

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

CIVIL APPLICATION NO. 37/01 OF 2020

AIRTEL TANZANIA LIMITEDAPPLICANT

VERSUS

**1. MISTERLIGHT ELECTRICAL
INSTALLATION CO. LIMITED }RESPONDENTS
2. ARNORD MULASHANI }**

**(Application for extension of time from the decision of the
Court of Appeal of Tanzania, at Dar es Salaam)**

(Mziray, Mwangesi, Kitusi, JJA.)

**Dated the 27th Day of November, 2019
in
Civil Application No. 374 of 2018**

RULING

14th & 21st September, 2021

KEREFU, J.A.:

The applicant, Airtel Tanzania Limited, has lodged this application seeking an order for extension of time within which to provide a banker's guarantee as security for the whole of decretal sum in Civil Case No. 198 of 2011 as ordered by the Court (Mziray, Mwangesi, Kitusi, JJA) on 27th November, 2019 in Civil Application No. 374 of 2018. The application is brought by way of notice of motion lodged under Rule 10 of the Tanzania

Court of Appeal Rules, 2009 as amended (the Rules). The grounds canvassed in the notice of motion are as follows, that: -

- (a) the time of thirty days provided by the Court for processing the guarantee was not sufficient due to the bank's internal process;*
- (b) no prejudice will be caused to the respondents because the guarantee has been obtained and already deposited in Court;*
and
- (c) the costs for the application shall abide on the outcome of the intended appeal.*

The application is supported by an affidavit of Mr. Gasper Nyika, learned counsel for the applicant. On the other hand, the respondents have jointly filed an affidavit in reply sworn by Mr. Kennedy Marco Fungamtama, learned counsel opposing the application.

For a better appreciation of the issues raised herein, it is important to explore the background of the matter and the factual setting giving rise to this application. According to the record of the application, the applicant, a judgment debtor in Civil Case No. 198 of 2011 before the High Court of Tanzania at Dar es Salaam (Arufani, J.), had initiated a process of appeal by lodging a notice of appeal. In that process, the applicant also lodged Civil Application No. 374 of 2018 for an order of stay of execution of the decree of the High Court in that decision. Having heard the said

application, the Court on 27th November, 2019 ordered for stay of execution of the said decree pending hearing and determination of the intended appeal on the condition that the applicant should file security in a form of a banker's guarantee for the whole of the decretal sum within thirty (30) days from the date of delivery of the said order. As such, the applicant was required to file the said security by 27th December, 2019 but the same was filed on 30th December, 2019. It is the applicant averments that from 27th November, 2019 to 27th December, 2019 he was in the bank's corridors processing the said bank guarantee. That, after discovering that he was late, he decided to file the said banker's guarantee on 30th December, 2019 and he then lodged this application on 7th February, 2020 for the Court to condone the said delay.

On their part, the respondents have taken issues with the applicant's averments as they contended that this application was preferred after they had already moved the Court, in their letter dated 7th January, 2020 to reject the banker's guarantee filed by the applicant on 30th December, 2019 for being time barred and inoperative.

At the hearing of the application, the applicant was represented by Mr. Gasper Nyika, learned counsel whereas the respondents were represented by Mr. Kennedy Fungamtama, learned counsel. It is

noteworthy that the counsel for the applicant did not file written submission as required by Rule 106 (1) of the Rules and he thus addressed me in terms of Rule 106 (10) (b) of the Rules. On his part, the counsel for the respondent had earlier on filed his written submissions under Rule 106 (2) of the Rules which he sought to adopt to form part of his oral submission.

Submitting in support of the application, Mr. Nyika commenced his submission by fully adopting the contents of the notice of motion and the supporting affidavit. He then argued that on 27th November, 2019 the applicant was ordered by the Court to file security in a form of a banker's guarantee for due performance of the decree. That, the applicant had tried to obtain the said guarantee within the stipulated time but failed due to the long process taken by the bank to authorize the said guarantee, which, he said, was beyond the applicant's control. He argued further that, the said guarantee was availed to the applicant on 27th December, 2019 and it was filed on Court on 30th December, 2019 after lapse of only three (3) days. He therefore clarified that, the main issues to be considered by the Court as sufficient reasons to grant the application are that: -

(a) there was a long process taken by the bank to process the guarantee which was beyond the applicant's control;

- (b) the delay was minimal as it was only three (3) days; and*
- (c) the purpose of the banker's guarantee was to protect the respondent and since the same was already lodged on 30th November, 2019 the respondent is well protected and the said purpose had been achieved.*

It was the argument of Mr. Nyika that, since Rule 10 of the Rules allows extension of time before or after the act has been performed and because, in this matter, the applicant had played an active role of filing the banker's guarantee on 30th November, 2019 without further delays, the Court should condone the delay and bless the act done by the applicant.

When I prompted him to avail an authority to support his line of argument, Mr. Nyika promised to avail the same, but he could not walk the talk until I composed this Ruling. With respect therefore, I find his submission on this aspect to be misconceived.

Upon being further probed as to whether the applicant has accounted for each day of delay from 27th December, 2019 when she was issued with the said banker's guarantee to 7th February, 2020 when the instant application was lodged, Mr. Nyika conceded that the said period was not accounted for. He however argued that, the said period was not relevant because the said guarantee had already been lodged out of time. It was therefore his argument that, the reasons advanced by the applicant in

relation to the delay of three (3) days is sufficient and constitute good cause within the purview of Rule 10 of the Rules. He thus urged me to grant the application.

In response, Mr. Fungamtama strenuously opposed the application by arguing that the applicant has failed to show good cause for extension of time. Relying on the affidavit in reply and the written submission he had earlier on lodged, Mr. Fungamtama argued that the application for extension of time was lodged by the applicant after the respondents had already moved the Court to reject the purported guarantee for being time barred and inoperative. He clarified that, since the Court ordered the applicant to file the banker's guarantee within thirty (30) days i.e from 27th November, 2019 to 27th December, 2019, the act of the applicant to file it on 30th December, 2019, after the lapse of the stated deadline without leave of the Court cannot be condoned by the Court.

He further contended that, although in his affidavit Mr. Nyika alleged that the applicant was delayed by the bank, he failed to substantiate his allegation with an affidavit of the officer from the applicant's company or from the bank. He argued that, the law is settled that when the deponent is relying on the information or an act performed or caused by another person, is required to attach an affidavit of that person to substantiate his

allegation. It was the strong argument of Mr. Fungamtama that, since Mr. Nyika has failed to avail the affidavit of the said officers, his allegations are bare words which cannot constitute good cause for the delay. To buttress his position, he cited the case of **John Chuwa v. Anthony Ciza** [1992] T.L.R. 232.

Mr. Fungamatama also challenged the validity of banker's guarantee filed by the applicant that it had expired since 3rd December, 2020 and argued that, even if the extension of time is granted to the applicant today, the said guarantee is inoperative as it had been overtaken by events. He thus insisted that, what the applicant is doing, is only an academic exercise. As such, Mr. Fungamtama urged me to dismiss the applicant's application with costs for lack of merit.

In his brief rejoinder, Mr. Nyika challenged the submission made by Mr. Fungamtama in relation to the validity of the banker's guarantee that the same is not relevant in the current application. He thus urged me to disregard the same. He then reiterated what he submitted earlier and emphasized that the Court should condone the delay of the three (3) days and bless the act done by the applicant of lodging the banker's guarantee out of time.

Having heard the counsel for the parties, the main issue for my consideration is whether the applicant has submitted good cause for the delay to warrant grant of this application. It is essential to reiterate that the Court's power of extending time under Rule 10 of the Rules is both wide-ranging and discretionary but the same is exercisable judiciously upon good cause being shown. It may not be possible to lay down an invariable or constant definition of the phrase "good cause", but the Court consistently considers such factors like, the length of delay involved, the reasons for 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, and 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. There are numerous authorities to this effect which include, **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Kalunga & Company Advocates Ltd v. National Bank of Commerce Ltd** (2006) TLR 235, **Elia Anderson v. Republic**, Criminal Application No. 2 of 2013 and **Attorney General v. Tanzania Ports Authority & Another**, Civil Application No. 87 of 2016 to mention but a few.

Now, in the application at hand, it is common ground that the applicant is contending that the thirty (30) days given by the Court to file a bank guarantee was not adequate due to the bank's long process of authorization of the said guarantee. It is the applicant's further contention that she tried to obtain the said bank guarantee within the set time but failed as the same was availed to her on 27th December, 2019 and that she lodged it in Court on 30th December, 2019 after lapse of three (3) days. It was her argument that she should not be blamed and penalized for the said delay because it was beyond her control.

It is clear that under paragraph 4 of the affidavit in support of the application together with Mr. Nyika's oral submission, the applicant is shifting the blame for delay to the bank. Therefore, and as correctly argued by Mr. Fungamtama, the applicant was expected to attach the affidavital evidence of the officer from the bank to substantiate his allegation. Unfortunately, that was not done. In **Issack Sebegele v. Tanzania Portland Cement**, Civil Application No. 25 of 2002 when the Court considered applicant's claims for the delay towards a Court's clerk stated that: -

*"Evidence in support of the applicant's claim
against the Court's clerk was necessary.*

The name of the said Court's clerk should have been indicated in one of the paragraphs of the affidavit of the learned counsel and that, the application should have been accompanied with the affidavit of the Court Registry Officer duly sworn to that effect." [Emphasis added].

Similarly, in this application, since Mr. Nyika is alleging that the applicant was delayed by the bank, he was expected to substantiate his assertion with the affidavit of an officer from the bank who attended and delayed the applicant. I therefore agree with the counsel for the respondent that bare assertion and allegation of Mr. Nyika without proof cannot suffice in showing good cause for the delay.

Next for my consideration is whether the applicant has accounted for each day of delay in relation to the filing of the instant application. It is on record that the bank guarantee was obtained on 27th November, 2019 and this application was lodged on 7th February, 2020 after lapse of eleven (11) days. I am mindful of the fact that, although Mr. Nyika conceded that the said period was not accounted for, he argued that the said period was not relevant because the guarantee was already filed. With profound respect, I

am unable to agree with Mr. Nyika on this point, because from 28th November, 2019 up to 7th February, 2020 when this application was lodged, the time sought to be extended was yet to be granted and therefore, the applicant was still operating out of time. It is settled that, any applicant seeking for extension of time under Rule 10 of the Rules is required to account for the delay of each day. Indeed, the Court has reiterated that position in numerous cases and one of them is **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 03 of 2007, (unreported) where the Court emphasized that: -

"...Delay of even a single day, has to be accounted for, otherwise there would be no point of having rules prescribing period within which certain steps have to be taken." [Emphasis added].

I fully subscribe to the above authority and reasoning. I should add that, beyond our borders, the Supreme Court of South Africa stated, in a similar vein, in **Uitenhage Transitional Local Council v. South African Revenue Service**, 2004 (1) SA 292, that when seeking condonation of delay, a full detailed and accurate account of the causes of the delay and

its effects must be furnished for the Court to exercise its discretion accordingly.

Therefore, since in this application the applicant has failed to account for the delay of each day, the application cannot stand as there is no material upon which the Court can exercise its discretion under Rule 10 of the Rules to grant the application.

In the event, I find that this application is devoid of merit and is hereby dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 21st day of September, 2021.

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 21st day of September, 2021 in the presence of Ms. Grace Kibaki, learned counsel for the applicant and Mr. Kennedy Fungamtama, learned counsel for the Respondent is hereby certified as a true copy of the original.




B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL