamed Sumry and resisted by an affidavit in reply affirmed by Musa Shaibu Msangi, the respondent.

At the hearing of the application on 05.10.2018, both parties were represented. Mr. Abubakar Salim, learned counsel, represented the applicants and the respondent was represented by Mr. Deogratias Ogunde Ogunde, also learned counsel.

The applicants had earlier on filed written submissions which Mr. Salim sought to adopt together with the notice of motion as well as the supporting affidavit as part of the oral submissions at the hearing. Elaborating, Mr. Salim stated that there were some pages of the transcribed proceedings which were not included in record of appeal. Having so discovered, the applicant applied to the High Court (Commercial Division) to be supplied with the same on 02.03.2015. Up to that date; that is 02.03.2015, the fourteen days within which they could include the

missing pages in the record without leave of the Court as prescribed by rule 96 (6) of the Rules had expired; hence the application. He submitted that they were supplied with the missing pages in the same month and the present application was filed in September, 2018. He added that they have been prosecuting a similar application (deposed at para 6 of affidavit) which they sought to withdraw on 28.08.2018 and the present application was lodged on 04.09.2018. To buttress his submissions, Mr. Salim cited **Bifa Fita v. Mawe Mairo Village Government & another**, Civil Case No. 14 (B) of 2015, **Twiga Bancorp Ltd v. Grayson Kiondo**, Civil Case No. 157 of 2016 and **Ms. Henry Leonard Maeda & another v. John Anael Mongi & another**, Civil Application No. 31 of 2013 (all unreported). He added that the respondent will not be prejudiced if the application is granted as the ailment has been discovered by the applicant. He thus prayed that the applicant be allowed so as to include the missing pages in the record of appeal so as to make a complete record of appeal. He prayed that costs should be in the main appeal.

Responding, Mr. Ogunde fully adopted the facts deposed in the affidavit in reply. He resisted the application submitting that the affidavit and the letter applying to be supplied with the missing pages are at

variance on when the applicant discovered the ailment. In the letter, he argued, the applicants say they discovered the shortcoming during the preparation of the record of appeal while at para 3 of the affidavit they say that it was during the preparation of the written submissions. In the circumstances, he argued, as per section 100 of Tanzania Evidence Act, Cap. 6 of the Revised Edition, 2002, what prevails is documentary evidence and therefore the period between the preparations of the record of appeal and the filing of the present application has not been accounted for. Mr. Ogunde also assailed the application on the ground that the applicants have not stated when they were supplied with the missing pages as well as when they filed Civil Application No. 80 of 2015 of which there was no proof that Civil Application No. 80 of 2015 has been withdrawn.

Regarding prejudice, Mr. Ogunde argued with some force that the respondents will be prejudiced if the application is allowed because he will be delayed to enjoy the fruits of the decree in his favour.

Regarding the cases cited by Mr. Salim, Mr. Ogunde submitted that they were distinguishable in that in all those cases, the applicants had accounted for every day of delay. On accounting for each day of delay, Mr. Ogunde referred me to the cases of **Ally Rashid v. Halima Kazaria**

& another, Civil Application No. 280/01 of 2017 (unreported) in which the cases of **Lyamuya Construction Co. Ltd. v. Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, **Bariki Israel v. Republic**, Criminal Application No. 4 of 2011 and **Sebastina Ndaula v. Grace Rwamafa (Legal Personal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014 (all unreported) were cited and relied upon.

He thus prayed that the application should be dismissed with costs.

In rejoinder, Mr. Salim conceded to the variance between the letter to the Deputy Registrar and affidavit; submitted that that what is stated in the affidavit should be taken to depict the truth. He stated that the statement in the letter to the defect that the alimant regarding missing pages was discovered during the preparation of the record of appeal was a slip of the pen in that at that time the appeal had already been filed; the date of the letter is 02.03.2015 and the appeal was filed on 16.02.2015.

On the withdrawal of Civil Application No. 80 of 2015, Mr. Salim submitted that was withdrawn by himself and that there was an order to

this effect but that the detail was not deposed in the affidavit because it was made after they lodged the present application.

Insisting that the applicants have accounted for every day of delay, Ms. Salim submitted that the application should be allowed.

Having summarized the submissions of both learned counsel for the parties, the ball is now in my court to determine the issue of contention. This is, whether the applicant has brought before me good cause to grant the orders sought. Before going further, I wish to state that the law in applications under rule 10 of the Rules, upon a plethora of authorities, is now settled. An applicant will only succeed in an application of this nature only if good cause is shown. This is the tenor and import of rule 10 of the Rules which, for ease of reference, I reproduce hereunder:

*"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.” [Emphasis added].

What amounts to good cause has not been defined by the Rules but the jurisprudence of the Court has it that extension of time being a matter within the discretion of the court, cannot be laid down by any hard and fast rules but, rather, will be determined upon consideration of all the circumstances of each particular case – see: **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007, **Tanga Cement Company Limited v. Jumanne D. Massanga and another**, Civil Application No. 6 of 2001, **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987 and **Yusufu Same and another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002, **Vodacom Foundation v. Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 and the already cited **Ally Rashid v. Halima Zakaria & another** (all unreported decisions of this Court).

In the case at hand, the reason why the appellant did not file the missing pages of the transcribed record of proceedings is found at paras 5 of the affidavit in support. For easy reference, I reproduce the two paras:

*"5. That later the applicants filed in the Registry the Record of Appeal on 16th February, 2015 and the appeal was registered as Civil Appeal No. 14 of 2015. While going through the said record of appeal for purpose of preparing written submissions it was discovered that pages 23 to 33 of the transcribed proceedings were missing. This necessitated applicants to once again write a letter to the Registrar of the High Court Commercial Division on 2nd March, 2015. The Registrar of the High Court of Tanzania (Commercial Division) supplied the said missing pages to the applicants only to find that a missing page could only be filed with the leave of the Court. Attached herewith is a copy of the said letter marked as **Annexure D.** and the applicants crave for leave of the Court that it forms part of this affidavit.*

6. That the applicants had filed an application before this Court for leave to lodge a supplementary record of appeal which was registered as Civil Appeal No. 80 of 2015. The said application was withdrawn on application by the applicants via a notice lodged on the 28th August, 2018 on learning the decision of this

*Court in Criminal Appeal No. 2 of 2018. Attached herewith is a copy of the said notice and the decision of this Court marked as **Annexure F** collectively to form part of this affidavit with leave of the Court."*

The present application was lodged on 03.09.2018; few days after Civil Application No. 80 of 2015 was withdrawn on 28.08.2018. That was prompt enough. The jurisprudence of the Court as it stands now is to freely allow amendments of this nature – see: **Waljee's (Uganda) Ltd v. Ramji Punjabhai Bugerere Tea Estates Ltd**, [1971] 1 EA 188 and **CRDB Bank Ltd V. Issack B. Mwamasika & 2 Others**, Civil Application No. 469/01 of 2017, **Bifa Fiat v. Mawe Mairo Village Government & another**, Civil Application No. 14 (B) of 2015, **Twiga Bancorp Ltd v. Grayson Kiondo**, Civil Application No. 157 of 2016 and **Ms. Henry Leonard Maeda & another v. Ms. John Anael Mongi & another**, Civil Application No. 31 of 2013 (all unreported).

The foregoing stated, it is my considered view that the applicants have supplied good cause to warrant the Court grant the enlargement of time sought. This application is therefore meritorious and allowed. The applicants are granted leave to include in the record of appeal the missing

pages of the transcribed record of proceedings of the trial court within a fortnight reckoned from the pronouncement of this Ruling. Costs of the present application to abide by the outcome of the appeal.

Order accordingly.

DATED at **DAR ES SALAAM** this 22nd day of October, 2018.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL