

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 551/18 OF 2022**

**ISON BPO TANZANIA LIMITED..... APPLICANT**

**VERSUS**

**MOHAMED ASLAM ..... RESPONDENT**

**(Application for extension of time to serve the respondent with the Notice of Appeal, Memorandum of Appeal and Record of Appeal of Civil Appeal No. 485 of 2021)**

**(Mwipopo, J.)**

**dated the 16<sup>th</sup> day of July, 2021**

**in**

**Civil Revision No. 553 of 2020**

**RULING**

15<sup>th</sup> & 22<sup>nd</sup> November, 2023

**NGWEMBE, J.A.:**

The respondent successfully made Revision to the High Court (Labour Division) in Revision No. 553 of 2020. The judgement of the High Court was delivered on 16<sup>th</sup> July, 2021 followed by a notice of appeal lodged on 10<sup>th</sup> August, 2021. Later on, the applicant lodged an appeal recorded as Civil Appeal No. 485 of 2021. However, the applicant failed to serve the respondent with the notice of appeal, memorandum of appeal and record of appeal timely, hence the instant application for extension of time within which, to serve the respondent.

Equally, it is noted that at the midst of appealing, the respondent lodged Civil Application No. 648/01 of 2021 bearing a prayer to strike out that notice of appeal for failure of the applicant to take necessary steps to lodge the intended appeal and serve the respondent with the memorandum and record of appeal. However, in determining that application, the Court found the applicant to have taken all necessary steps to serve the respondent, but in vain for the respondent's address was unknown. Henceforth, the application was dismissed. Thus, this application for extension of time to serve the respondent with notice of appeal, memorandum of appeal and record of appeal.

At the hearing of this application, Mercy – Grace Kisinza and Glory Mushi, learned advocates appeared for the applicant, and Ali Jamal also learned advocate appeared for the respondent. The applicant preferred this application under Rule 10 and 48 (1) and 106 (10) of the Tanzania Court of Appeal Rules 2009 (the Rules), by way of notice of motion to which it annexed an affidavit of Mercy – Grace Kisinza stating the reasons behind the delay to serve the respondent with the notice of appeal, memorandum of appeal and record of appeal. According to the

affidavit, following lodging notice of appeal, the respondent's address was unknown hence difficult to serve him with the record of appeal.

The affidavit further states that, the applicant exercised physical service to the former advocate of the respondent who claimed to have not been retained and later the advocate's office was closed. The applicant was left with an alternative to use DHL to serve the respondent. Upon using DHL services, she presumed the respondent is properly served with the notice of appeal, memorandum of appeal and record of appeal.

Moreover, the affidavit indicates that, the whereabouts of the respondent became known to her when she was served with an application to strike out the notice of appeal for failure to take necessary steps after lodging the notice of appeal and for failure to serve him. The time she became aware of the new address of the respondent, the applicant had already filed the required memorandum and record of appeal. Thus, this application for extension of time to serve the respondent.

In turn, the respondent vehemently contested the application by lodging an affidavit in reply, detailing responses against the averments of

the applicant, raised the following; first, that the applicant was the employer of the respondent, hence, she knew the physical address of the respondent at Flat No. A, House No. 19, plot 80, Rufiji/Jangwani street, Kariakoo Dar es Salaam; second, that the affidavit of Court Process Server one Temu Mwambete contained unreliable information and contradicts information sworn by Ms. Mercy–Grace Kisinza; third, the service through DHL is not accompanied with report; fourth, the applicant delayed to serve the respondent with no apparent reason. Thus, insisted that the application be dismissed for lack of seriousness of the applicant.

As indicated above, both parties enjoyed the legal services of learned counsel all along from the High Court and to this Court. In support to the application, Ms. Kisinza and Mushi, adopted the contents of the affidavit and proceeded to submit along with the contents of the supporting affidavit. In brief both repeated and amplified the contents of the applicant's affidavit, that all efforts to trace as to whereabouts of the respondent to serve him with the notice of appeal proved futile. Hence opted to serve him through DHL. Substantiated those efforts by an

affidavit of Court Process Server and DHL receipt, which were annexed with the affidavit in support to the notice of motion.

Added that the new address of the respondent became known to the applicant after being served with notice of motion in Application No. 648/01 of 2021. Therefore, invited this Court to take judicial notice on the ruling of Application No. 648/01 of 2021 which was delivered on 29<sup>th</sup> July, 2022. The said ruling is annexed in the affidavit of the applicant and is made part of the list of authorities filed on 15<sup>th</sup> November, 2023 that is on the date of hearing of this application. Also, she referred this Court to the case of **Benedict Shayo vs. Consolidated Holdings Corporation**, Civil Application No. 366/01 of 2017 (Unreported). Insisted that, soon after receipt of an Application No. 648/01/2021, it was prudent to wait for its conclusion and make this application. Rested by referring to the case of **Anna Alphonse Kasembe vs. Dora Kawawa Fusi & 4 others**, Civil appeal No. 52 of 2021 (unreported), where right to be heard was underscored, and the case of **Elias Masija Nyang'oro, Edna Elias Nyang'oro and Rodrick Elias Nyang'oro vs. Mwananchi Insurance Company Limited**, Civil Application No. 552/16 of 2019 (Unreported).

Ms. Mushi, joined the submission in chief of Ms. Mercy – Grace Kisinza, by insisting that, the applicant has already lodged an appeal registered as Civil Appeal No. 485 of 2021, which is pending in this Court. The hearing of that appeal depends on the outcome of this application, otherwise, it will be rendered nugatory and the applicant will be left to suffer irreparably.

In turn Mr. Jamal, learned counsel for the respondent adopted the affidavit in reply and strongly resisted the application. Further, submitted that, the delay to serve the respondent was not accompanied with good cause. Referred this court to the affidavit of court process server that, its contents contradicted with paragraph 1 of the affidavit in support to the notice of motion. Justified his argument by referring the Court to Rule 86A of the Rules. Insisted that the respondent's physical address was known to the applicant as a former employer, that is, Flat No. A, House No. 19, plot 80, Rufiji/Jangwani street, Kariakoo Dar es Salaam. Thus, the averment of failure to serve the respondent due to unknown address is an afterthought.

Further argued that, even the attempt to serve him through DHL is unreliable. Added that lodging the memorandum of appeal and record of

appeal without serving the respondent timely is contrary to law, thus the appeal is caught in a web of Rule 97 (1) of the Rules. Therefore, the application for extension of time to serve the respondent was delayed for 286 days with no reason for such long delay. Rested by a prayer that, the application be dismissed with costs.

In rejoinder, Ms. Kisinza challenged the respondent by referring this Court to the ruling of the Court in Civil Application No.648/01 of 2021. That all what Mr. Jamal has submitted are replica to what he argued in that application, which is already decided. Rested by reiterating to her submission in chief.

It will be recalled that, the applicant's contention is for extension of time upon which to serve the respondent with the notice of appeal, memorandum of appeal and record of appeal. It is also on record that the applicant does not have only the notice of appeal, but rather has already lodged an Appeal No. 485 of 2021 waiting for hearing.

Equally I take judicial notice that, this application is preceded over by another Application No. 648/01 of 2021 instituted by the respondent herein inviting the Court to strike out notice of appeal for failure to take necessary steps and serve the respondent with that notice. The ruling of

that application was delivered on 29<sup>th</sup> July, 2022 in favour of the applicant. Hence this application for extension of time was lodged on 14<sup>th</sup> September, 2022. Rule 84 of the Rules, provides for only 14 days from the date of lodging notice of appeal to serve the respondent and all persons who seem to be directly affected by the intended appeal. Also, the respondent(s) is obliged under Rule 86 of the Rules to provide full and sufficient address for service to the applicant within 14 days from the date of service of the notice of appeal.

Equally, I have noted that, most of the issues argued by both learned counsel are replica of what was determined in Civil Application No. 648/01 of 2021. I would therefore, point out few relevant issues for determination in this application. First, the existence of Civil Application No. 648/01 of 2021 where same parties appeared before the full Court and the Court blessed the efforts made by the applicant to serve the respondent; second, the applicant has already lodged Civil Appeal No. 485 of 2021 waiting for hearing by this Court; third, the applicant agrees that she failed to serve the respondent with the notice of appeal, memorandum of appeal and record of appeal timely because the respondent's address was unknown; fourth, the applicant became aware



of the respondent's address after lodgment of Civil Application No. 648/01 of 2021. Thus, this application for extension of time to serve the respondent; and fifth, the reasons for delay to serve the respondent are disclosed in paragraphs 8, 9, 10 and 11 of the affidavit as alluded to herein above. Though the learned advocate for the respondent tried to convince this Court otherwise, yet those are undisputed facts.

It is noteworthy that the application for extension of time to do an act which ought to be done within a specified time is purely within the jurisdiction of the Court. Although the Court's power to extend time under Rule 10 of the Rules is both broad and discretionary, yet can only be exercised if good cause is shown.

In respect to this application, the applicant reasoned that, she was diligent all along by using the Court Process Server to serve the respondent through his former advocate timely, however that effort failed, even the respondent's physical address was unknown. Thus, resorted to use DHL services as per paragraphs 8 & 9 of the affidavit.

I think this application for extension of time is sought to comply with Rule 84 of the Rules, which was not complied with by the applicant timely. Similar position was considered in the cases of **Tanga Cement**

**Company Limited vs. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 2 of 2013; **Eliya Anderson vs. Republic**, Criminal Appeal No. 3 of 2014; and **Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (all unreported). The basic elements for delay have been discussed in a good number of precedents, that the Court should consider 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 point of law of sufficient importance such as the illegality of the decision sought to be challenged and the overall importance of complying with prescribed timelines.

In regard to this application, the applicant's failure to serve the respondent with the notice of appeal, memorandum of appeal and record of appeal was due to unknown address of the respondent. Even by attempt to use the address of his former advocate and DHL both proved fruitless. Thus, I think the applicant has disclosed good cause for extension of time. The steps taken by the applicant to serve the respondent proved that she was diligent as opposed to what Mr. Jamal

submitted. Similar circumstances occurred in the case of **Tanga Cement Co. Ltd vs. Jumanne D. Masangwa & Another** (supra), the Court having considered that the applicant could not serve the respondent by any means, because the respondent's address and whereabouts was a mystery, it granted extension of time to the applicant to serve the respondent.

The circumstances pertaining to this application and the fact that there is already pending appeal in this Court and in fact, granting extension of time will facilitate quick disposition of the main appeal pending in this Court, which is for the benefit of both parties. In case the applicant fails to serve the respondent because of the latter's unknown address for service, it will be unjust to the applicant if the appeal will be struck out or any adverse order is made. Considering all those facts, I am convinced that, good cause has been shown by the applicant for the Court to exercise its discretionary powers to grant this application.

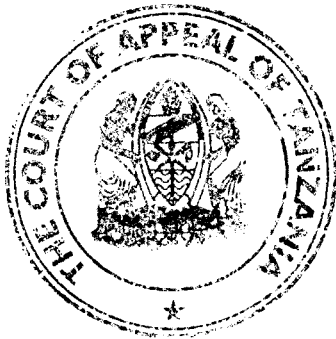
The above said, I grant the application. Accordingly, under Rule 10 of the Rules, I order the applicant to serve the respondent with notice of appeal, memorandum of appeal and records of appeal within 14 days of

the delivery of this ruling. Costs of this application shall abide by the outcome of the pending appeal.

**DATED at DAR ES SALAAM** this 21<sup>st</sup> day of November, 2023.

P. J. NGWEMBE  
**JUSTICE OF APPEAL**

The Ruling delivered this 22<sup>nd</sup> day of November, 2023 in the presence of Mr. Mohamed Aslam learned counsel for the Respondent and Absence for the Applicant, is hereby certified as a true copy of the original.



  
G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**