

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 112 OF 2016

ROBERT SCHELTENS.....APPLICANT

VERSUS

1. MR. BALDEN NORATARAN VARMA..... 1ST RESPONDENT

2. MR. VIKAS VARMA2ND RESPONDENT

3. NATIONAL FURNISHERS LIMITED.....3RD RESPONDENT

**(Application for extension of time to lodge an application
for stay of execution of the Decree of the
High Court (Commercial Division)
at Dar es salaam)**

(Massati, J.)

Dated 26th day of November, 2007

In

(Commercial Case No. 26 of 2004)

RULING

17th April & 3rd May, 2018

MZIRAY, J.A.:

By a notice of motion which was filed on 21/4/2016 under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant, Robert Scheltens, through the services of Mr. Gaudiosus Ishengoma, learned counsel, is seeking an extension of time to enable him to lodge an

application for a stay of execution of the decree of the High Court (Commercial Division) dated 26/11/2007 in Commercial Case No. 26 of 2004. The application is supported by the affidavit sworn to by Gaudiosus Ishengoma himself, counsel for the applicant and is premised on the ground that:-

The applicant filed and prosecuted application for stay of execution, Civil Application no. 129 of 2010 but the same was struck out for being incompetent, thus this application.

The respondents through the services of Mr. James Bwana, learned counsel filed affidavit in reply titled Civil Application No. 112 of 2015 instead of Civil Application No. 112 of 2016, to controvert the contents of the affidavit in support of the application. Mr. Ishengoma, objected the contents contained therein stating that since the number of the present case is erroneously cited, then, there is no affidavit filed in reply in respect of this case and therefore the submission by the learned advocate for the respondents that the applicant has not shown sufficient cause for being granted extension of time to file the application is only a statement from the bar which cannot be given due weight.

With respect to Mr. Ishengoma, the complained error is curable. In **Leila Jalalaludin Haji Jamal v. Shafin Jalalaludin Haji Jamal**, Civil Appeal No. 55 of 2003 (unreported), the year of the case was mistakenly inserted, just like in the instant matter, but this Court among other things ruled out that the said wrong insertion was not a material irregularity to render the appeal incompetent. On that basis therefore, Mr. Ishengoma's argument is without justification.

On the merit of the application, Mr. Ishengoma explained the reasons for delay in lodging the application. They are adequately covered in his affidavit in support of the motion and the written submissions of the applicant. He stated that prior to this application, the applicant filed two applications, that is, Application No. 129 of 2010 and Civil Application No. 105 of 2015 which were all struck out by this Court. He submitted that Application No. 129 of 2010 was for stay of execution filed in time but the same was on 4/5/2015 struck out on a technical ground that a copy of Notice of Appeal was not attached to the application. He went on to submit that following the striking out order, the applicant filed application No. 105 of 2015 seeking extension of time to file application for stay of

execution. The application was also regrettably struck out on 11/4/2016 for the similar reason that a copy of Notice of Appeal was not attached to it, hence this application. He complained that the striking out order penalised the applicant.

On that basis, the learned counsel argued that the delay in filing the application was not out of sheer negligence but it was with valid reasons taking into account that by the time when Civil Application 105 of 2015 was filed, it was not a requirement of the law under Rule 10 of the Rules in the application of the nature to attach to it a copy of Notice of Appeal. The only requirement was to furnish reasons for the delay and not otherwise. On this, the learned counsel cited the unreported cases of **Daud Haga v. Jenitha Abdon Machafu**, Civil Reference No. 1 of 2000 and **Yusufu Same v. Hawa Dada**, Civil Appeal No. 1 of 2002 as authorities. On that basis therefore, he urged the Court to grant the application.

In his reply submission, Mr. Bwana learned counsel vigorously resisted the application. He submitted that the applicant was negligent or lacked diligence in not attaching to the applications copies of Notice of

appeal. He maintained that the omission done twice is not excusable. He argued that lack of diligence or gross negligence like this by any standard has to be penalized. He cited numerous cases including **Umoja Garage v National Bank of Commerce** [1977] LRT 109 in which the Court dismissed applications for extension of time for lack of diligence and urged the Court to do the same in this application.

Having heard the parties through their respective learned counsel, I find the crucial issue for determination and decision is whether the applicant has given sufficient reason for the Court to grant the prayer sought.

I have carefully gone through the application and the submissions both in support of and against the application. There is no doubt at all that prior to this application, the applicant was in this Court pursuing Application No. 129 of 2010 and Civil Application No. 105 of 2015 in which both of them were struck out for similar reasons that the applicant did not attach copies of a Notice Appeal to the applications. From the above facts, it is clear that the applicant did not stay idle but was busy in the Court corridors battling with the two applications which unfortunately were found

to be incompetent. In my considered view, by pursuing the two applications in Court shows element of seriousness on the part of the applicant's counsel and it cannot be taken that he was negligent or failed to exercise due diligence because the learned counsel for the applicant did not just sit down and relax. He tried twice but luck was not on his side.

In **Fortunatus Masha v. William Shija and Another [1997] TLR 154**, in allowing an extension, the Court observed at p. 155:

*"...a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any rely refers to the filing of an incompetent appeal not the delay in filing it. **The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh***

appeal. In fact in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal."

[Emphasis supplied].

Under Rule 10 of the Rules, the Court has power to extend time for the doing of any act authorized or required by the Court Rules if there is good cause. The Rule does not suggest that in the application for extension of time, like the present one, a Notice of Appeal is necessary document to be annexed in the motion. (See **Paul Juma v. Diesel and Auto Electric Services (DAS Ltd) and two Others**, Civil Application No. 54 of 2007 (unreported).

Deducing from **Paul Juma** (supra) one could safely argue that the omission of the copy of the Notice of Appeal will not render an application for extension of time to apply for stay of execution incompetent. A similar view was taken by a single Justice in the case of **Tanzania Electric Supply Co. Ltd v. Isaac Minja**, Civil Application No. 102 of 2016 (unreported). In that application the Court started that:

"...the Rule did not envisage the notice of appeal as a prerequisite document in an application for

extension of time otherwise the Rule could have specifically provided so as it is the case in an application for stay of execution under Rule 11(1) (c) of the Rules.”

Relying on the two decisions I have cited, it is my view that it was unfortunate for Civil Application No. 105 of 2015 to be struck out for failure to annex the Notice of Appeal.

Be that as it may, the essence of Rule 10 of the Court Rules is that the applicant in order to be extended time he must put before the Court material to show **“good reason.”** The sole reason as can be gleaned from the affidavit filed in support of the notice of motion is that the applicant had all along been in this Court pursuing incompetent applications. Contrary to Mr. Bwana’s contention, I am of the firm considered view and pursuant to authorities of this Court that the reason in itself constitutes sufficient reason to warrant this court extends the time. See **China Henan International Cooperation Group v Salvand K. A. Rwegasira**, Civil Reference No. 22 of 2005 (unreported).

On that basis therefore the application is of merit. I grant him extension of time to file the application for stay of execution. The same

should be filed within a period of 30 days from the date of the delivery of this ruling. Since the counsel for the applicant did not press for costs, I make no order for costs.

DATED at **DAR ES SALAAM** this 24th day of April, 2018.

R.E.S. MZIRAY
JUSTICE OF APPEAL

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


E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL