

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

CIVIL APPLICATION NO. 89/15 OF 2018

DIAMOND TRUST BANK TANZANIA LIMITED....APPLICANT

VERSUS

IDRISA SHEHE MOHAMED.....RESPONDENT

**(Application for extension of time to file a supplementary
Record of Appeal to the Court of Appeal against the
decision of the High Court of Tanzania
at Zanzibar)**

(Mkusa J.)

dated 11th day of July, 2017

in

Civil Case No. 31 of 2016

RULING

29th November & 5th December, 2018

MBAROUK, J.A.:

When this application for extension of time was called for hearing, it transpired that, the respondent, had earlier on 9th November, 2018 filed a notice of preliminary objection to the following effect:

1. *That the applicant's application is a total misconception as the applicant pursued a wrong channel by lodging an application before this court for extension of time to file 'supplementary record of appeal' while the proper channel is to lodge an application before this court for leave to file 'supplementary record of appeal'*

ALTERNATIVELY

2. *That this Court lacks jurisdiction to hear and determine applicant's application.*
3. *That, the Tanzania Court of Appeal Rules, 2009 does not authorize the applicant to file 'supplementary record of appeal'.*
4. *The Court is not properly moved.*

In this application Mr. Salim Mnkonje did appear for the applicant, whereas the respondent was represented by Mr. Rajab Abdalla Rajab.

As per the practice of the Court, I have decided to proceed with the hearing of the point of preliminary objection first before hearing the application.

Arguing in support of his preliminary objection, Mr. Rajab, submitted that, according to Rule 76 (6) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant was supposed to lodge the supplementary record within 14 days without leave, but if time expires he may apply for leave to file supplementary record. He submitted that, the applicant was not supposed to file application for extension of time but only to apply for leave to file the supplementary record of appeal. In

support of his submission, he cited the case of **Ace Distributors v. The Commissioner General Tanzania Revenue Authority**, Civil Application No. 163 of 2018 (unreported).

Mr. Rajab added that, the applicant applied a wrong channel, since this is different from Rule 83(2) of the Rules on which after time expires one prays for extension of time without leave. He thereafter prayed for the application to be struck out with costs.

On his part, Mr. Mnkonje submitted that, he has applied for extension of time first and then if granted, he would apply for leave before a panel. He then said, even in the case cited by the Respondent of **Ace Distributors v. The Commissioner General Tanzania Revenue Authority** (*supra*), the applicant

applied for extension of time first. He submitted further that, applying for leave without extension of time is not proper; that this Court has jurisdiction to entertain this application.

In his rejoinder, Mr. Rajab stated that, as to the main application he has no problem, but only the procedure applied by the applicant.

I have dispassionately considered the respondent's arguments when arguing his preliminary point of objection. Let me commence by pointing out that, there is no flicker of doubt that the applicant's record of appeal has omitted to include some vital documents. Also it is a fact that the 14 days period kept under Rule 76(6) of the Rules which allows an applicant to include in the record of appeal the omitted documents has expired. That is

why the applicant preferred this application so as time to include the missing documents in the record of appeal be extended.

The applicant having found himself omitted to include into the record of appeal one of the crucial annexure, and the 14 days period provided under Rule 76(6) of the Rules, to file the omitted documents without leave had already lapsed, the only remedy he had, was to apply for extension of time to file supplementary record of appeal under Rule 10 of the Rules. The preliminary point of objection raised by the respondent lacks merit and it is therefore overruled.

Embarking on the main application, it cannot be doubted that this application is premised on the provisions of Rule 10 of the Rules, 2009. It is therefore important, I think, to reproduce it 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."

However, good cause has not been defined. It is therefore up to the applicant to sufficiently convince the Court that good cause exists. In **Tanga Cement Company Ltd v. Jumanne D. Masangwa and Amos**

A. Mwalavanda, Civil Application No. 6 of 2001 (unreported), Nsekela, J.A. (as he then was) observed as follows:

"What amounts to sufficient cause has not been defined. From decided case a number of factors have to be taken into account; including whether or not the application has been brought promptly, the absence of any valid explanation for delay, lack of diligence on the part of the applicant."

I have read the grounds raised in the Notice of Motion and in the supporting affidavit, the applicant has averred that, when he was preparing the requisite submission when the appeal was already lodged, it is when he realized that annexure MSI 8 in the amended

Plaint was inadvertently left out; and that this annexure is necessary for proper determination of the appeal. Apart from that, in the affidavit particularly at paragraph 9, the applicant stated that, an attempt to file an application for extension of time was already made but the same was withdrawn on the 24th day of January, 2018 following the defect that the application was omnibus. Having been withdrawn, the applicant without undue delay filed this application on 9th day of February, 2018.

I am of the considered opinion that the applicant has been diligent in pursuing his right; 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. To bolster its importance, this Court in the

case of **Royal Insurance Tanzania Limited v. Kiwengwe Strand Hotel Limited**, Civil Application No. 111 of 2009 (unreported), 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."

The applicant further, at paragraph 13 of the affidavit, raised the point of illegality found in the decision sought to be appealed against that, the court did not have pecuniary jurisdiction when determined the

matter. This Court, time and again has held that, illegality is the good ground for extension of time, See: **Principal Secretary Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185, where it was held that:-

"if the point of law at issue is the illegality of the decision being challenged, that constitutes a sufficient reason for the purposes of Rule 8" (currently Rule 10 of 2009 Rules).

As I have alluded earlier on, I am settled in my mind that the applicant has been able to satisfy the requirements stipulated under Rule 10 of the Rules. For the foregoing, I find the application has merit and I accordingly grant the prayer and order the applicant to

file the supplementary record of appeal within 14 days
from the date of this ruling. It is so ordered.

DATED at **ZANZIBAR** this 4th day of December,
2018.

M. S. MBAROUK
JUSTICE OF APPEAL

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




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL