

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

CIVIL APPLICATION NO. 552/16 OF 2019

**ELIAS MASIJA NYANG'ORO
EDNA ELIAS NYANG'ORO
RODRICK ELIAS NYANG'ORO** } **APPLICANTS**

VERSUS

MWANANCHI INSURANCE COMPANY LTD RESPONDENT

**[Application for extension of time to serve on the respondent
Memorandum and Record of Appeal from the decision of the High
Court of Tanzania (Commercial Division) at Dar es Salaam]**

(Sehel, J.)

dated the 23th day of October, 2017

in

Civil Appeal No. 278 of 2019

RULING

17th February & 2nd March, 2021

LEVIRA, J.A.:

This is an application for extension of time within which to serve on the respondent the memorandum and record of appeal in Civil Appeal No. 278 of 2019 out of time. The said appeal is against the decision of the High Court of Tanzania, Commercial Division (Sehel, J. as she then was) dated 23rd October, 2017 in Miscellaneous Commercial Application No. 192 of 2017. The application is by way of a notice of motion which

was taken out under the provisions of Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The same is supported by an affidavit, duly affirmed by Daimu Halfan, advocate for the applicant. In addition, the applicants have filled written submissions in support of the application. Initially, the respondent had filed an affidavit in reply through her advocate, Hussein Kitta Mlinga resisting this application. However, at the hearing Ms. Agnes Dominic, learned advocate appeared for the respondent and informed the Court that the respondent does not resist this application; neither claims for costs.

A brief background of this matter is to the effect that, in the High Court of Tanzania, Commercial Division the respondent sued the applicants claiming for various reliefs including, an order for payment of Tanzanian Shillings 862,071,745.00 which were fraudulently transferred by the 1st and 2nd applicants to the 3rd applicant. The matter was heard *ex parte* as the counsel for the applicants defaulted appearance and the *ex parte* judgment in favour of the respondent was delivered on 12th June, 2017.

Aggrieved, the applicants applied in the same court in Miscellaneous Commercial Application No. 192 of 2017 to set aside *ex parte* judgment.

Having heard the parties, the High Court found that the application with no merit and thus dismissed it on 23rd October, 2017.

On 1st November, 2017 the applicants lodged a Notice of Appeal and submitted a letter to the Registrar of the High Court requesting for copies of Proceedings, Ruling, and Drawn Order for appeal purposes; and they served the respondent with the copies of the said notice and the letter. Upon being served with the requested documents, they prepared a memorandum and record of appeal and lodged them in Court's Registry where they were registered as Civil Appeal No. 278 of 2019. That was on 15th October, 2019. However, the applicants did not serve the respondent with the memorandum and record of appeal within the prescribed time. Instead, the respondent was served on 17th December, 2019. On the same date they as well served the respondent with written submissions in support of the appeal, hence, the current application.

Mr. Halfan who appeared for the applicants at the hearing, adopted the notice of motion, his affidavit and the written submissions as part of his oral submission before the Court. Thereafter, he

submitted that, since the respondent has no objection, the application should be granted. Likewise, he did not press for costs.

Having heard the parties and perused the record of application, the issue for consideration is whether the applicants have demonstrated good cause to justify the grant of the application.

It is settled position that for the Court to grant extension of time, an applicant has to show good cause to move the Court to exercise its discretionary powers (see Rule 10 of the Rules). In determining good cause, circumstances of each case have to be taken into consideration as there is no single definition of what constitutes good cause. (See **Oswald Masatu Mwizaburi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (unreported) and **Republic v. Y. Kaponda & 9 Others** [1985] TLR 84.

In the affidavit in support of this application, the counsel for the applicants states under paragraph 5 that, after they had lodged the appeal the applicants were required by the law to serve on the respondent the memorandum and record of appeal. Inadvertently and unfortunately the same were not served on the respondent within time. He also states under paragraph 7 that the non-service of the said

documents to the respondent was discovered on 17th December, 2019. He went on stating under paragraph 8 that upon that discovery, the respondent was served on the same date with the memorandum and record of appeal together with written submissions.

Mr. Halfani averred under paragraph 9 of the supporting affidavit that, non-service of the memorandum and record of appeal was neither intentional nor deliberate. In addition, he stated that the respondent has not been prejudiced and no injustice has been occasioned to her.

Apart from the reasons for delay, Mr. Halfani raised a ground of illegality of the impugned decision and proceedings. Expounding on the points of illegality, the applicants identify in their written submission in support of the application at page 6 as follows;

- (i) The appellants were denied the right to be heard and to a fair trial.*
- (ii) The High Court had (sic) jurisdiction over the matter as there was a Notice of Appeal to the Court of Appeal.*
- (iii) The High Court took into account matters which it ought not to take into account;*

- (iv) The suit before the High Court emanated from the Report of the Inspectors who were not appointed by the High Court;*
- (v) Suit was a nullity and the High Court had no jurisdiction to over (sic) it as was instituted in contravention of section 222(3) of the companies Act 2002 which mandates only the Attorney General to institute such Civil Proceedings in the name of body corporate, and in this case the respondent.*
- (vi) Absence of resolution of the Board of Directors of the respondent to authorise the institution of the suit which renders the said suit a nullify.*

Finally, the counsel for the applicants prayed for the application to be granted.

With respect, I wish to observe right away that having gone through the record, am not persuaded with the grounds of illegality raised by the applicants. The reason behind being that the claimed illegality is not apparent on the face of record and therefore does not meet the settled threshold. (See **The Principal Secretary Ministry of Defence and National Service v. Devram Valambia** [1991] TLR 387). Therefore, I

find that the points of illegality raised by the applicants do not constitute good cause warranting extension of time sought.

It is on record that the memorandum and the record of appeal subject of this application were lodged in Court's Registry on 15th October, 2019. Therefore, according to the requirements under Rule 97(1) of the Rules, the applicants were supposed to serve the respondent with a copy of the same on or before 22nd October, 2019. For clarity that Subrule provides as follows:

"The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies of them on each respondent who has complied with the requirements of rule 86."

However, the applicants did not serve the respondent with the memorandum and record of appeal within the prescribed time; instead, she was served on 17th December, 2019, after lapse of almost two months. It is explained in the supporting affidavit and the applicants' written submissions that, the applicants inadvertently and unfortunately did not serve the respondent within time as indicated above. In the

applications of this nature, whether the reason advanced by an applicant constitutes good cause, depends on the circumstances of each case.

In the current case, it is clear on record of the application that the respondent was served with the memorandum and record of appeal on 17th December, 2019. The said documents were received by one Anna Ringo around 15:35 pm on that date. According to the record, this is the date which the applicants discovered the omission to serve the respondent timely. Circumstances of this case reveal all the steps taken by the applicants to exercise their right of appeal immediately after the delivery of the impugned decision until such time when they served the respondent with those documents. In my considered opinion they acted promptly to remedy the situation having discovered the omission because the respondent was served on the day of discovering the omission and the following day, that is on 18th December, 2019 this application was lodged.

It should be understood that 'inadvertence' does not constitute good cause in terms of Rule 10 of the Rules. Should the Court rely on it in extending time for doing an act limited in the Rules, it has to consider other factors like diligence of the applicant and the promptness in taking

actions. In **Standard Chartered Bank (Tanzania) Ltd. v. Bata Shoe Company (T) Limited**, Civil Application No. 101 of 2006 (unreported) the Court quoted with approval its decision in **Michael Lessani Kweka v. John Eliafye** [1997] TLR 152 at page 153 where it was stated as follows:

"...Although generally speaking a plea of inadvertence is not sufficient, nevertheless I think that extension of time may be granted upon such plea in certain cases, for example, where the party putting forward such plea is shown to have acted reasonably diligently to discover the omission and upon such discovery, he acted promptly to seek remedy for it."

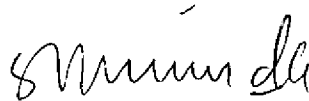
In the light of the above decision, I have considered circumstances pertaining to this application and the fact that the respondent will not be prejudiced if this application is granted as rightly stated, in my view, by her counsel. I am convinced that good cause has been shown by the applicants for the Court to exercise its discretionary powers to grant this application. Therefore, I grant the application retrospectively in terms of Rule 10 of the Rules and hereby legalize the

service effected on the respondent on 17th December, 2017. No order as to costs. It is so ordered.

DATED at DAR ES SALAAM this 26th day of February, 2021

M. C. LEVIRA
JUSTICE OF APPEAL

The ruling delivered this 2nd day of March, 2021 in the presence of Ms. Loveness Dennis, leaned Counsel for the Applicants who also holds brief for Ms. Agness Dominick, counsel for the respondent is hereby certified as a true copy of the Original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL

