

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 298/16 OF 2020

FIRST NATIONAL BANK TANZANIA LIMITED.....APPLICANT

VERSUS

HUSSEIN AHMED SALWAR t/a PUGU HARDWARE (200).... 1ST RESPONDENT

AHMED HUSSEIN ABDULKARIM..... 2ND RESPONDENT

**(Arising from the decision of the High Court of Tanzania
(Commercial Division) at Dar es salaam)**

(Fikirini, J.)

dated at 22nd day of April 2020

in

Commercial case No.57 of 2019

.....

RULING

3rd & 8th November, 2023

MLACHA, J.A.:

The applicant, First National Bank Tanzania Limited filed an application against Hussein Ahmed Salwar t/s Pugu Hardware (200) and Ahmed Hussein Abdul Karim (herinafter referred to as the first and second respondents) seeking extension of time within which to file an appeal before the Court against the decision of the High Court Commercial Division made in Commercial case No. 57 of 2020 (Fikirini J.) as she then was. The application

is made under rule 10 of the Tanzania Court of Appeal Rules, 2009, (the Rules) and is supported by the affidavit of Mr. Joseph Kipeche, learned advocate.

The background of the matter as reflected in the affidavit and documents supporting the application is as follows; The applicant filed Commercial Case No. 57 of 2020 claiming Tzs. 490,286,954.82 being the principal loan amount plus interests arising out of a facility agreement between the applicant and the first respondent. The second respondent was the guarantor. As they could not be traced, service was done by publication. The applicant was then called to establish her case in the absence of the respondents. The High Court delivered the judgment on 22nd April, 2020 dismissing the matter for want of proof. The applicant was aggrieved and filed a notice of appeal on 15th May 2020. They also requested to be supplied with a copy of proceedings for appeal purposes. As the respondents were not parties in the proceedings at the High Court, it was not possible to serve them with copies of the notice of appeal and the letter requesting to be supplied with copies of the judgment, decree and proceedings.

The applicant lodged Civil Application No. 194/16 of 2020 before the Court praying for direction on the manner in which the appeal could be lodged without service of the notice of appeal and the letter to the respondents who were not parties in the High Court. The Court directed that in the

circumstances, the appeal could be lodged without service of the notice and the letter to the respondents. The process caused a delay making her out of time. That is the essence of the application now before the Court.

Making reference to rule 90(1), it was submitted that the appeal was supposed to be filed within 60 days from the date of filing the notice of appeal, that is between 15th May 2020 and 11th July 2020 but it could not be filed because the applicant had not been supplied with a copy of proceedings. They were supplied with the same on 20th July 2020 well out of the statutory period of 60 days. It was submitted further that the applicant could not rely on the certificate of delay because it could not be issued without service of a copy of the letter to the respondents as required by rule 90(2). The Court was argued to follow its decision made in **Tihairwa v. Chief Executive Officer TTCL**, Civil Appeal No.251 of 2017(unreported) in support of this view. The oral submissions made by Mr. Joseph Kipeche had the same line of reasoning. Counsel argued the court to grant the application.

Rule 10 under which this application is brought reads:

*" The Court may, up on **good course** shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorised or required by these Rules, whether before or after the expiration of that time and whether before*

or after the doing of the act; and any reference in these rules to any such time shall be construed as a reference to that time as so extended.”(Emphasis added)

What amounts to good cause has not been defined by the rules. From decided cases, a number of factors have to be taken into account including whether or not the application has been brought promptly; the absence of any explanation for the delay and lack of diligence on the part of the applicant. See **Tanga Cement Company Limited v. Jumanne D. Masanja and another**, Civil Application No.6 of 2001 and **Dar es Salaam City Council v. Jayantlal P. Rajan**, Civil Application No.27 of 1987 (both unreported).

See also **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 Of 2010 (unreported), pages 6 to 7 where a single Judge of the Court had this to say:-

"As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities however, the following guidelines may be formulated:- (a) The applicant must account for all the

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 the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged."

Similar observations were made in **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported) at page 5 where reference was made to the case of **Mbogo Vs. Shah** [1968] EA 93 where the defunct Court of Appeal for Eastern Africa held thus:-

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended."

The records show that the judgement of the High Court is dated 22nd April 2020. Notice of appeal was lodged on 15th May 2020. The letter requesting to be supplied with a copy of judgement, decree and proceedings was lodged on the date of the notice of appeal. It could not be served to the respondent because the case was conducted in their absence. The applicant

filed Civil Application No.194/16/2020 on 2nd June 2020. A decision to this application was made on 19th June 2020. Counting from there, one may find that the 60 days within which the applicant could file the appeal expired on 13th July 2020 since the applicant received a copy of the proceedings on 17th July 2020. The appeal was supposed to be filed within 60 days from the date of filling the notice but he could not do so for want of proceedings which were supplied to her at a later stage.

Further that, given the nature of the proceedings which were conducted in the absence of the applicant, it could not be possible to serve a copy of the letter to the respondents as required by rule 90 (3) making it necessary to file Civil Application No.194/16/2020 before the Court to seek for orders to lodge the appeal without serving the letter to the respondents. This consumed some time.

Looking at the facts before me, I have found that the applicant was prevented to lodge his appeal timely by two factors; One, failure to get a copy of the proceedings in time; and two, the existence of Civil Application No.194/16/2020 which came as a matter of necessity. I find these reasons as genuine and excusable. I also find that the applicant took all the steps promptly and without any negligence or undue delay on her side.

With that in mind, in the exercise of the discretion of this Court under

rule 10 of the Rules and in the great interests of justice, time is extended for the applicant to file his appeal against the decision of the High Court of Tanzania Commercial Division made in Commercial case No. 57 of 2020 out of time. She is given 30 days within which to file the appeal.

It is ordered so.

DATED at DAR ES SALAAM this 8th day of November, 2023.

L. M. MLACHA
JUSTICE OF APPEAL

The Ruling delivered this 8th day of November, 2023 in the presence of Mr. Julius Moris, holding brief for Mr. Joseph Kipeche, learned Counsel for the Applicant and in the absence of the 1st and 2nd Respondents is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL