

**IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA**

CIVIL APPLICATION NO. 12/07 OF 2022

INDO-AFRICAN ESTATE LTD.....APPLICANT

VERSUS

- | | | |
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| 1. DISTRICT COMMISSIONER FOR LINDI DISTRICT
2. REGIONAL COMMISSIONER FOR LINDI REGION
3. THE MINISTER FOR LANDS AND HUMAN
SETTLEMENT DEVELOPMENT
4. THE ATTORNEY GENERAL | } | ...RESPONDENTS |
|---|---|-----------------------|

**(Application for extension of time from the Decision of the High Court of
Tanzania at Mtwara)**

(Twaib, J.)

**Dated the 22nd Day of February, 2018
in
Land Case No. 17 of 2015**

RULING

23rd & 24th March, 2022

KEREFU, J.A.:

The applicant, INDO-AFRICAN ESTATE LTD, has lodged this application seeking an order for extension of time within which to lodge an appeal against the decision of the High Court of Tanzania at Mtwara, (Twaib, J.) dated 22nd February, 2018 in Land Case No. 17 of 2015. 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 applicant was supplied with marked exhibits late and after being supplied with copy of proceedings; and*
- (b) The Registrar of the High Court issued certificate of delay which excluded the days for the preparation of the copies of proceedings and the marked exhibits, and while verifying the documents and preparation of the record of appeal on 31st October, 2020 it was discovered that the days to be excluded were those of preparation of proceedings and not copies of the marked exhibits.*

The application is supported by an affidavit of one Daimu Halfani, learned counsel for the applicant. On the other hand, the respondents have filed a joint affidavit in reply 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 affidavit in support of the application, on 7th October, 2015, the applicant instituted a suit in the High Court of Tanzania at Mtwara (Land Case No. 17 of 2015) against the respondents claiming for payment of TZS

5,000,000,000.00 plus interests and costs in respect of the applicant's Mkwaya farms measuring 3601 acres. The said suit was based on the government's commitment and promise that it would acquire the said land for the purposes of distributing it to the Mkwaya villagers and that it would pay the applicant the requisite compensation and damages for the said exercise including the land that had already been occupied by the Mkwaya villagers.

In their joint written statement of defence the respondents denied the applicant's claim, hence the suit proceeded into a full trial. At the close of the defendants' defence case, the counsel for the respondents raised two points of law, **one**, that, the suit was time barred as the cause of action arose about forty years' back, and **two**, that there was a mis-joinder and non-joinder of the parties. However, the second point was abandoned and parties argued only on the first point.

After hearing the parties, the trial court sustained the first point of objection and dismissed the applicant's suit for being time barred. Aggrieved, the applicant lodged a notice of appeal in this Court on 7th March, 2018 and on the very same day requested for certified copies

of the proceedings, judgement and decree for purposes of the intended appeal.

Subsequently, on 13th March, 2018, the applicant applied for leave (Misc. Land Application No. 12 of 2018) to appeal which was granted on 9th April, 2019. He then requested to be supplied with certified copies of the proceedings, ruling and drawn order of the said application which were availed to him together with the certificate of delay.

Upon perusal of the trial court's record supplied to her, the applicant discovered that the Registrar inadvertently had omitted the duly endorsed exhibits admitted during the trial. In its letter, dated 9th July, 2019, the applicant notified the Registrar on that omission and requested to be supplied with the said exhibits. The said letter was followed by several reminders written to the Registrar dated 12th September, 2019 and 10th February, 2020 respectively. On 23rd October, 2019, the Registrar informed the applicant that the said exhibits have been misplaced and they have tried to trace them, without success. The said Registrar, however, promised to continue with exercise of searching for the said missing exhibits. Again, on 5th

May, 2020 the applicant sent another reminder to the Registrar on the same subject matter and suggested that, if the said exhibits are not found, then the Registrar may find it appropriate to make directions on the way forward of the appeal under Rule 96 (3) of the Rules. Finally, on 11th September, 2020 the Registrar informed the applicant that they have managed to find the exhibits and requested him to collect them. Thus, the applicant was issued with the said exhibits together with a second certificate of delay after the Registrar had vacated the previous one. However, on 1st November, 2020, while verifying the documents for purposes of preparing the record of appeal, the applicant discovered that the days excluded in the certificate of delay were wrongly indicated. That the Registrar was required to only include the days he used to prepare the initial record of appeal and not copies of duly endorsed exhibits. Thus, the applicant decided to lodge the current application on 4th November, 2020. It is the applicant averments that all that time he was in courts' corridors pursuing the matter diligently and in good faith.

At the hearing of the application, the applicant was represented by Mr. Daimu Halfani, learned counsel whereas the respondents were

represented by Mses. Pauline Mdendemi and Gertrude Songoi, both learned State Attorneys. It is noteworthy that, the applicant had earlier on lodged written submissions in terms of Rule 106 (1) of the Rules which he sought to adopt to form part of his oral submission. On the other side, the respondents did not file any written submissions and they thus addressed the Court under Rule 106 (10) (b) of the Rules.

Submitting in support of the application, Mr. Halfani commenced his submission by fully adopting the contents of the notice of motion, the supporting affidavit and his written submission. In his written submission, Mr. Halfani narrated the historical background to this application as indicated above, he then argued that, the applicant has taken various steps to challenge the impugned decision including lodging of the notice of appeal timely. That, the source of the delay was the failure by the Registrar to issue the applicant with endorsed and marked exhibits that was tendered during the trial. He insisted that the issuance of the duly marked exhibits in the record of appeal is crucial for the validity of the appeal as the said exhibits are part of the evidence and record of the case. Mr. Halfani referred the Court to

Rule 96 (1) (f) of the Rules and argued that, in terms of the said Rule, a valid record of the appeal must contain all documents put in evidence before the trial court. He secured his stand by citing cases of **Joseph Onaukiro Ngiloï v. The Permanent Secretary Central Establishment & 3 Others**, Civil Appeal No. 78 of 2011 and **Amran Mohamed Talib & 2 Others v. Jamal Abdallah Suleiman**, Civil Appeal No. 18 of 2015 (both unreported). He then argued that, the omission to include the said exhibits in the record of appeal would have rendered the applicant's appeal incompetent.

Mr. Halfani submitted further that, in this application, the applicant was supplied with the record of appeal without the endorsed and marked exhibits. That, he applied for them through several letters but without success until 11th September, 2020 when the Registrar vide his letter with Ref. No. MH/C.2/45/184 informed the applicant that the exhibits have been traced and found and are ready for collection. The applicant obtained the said exhibits and was issued with a certificate of delay. However, upon perusal of the said certificate, the applicant discovered that it was incurably defective, thus resorted to the current application.

It was the submission of Mr. Halfani that the applicant has been diligent in pursuing this matter as he made tireless follow-ups for the requested documents and a proper certificate of delay. That, even the current application was promptly made, as it was immediately lodged upon discovery of the said defects in the certificate of delay which was not occasioned by the applicant's fault, inaction or negligence. He thus urged the Court to find out that the delay was due to the time spent in pursuing the appeal and follow-ups of the said exhibits. Reinforcing his argument, Mr. Halfani cited the cases of **Standard Chartered Bank (Tanzania) Ltd v. BATA Shoe Company (T) Limited**, Civil Application No. 101 of 2006 and **Diamond Trust Bank Tanzania Limited v. Idrisa Shehe Mohamed**, Civil Application No. 89/15 of 2018 (both unreported). He then submitted that the reasons advanced by the applicant constitute good cause within the purview of Rule 10 of the Rules. He finally urged me to grant the application with costs.

In response, Ms. Mdendemi commenced her submission by adopting the contents of the affidavit in reply. She then strenuously opposed the application by arguing that the applicant has failed to

show good cause for extension of time. She specifically referred to paragraph 16 of the applicant affidavit and argued that the reason for the delay indicated therein is ignorance, as the applicant received the certificate of delay on 11th September, 2020 but discovered the defects on 1st November, 2020. It was her argument that, if the applicant could have been diligent enough and read the said certificate upon receipt, would have discovered the said defects on the same day and could have acted promptly. She contended that ignorance cannot constitute a good reason for extension of time. To bolster her proposition, she cited **Kibo Hotel Kilimanjaro Limited v. The Treasury Registrar & Another**, Civil Application No. 502/17 of 2020 and **Wambele Mtumwa Shahame v. Mohamed Hamis**, Civil Reference No. 8 of 2016 (both unreported). She finally submitted that the applicant has failed to submit good cause to warrant grant of this application.

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 -see; **Kalunga & Company Advocates Ltd v. National Bank of Commerce Ltd** (2006) TLR 235, **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987, **Elia Anderson v. Republic**, Criminal Application No. 2 of 2013 and **Attorney General v. Tanzania Ports Authority & Another**, Civil Application No. 87 of 2016 (all unreported) to mention but a few.

Now, in the application at hand, it is obvious that the applicant's affidavit has sufficiently explained the reasons for the delay by stating the chronological account of what exactly transpired in this matter.

That, the impugned decision, subject matter of the intended appeal, was handed down on 22nd February, 2018. The applicant, within the prescribed time manifested his intention to appeal against that decision by lodging a notice of appeal on 7th March, 2018 and requested for certified copies of the proceedings, judgement and decree for purposes of the intended appeal.

Upon perusal of the trial court's record supplied to her, the applicant discovered that the Registrar inadvertently had omitted the duly endorsed exhibits admitted during the trial. In its letter, dated 9th July, 2019, the applicant notified the Registrar on that omission and requested to be supplied with the said exhibits. The said letter was followed by several reminders written to the Registrar dated 12th September, 2019, 10th February, 2020 and 5th May, 2020. However, the said exhibits could not be traced till 11th September, 2020 when the same were availed to the applicant together with a second certificate of delay after the Registrar had vacated the earlier one. It is also on record that the current application was lodged 4th November, 2020, two days from the date when the applicant discovered defects in the second certificate of delay availed to him.

Having considered the chronological of events narrated by Mr. Halfani, I find that there is ample evidence that the applicant had acted diligently well within time, but only delayed by the inadvertently mistakes by the Registrar. As such, I cannot lay some of these blames to the applicant. If the Registrar could have availed a correct record of appeal with well-prepared documents, all these confusions could not have happened.

In the premise, I find no reason to penalize the applicant for the mistake that was beyond his control. In the circumstances, I am persuaded by the finding of my sister Kimaro, JA, (as she then was), in **Tanzania Revenue Authority v. Tango Transport Company Ltd**, Civil Application No. 5 of 2006 when she considered an application for extension of time to lodge a notice of appeal and noted that, the delay was caused by the mistakes done by the Registrar. At pages 10 – 11 of the Ruling Justice Kimaro observed that: -

"In my considered opinion if the Court denies this application it will amount to penalizing the applicant for a mistake done by the Court itself. This will cause grave injustice on the part of the applicant who under article 13(6)(a) of the Constitution

of the United Republic of Tanzania, 1977 is entitled as of right to appeal against the decision of the High Court.... it will not be in the interest of justice to deny him his right of appeal on this basis because taking such a position would amount to give an unjust decision. I say so because the Court, through its Registrar was the source of the problem...The role of the courts is to meet out justice and not to deny justice to parties because of its own mistakes" [Emphasis added]. She then granted the application.

Likewise, in the application at hand, I am settled in my mind that, the applicant's affidavit together with the submission of Mr. Halfani have clearly demonstrated beyond any doubt that the delay was neither caused by nor can it be attributed to any dilatory conduct on the part of the applicant. The applicant's application has fulfilled the test above and deserves to be granted.

I am however mindful of the fact that, in her submission, Ms. Mdendemi had referred me to paragraph 16 of the affidavit and argued that the applicant had pleaded ignorance and thus she urged me to dismiss the application. With respect, I am unable to go along with her on account of reasons intimated above. I wish also to note

that, although, Ms. Mdendemi prayed for the application to be dismissed, but she said nothing on how the respondents will suffer if this application is granted. I equally do not see in which ways the respondents will be prejudiced if extension of time is granted.

In the premises, I find merit in the application and it is hereby granted. The applicant should lodge the intended appeal within sixty (60) days, from the date of delivery of this Ruling. Costs to be in the cause.


It is so ordered.

DATED at MTWARA this 24th day of March, 2022.

R. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 24th day of March, 2022 in the presence of Ms. Getruda Songoi holding brief of Ms. Daimu Halfani, learned Counsel for the Applicant and Ms. Getruda Songoi, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL