

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

CIVIL APPLICATION NO. 77/01 OF 2019

TUMAINI MASSORO APPLICANT

VERSUS

TANZANIA PORTS AUTHORITY..... RESPONDENT

**(Application for extension of time to serve the respondent with the
Memorandum and Record of Appeal out of time against the
Decision of the High Court of Tanzania at Dar es Salaam)**

(Nyerere, J.)

dated the 14th day of July, 2017

in

Revision No. 177 of 2017

RULING

22nd July, & 16th August, 2019

LEVIRA, J.A.:

In this application the applicant is applying for extension of time to serve the respondent with the Memorandum and the Record of Appeal out of time and also to file written submission out of time. The application is made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by the affidavit duly affirmed by Kichere Mwita Waissaka, learned advocate. The application is opposed by the respondent through affidavit in reply deposed by Innocent Felix Mushi, learned counsel for the respondent.

At the hearing of this application, learned counsel for the parties as introduced above entered appearance and they argued for and against it.

Mr. Waissaka commenced his submission by adopting the contents of his affidavit in support of the application. Briefly, he stated that they failed to serve the respondent with the Memorandum and the Record of Appeal in time because he was bereaved of a close family member. As such, he was of the view that, failure to serve the respondent in time and to file written submission was not due to applicant's advocate indolence but, was due to act of God. Thus, Mr. Waissaka prayed for the application to be granted.

In reply submission, Mr. Mushi as well adopted the contents of his affidavit in reply filed on 28th March, 2019. He went on stating that Rule 97(1) of the Rules requires the applicant to serve the respondent with the Memorandum and the Record of Appeal within seven (7) days after lodging them in the appropriate Registry. Furthermore, it was his submission that, Rule 106(1) of the Rules also requires the applicant to file written submission within sixty (60) days after lodging of the Record of Appeal. Being guided by those provisions, he was of the view that failure by the applicant to abide by those provisions is not justified.

According to him, the reason advanced by Mr. Waissaka for failure to serve the respondent and file written submission in time is without merit. His stance was based on the fact that Mr. Waissaka just made a bare claim, that he was bereaved without bringing any documentary exhibit like death certificate, burial permit, bus or air ticket to prove that he was really bereaved and he travelled to Mara Region to attend burial ceremonies as he claimed in his oral submission and the affidavit in support of the application.

Mr. Mushi added that, Mr. Waissaka failed to state the length of delay and to account for each day of delay. To support his argument he cited the case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, unreported. Apart from that, it was Mr. Mushi's view that there was no illegality in the matter intended to be appealed against which would warrant extension of time. He condemned Mr. Waissaka for being negligent. Finally, he prayed for this application to be dismissed with costs for lack of merits.

Responding to Mr. Mushi's reply submission, Mr. Waissaka stated vigorously that he could not produce any documentary proof of the death of his family member and travel due to the reason that, he traveled by private transport. So there is no way he could produce

tickets. He added that, the question of death certificate or burial permit does not arise because his relative died in rural area and burial ceremonies as in the current case are normally conducted without first seeking for burial permit. He clarified that, since his brother did not die of unnatural death nor did he die in the hospital, there was neither death certificate nor burial permit issued.

Concerning the length of delay, Mr. Waissaka stated that the filing of Memorandum of Appel was done on time as it is on record, only that it was not served on to the respondent on time due to the circumstances stated above. This being the case, the applicant could not again file written submission without leave as time had already expired.

Mr. Waissaka was of the firm view that the delay by the applicant was explained through paragraphs 5, 6 and 7 of the supporting affidavit. According to him, the affidavit gives account of what transpired after he returned from Mara. As for him the case of **Lyamuya Construction Company Limited** cited by Mr. Mushi is distinguishable from the current matter. He emphasised that the applicant was neither negligent nor indolent; rather, the situation was exceptional. Hence, it was his submission that the respondent's reliance on Rules 97 and 106 of the Rules, do not cover the exceptional circumstances that occurred in this matter. He thus prayed for the application to be granted.

Having considered the rival submissions by the counsel for the parties the only issue calling for my determination is whether the applicant has been able to advance good cause to warrant extension of time. It is a well-established principle of the law that, extension of time will only be granted upon showing good cause. Rule 10 of the Rules under which this application is made provides as 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 to that time as so extended". [Emphasis added].*

In answering the issue raised above, it is important to consider the principle of the law governing extension of time in relation to available material facts. According to the record and the oral submission by Mr. Waissaka, the main reason for delay to serve the respondent with the Memorandum and the Record of Appeal is that he was bereaved by a close family member and therefore had to travel to Mara to attend burial

ceremonies. This reason was faulted by Mr. Mushi as the same remained to be a mere assertion. Mr. Waissaka did not produce any documentary evidence to prove that he really travelled and that the said relative passed away as alleged. In response to this challenge Mr. Waissaka conceded to the effect that, it is true that he did not produce documentary evidence but, he said, it was due to the reasons that he travelled by private transport and that the death occurred in rural area where when natural death occurs, it does not require one to have death certificate and burial permit to bury the deceased. This according to him was the reason as to why he did not produce documentary evidence to prove that he went to participate in burial ceremonies of his family member. I agree with Mr. Mushi on this point that Mr. Waissaka ought to have produced documentary evidence to prove his assertion that he was bereaved and that he travelled to Mara to attend the burial ceremonies of his family member.

The applicant was challenged by Mr. Mushi for failure to account for each day of the delay as was decided in the case of **Lyamuya Construction Company Limited** that, each day of the delay must be accounted for. As a way of defending his accountability, Mr. Waissaka relied on the contents of paragraphs 5, 6 and 7 of his supporting

affidavit stating that he accounted for the delay. I wish to quote them hereunder:

*"5. That immediately upon lodging the Record and Memorandum of Appeal on 26th February, 2018 I received shocking news of the death of one of my younger brothers **WAISSAKA KICHERE WAISSAKA** in Wegero, **BUTIAMA DISTRICT MARA REGION.***

6. That being a senior member of the family I was obliged to travel to my ancestral home on 28th February, 2018 to attend to the complicated family issues arising therefrom including the children's and widow's welfare.

7. That upon returning from the said humanitarian issue on 9th April, 2018 the time for serving the opposite party had elapsed hence this Application for extension of time."

Rule 97(1) of the Rules as correctly cited by Mr. Mushi requires in a mandatory term the appellant (applicant) before or within seven days after lodging the Memorandum of Appeal and the Record of Appeal in

the appropriate Registry to serve copies of the same on the respondent. In the current matter, the Memorandum of Appeal and the Record of Appeal were lodged on the 26th February, 2018. This means that, the respondent was supposed to be served by 5th March, 2018 but, the applicant could not do so. As indicated in paragraph 6 of the supporting affidavit, Mr. Waissaka travelled to Mara Region on the 28th February, 2018 before the expiry of seven days within which he could serve the respondent and he came back after the expiry of that time. This trend of events also affected the applicant's counsel in discharging his obligation of filing written submission within sixty (60) days of lodging the Record of Appeal to file written submission in support of the appeal. By simple calculation, the available information in the supporting affidavit reveals that Mr. Waissaka came back from Mara two days after the expiry of the days in which he could have filed written submission without leave.

In his submission Mr. Waissaka was of the firm view that the cited case of **Lyamuya Construction Company Limited** by Mr. Mushi is distinguishable from the circumstances of the present application, where he said, the current application falls under exceptional circumstance which deserves consideration. I wish to point out that, exceptional circumstances do not discharge applicant's obligation of accounting for the delay. In my view, exceptional circumstances if any,

should strengthen the reasons for the delay rather than being used as shield to protect only interests of the applicant. This view notwithstanding, I am in agreement with Mr. Waissaka to the extent that circumstances of the matter at hand are exceptional as death is an unplanned event. I may also add that, death is not a pleasant thing and there is no reason advanced by Mr. Mushi to show as to why Mr. Waissaka would opt to lie on such a misfortune.

I wish to note that, the main contention to this application put forth by Mr. Mushi is that, Mr. Waissaka has failed to account for the delay. Mr. Mushi said nothing on how the respondent will suffer if the application will be granted. It has to be clear that, powers to grant or otherwise the application for extension of time are discretionary depending on the circumstances of each case.

In the present application, the applicant had already lodged the Memorandum and the Record of appeal in court on time. It is only that he did not serve the respondent with the copies of the said Memorandum and the Record of Appeal, in other words, appeal process has already been initiated. Under the circumstance and after taking into consideration that substantial justice requires matters to be determined on merit, I do not see in which ways the respondent will be prejudiced if extension of time is granted for the applicant to serve her with the

Memorandum and the Record of Appeal. In my considered view, allowing the applicant to serve the respondent at this stage where hearing of the appeal date is yet to be fixed will facilitate fair and speedy delivery of justice which I find to be a justifiable reason as to why I should extend time.

Basing on the discussion above, I am settled that the applicant's failure to serve the respondent with the Memorandum and the Record of Appeal and to file written submission in time was not deliberate. Therefore, I find and hold that, the applicant has advanced good cause for extension of time as it was stated in **Oswald Masatu Mwizarubi vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, that:

*"What constitutes good cause cannot be laid down by any hard and fast rules. The term **"good causes"** is a relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion."*

In exercise of my discretionary powers, I hereby grant the application for the applicant to serve the respondent with the Memorandum and the

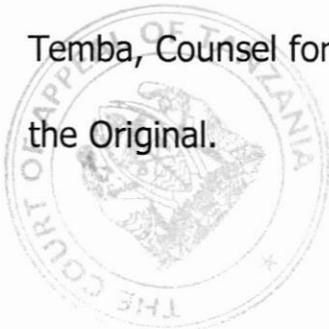
Record of Appeal within seven (7) days and to file written submission within sixty (60) days from the date of delivery of this Ruling.

Costs in the cause.

DATED at DAR ES SALAAM this 7th day of August, 2019.

M.C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 16th day of August, 2019 in the presence of Mr. Mwita Waissaka, learned Counsel for the Applicant and Mr. Adolf Temba, Counsel for the Respondent, is hereby certified as a true copy of the Original.




E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL