

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

CIVIL APPLICATION NO. 540/08 OF 2022

BENJAMIN ELIKANA MASOTA @ BENJAMIN MASOTA..... APPLICANT

VERSUS

OMEGA FISH LIMITED.....RESPONDENT

**(Application for leave of the court to serve the respondent out of time
with a letter requesting for proceedings, judgment and decree of the
High Court of Tanzania (Commercial Division) at Mwanza)**

(Nangela, J.)

dated the 08th day of June, 2022

in

Commercial Case No. 4 of 2020

.....

RULING

16th & 22nd August, 2023

MWANDAMBO, J.A.:

The applicant, Benjamin Elikana Masota @ Benjamin Masota, was aggrieved by the decision of the High Court (Commercial Division) sitting at Mwanza made on 10/06/2022 in Commercial Case No. 4 of 2020. He accordingly lodged a notice of appeal against that decision. Similarly, in terms of rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), acting through his advocates, on 4/07/2022, the applicant applied for copies of judgment, decree and proceedings with the Deputy Registrar of the High Court for the purpose of the

intended appeal. In terms of rule 84 (1) of the Rules, he served a copy of the notice of appeal on the respondent's advocates. However, he omitted to serve a copy of the letter to the Deputy Registrar as required under rule 90 (3) of the Rules. Since time for serving a copy of the said letter had run out, the applicant has preferred the instant application for enlargement of time for serving the said copy on the respondent.

The application which is made under rule 10 of the Rules, is supported by the applicant's an affidavit and a supplementary affidavit deponed by Dioniz John Mwasi; his erstwhile advocate. Resisting the application, the respondent has filed an affidavit in reply affirmed by its managing director, Amin Mohamed Hassanali.

According to the applicant, failure to serve the copy on the respondent's advocates was a result of human error by his erstwhile advocate who believed that he had done so along with the notice of appeal only to be discovered later by the current advocate that such copy had not been served. It is averred further that, upon such discovery, the applicant, acting through. Mr. Mashaka Fadhili Tuguta, learned advocate of Extreme Attorneys, lodged the application nine

days of the expiry of 30 days requisite for service of the copy on the respondent's advocate. The respondent for her part who is represented by Messrs. Geoffrey Kange and Thobias Ruge Ferdinand, learned advocates, contends that the failure was a result of negligence and in any case, the delay is inordinate.

At the hearing of the application, Messrs. Tuguta and Kange addressed me for and against the application after adopting averments in the respective affidavits and decided cases. Mr. Tuguta's submission focused on two aspects, namely; cause of the delay and length of such delay. Relying upon the Court's unreported decision in **Kambona Charles (as Administrator of the Estate of the Late Charles Pangani) v. Elizabeth Charles**, Civil Application No. 529/17 of 2019, Mr. Tuguta urged me to accept that failure to serve the copy was a result of human error which is distinct from negligence or lack of diligence. It was further urged that, in any case, the delay was for only five working days and so, the Court should exercise its discretion in the applicant's favour.

Resisting the application, Mr. Kange was emphatic that the applicant's erstwhile advocate was negligent for his failure to serve

the copy along with the notice of appeal. He sought to distinguish **Kambona Charles** (supra) arguing that, in that case, there was evidence that the applicant's advocate was working under pressure away from Dar es Salaam in a task force which is not the same in this application in which no explanation has been made to justify the extension sought. The learned advocate argued, relying on the Court's decision in **Magnet Construction Limited v. Bruce Wallace Jones**, Civil Appeal No. 459 of 2020 (unreported), that the applicant has not disclosed good cause for the delay. Besides, on the authority of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), he argued that, the delay is inordinate as the applicant has not accounted for each day of delay to warrant the Court's exercise of discretion for the order sought.

I will begin my discussion with the obvious; the Court's discretion under rule 10 of the Rules. Both counsel agree and it is indeed elementary that it must be exercised judiciously based on judgment on what is fair under the particular circumstances guided by the rules and principles of law consistent with the Court's decision in

Mwita s/o Mhere v. Republic [2005] T.L.R. 107. In other words, the exercise of discretion must take into account all relevant factors as opposed to arbitrariness, personal whims, sympathy or capriciousness. Whilst it is of paramount importance to act according to rules and principles of law in exercising discretion, one must not lose sight of the fact that each case must be decided according to peculiar facts and circumstances. That means, the authorities placed before me for and against the application must be treated from that perspective.

Mindful of the foregoing reality, the Court has, through decided cases, developed parameters to guide it in the exercise of its discretion in applications for extension of time. In **Lyamuya Construction** (supra), for instance, the Court listed such parameters to include: (1) cause of the delay; is it reasonable?; (2) length of the delay; whether it is inordinate and explanation accounting for such delay; (3) exhibition of diligence by the applicant and not apathy, negligence or sloppiness in the prosecution of the intended action; and (4) existence of a point of law of sufficient importance such as, illegality in the decision sought to be challenged. It is significant that, in **Kambona Charles** (supra), the Court discussed other considerations from previous decisions to include; prejudice and its

degree, if any, each party stands to suffer depending on the decision the court takes, conduct of the parties, and the need to strike a balance of the interest of a successful party against the interest of a party who has a constitutional right of appeal (at page 5).

Applying the above in the instant application, it is common cause that, the determination of the application lies in two of the considerations namely; cause behind the delay and whether such delay is inordinate. The learned advocates crossed swords on the cause of the delay; whether it was a result of human error and mistaken belief or negligence and lack of diligence. There is no dispute that the applicant's erstwhile advocate, one Dioniz John Mwasi acted promptly in lodging a notice of appeal and applying for certified copies of proceedings from the Deputy Registrar of the High Court. Likewise, there is no dispute that the said advocate served a copy of the notice of appeal on the respondent's advocate within the prescribed time. The dispute lies in the failure to serve a copy of the letter applying for certified of proceedings; was it attributed to human error or negligence?

Having examined the sequence of events in the affidavit and the supplementary affidavit, I cannot, with respect, share Mr. Kange's view that the delay was a result of negligence. The view I have taken is reinforced by what the Court said in **Zuberi Mussa v. Shinyanga Town Council**, Civil Application No. 3 of 2007 (unreported) referred to in **Kambona Charles**. In that decision, the Court made a distinction between pure human error which may be considered to be good cause and mistakes amounting to lack of diligence. While I accept that there was indeed a lapse on the part of the erstwhile advocate in failing to serve a copy of the letter on the respondent's advocate, I am far from being persuaded that such lapse constituted lack of diligence considering the promptness in taking steps to remedy it by filing an application for extension of time and absence of evidence of repetition of the same lapse. I am thus inclined to accept that, taking into account all the surrounding circumstances in the instant application, the delay was, but a result of human error rather than negligence.

Next I will consider the length of the delay in taking an action to remedy the default. I propose to address the issue in the light of the time requisite for service of the copy. Admittedly, rule 90 (3) of the

Rules does not set time limit within which to serve the copy. However, in **Principal Secretary, Ministry of Defence, National Service v Devram Valambhia** [1992] T.L.R. 387, the Court which is equivalent to rule 90 (3) of the Rules construed rule 83 (1) of the replaced 1979 Rules of the Court on the requirement to serve a copy of the letter to the Registrar to be co-extensive with the 30 days period within which the appellant has to send a copy of that letter to the respondent. The Court reiterated that position in in **Novatus Williams Nkwama v. TUGHE** (Civil Appeal No. 353 of 2020) [2021] TZCA 40, (TanzLii, 21 February 2022).

It will be clear by now that Mr. Tuguta cannot be correct in his argument that 30 days period has to be reckoned from the date on which the applicant sent the letter to the Deputy Registrar; 4/07/2022. On the contrary, since the decision against which it is desired to appeal was made on 08/06/2022, time for serving the copy expired on 07/07/2022. That means, the applicant lodged the application 62 days after the delivery of the judgment sought to be appealed against. Nevertheless, the actual delay was, in the circumstances, a period of 32 days reckoned from the expiry of 30 days of the date of the delivery of the impugned judgment.

Back to the issue, I must confess that its determination is not always a simple one. I say so mindful of the fact that, a determination whether the delay is inordinate or not is not on any mathematical precision it being a subjective one depending on the peculiar circumstances of each case. The learned advocate for the applicant urged me to find that a delay of five working days was not inordinate on the understanding that time for doing so was to be reckoned from the date his erstwhile advocate applied for the requisite copies. As alluded to above, the actual delay was 32 days. Be it as it may, the respondent's advocate was adamant that the delay was inordinate the more so when the applicant has not accounted for each day of delay to warrant the Court's exercise of discretion in his favour.

Mindful of the above, in my view, a determination of what is inordinate will depend on the peculiar facts of each case but regard must be had to the plain a dictionary meaning of the word itself; far more than is usual or expected, excessive [See: Oxford **Advanced Learner's Dictionary**, 10th Edition at page 800]. I am alive to the applicant's duty to account for each day of delay. In this case, the applicant was bound to explain away a delay of 32 days from the date of expiry of the time requisite for serving a copy of the letter to the

respondent to benefit the exemption from 60 days limitation to institute his appeal as required by rule 90 (1) of the Rules. Obviously, that was only necessary if the Deputy Registrar was unable to supply him with the documents requested prior to the expiry of 60 days reckoned from the date of lodging the notice of appeal. Had the applicant been furnished with the copies of the documents before the expiry of 60 days, he could have instituted his appeal without obtaining a certificate of delay from the Deputy Registrar.

I have already accepted the cause behind the delayed service of the copy. The circumstances in this application reveal that, (1) the applicant's erstwhile advocate mistakenly believed that he had served a copy of the letter to the respondent along with the copy of the notice of appeal which is not so unusual, (2) the applicant engaged another advocate who discovered the omission when time for serving the copy had already lapsed and, (3) through the current advocate, the applicant acted promptly by lodging the instant application. On the whole, I do not think that a delay of a month for effecting service of the copy of the letter on the respondent's advocate can be said to be unusually excessive in the circumstances.

Finally, I have to consider whether there will be any prejudice to the respondent if the application is granted. For avoidance of doubt, this factor is taken in addition to other factors in the prevailing circumstances of the application rather than a stand-alone consideration. The word prejudice is defined by the **Black's Law Dictionary**, 8th Edition, Bryan A. Garner to mean:

"Damage or detriment to one's legal rights or claims"

[At page 1218]

The respondent is a decree holder in the impugned judgment with a right to seek execution of the decree regardless of the pendency of the notice of appeal let alone the appeal if, any. It has not been suggested that the respondent will in any way be prevented from executing the decree if the application will be granted neither will the grant of the application be detrimental to her legal right to enjoy the fruits of the decree. On the contrary, in my view, striking the balance of the interest of the parties, the grant of the application in the circumstances of the application will place the applicant in a position to exercise his statutory right of appeal from the decision against him without any prejudice the respondent's right to enforce the decree.

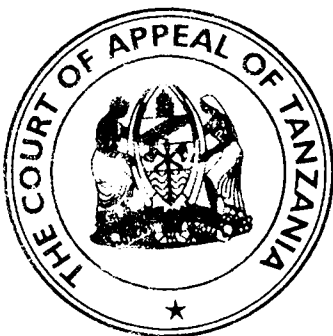
In the event, I am satisfied that the applicant has shown good cause for the exercise of discretion under rule 10 of the Rules. Accordingly, I grant the application and extend the time for serving a copy of the letter on the respondent not later than 30 days from the date of this ruling. Costs shall be in the cause.

It is so ordered.

DATED at MWANZA this 21st day of August, 2023.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of August, 2023 in the presence of the applicant in person unrepresented, Mr. Mashaka Fadhili Tuguta, learned counsel for the Applicant who took brief for Mr. Geoffrey Kange, learned counsel for the Respondent, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to read "A. L. Kalegeya".

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL