

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

CIVIL APPLICATION NO. 212/18 OF 2020

FINCA TANZANIA LIMITED APPLICANT

VERSUS

HASSAN LOLILA RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania
(Labour Division) at Dar es Salaam)**

(Nyerere, J.)

dated the 26th day of October, 2017

in

Revision No. 383 of 2016

RULING

23th February, & 12th March, 2021

LEVIRA, J.A.:

The applicant, FINCA TANZANIA LIMITED has lodged a notice of motion under Rule 10 of the Tanzania Court of Appeal Rules (the Rules) supported by an affidavit of Stella Manongi, advocated for the applicant seeking extension of time within which to file an application for restoration of Civil Application No. 276/18 of 2019. The respondent filed an affidavit in reply but did not appear on the hearing date despite being duly served and did not file written submissions.

On 23rd February, 2021 when this application came for hearing Ms. Stella Manongi, learned advocate appeared for the applicant. The respondent did not enter appearance as introduced above. Following the absence of the respondent, Ms. Manongi argued that since the respondent was duly served with notice for appearance by one Salum Edward, process server on 20th January, 2021 and was not present, hearing should proceed in terms Rule 63(2) of the Rules. The prayer was granted and hearing proceeded *ex parte* in the absence of the respondent.

Ms. Manongi adopted first the notice of motion and her affidavit. She submitted in support of the application to the effect that, the application at hand is preferred under Rule 10 of the Rules which confers powers to the Court to extend time upon good cause being shown. She stated further that the applicant is applying for restoration of Civil Application No. 276/18 of 2019 which was filed in this Court between the same parties. According to her, the reason for delay to file an application for restoration of the said application is stated under paragraph 20 of the supporting affidavit. Expounding the said reason, she submitted that the applicant was not aware of the

dismissal order of that application as she was not present at the hearing date. The learned counsel stated further that, as a counsel for the applicant, was not aware of the hearing date of the application No. 276/18 of 2019 and a copy of the dismissal order which they received on 14th May, 2020 was posted through their postal address. It was her argument that, the applicant could not file the application to set aside the dismissal order on time because when they received the said order, the time to file application for restoration allowed by the Rules had already lapsed.

Ms. Manongi averred that upon reading the dismissal order, she discovered that the applicant's application for extension of time that was pending in Court was dismissed for non-appearance. Having made investigation in her office, she discovered that the summons was served on them on the date when their office clerk (Happy Emmanuel) fell ill and collapsed before she recorded the date in the office diary. She argued that, it was not possible for her to know about that service as from that date the said office clerk continued to be sick as a result of stroke which made her to lose her speech and ability to walk. She said, the affidavit of their office clerk is attached

as annexure FINCA – 8 under paragraph 20 of the supporting affidavit. However, according to her, the information about service was revealed to her by the said clerk upon humbly making inquiry on her.

It was Ms. Manongi's submission that, failure to attend hearing of Civil Application No. 276/18 of 2019 on 11th February, 2020 was not attributed to negligence on the part of the applicant and or her counsel but it was due to the circumstances explained above. She cited the case of **Regional Manager, Tanroads Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 (unreported) where it was stated that, what constitutes sufficient reason cannot be laid down by any hard and fast rules. Therefore, she urged the Court to find that the reason for delay to file an application for restoration of the said application advanced by the applicant herein, amounts to good cause.

In view of the submission of the counsel for the applicant and the relevant law, the issue for determination in this application is whether there is good cause for exercising the discretion of the Court in granting the extension of time sought in this application.

It is settled position that in order for the Court to exercise its discretionary powers in extending time under Rule 10 of the Rules, good cause must be shown by the applicant. Thus, what constitutes good cause depends on the circumstances of each case.

In the current application the main reason for the applicant's failure to file application for restoration of Civil Application No. 276/18 of 2019 was due to sudden illness of the applicant's office clerk and the mode of receiving the dismissal order of the Court of 11th February, 2020 which took long time.

Since the application before me is for extension of time to file application for restoration of the dismissed application, suffices here to state that, I have seen the affidavit of one Happy Emmanuel attached under paragraph 20 of the supporting affidavit which explains about when she received the summons and how she felt sick. With that remark, I now move to consider the reason (s) for delay in the current application.

Having gone through the record of this application, in particular, the supporting affidavit I observed that the reason for delay to file the

application at hand is stated under paragraphs 16 and 17 of the supporting affidavit. In order to appreciate the gist of the application, I find it important to reproduce what is stated in those paragraphs hereunder:-

"16. That copy of the said order was posted to me through our postal address No. 78572 Dar es Salaam of which the posted date is not indicated and the same was received by our office on 14th May, 2020 copy of the envelope that delivered the Court Order is hereto annexed and marked as FINCA – 7 and I crave leave of the Court for it to form part of this affidavit.

17. That we could not file the application to set aside the dismissal order on time because when we received the order the time to file application for restoration allowed by the Court of Appeal Rules had already lapsed."

According to the record, the dismissal order of the Court was made under Rule 63(1) of the Rules for nonappearance of the applicant. However, Rule 63(3) of the Rules provides for a room for the party in whose absence the application was determined to apply to the Court to restore the application for hearing. The application for restoration is to be done within thirty (30) days of the decision of the Court in terms of Rule 63(4) of the Rules.

In the current application as it can be observed from the quoted paragraphs of the supporting affidavit, the main reason for the delay to file application for restoration of the dismissed application is that the applicant got the information about the dismissal after lapse of time to file such application. According to the counsel for the applicant, the mode used by the Registrar contributed to the delay to receive the information about the dismissal.

It is on record that the dismissal order of the Court was delivered on 11th February, 2020. However, annexure FINCA – 7 attached to paragraph 16 of the supporting affidavit quoted above does not reveal as to when the said document was sent as stated by the counsel for the applicant. The said annexure only shows the

address and telephone number of the receiver, Reference which is indicated as "Ref. Civ. Appl. 276/18/2019" and the stamp written CITY URGENT MAIL with the following number – CM007418025 TZ on the front part. At the back side, there is a stamp of the Registrar of the Court of Appeal, Dar es Salaam. I agree with the counsel for the applicant that, there is no date showing when the mail was sent. Under paragraph 6 of the supporting affidavit it is stated that, the applicant received the said order on 14th May, 2020.

Ms. Manongi stated in her affidavit that having received the order, she had to investigate as to whether the applicant received summons for appearance. The said investigation took her more than a month following sickness of their office clerk. As a result, the current application was lodged on 16th June 2020.

I have carefully gone through the notice of motion, the supporting affidavit and the submission by the counsel for the applicant, I am satisfied that the circumstances of this case lead me to a conclusion that good cause has been shown for the Court to exercise its discretionary powers to extend time as sought.

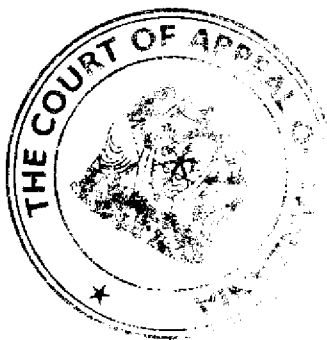
In the upshot, I grant the application. The applicant is ordered to lodge the intended application for restoration of Civil Application No. 276/18 of 2019 within thirty (30) days of the date of delivery of this Ruling. Each party to bear its costs.


It is so ordered.

DATED at **DAR ES SALAAM** this 3rd day of March, 2021

M. C. LEVIRA
JUSTICE OF APPEAL

The ruling delivered this 12th day of March, 2021 in the presence of Ms. Stella Manongi, learned Counsel for the Applicant and the respondent in person, is hereby certified as a true copy of the original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL