

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO 518/4 OF 2017

THE REGISTERED TRUSTEES OF THE

EVANGELICAL ASSEMBLIES OF GOD (T) (EAGT)APPLICANT

VERSUS

REVEREND DR. JOHN MAHENERESPONDENT

(Application for extension of time to serve Notice of Appeal and lodge appeal
against the decision of the High Court of Tanzania
at Dar es Salaam out of time)

(Khaday, J.)

dated the 8th day of September, 2017

in

Miscellaneous Civil Cause No. 9 of 2017

RULING

22nd Feb & 21st Mar. 2019

MWANGESI, J.A.:

The applicant herein is moving the Court to grant an order for enlargement of time within which it can serve Notice of Appeal to the respondent, and lodge an appeal to challenge the ruling of the High Court of Tanzania at Dar es Salaam Registry (Khaday, J.) dated the 8th September, 2017. The notice of motion has been predicated under the provisions of Rule 10 of the Tanzania Court of Appeal Rules, 2009 (**the Rules**). It has been supported by two sworn affidavits of Mr. Aaron Kabunga, learned

counsel, and Mr. Alexander Joseph Simbila, a Pastor. And, to beef up the notice of motion, on the 8th day of December, 2017, the applicant in terms of Rule 106 (1) of **the Rules**, lodged in Court written submissions.

On the other hand, the respondent also lodged two affidavits in reply which were sworn by Reverend Dr. John Mahene, and Sylivester Sebastian, an advocate. And in compliance with the requirement stipulated under the provisions of Rule 106 (8) of **the Rules**, on the 18th day of January, 2018, the respondent lodged written submission in opposition to what was submitted by the applicant in his written submission.

The facts of the matter leading to the application as could be gathered from the record can briefly be stated thus, the respondent who is a Pastor and deputy Arch Bishop, was stripped off his duties by the applicant. He successfully challenged his removal from office in the High Court of Tanzania Dar es Salaam registry, by way of judicial review. In a ruling that was delivered on the 8th September, 2017, the Court quashed the decision of the applicant. Aggrieved by the decision of the High Court, the applicant lodged a Notice of Appeal, and the application at hand.

When the application was called on for hearing before me on the 22nd day of February, 2019, Mr. Aaron Kabunga, learned counsel, entered appearance to represent the applicant whereas, the respondent enjoyed the services of Mr. Edwin Enosy also learned counsel.

Upon taking the floor to expound the grounds of the notice of motion, the learned counsel for the applicant sought leave of the Court to adopt and make part of his oral submission in Court, the two affidavits which were sworn to support the notice of motion, as well as the written submission which was lodged by the applicant on the 8th December, 2017. In essence he argued that, upon delivery of the ruling in respect of the disputants herein on the 8th September, 2017, the applicant immediately that is, on the 15th September, 2017, lodged his notice of appeal to challenge it. And on the very date, he applied to the Court to be supplied with the drawn order, ruling and proceedings for appeal purposes. Such prompt act by the applicant evidently demonstrates vigilance and seriousness on the part of the applicant in pursuing the appeal, argued the learned counsel.

Referring the Court to what has been deposed by Alexander Joseph Simbila, who had been assigned the task of effecting service to the respondent's counsel in paragraphs 6, 7 and 8 of his sworn affidavit, Mr. Kabunga, argued that undoubtedly there were difficulties encountered by the same. In the circumstances, it could not be said that the failure by the applicant to effect service on the respondent with the Notice of Appeal and the letter applying for the requisite documents from the Court, was due to laxity or negligence. Rather, it was due to the fact that they could not be traced.

The learned counsel for the applicant submitted further to the effect that, the fact that an enlargement of time if granted, will not prejudice the respondent in any way, he implored the Court to grant it to pave way for the appeal to be determined on merits. In so arguing, he sought refuge from the decision of the Court in **The Editor Msanii Africa Newspaper Vs Zakaria Kabendwe**, Civil Application No. 2 of 2009 (unreported), where extension of time was granted in terms of Rule 2 of **the Rules**, even though it had been established that there was negligence on the part of the counsel for the applicant.

In response to his learned friend, Mr. Enosy also prayed for the Court's leave to adopt the affidavit in reply lodged by Rev. Dr. John Mahene and Sylvester Sebastian, as well as the written submission in opposition to the notice of motion, as part and parcel of his oral submission. The learned counsel introduced his response by faulting the notice of motion that, it was incompetent for being omnibus in that, two prayers have been lumped in one application. He pegged his stance on the decision of **Rutagatina C. L. Vs The Advocates Committee and Clavery Mtindo Ngalapa**, Civil Application No. 98 of 2010 (unreported).

With regard to the merit of the application, the learned counsel for the respondent argued that, while he was aware that extension of time wholly falls within the discretion of the Court, he hastened to add that, such discretion has to be exercised judiciously upon gauging as to whether good cause has been demonstrated by the applicant for the delay. In his view, such task has completely not been discharged by the applicant in this application. According to him, the allegation by the applicant that it attempted to trace the whereabouts of the respondent and his advocate, so as to serve them to no avail, was blatant lies which have been engaged

after the applicant realized that, it had negligently delayed to serve the respondent with the alleged Notice of Appeal and his letter applying for copies of documents.

The learned counsel for the respondent, distinguished the decision in the case of **the Editor Msanli Newspaper** (supra), which was relied upon by his learned friend by arguing that, the said decision did not enact its own rules but only that, due to the peculiar circumstances which it had, the Court was moved to hold in the way it did. Since the situation in the instant matter was different, such holding was inapplicable to the circumstances of this application. He thus urged the Court to dismiss it with costs.

Before I embark on considering the merit and/or demerits of the application for extension of time, I find it imperative to deal with the issue of lumping up of prayers in one application, which has been raised by the learned counsel for the respondent. Indeed, in the notice of motion, the applicant has indicated that he is praying for two reliefs that is, extension of time to serve Notice of Appeal to the respondent, and extension of time

to lodge an appeal to the Court out of time. The question which arises is whether the combining of two prayers in one application was fatal.

The decision of the Court in **MIC Tanzania Limited Vs Minister for Labour and Youth Development and the Attorney General**, Civil Appeal No. 103 of 2004 (unreported), is very instructive on this point. While emphasizing that each case must be decided on the bases of its own peculiar facts, the Court stated further that:

"Unless there is a specific law barring the combination of more than one prayer in one chamber summons, Courts should encourage this procedure rather than thwart it for fanciful reasons."

As earlier stated above, the two prayers presented together by the applicant in this application which are being challenged by the respondent are, first an extension of time to serve the Notice of Appeal and two, an extension of time for lodging the appeal. Basically, both prayers are for a similar relief of extension of time. Going by the reasoning which was given in the case of **MIC Tanzania Limited** (supra), the fact that there is no

law which bars to combine two prayers in one application, I do not think it would have been prudent to prefer two distinct applications seeking for the same relief. The exercise would have unnecessarily multiplied the work load to the Court as well as aggravating costs for the applicant.

On the foregoing reasons, it is my finding that the contention which was advanced by the learned counsel for the respondent that the application was incompetent for being omnibus, is without founded basis and as a result, I dismiss it.

In regard to the main application, the issue for determination by the Court in the light of what has been submitted by either counsel above is whether the application by the applicant is founded. It is common knowledge that, an application for extension of time will be granted upon the applicant demonstrating good cause as to why he failed to do what he ought to within the time that has been prescribed by the law. My take therefore in determining the issue is the contents of paragraphs 6, 7 and 8 of the affidavit of Alexander Joseph Simbila, which I hereby reproduce *verbatim* thus:

6. That, on the 6th September, 2017 I went to the office of Sylivester Sebastian, an advocate, to effect service but I could not trace him in room No. 504 CCM DSM Regional building where the advocate indicated to work with Sai Attorneys.

7. That, I was told by the clerk in Sai Attorneys who never introduced himself that, Sylivester Sebastian is not working in the said chamber and never explained where the offices of the said advocate were situated within Dar es Salaam.

8. That, I called the respondent to avail the contact of his advocate for service but was not cooperative and added that he was not ready to receive any documents save only when they are brought to him by his advocate.

The response by advocate Sylivester Sebastian to what was deponed by Alexander Joseph Simbila as contained in paragraphs 3 and 4 of his affidavit in reply reads that:

3. That, during the whole time when the matter was in the High Court, I was based in Sai Attorneys which is situated at Lumumba Street, CCM Dar es Salaam Regional building, 5th floor room No. 504.

4. That, I then changed the office from Sai Attorneys to Giraffe Attorneys, the latter office which is within the same Street, the same building, the same floor but different room, that is from room 504 to 505.

What one gathers from what was deponed by Alexander Joseph Simbila and responded by Sylivester Sebastian is the fact that, indeed advocate Sylivester Sebastian changed the office from the one which he was using while conducting the case when it was in the High Court to somewhere else that is, from room 504 to room No. 505. Also not in dispute is the fact that, advocate Sylivester Sebastian changed the firm from Sai Attorneys, which he had previously being working with to Giraffe Attorneys. In the circumstances, the contention by Mr. Enosy that, the allegation by the applicant that it attempted to serve the respondent's counsel to no avail are blatant lies, is not supported by what was deponed by the two above. Attempts were made by the applicant only that the advocate could not be traced due to the changes which he had made as shown in his affidavit above.

Admittedly, as it has been submitted by the learned counsel for the applicant, the act by the applicant to lodge his notice of appeal within seven days of the date of ruling is an indication that he was vigilant in prosecuting his intended appeal. It would defeat logic to hold that the applicant was dilly dallying to serve his notice of appeal which in turn would delay the hearing of his appeal. It is thus my conviction that, there were sound reasons as indicated in the affidavit, which caused the failure by the applicant to serve on the respondent the notice of appeal within time.

Additionally, I am in agreement with the learned counsel for the applicant that, grant of extension of time to the applicant would not in any way, prejudice the respondent. This position is further backed up by the advent of section 3A which has been introduced in the Appellate Jurisdiction Act, Cap 141 R.E 2002, by the Written Laws (Miscellaneous Amendment) Act, 2017, Act No 4 of 2017 whereby, the Court is urged to focus on the substantive justice. To that end, I hereby grant extension of time for the applicant to serve on the respondent the notice of Appeal and the letter applying for certified documents from the Court, as well as

lodging the appeal to the Court. The same be done within 21 days from the date of this ruling. Costs to be in the cause.

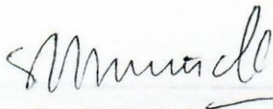
Order accordingly.

DATED at **DAR ES SALAAM** this 19th day of March, 2019.

S.S. MWANGESI
JUSTICE OF APPEAL

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




J. S. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL