

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 447/16 OF 2021

GRANITECH (T) COMPANY LIMITED..... APPLICANT

VERSUS

DIAMOND TRUST BANK TANZANIA LIMITED.....1ST RESPONDENT

SAFINA HOLDING COMPANY LIMITED.....2ND RESPONENT

JOSEPH ANTHONY KARWIMA.....3RD RESPONDENT

JOHN KASSIM MSEMO LIMITED.....4TH RESPONDENT

THOMAS MTEI LEBABU.....5TH RESPONDENT

**(Application for extension of time to file written submission in reply
to the appellant's written submissions in respect
of Civil Appeal No.153 of 2021)**

.....

RULING

14th July & 1st August, 2023

MGONYA. J.A.:

This is an application for extension of time within which the applicant herein can file a written submission in reply out of time. The application has been preferred under Rules 10, 48(1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) through a notice of motion supported by three separate affidavits of Dr. Alexander Thomas Nguluma, Mr. Japhet Stephen and Ms. Victoria Rumisha all from Rex Advocates.

Briefly, the facts leading to this application as garnered from the affidavits in support of the application is thus; before the High Court of

Tanzania (Commercial Division) there was a Commercial Case No. 44 of 2019 between the parties herein. On 18th December, 2020 the High Court delivered its judgment in favour of the applicant herein. Aggrieved by the decision, the 1st Respondent filed its appeal on 11th May, 2021 vide Civil Appeal No. 153 of 2021, followed by the written submission in support of the appeal which was filed on 6th July 2021 and served to the applicant's firm on 09th July, 2021.

As the law requires under rule 106(7) of the Tanzania Court of Appeal Rules, 2009 (the Rules), being served with the submission in chief, the applicant herein was supposed to file the reply to the submissions within 30 days. However, the applicant failed to meet the deadline hence this application.

At the hearing of the application, it was Dr. Alexander Thomas Nguluma who represented the applicant, while the 1st respondent was represented by Zacharia Daudi, learned advocate and the remaining respondents neither appeared nor filed their submissions.

When Mr. Nguluma was called upon to submit in support of the application, he adopted the three affidavits in support of notice of motion and by referring to rule 10 of the rules, he stated that this Court has discretion to grant extension of time to file written submission upon good cause be shown. He went on to submit that the circumstance of this

application is peculiar and quite different from the cases attached by the respondent. That a saga in this application is, the submissions were served in their office but the receptionist who was sick had kept them in the desk drawer. Therefore, he lost 76 days between the date the respondent served the documents to their office and the date they discovered that they have been served. Then, he lost 4 days from the date he became aware of the submission to the date he filed this application. It was Dr. Nguluma's further submission that, there was no any negligence on their part. Also, there is no any prejudice to the respondent hence the application be granted.

In reply to Dr. Nguluma's submission, Mr. Zacharia learned counsel who was brief and direct contended that, the Court should not include forgetfulness as one of the use for extension of time. That he doesn't see any difference between forgetting and being negligent. That the applicant's counsel was negligent to file. Counsel Zacharia also refuted the applicant's contention that the 1st respondent will not be prejudiced. He argued that being a lending financial institution struggling to file an appeal of which the hearing has been withheld and also the 1st respondent had to hire the advocate to defend this application, henceforth, the 1st respondent has been highly prejudiced. On that premise he prayed the Court to dismiss the application with costs for want of merit.

In his rejoinder Dr. Nguluma reiterated his submission in chief while insisting his initial prayer that his application be granted.

I have given due consideration to the rival arguments made by the parties on whether or not good cause has been shown by the applicant to warrant the extension of time. The issue which calls for determination is whether the alleged sickness and forgetfulness of the receptionist is a good cause upon which to grant this application.

As rightly submitted by Mr. Nguluma this Court has discretion to grant extension of time upon good cause shown. Such power is bestowed by rule 10 of the Rules. Although there is no straight definition of the phrase "good cause" so as to guide the Court in exercising its discretion to enlarge time under rule 10, the Court always 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 and whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged. See: **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010; **Omary Ally Nyamalege (As the Administrator of the estate of the late Seleman Ally Nyamalege) & Others vs. Mwanza Engineering Works**, Civil Application No. 94/08

OF 2017, **Benjamin H. Ndesario T/A Harambee Bus Services/ Ub 40 Bus Service Vs. M/S Rahisi General Marchant Ltd & Another**, Civil Application NO. 265/05 OF 2020; **Loshilu Karaine and Three Others v. Abraham Melkizedeck Kaaya (suing 3 as Legal Representative of Gladness Kaaya)**, Civil Application No. 140/02 of 2018; **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 and **Henry Muyaga v. Tanzania Telecommunication Company Ltd**, Civil Application No. 8 of 2011 (all unreported). In the latter case the Court observed that:

"The discretion of the Court to extend time under Rule 10 is unfettered" but has also been held that, in considering an application under the Rule, the Court may take into consideration such factors as, the length of the delay, the reason for the delay, the chances of success of the intended appeal and the degree of prejudice that the respondent may suffer if the application is granted. [See Tanzania Revenue Authority v. Tango Transport Co. Ltd, Consolidated Civil Applications No. 4 of 2009 and 9 of 2008 (unreported)."

See also the famous cases of **The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992]

TLR 387; and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

According to the affidavits and submissions of the counsel for the applicant, reasons for delay to file submission in reply is in twofold, that the receptionist who received the submission kept the same in the desk drawer and that the said receptionist was sick as there was COVID by that time. It was Mr. Nguluma's submission that there was no any negligence on their part although he lost 76 days, from the date of service to the time he became aware of the service.

As indicated earlier, the applicant supported his prayer by three affidavits. One of the affidavits is the one deponed by one Victoria Rumisha who is the receptionist stated to be sick. It is from paragraph 3 to 5 of the affidavit where she deponed that she received the written submission on 9th July, 2021 at 12:03 noon in respect of Civil Appeal No. 153 of 2021. She went on to state that the time she received the document she was not in good health as she had severe flue. That she left the office to the hospital for treatment where she was advised to isolate herself for 14 days, without forwarding the document to the counsel responsible. She deponed further under paragraph 5 that the applicant's counsel being working from home due to COVID 19 pandemic,

she had to hand over the written submission when in office but due to lapse of memory she didn't submit the said document until 24th September, 2021.

At the outset, I agree with Mr. Nguluma that sickness can serve a sufficient ground for the Court to enlarge time. However, there must be medical reports to prove the sickness as it has been explained how the alleged illness contributed the delay. (See; **Juto Ally vs Lukas Komba & Another**, Civil Application No.484/17 of 2019 (unreported)).

Turning to this application it is submitted that the delay occasioned by sickness and forgetfulness of the receptionist. However, apart from bare facts of the alleged sickness there is no any piece of evidence attached to the affidavit to prove that she was sick. She deponed that she went to hospital for examination but there is no medical evidence to substantiate the allegation. Nothing was deponed as to which hospital she went, no explanation as to what was the observation after medical examination, neither no medical chit attached to the affidavit to persuade the Court to exercise its discretion power to enlarge time. Therefore, it is from this shortcoming I am forced to believe that the alleged sickness came to the applicant's counsel as an afterthought in his struggle to persuade this Court to extend the time.

Coming to the point of losing memory as deponed by the receptionist in the filed affidavit, admittedly, we as human being tend to forget in our daily undertakings. However, am warned to include forgetfulness to be a sufficient reason for the Court to enlarge time. For proper and timely administration of justice, there must be strict deadlines in filling legal documents. The deadlines are set to maintain order and efficiency in the legal process. Therefore, there must be genuine reasons which prevents someone from meeting a dead line of which forgetfulness is not among those reasons. Turning to the scenario of this case, I decline to agree with Mr. Nguluma's contention that, the circumstance of this application is peculiar merely because the receptionist forget to give him the submission on time. It is from the submission that the said document was supplied to him after 76 days. I find the same to be lack of diligent and apathy hence no excuse on that.

As law requires, before filling an appeal the respondent is supplied with a copy of notice within 30 days. The intention of the notice is to alert that the other party was aggrieved with the decision hence something is going on before the Court. No where in his submission Mr. Nguluma stated that he was not supplied with a notice to appeal. Therefore, he was aware on what was going on before the Court with regard to the subject matter. With those facts, if he was diligent enough, he was duty

bound to have several correspondences with receptionist to check on which documents came into their office for his attendance. Informing the Court that he became aware with the document after 76 days, reveals that he was not diligent. As submitted by Mr. Zacharia for the respondent, the circumstance of this application reveals nothing but negligence.

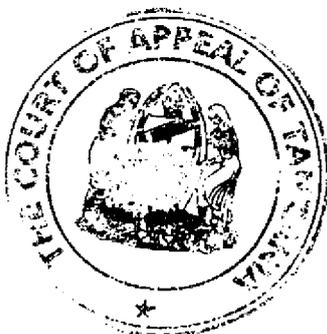
All said and done, I find no sufficient reason established by the applicant warranting this Court to extend the time. Henceforth, I find no merit in the application and I dismiss it with costs.

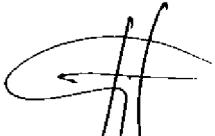
It is so ordered.

DATED at **DAR ES SALAAM** this 1st day of August, 2023.

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered this 1st day of August, 2023 in the presence of Mr. Zakaria Daudi, learned counsel for the 1st Respondent, also holding brief for Dr. Alex Nguluma, learned counsel for the Applicant and in the absence of the 2nd, 3rd, 4th and 5th Respondents is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL