

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 210/01 OF 2019

TANZANIA RENT A CAR LIMITEDAPPLICANT

VERSUS

PETER KIMUHU.....RESPONDENT

**(Application for Extension of Time to lodge Reference against the Ruling
and Order of the Court of Appeal of Tanzania, at Dar es Salaam)**

(Mwambegele, JA.)

dated the 30th day of April, 2019

in

Civil Application No. 226/01 of 2017

RULING

22nd July, 2019 & 8th August, 2019

KEREFU, J.A.:

By Notice of Motion the applicant herein has brought this application for extension of time to lodge an application for reference out of time under Rule 10 of the Tanzania Court of Appeal Rules, 2009, (*'the Rules'*). The application is supported by the affidavit of one Braysoni Shayo, learned counsel for the applicant. The Notice of Motion has been predicated upon the following grounds, that: -

- (a) *the Registrar of the Court read to the parties only the summary of the Ruling and Order of the Court, therefore it was not possible for the applicant's*

advocate to understand the reasons of the dismissal of the applicant's application (Civil Application No. 226/01 of 2017 (Hon. Mwambegele, JA) and advice of the applicant;

- (b) the copy of the Ruling and Order of the Court was supplied to the parties after the time to file Reference against the said Ruling had already expired;*
- (c) the applicant's Board of Directors could not be in position to actions (sic) to instruct their advocates to file Reference without first being availed with copy of the Ruling of the Court and understand the Court reasoning for dismissing their application;*
- (d) the applicant, their advocate did not act negligently for not filing their application for Reference within time prescribed by the law; and*
- (e) the application for Reference has good chances of success and the respondent will not be prejudiced.*

In the supporting affidavit, the counsel for the applicant gave a chronological account on what exactly transpired to the applicant. That, the applicant applied for an order of extension of time to file review of an Order of the Court delivered on 18th October 2016 (Kimaro, Mmilla and Lila, JJA), which was registered as *Civil Application No. 226/01 of 2017* and

placed before Hon. Mwambegele, JA. The said application was dismissed on 30th April, 2019 and the summary of the Ruling was read to the parties by the Registrar on 7th May, 2019. Mr. Shayo made efforts to get the copy of the Ruling to avail the same to the applicant's Board of Directors to agree on the appropriate cause to pursue, but up to 20th May, 2019 the said Ruling was not ready. By his letter dated 20th May, 2019 with *Ref. No. BA/DR/CAT/01/19*, Mr. Shayo, requested the Registrar to avail him with the certified copies of the said Ruling and the Order of the Court. The said documents were availed on 23rd May, 2019, but the Ruling indicated wrongly that, it was delivered on *21st May, 2019* by *three Justices of Appeal* i.e (*Mziray, Mwambegele and Kwariko, JJA*), instead of 30th April, 2019 and delivered by *a single Justice (Mwambegele, JA)*. On 24th May, 2019, Mr. Shayo wrote another letter to the Registrar on the noted errors and requested him to rectify the same. The copy of the corrected Ruling was availed to the applicant on 4th June, 2019 and since 5th and 6th June, 2019 were public holidays, the applicant presented the application before the Court on 7th June, 2019, which went through the process of admission till 12th June, 2019, when it was formally lodged.

In the reply affidavit, Mr. Odhiambo Kobas, learned counsel for the respondent acknowledged the chronological account on the matter as itemized by the applicant, but he faulted the applicant for failure to account for the period from 5th June, 2019 to 12th June, 2019. He also challenged that, the applicant has not stated as when exactly the board of directors was availed with the said Ruling and resolved to prefer the reference. Mr. Kobas further challenged the claim by the applicant that, the application has greater chances of success, as he indicated that, it does not have any chance of success. He finally prayed for the application to be dismissed.

At the hearing of the application, learned counsel for the parties indicated above entered appearance and gave their oral submissions for and against it.

In support of the application, Mr. Shayo commenced his submission by fully adopting the contents of the Notice of Motion, the supporting affidavit, his written submissions and the authorities he had since lodged. He then clarified on the main reasons which delayed the applicant as indicated in the supporting affidavit and summarized above. He then referred to paragraphs 9 and 10 of the supporting affidavit and argued that

the applicant has accounted for each day of delay as required by the law. He also referred to paragraph 15 of the supporting affidavit and second paragraph at page 18 of the impugned Ruling and argued that, the intended reference stands high chances of success. He finally submitted that, the applicant has shown due diligence in pursuing the matter and he prayed for the application to be granted with costs.

In reply, Mr. Kobas, as well, adopted the contents of the affidavit in reply and written submission together with the list of authorities he had earlier on filed. He acknowledged the chronological of events narrated by the applicant in the supporting affidavit that it portrayed the factual situation of the matter. He also, after seeing the stamp of the Court indicating that the application was received by the Court on 7th June, 2019, abandoned his earlier contention that the applicant has failed to account for the delay of each day and he as such, accepted the reason for delay advanced by the applicant.

The only issue still challenged by Mr. Kobas is the claim by the applicant that the intended reference has greater chances of success. It was the strong view of Mr. Kobas that, there are no changes of success in

the intended reference, because the application is based on issues of clerical errors on the notice of appeal which he himself prepared and lodged before the court as *Civil Appeal No. 84 of 2012*, whose judgement was delivered dismissing the appeal for being time barred. Mr. Kobas further submitted that, in the said notice of appeal the date reflected by the applicant was 11th May, 2011 instead of 11th May, 2012, which led the High Court to also incorrectly cite the said wrong date in its judgement. It was the further view of Mr. Kobas that, the said errors can easily be rectified under Rule 42 of the Rules without affecting the High Court's judgement. To buttress his position he cited the case of **Umoja Garage v. National Bank of Commerce** [1997] TLR 109 and prayed for the application to be dismissed with costs.

In rejoinder submission, Mr. Shayo noted that there is no dispute that Mr. Kobas is not challenging the reasons for the delay, but only disputes the claim that the intended reference had high chances of success. It was the view of Mr. Shayo that, the submission of Mr. Kobas on the chances of success of the intended reference is misconceived and is only intended to confuse the Court, because what is before the Court is the application for extension of time and not reference. Mr. Shayo concluded

that, since the reason for delay submitted was not challenged by the respondent, the application deserves to be granted.

Having considered the submissions by the counsel for the parties and perused the record of the application the only calling issue for my determination is *whether the applicant has been able to advance good cause to warrant extension of time*. Pursuant to Rule 10 of the Rules, an application of this nature can only be granted if the applicant has advanced good cause for the delay. For avoidance of doubt, I think it is instructive to extract the said Rule in full. Rule 10 provides that:-

*"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 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].

From the wording of the above Rule, it is clear that for an application for extension of time to be granted the applicant must advance good cause

for the delay. There are numerous authorities to this effect and some of them include **Kalunga & Company Advocates Ltd v. National Bank of Commerce Ltd** (2006) TLR 235; **Said Issa Ambunda v. Tanzania Harbours Authority**, Civil Application No. 177 of 2004 and **Attorney General v. Tanzania Ports Authority & Another**, Civil Application No. 87 of 2016 at pg 11. Specifically, in **Said Issa Ambunda** (supra) at page 6 it was observed that:-

"A notice of motion seeking orders for enlargement of time...must be accompanied by an affidavit bearing the grounds for the delay. If the affidavit does not contain the grounds for the delay, the application is incompetent."

Applying the above authority in the case at hand, and as it was intimated earlier on, it is obvious that the applicant's affidavit herein has clearly elaborated on the grounds for the delay by stating the chronological account of what exactly transpired in this matter. That, on 7th May 2019 the Deputy Registrar only gave a summary of the said Ruling that it was dismissed with costs. Mr. Shayo made efforts to obtain the copy of the entire Ruling which was availed to him on 23rd May 2019, but it indicated wrongly that the Ruling was delivered on 21st May, 2019 by *three Justices*

of Appeal i.e (*Mziray, Mwambegele and Kwariko, JJA*), instead of 30th April, 2019 and delivered by *a single Justice (Mwambegele, JA)*. It is also clear that, thereafter, Mr. Shayo was involved in the process of correcting the said errors and managed to obtain the correct Ruling on 4th June, 2019. Since 5th and 6th June, 2019 were public holidays and business day resumed on 7th June, 2019, the applicant submitted the application before the Court on that date and it went through the process of admission till 12th June, 2019. The narrated chronological of events together with the reason for the delay advanced by Mr. Shayo were all acknowledged and accepted by Mr. Kobas, who also noted that, the applicant has well accounted for the delay of each day, as decided in **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 03 of 2007, (unreported).

On the basis of the above facts, I am in agreement with the counsel for the parties that the reason for delay advanced by the applicant constitutes good cause. The applicant's affidavit has also clearly indicated that, Mr. Shayo had acted diligently soon after the summary of the impugned Ruling was delivered to them. Even after he detected the said defects, he as well immediately filed a request for the Registrar to rectify

the same. All these letters were attached to the Application to prove the seriousness and due diligence on the part of the applicant.

Now, considering that there is ample evidence that the applicant had acted diligently well within time, but only delayed by the inadvertently mistakes by the Registrar, I cannot lay some of these blames to the applicant. If the Registrar could have availed correct and well-prepared documents, all these confusion could not have happened. In the premise, I find no reason to penalize the applicant for the mistake that was beyond his control. In the circumstances, I am persuaded by the finding of my sister Kimaro, JA, (as she then was), in **Tanzania Revenue Authority v. Tango Transport Company Ltd**, Civil Application No. 5 of 2006 when she considered an application for extension of time to lodge a notice of appeal and noted that, the delay was caused by the mistakes done by the Registrar. At pages 10 – 11 of the Ruling Justice Kimaro observed that:-

"In my considered opinion if the Court denies this application it will amount to penalizing the applicant for a mistake done by the Court itself. This will cause grave injustice on the part of the applicant who under article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 is entitled as

*of right to appeal against the decision of the High Court.... **it will not be in the interest of justice to deny him his right of appeal on this basis because taking such a position would amount to give an unjust decision. I say so because the Court, through its Registrar was the source of the problem...The role of the courts is to meet out justice and not to deny justice to parties because of its own mistakes***" [Emphasis added].
She then granted the application.

Likewise, in the application at hand, I am settled in my mind that, the applicant's affidavit has demonstrated beyond any doubt that the delay was neither caused by nor can it be attributed to any dilatory conduct on the part of the applicant. The applicant's application has fulfilled the test above and deserves to be granted.

Before penning of, I am mindful of the fact that, Mr. Kobas had since challenged the applicant's application that the intended reference has no chances of success. Now, since the said reference is not before me, I agree with Mr. Shayo that, the argument of Mr. Kobas on this matter is misconceived and cannot be considered at this stage. I wish also to note that, though in his conclusion Mr. Kobas prayed for the application to be

dismissed, but he said nothing on how the respondent will suffer if this application is granted. I equally do not see in which ways the respondent will be prejudiced if extension of time is granted.

For the foregoing reasons, I hold that, this application is meritorious and ought to be granted. I accordingly grant this application and extend time for the applicant to lodge an application for reference out of time. The same should be lodged in accordance with the law, within seven (7) days from the date of delivery of this Ruling. Each side to shoulder its costs.

DATED at DAR ES SALAAM this 31st day of July, 2019.

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 7th day of August, 2019 in the presence of Mr. Bryson Shayo, learned Counsel for the Applicant and Ms. Lulu Mbinga, Counsel for the Respondent, is hereby certified as a true copy of the Original.


E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL