

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 359/01 OF 2022

AHMED MOHAMED KIDEGE APPLICANT

VERSUS

MSICHOKE PETER LUGOMERESPONDENT

(Application for extension of time within which the Applicant be able to save the Respondent with a Notice of Appeal and a letter requesting for proceedings, Judgment, decree and record of appeal out of time against the Decision of the High Court of Tanzania, at Dar es Salaam)

(Shangwa, J.)

dated 4th day of December, 2015

in

Civil Appeal No. 99 of 2014

RULING

31st May & 15th June, 2023

KITUSI, J.A.:

This is an application for extension of time lodged by way of a notice of motion under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) and supported by three affidavits, one by Ahmed Mohamed Kilege the applicant and the other two by Mr. Jeremiah Mtobesya his lawyer and of Ms. Sara Mwipopo, a legal officer working in the same firm of advocates. It seeks extension of time within which to serve to the respondent a copy of notice of appeal and a letter requesting for proceedings, judgment and decree. Within the same

notice of motion, the applicant prays for extension of time within which to file a record of appeal out of time.

The application arises from matrimonial proceedings that commenced at Ilala District Court Matrimonial Cause No. 08 of 2013 then to the High Court Civil Appeal No. 99 of 2014 whose decision aggrieved the applicant. According to the applicant's affidavit he took steps towards appealing the decision of the High Court. First he lodged a notice of appeal and made to the Registrar of High Court his written request for copies of proceedings, judgment and decree. However, although he served to the respondent copies of the notice of appeal and that of the letter, the same were not endorsed because, he avers, he was not accordingly advised by his former advocate.

Secondly, he filed Miscellaneous Civil Application No. 780 of 2015 seeking leave of the High Court to appeal to the Court but that application was dismissed. He then filed another application for leave by way of second bite to the Court after obtaining an order of extension of time to do so. Later it dawned on the applicant that leave was not a requirement in appealing against judgment and decree arising from matrimonial proceedings. He therefore withdrew the application on 3/6/2022.

Thus, as the applicant is out of time, he needs an order of extension of time allowing him to first serve the respondent with a copy of notice of appeal and letter requesting for requisite documents and secondly, to lodge the appeal.

The applicant's affidavit gives an account of the delay from 13th June, 2022 when the copy of the ruling of withdrawal was availed to him and delivered it to his advocates. Mr. Mtobesya's affidavit explains away the days from 13th June 2022 when he received the copy of ruling to 16th June 2022 when he began to prepare this application. He stated that on 13th June, 2022 he was appearing before the High Court, citing the case. On 14th June, 2022 he was appearing before the Court in a case which he also cited, and on 15th June, 2022 he spent the day at Kisumu Resident Magistrates' Court representing a client who had just been arrested the previous day.

The affidavit of Ms. Mwaipopo a legal officer in the same law firm as Mr. Mtobesya explains what happened from 17th June, 2022 when she was instructed by Mr. Mtobesya, to file this application at the Registry of the Court but she could not file it because the registry officer told her it did not bear a sufficient address of service. She had to go back and amend the documents, get the applicant to sign them again and approach the Court registry again. However, when she went back to

the Court Registry later it was past 13.00 hours and the window had been closed. That was on a Friday so she had to wait and lodge the application on the immediate next Monday, that is 20th June, 2022.

The application is based on two grounds cited in the notice of motion; one, that the applicant has been diligently pursuing matters connected to the intended appeal, and two, that the applicant timely served the copy of notice of motion on the respondent but the latter did not endorse on the applicant's copy to signify receipt.

Counsel referred to the relevant paragraphs in the affidavit of the applicant showing that his former advocate did not properly advise him on the consequences of a document served to the other party not being endorsed. For this he referred us to the case of **Felix Tumbo Kisima vs. Tanzania Telecommunication Co. Ltd & Another** [1997] T.L.R 57. And also, the case of **Yusuf Sawe & Another vs. Hadija Yusuf**, Civil Appeal No. 1 of 2002 (unreported) for the view that negligence of an advocate may constitute good cause for extension of time.

Mr. Mtobesya also took me through the litigations that were conducted by the applicant. He referred to unsuccessful attempts averred in paragraphs 7, 8 and 9. Then the second bite application referred to in paragraph 10 which he withdrew on 3/6/2022 as per

paragraph 11 and whose ruling was supplied on 13/6/2022 as alluded to earlier.

Mr. Nehemia Gabo, learned advocate represented the respondent. In addressing me, Mr. Gabo relied on the respondent's affidavit in reply and took issue with the omission to endorse the notice of appeal. He submitted that that cannot be blamed on the advocate as it is a party's duty under rule 84 (1) of the Rules to effect service of notice of appeal, and in any event, it is the Court process server who ought to depone to such a fact. He urged that there is no negligence by advocate in this case therefore the cases of **Felix Tumbo** (supra) and **Yusuf Sawe** (supra) are distinguishable.

As for the delay caused by the applicant's pursuit of other matters, Mr. Gabo submitted that it is Mr. Mtobesya who wrongly pursued an application for leave to appeal a judgment and decree in a matrimonial cause. Mr. Gabo's argument is that Mr. Mtobesya should have known better, and that his negligence cannot be good cause.

Counsel drew my attention to the fact that the notice of appeal was lodged over seven years ago on 10/12/2012 and was supposed to be served within 30 days of that date. The letter requesting documents was written on 7/12/2015 also over seven years ago. Citing the case of **Charles Richard Kombe vs. Kinondoni Municipal Council**, Civil

Application No. 379/01 of 2018 (unreported), for the principle that the applicant ought to account for each day of the delay, Mr. Gabo has submitted that the applicant did not discharge that duty.

In a rejoinder Mr. Mtobesya insisted that rule 84 (1) of the Rules was complied with by the applicant but since there is no endorsement, evidence of that compliance is missing. He also reiterated the submission that litigating diligently in related matters is good cause even if a party is represented.

Paramount for my initial decision is factual, that is whether I accept the applicant's averment in paragraph 6 of the applicant's affidavit that he served the respondent with the copy of notice of appeal and letter, or not as alleged in paragraph 3 of the affidavit in reply. In addressing this issue, I take note of the fact that what amounts to good cause for extension of time under rule 10 of the Rules is not defined and that in determining this issue every case has to be decided on the basis of its own peculiar facts. [See the case of **Moses Mchunguzi vs. Tanzania Cigarette Co. Ltd**, Civil Reference No. 3 of 2018 (unreported).

Over the years it has been agreed that the following factors will be considered in gauging whether a party has made a case for extension of time or not. These factors, taking from, for instance, **Lyamuya**

Construction Co. Ltd v. Board of Registered Trustees of Young Women' Christian Association of Tanzania, Civil Application No. 2 of 2010 (unreported), require: -

- " (a) The applicant must account for all period of delay*
- (b) The delay should not be inordinate*
- (c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take*
- (d) If the court feels that there are other sufficient reasons, such as existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged".*

Has the applicant managed to account for the entire period of the delay? The answer is partly yes, especially the period after the withdrawal of the last application and supply of copy of ruling on 13th June 2022. He may have also established what has now been accepted as technical delay, which accounts for the period spent in pursuing other related matters. See the case of **Tanzania Fish Processors Limited v. Eusto K. Ntagalinda**, Civil Application No. 41/08 of 2018 (unreported).

I however have serious doubts on the duration of the delay. Mr. Gabo has submitted that what the applicant intends to be permitted to

do ought to have been done more than seven years ago, and there has been no rejoinder to that argument. Seven years is, in my view, way too inordinate to turn a blind eye on. When this factor is considered along with factor (c) in the excerpt from **Lyamuya's case** above, which requires *"diligence and not apathy, negligence or sloppiness"* it leads me to the conclusion that the applicant was so negligent and indifferent that it took him over seven years to take an action that ought to be taken within 30 days. An order in favour of the applicant will, certainly, cause the respondent a great deal of prejudice and inconvenience. In **Paradise Holiday Resort Limited v. Theodore N. Lyimo**, Civil Application No. 435/01 of 2018 (unreported) it was held that in exercising its discretion under rule 10 of the Rules:-

*"...the Court consistently considers factors such as the length of the delay, the reasons for the delay, **the degree of prejudice the respondent stands to suffer if time is extended**, whether the applicant was diligent, whether there is a point of law of sufficient importance, such as the illegality of the decision sought to be challenged". (Emphasis mine).*

The pursuit of other matters would only be relevant in explaining delay in instituting an appeal. It has no relevance in accounting delay in serving the respondent with notice.

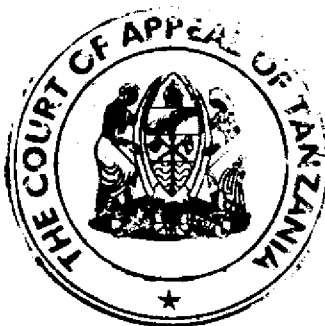
Therefore, the applicant's contention that he served the respondent cannot hold in the absence of evidence of an endorsement by the recipient. To allow such bare words would make application of rule 10 of the Rules very unpredictable, in my view.

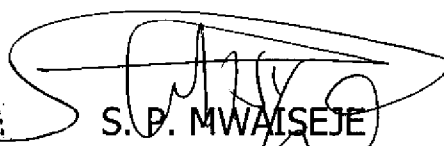
For the reason that the applicant was not diligent and that the period of the delay is inordinate such that it will prejudice the respondent if time is extended, I find no merit in this application and consequently dismiss it. I make no order as to costs because the essence of this application is a matrimonial cause.

DATED at DAR ES SALAAM this 13th day of June, 2023.

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 15th day of June, 2023 in the presence of Mr. Deogratias Mahinyila, learned counsel for the Applicant and Mr. Nehemia Gabo, learned counsel for the Respondent is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL