

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

CIVIL APPLICATION NO. 498/12 OF 2019

ALASAI JOSIAH (Suing by his Attorney Oscar Sawuka) APPLICANT

VERSUS

LOTUS VALLEY LTD RESPONDENT

(Application for extension of time to lodge a Notice of full address for service and serve a copy of it to the appellant from the Judgment and Decree of the High Court of Tanzania, Land Division at Dar es Salaam)

(Maghimbi, J.)

dated the 28th day of May, 2019

in

Land Case No. 323 of 2014

RULING

19th February & 1st March, 2021

LEVIRA, J.A.:

The applicant, Alasai Josiah has lodged a notice of motion made under the provisions of Rules 10 and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), moving the Court to extend time within which he can lodge a notice of a full address for service and serve a copy of it on the intended appellant. The notice of motion is supported by an affidavit that has been sworn by Oscar Sawuka, an Attorney of the applicant. The respondent had filed an affidavit in reply in opposition of this application but the same was dropped during hearing

of the application. Therefore, the application is not resisted by the respondent.

A brief background of this application is that, the applicant had instituted Land Case No. 323 of 2014 against the respondent in the High Court of Tanzania, Land Division. The decision of the High Court (Maghimbi, J.) was delivered on 28th May, 2019 in the applicant's favour. Aggrieved, the respondent lodged in the High Court a notice of appeal against that decision and served the same on the applicant. The applicant failed to lodge in Court notice of his address for service timely as required by law due to circumstances that occurred as they will shortly be revealed, and hence, the current application.

At the hearing of this application, the applicant was represented by Mr. Mark Lebba, learned advocate, whereas, the respondent enjoyed the services of Mr. Charles Tumaini, also learned advocate.

Mr. Lebba adopted the affidavit in support of this application as part of his oral submission. He stated that the applicant was required in terms of Rule 86 (1) (a) to lodge and serve on the appellant notice of a full address for service within fourteen (14) days after being served with a notice of appeal but he could not do so and hence the current

application. The learned counsel referred the Court to paragraphs 5, 6 and 7 of the supporting affidavit and stated that, the delay to serve the respondent with the said notice was due to deteriorating health condition of the applicant's father who resides in Arusha. Thus, the applicant had to travel frequently to Arusha from Dar es Salaam to attend to his sick father. Under paragraph 5 of the supporting affidavit the deponent attached copies of bus tickets No. 9535 issued on 20/7/2019, No. 2801 issued on 17/8/2019, No. 4373 issued on 25/8/2019 and No. 10295 issued on 8/9/2019 collectively marked as annexure OWK-1, which the learned counsel said, was a proof of trips from Dar es Salaam to Arusha and back to Dar es Salaam.

The learned counsel added that, the deponent was the only person to serve the appellant. However, he could not do so because of the condition of his father and he could not hire an advocate to represent the applicant. As a result, service of notice under consideration is in total delay of 106 days.

Mr. Lebba urged the Court to consider the severity of the circumstances which prevented the applicant to lodge and serve the notice of full address for service on the respondent; and grant the

application under overriding objective for the interest of justice. It was his argument that, if this application is granted the rights of the respondent will not be prejudiced. To support this application, he cited a number of Court decisions, including: **KCB Bank Tanzania Ltd v. Tanzania Revenue Authority**, Civil Application No. 156/20 of 2018; **Yusuf Nyabuna Nyatururya v. Mega Speed Liner Ltd & Another**, Civil Appeal No. 85 of 2019 and **Sanyou Service Station Ltd v. BP Tanzania Ltd (Now Puma Energy Ltd)**; Civil Application No. 185/17 of 2018 (all unreported).

Finally, Mr. Lebba stated that the orders sought in this application are discretionary. He thus urged the Court to exercise its discretionary powers to grant the application.

In reply, as intimated above, Mr. Tumaini supported the application. He said, in order to ensure proper administration of justice and in consideration that the application does not affect the rights of the respondent, the respondent does not object it.

Having considered parties' submissions, the only issue to be considered is whether the applicant has shown good cause warranting extension of time sought.

Rule 10 of the Rules under which this application has been made, requires the Court to exercise its discretionary power to extend time for the doing of any act authorised by the Rules upon good cause being shown. In order to determine good cause, circumstances of each case need to be considered as there is no single definition of that term. (see **Benedict Mumello v. Bank of Tanzania** [2006] 1 EA 227.

In the current application, the applicant was served with the notice of appeal by the respondent on 18th July, 2019 as per paragraph 3 of the supporting affidavit. Rule 86 (1) (a) of the Rules requires that every person on whom a notice of appeal is served within fourteen days after service on him of the said notice, to lodge in the appropriate registry and serve on the intended appellant notice of a full and sufficient address for service. Therefore, it means that the applicant was supposed to lodge a notice of his address for service on or before 1st August, 2019 and serve the same on the respondent. As stated by the counsel for the applicant, the current application was lodged on 14th November, 2019 after a lapse of more than three months. Far beyond the prescribed time.

The main reason for delay advanced by the deponent is that he had a busy schedule of attending to his father who was seriously sick. Since the said father resides in Arusha, he had to travel to Arusha frequently to attend to him as he was the only person to provide such service. In addition, he said, the applicant had no advocate who could assist him in lodging and effecting service of the notice to the respondent. He substantiated his assertion with annexure proving his travel schedule (annexure OWK -1).

In paragraph 9 of the supporting affidavit, the applicant stated that his failure to lodge in Court the notice of his full address for service and serve the same on the respondent, within time, has not been caused by negligence or mere inaction on his part, but it was due circumstances which were beyond his control as explained hereinabove. I am aware of the factors to be considered in assessing "good cause" as stated in a number of decisions of the Court, including the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 which included, but not limited to, the reason (s) for delay, length of delay, the degree of prejudice the

respondent stands to suffer if time is extended, whether the applicant was diligent, whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged and the overall importance of complying with prescribed time lines.

In the application at hand, the Attorney of the applicant stated that he was prevented by the illness of the applicant to lodge and serve the respondent with the notice of full address for service. Being the only close relative of the applicant, the said Attorney had no other choice except to devote his time and resources to take care of his sick father. I will let part of his deposition from paragraph 6 and 7 of the supporting affidavit to speak for itself:

6. "That my father's health condition is deteriorating each day that passes, requiring close attention by family members as well as medical care and there is no other close relative apart from me, to assist him in that regard."

7. That my father's health condition as explained in paragraph 6 above is giving me serious psychological tension and trauma in that due to his very old age,

he does not respond to medical treatment with the result that he is confined to bed at home, such that I have been unable to attend sufficiently to other important duties, including the duty to attend to the Respondent's intended appeal."

From the above paragraphs, it is my observation that circumstances of the present application are peculiar. Sickness is beyond human control and therefore nobody will fault the applicant for being sick. His Attorney has explained why he failed to attend to the respondent's intended appeal.

Having taken into consideration the peculiarity of the circumstances of this matter and the fact that the respondent does not resist the application basing on the fact that the outcome of it will not affect him in any way, I find that the reason for not lodging and serving the respondent with a full address for service advanced by the applicant is valid. The applicant has managed to substantiate that he had been travelling frequently to and from Arusha to attend to the applicant.

In the circumstances, I am convinced that the reason advanced by the applicant for failure to serve the respondent with his address for

service amounts to good cause in terms of Rule 10 of the Rules; as what constitutes good cause cannot be laid down by any hard and fast rules. (See **Oswald Masath Mwaizarubi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (unreported)).

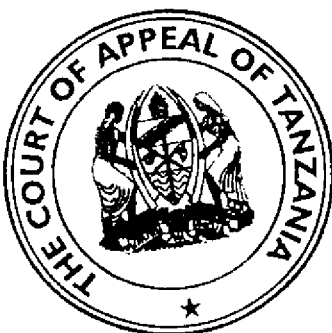
Consequently, extension of time is hereby granted for the applicant to lodge and serve the respondent with a full and sufficient address for service within 14 days from the date of this Ruling. Costs shall abide the outcome of the intended appeal.


It is so ordered.

DATED at DAR ES SALAAM this 25th day of February, 2021

M. C. LEVIRA
JUSTICE OF APPEAL

The ruling delivered this 1st day of March, 2021 in the presence of Mr. Mark Lebba, learned Counsel for the Applicant and Mr. Charles Tumaini, learned Counsel for the Respondent, is hereby certified as a true copy of the original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL