

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

CIVIL APPLICATION NO.431 OF 2021

RASHIDI ABIKI NGUWA APPLICANT

VERSUS

RAMADHAN HASSAN KUTEYA1ST RESPONDENT

NATIONAL MICROFINANCE PLC2ND RESPONDENT

**(Application for extension of time to serve the 2nd Respondent with a
Notice of Appeal out of time)**

(Mlacha, J.)

Dated the 11th day of December, 2019

in

Land Case No.2 of 2017

RULING

18th & 21st October, 2021

KAIRO, J.A.:

In this matter, the applicant is praying for an extension of time to serve the 2nd respondent with a notice of appeal out of time so as to challenge the decision of the High Court of Tanzania at Dodoma Registry (Mlacha, J.) in Land Case No. 2 of 2017 delivered on 11th day of December, 2019. The application which was brought under certificate of urgency is preferred under the provisions of Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by two affidavits; one sworn by Mr. Deus Juma Nyabiri, the applicant's learned

counsel and the other one affirmed by Mr. Rashid Abiki Nguwa, the applicant.

On the other hand, the respondent has lodged an affidavit in reply which was sworn by Mr. Simon Robert Ng'wigulu, the 2nd respondent's counsel. No affidavit was filed in respect of the 1st Respondent.

Briefly the fact that culminated to this application as could be discerned from the record is that, the applicant and the 1st respondent are business partners. They together bought an oil refinery mill situated on Plot No. 44 Block AA Kindai within Singida Municipality which is also a joint property. In a move to expand their business, the duo agreed to borrow some fund from the 2nd respondent and mortgage the joint property as security for the loan to be extended.

Upon request, a term loan of TZS. 150,000,000.00 and an overdraft facility of TZS. 150,000,000.00 was approved in their favour by the 2nd respondent. However, the duo had no joint business account with the 2nd respondent. They thus agreed that the loan facilities be disbursed through a bank account of the 1st respondent which was done.

It appears there was a default to effect repayment of the said facilities as agreed, the situation which made the 2nd respondent to issue a notice of its intention to auction the property mortgaged to secure the

loan to the applicant. The move did not amuse him and decided to institute Land Case No. 2 of 2017 at the High Court, Dodoma Registry against the 1st and 2nd respondents in a bid to rescue the property. The case was found without merit, thus dismissed. The applicant was further aggrieved and lodged a notice of appeal to the Court and further wrote a letter to the Registrar requesting for necessary documents for appeal purpose. He later lodged Civil Appeal No. 421 of 2020 in Court to challenge the said decision which dismissed his case. Later, his advocate discovered that the notice of appeal was not served to the 2nd respondent within the prescribed time as per Rule 84 (1) of the Rules, hence this application at hand.

When the application was called on for hearing before me on 18th October, 2021, Mr. Deus Juma Nyabiri, learned counsel appeared for the applicant whereas Messrs Malimi Juma and Simon Ng'wigulu, both learned counsel appeared for the 1st and 2nd respondents respectively.

When invited to amplify the ground in the notice of motion, Mr. Nyabiri sought leave of the Court to adopt the two affidavits in support of the application. In his deposed affidavit and oral submission, Mr Nyabiri argued that on 13th August, 2021 when he was preparing for the hearing of Civil Appeal No. 421 of 2020 which was scheduled for hearing

before the Court in August, 2021, he discovered that the notice of appeal has not been signed by the 2nd respondent to prove that he has been served as the law requires. He immediately therefore took action to file this application on 23rd August, 2021 seeking an extension of time to serve the notice of appeal to the 2nd respondent out of time. He went on to submit that the affidavit of the applicant in paragraphs 4, 5 and 6 together with his affidavit in paragraphs 3, 4, 5 and 6 show that an error which was not premeditated occurred when effecting service to the 2nd respondent. He elaborated that he prepared the notice of appeal and wrote a letter to the Registrar requesting for the relevant documents for appeal purposes and handed over the two documents to the applicant to serve them to the 2nd respondent in Singida which was done and both documents were returned. However, none of them noticed that the notice of appeal was not signed by the 2nd respondent to prove that the service was effected while the letter requesting for relevant documents for appeal purpose was signed to indicate its receipt by the 2nd respondent. He added that, while thinking that the notice of appeal was served to the 2nd respondent, the service was not proper for lack of proof. He thus rushed to file this application on 23rd August, 2021.

He went on to submit that he is aware that the grant of this application is within the Court's discretion but requested the Court to

exercise its discretion judiciously considering that the appeal to challenge the dismissed suit (Civil Appeal No. 421 of 2020) is scheduled for hearing on 29th October, 2021. As such, the grant of the application will not prejudice the 2nd respondent. He cited the case of **The Registered Trustees of the Evangelical Assemblies of God (T) (EAGT) vs. Reverend John Mahene**, Civil Application No. 518/14 of 2017 (unreported) to back-up his submission. He beseeched the Court to proceed with its stance of focusing on substantive justice as it did in the cited case.

Mr. Nyabiri also pleaded with the Court to find that the delay in this matter was with good cause as there is no hard and fast rules with regards to what constitutes good cause. He referred the Court to the case of **Enock Kalibwani vs. Ayoub Ramadhani and 2 Others**, Civil Application No. 491/17 of 2018 which cited the case of **Osward Masatu Mwizarubi vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2013 to substantiate his submission. He concluded that the pointed-out lapse was not caused by negligence but human error and thus prayed the Court to grant the application.

Mr. Malimi on his part informed the Court that he has no objection to the application. However, Mr Ng'wigulu forcefully objected to the

notice of motion. In rebuttal, he told the Court that his arguments are based on two limbs; the first limb is to the effect that the applicant has failed to advance any good cause to warrant the grant of the prayers sought. As for the second limb he argued that the applicant has failed to account for the days of delay.

Arguing for the first limb Mr. Ng'wigulu submitted that the only reason advanced by the appellant in paragraph 5 of his affidavit is that, though he sent to the 2nd respondent the two documents together; that is the notice of appeal and the copy of the letter to the Registrar requesting for relevant documents for appeal purpose, but only the copy of the said letter was signed and the notice of appeal was not. However, in paragraph 6 of the affidavit the applicant admits that there is no proof of service, to which he considers contradictory.

He went on to argue that, even the said letter alleged to have been signed by the 2nd respondent and which the applicant tends to rely on has no proof that it has been dully served to the 2nd respondent. He referred the Court to the last page of the letter annexed and marked annexure RN1 to the applicant's affidavit contending that at the Branch Manager's space to endorse for receipt purpose, only a mere signature and date were indicated while this is the document which according to

the applicant, it verifies the service upon the 2nd respondent. He argued that even the said letter was not served to the 2nd respondent as well. Giving the reason for his argument in this aspect, Mr. Ng'wigulu stated that the said signature thereat is of unknown person and even the 2nd respondent does not know the person who signed it. Further to that, the name of the person who received it was not indicated therein, nor the title of the person who signed. On top of that, no official rubber stamp was affixed on the said letters which he argued to be abnormal as generally all letters received at the 2nd respondent's office are stamped by an official stamp.

Mr. Ng'wigulu went on to argue that in the circumstances, even the letter as per paragraph 5 of the affidavit the applicant intends to rely on to substantiate that the two documents were served together; one signed and the other one not, does not rescue the situation. He added that all the circumstances demonstrate that the failure of the applicant to serve the 2nd respondent is tainted with negligence which has never been a good cause to warrant the grant of an extension of time.

In the 2nd limb Mr. Ng'wigulu faulted the applicant for failure to account for the days of delay. He elaborated that the judgment sought to be challenged was delivered on 11th December, 2019 and the notice of

appeal was lodged on 24th December, 2019. That, the 14 days within which to serve the 2nd respondent lapsed on 7th January, 2021. Thus, from 8th January, 2020 up to 13th August, 2021 when the applicant claims to have discovered the lapse is a total of 592 days which period the applicant is required to account for. He went on to argue that, despite pleading human error, but the failure to discover the lapse within all those 592 days is a negligence of the highest degree.

Mr. Ng'wigulu further submitted that even if it is assumed that the applicant exhibited a good cause for the said delay of 592 days, but still the applicant is required to account for the days when he discovered the lapse (14th August, 2021) and when the notice of motion was filed in Court (23rd August, 2021) that is a total of 11 days, adding that summing up with the 592 days is a total of 602 days which the applicant has not accounted for. He also refuted Mr. Nyabiri's argument that the grant of the application will not prejudice the 2nd respondent arguing that currently the 2nd respondent is suffering loss for unpaid loan, as such the contention is incorrect. Distinguishing the cited case of **Enock Kalibwani** (supra), Mr Ng'wigulu stated that the case discussed the issue of illegality while in the case at hand no illegality has been pleaded. He eventually prayed the Court to dismiss the application with costs.

In his rejoinder, Mr. Nyabiri submitted that Mr. Ng'wigulu is not a competent person to talk on the denial of the 2nd respondent's signature in annexure RN1. Rather, an affidavit to that effect was supposed to be sworn by the officer of the 2nd respondent. He further faulted Mr. Ng'wigulu's argument concerning the absence of the rubber stamp in annexure RN1 insisting that, no affidavit to that effect was sworn to explain the procedure of receiving the documents of the 2nd respondent.

Regarding the delay of 592 days which was argued by Mr. Ng'wigulu not to have been accounted for, Mr. Nyabiri stated that, in paragraph 6 of his affidavit which was not disputed by Mr. Ng'wigulu, he made it clear that the omission was discovered when he was preparing for the hearing of Civil Appeal No.421 of 2020, as such days of delay if any has to reconned from the discovery date to the date when the notice of motion was filed which is 10 days (13th – 23rd August, 2021), He however argued that the need to account for the 10 days does not arise as the applicant was well within 14 days when filing this application.

Reacting to the distinguished case of **Enock Kalibwani** (supra) which Mr. Ng'wigulu argued that it discussed on illegalities, Mr. Nyabiri contended that, the relevant part what he referred in the cited case is only the issue covering good cause and not illegalities. Therefore, the

case is still relevant in that aspect. He reiterated his prayer to have this application granted with no order as to costs so that the parties can proceed with the hearing of the appeal scheduled for 29th October, 2021.

Having gone through the affidavits together with the affidavit in reply and exposed the rival arguments, there is no dispute that the 2nd respondent was not served with the notice of appeal within the prescribed time as per the provision of Rule 84 (1) of the Rules for lack of proof of service. Rule 10 under which this application is predicated requires the applicant to advance good cause to warrant the grant of the extension of time. It reads: -

*"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 in these Rules to any such time shall be construed as a reference to that time as so extended.**" [Emphasis supplied].*

The begging question therefore is whether or not good cause has been exhibited by the applicant warranting the grant of extension of time sought.

However, it is imperative to point out that what constitute good cause has not been defined. A number of factors have been taken into account in various decided cases. In **Tanga Cement Company Limited vs. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No.6 of 2001, (unreported) the Court had this to say when faced with a similar situation: -

“What amounts to sufficient cause has not been defined. From decided cases, a number of factors have to be taken into account including, whether or not the application has been brought promptly, the absence of any or valid explanation for delay, lack of diligence on the part of the applicant...”

Again, in **Enock Kalibwani** (supra) cited to me by Mr. Nyabiri, the Court reiterated that stance when interpreting the term ‘good cause’ as follows: -

“What constitute good cause cannot be laid down by any hard and fast rules. The term good cause is a relative one and is depended upon the party seeking extension of time to provide relevant material in order to make the court to exercise its discretion.”

At this juncture, I hasten to add as rightly submitted by Advocate Nyabiri that to grant or refuse to grant an application like the one before

me is entirely in the discretion of the Court which must be exercised according to rules of reason and justice.

In the case of **Mbogo vs. Shah** [1968] E. A. quoted with approval in **Ngao Godwin Losero vs. Julius Mwarabu**, Civil Application No.10 of 2015 (unreported), the defunct Court of Appeal for Eastern Africa had this to say: -

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended."

Being guided by the above authorities, I now revert to consider this application.

The applicant attributed the delay to serve the 2nd respondent with the notice of appeal to human error. He elaborated that while thinking that the notice of appeal was as well served to her like the other document sent together, in actual fact it was not because there was no proof of service to that effect. On the other hand, Mr. Ng'wigulu associated the failure to serve the 2nd respondent with negligence which legally has never been a good cause to warrant extension.

It is on record that the applicant seeks to challenge the decision which was delivered on 11th December, 2019. It is not in dispute that the applicant lodged the notice of appeal and requested for relevant documents for appeal purpose on 24th December, 2019 to signify his intention to appeal well within time. He further went on to lodge the appeal on 6th October, 2020. It is further not in dispute that both documents were served to the 1st respondent on 27th December, 2019. Further to that, exhibit RN1 shows that the 2nd respondent's place in the copy of the letter to the Registrar has been signed but the notice of appeal has not been signed at the place of the 2nd respondent.

The applicant deposed that he took both documents to the 2nd respondent but one was returned unsigned. Unfortunately, neither the applicant nor the counsel for the applicant noted the lapse. It was not until on 13th August, 2021 when Mr. Nyabiri was preparing for the hearing of the appeal that he discovered that the 2nd respondent has not signed the notice of appeal to prove service. Upon that recovery, he rushed to the Court to file this application on 23rd August, 2021.

I have dispassionately considered and weighed the submitted cause of delay and I am convinced that the same was caused by a sheer human error. I am so saying as the applicant was not sloppy in remedying the lapse as he filed this application 10 days after discovering

it which I consider prompt enough and signifies his diligence. I asked myself, why should the applicant serve the 1st respondent and omit to serve the 2nd respondent. Again, why should he serve the 2nd appellant with the letter and omit to serve her with the notice of appeal. To say the least, no other explanation can be given than that of human error which the applicant has pleaded. On that account, I do not subscribe to Mr. Ng'wigulu's argument that the applicant was negligent with due respect.

Though, Mr. Ng'wigulu has submitted that the signature in annexure RN1 is of unknown person and even the 2nd respondent has denounced it, but as correctly submitted by Mr. Nyabiri that Mr. Ng'wigulu is incompetent to advance the allegation, rather the denial was supposed to be by an affidavit in reply sworn by the 2nd respondent. The same applies on the lack of official stamp duty of the 2nd respondent on the document at issue. The Court has times and again stated that the factual matters deposed in the affidavit has to be controverted by a counter affidavit, short of it, the averment countering the deposed facts remain to be mere statements from the bar which the Court cannot act upon. See **MIC Tanzania Limited vs. CXC Africa Limited**, Civil Application No.172/01 of 2019 and **Heritage Insurance Company Ltd vs. Sabians Mchau & 2 Others**, Civil Application No.284/09 of 2019

(both unreported). In the same vein, I consider Mr. Ng'wigulu's assertion in this aspect to be mere statements from the bar to which I cannot act upon.

Mr. Ng'wigulu has also faulted the applicant for failure to account for 602 days of delay. I would not want to be detained in this issue. Mr. Nyabiri has categorically stated that he discovered the lapse on 13th August, 2021 and filed this application on 23rd August, 2021. As such, the previous days are not relevant for the purpose of accounting for the days of delay. Besides, I do not consider the 10 days lapse unwarranted in this matter. Therefore, the need to account for them does not arise with much respect.

Mr. Ng'wigulu has also refuted the contention by Mr. Nyabiri that the grant of this application will not prejudice the 2nd respondent asserting that the 2nd respondent is currently suffering loss due to non-recovery of the loan. Suffice to state that, I am aware that the Civil Appeal No. 421 of 2020 is scheduled for hearing on 29th October, 2021. I believe the time left is too short to prejudice the 2nd respondent. Besides, it is within the spirit of the Court to focus on substantive justice. The position is backed up by sections 3A and 3B which has been introduced in the Appellate Jurisdiction Act, Cap 141 R.E 2002 by the Written Laws (Miscellaneous Amendment) Act, 2017, Act No.4 of 2017.

All having said and done and for the foregoing, I find the applicant has exhibited good cause. I therefore grant extension of time to the applicant to serve the 2nd respondent with the notice of appeal within five days from the date of delivery of this ruling. Costs to be in the cause.

It is so ordered.

DATED in **DODOMA** this 21st day of October, 2021.

L. G. KAIRO
JUSTICE OF APPEAL

The Ruling delivered this 21st day of October, 2021 in the presence of Mr. Francis Kesanta, learned counsel for the Applicant and Mr. Hamad Said, learned counsel for the 2nd Respondent also holding brief of Mr. Malimi Juma, learned counsel for the 1st Respondent, is hereby certified as true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL