

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 529/17 OF 2019**

**KAMBONA CHARLES (as administrator  
of the estate of the late CHARLES PANGANI) ..... APPLICANT  
VERSUS**

**ELIZABETH CHARLES ..... RESPONDENT**

**(Application for extension of time from the decision of the High Court of  
Tanzania, Land Division at Dar es Salaam)  
(Nchimbi, J.)**

**dated the 20<sup>th</sup> day of November, 2015**

**in**

**Land Appeal No. 15 of 2014**

.....

**RULING**

29<sup>th</sup> April & 12<sup>th</sup> May, 2020

**NDIKA, J.A.:**

In this ruling I am called upon to decide whether I should enlarge time within which the applicant can serve on the respondent a copy of the memorandum and record of appeal in Civil Appeal No. 336 of 2019 lodged in the registry of the Court at Dar es Salaam on 25<sup>th</sup> November, 2019. The application is by a notice of motion made under Rule 10 of the Tanzania Court of Appeal Rules ("the Rules") supported by an affidavit sworn by Mr. January R. Kambamwene, an advocate having the conduct of the matter on behalf of the applicant. It is noteworthy, at the very outset, that the respondent did not

lodge any affidavit in reply after she was served with the application, a course that renders the averments in the supporting affidavit uncontroverted.

As averred in the supporting affidavit, on 20<sup>th</sup> November, 2015, the High Court of Tanzania, Land Division at Dar es Salaam (Nchimbi, J.) handed down its judgment in Land Appeal No. 15 of 2014 in favour of the respondent. Aggrieved, the applicant duly manifested his intention to appeal to this Court by lodging a notice of appeal. Subsequently, the applicant's advocate, the said Mr. Kambamwene, compiled a record of appeal and drew up a memorandum of appeal. He handed over the documents to the applicant, who, then, lodged them in the Court on 25<sup>th</sup> November, 2019 in accordance with Rule 90 (1) of the Rules, thereby instituting Civil Appeal No. 336 of 2019. In terms of Rule 97 (1) of the Rules, the applicant was required to serve on the respondent a copy of the memorandum and record of appeal before or within seven days of their lodgment but none was served by 2<sup>nd</sup> December, 2019 when the said period expired, hence the instant application.

In justifying the prayer for extension of time, it is averred that after the applicant himself had lodged the appeal, he deposited the copies of the memorandum and record of appeal at Mr. Kambamwene's office in Dar es Salaam for the latter's further action. At that time, however, Mr. Kambamwene was away at Mahenge, Morogoro serving in a government-appointed special

committee known as "Task Force for Negotiation on Kinywe Epanko Mining project." The task force was mandated to negotiate the terms for resettlement of 2,500 local farmers from Epanko Village to give way for mining operations by an investor called Tanzgraphite (Tanzania) Limited. I take the liberty to excerpt hereunder the averments in Paragraphs 8 and 9 of the affidavit, which I find to be most relevant:

*"8. That while at Mahenge and under pressure of the work aforesaid, it escaped my mind that I needed to serve a copy of the memorandum and record of appeal on the respondent within seven days of filing thereof, deadline being 2<sup>nd</sup> December, 2019. By the time I came back to Dar es Salaam, on 5<sup>th</sup> December, 2019, the extremely short period of seven days prescribed for the purpose had already expired. I had to make this application for extension of time.*

*9. That my failure to serve the respondent with the copy has not been a result of negligence or dilatoriness. It was an oversight occasioned by pressure of work at Mahenge as aforesaid and upon that realization, I took immediate steps to apply for extension of time."*

At the hearing of the application, Mr. January Kambamwene, learned counsel, appeared for the applicant. There was no appearance on the part of the respondent. According to the affidavit of service deposed by a court

process server, the respondent was served with the notice of the hearing on 27<sup>th</sup> April, 2020 via her advocates based in Dar es Salaam, G&S Associates Economic Law Practice. Although a certain Mr. Iskaka Erasto rose to say that one Mr. Kambo, an advocate from G&S Associates Economic Law Practice, was due to appear but was prevented to do so on account of illness, he produced no documentary proof to back up his statement. Mr. Kambamwene, then, prayed for the hearing to proceed in the absence of the respondent. Given that neither the respondent herself nor her advocate appeared in court and that no formal communication was made by Mr. Kambo's law firm on his alleged ill-health, I acceded to the said prayer in terms of Rule 63 (1) of the Rules.

In his oral argument, Mr. Kambamwene adopted the contents of the notice of motion and the founding affidavit. The thrust of his contention was that the failure to serve the respondent with a copy of the memorandum and record of appeal was not a result of negligence or dilatoriness on his part but pressure of his work at Mahenge. He added that upon realization of the omission, he took immediate steps to apply for extension of time. The learned counsel thus beseeched that time be enlarged for service of the documents on the respondent.

I have dispassionately examined the notice of motion and the supporting affidavit in the light of the learned counsel's oral argument. The sticking

question is whether there is a good cause warranting enlargement of time prayed for.

At first, I should state that the discretion of a single Judge of the Court for extending time under Rule 10 of the Rules is both wide-ranging and discretionary. It is exercisable judiciously upon reason rather than arbitrarily, capriciously, on whim or sentiment. Some considerations that have been consistently taken into account by the Court in determining if "good cause" has been disclosed include the cause for the delay involved; the length of the delay; the degree of prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged: see, for instance, this Court's unreported decisions in **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001; **Eliya Anderson v. Republic**, Criminal Application No. 2 of 2013; and **William Ndingu @ Ngoso v. Republic**, Criminal Appeal No. 3 of 2014. See also **Principal Secretary, Ministry of Defence and National Service v.**

**Devram Valambhia** [1992] TLR 185; and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

As it is evident that the memorandum and record of appeal were lodged on 25<sup>th</sup> November, 2019, the applicant ought to have served a copy of the documents on the respondent in terms of Rule 97 (1) of the Rules by 2<sup>nd</sup> December, 2019 when the seven days' limitation period supposedly expired. The applicant's advocate contended that he could not do so because he had travelled to Mahenge to attend to a special assignment at the material time and that when he came back to Dar es Salaam on 5<sup>th</sup> December, 2019 he was already out of time to serve the documents. That omission is acknowledged in Paragraph 9 of the affidavit as "an oversight occasioned by pressure of work at Mahenge."

To be sure, it has not been suggested that the documents were to be served by Mr. Kambamwene himself. Rather, his responsibility was, in my view, to cause service of the documents to be effected on the respondent. To do that, he could have instructed an assistant at his offices in Dar es Salaam or a licensed process server to effect service. In this sense, his absence from his

offices in Dar es Salaam is not a pertinent consideration. In the circumstances, the learned counsel is to blame for the oversight to cause the service to be effected irrespective of where he was at the material time. This, then, begs the question whether his lapse should be condoned.

It is settled that a mistake made by a party's advocate through negligence or lack of diligence cannot constitute a ground for condonation of delay but a minor lapse committed in good faith can be ignored. The decision of the Court in **Yusufu Same and Another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 (unreported) is an apt illustration of the principle. It was held in that case that:

*"Generally speaking, an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time. This has been held in numerous decisions of the Court and other similar jurisdictions .... But there are times, depending on the circumstances surrounding the case, where extension of time may be granted even where there is some element of negligence by the applicant's advocate as was held by a single Judge of the Court (Mfalila, JA, as he then was) in **Felix Tumbo Kisima v. TTC Limited and Another** – CAT Civil Application No. 1 of 1997 (unreported)."*

In the same vein, in **Zuberi Mussa v. Shinyanga Town Council**, Civil Application No. 3 of 2007 (unreported), a single Judge of the Court explicated that:

*"Advocates are human and they are bound to make mistakes sometime in the course of their duties. Whether such mistakes amount to lack of diligence is a question of fact to be decided against the background and circumstances of each case. If, for instance, an advocate is grossly negligent and makes the same mistake several times, that is lack of diligence. But if he makes only a minor lapse or oversight only once and makes a different one on next time that would not, in my view, amount to lack of diligence."*

I am fully guided by the above position.

In the instant application, I am inclined to characterize the learned advocate's oversight a minor lapse as opposed to being gross inaction or inexcusable lassitude. That slip appears to have been made without *maia fides* as he was totally engrossed in a special assignment as averred in the supporting affidavit. To the applicant's credit, Mr. Kambamwene acted with promptitude to seek appropriate redress after realizing the lapse as he lodged this application on 10<sup>th</sup> December, 2019, which was five days after he had arrived back to Dar es Salaam from Mahenge. Furthermore, besides the fact



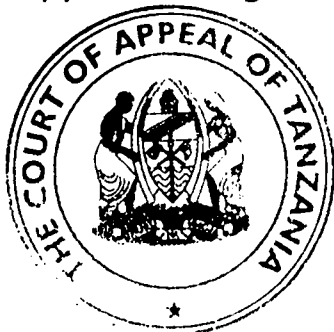
that the delay involved was rather short as it spanned eight days from 2<sup>nd</sup> to 10<sup>th</sup> December, 2019, I am of the view that the respondent will suffer no discernible prejudice if the extension prayed for is granted.

In the final analysis, I find merit in the application, which I grant. In consequence, I order the applicant to serve a copy of the memorandum and record of appeal in Civil Appeal No. 336 of 2019 on the respondent within seven days from the date of the delivery of this ruling. Costs shall be in the cause.

**DATED at DAR ES SALAAM this 12<sup>th</sup> day of May, 2020.**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

The Ruling delivered this 12<sup>th</sup> day of May 2020, in the Presence of Mr. January Kambamwene learned Advocate for the Applicant also holding brief of Mr. John Kambo learned advocate for the Respondent is hereby certified as a true copy of the original.



  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**