

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

CIVIL APPLICATION NO. 233/08 OF 2022

**MUSSA SHADRACK KWIYUKWA (Administrator
of the Estate of the Late BUZUKA MANDAGO) APPLICANT**

VERSUS

MEKTRIDA N KINGA FIRST RESPONDENT

ROSEMARY JOHN SECOND RESPONDENT

**(Application for extension of time to serve the respondents with copies
of the notice of appeal and letter applying for a copy of proceedings
from the Judgment and Decree of the High Court of Tanzania at
Mwanza)**

(Tiganga, J.)

dated the 27th day of November, 2020

in

Land Appeal No. 32 of 2019

.....

RULING

25th & 28th April, 2023

NDIKA, J.A.:

The applicant, Mussa Shadrack Kwiyyukwa acting as the Administrator of the Estate of the Late Buzuka Mandago, seeks extension of time within which to serve on Mektrida Nkinga and Rosemary John, the first and second respondents respectively, copies of the notice of appeal and the letter to the Registrar of the High Court applying for a copy of proceedings.

In support of the application, Mr. Mussa Joseph Nyamwelo, learned counsel instructed to pursue the matter on the applicant's behalf, swore an affidavit. In essence, it is averred that following delivery of the High Court's judgment on 27th November, 2020 in Land Appeal No. 32 of 2019, the applicant, through Mr. Prudence Buberwa, an advocate from a law firm styled as Nyaruju Attorneys based in Mwanza, duly lodged on 22nd December, 2020 a notice of appeal as well as a letter applying for a copy of the proceedings. Subsequently, the applicant applied to the High Court for leave to appeal, but it was refused. In further pursuit of the intended appeal, the applicant, on 21st March, 2022, lodged an application for leave to this Court as a second bite, which was yet to be determined when the instant matter was lodged on 11th April, 2022. Most pertinent to this matter are paragraphs 8 and 9 of the affidavit justifying the enlargement of time sought as follows:

"8. That in the course of making regular checks of the relevant documents/notice of motion and its affidavit on 06.04.2022, I noticed and/or discovered the omission that both respondents were not served with the notice of appeal

and letter requesting for a copy of the proceedings from the High Court.

9. That 07.04.2022 was a public holiday and as such the following day; 08.04.2022 I spent time reading the applicant's documents with a view of filing the instant application."

At the hearing of the application on 25th April, 2023, Mr. Constantine Mutalemwa, learned counsel, appeared for the applicant. The respondents seemed indifferent to this application; for, they neither lodged any affidavit in reply nor did they appear at the hearing despite having been served with the notice of hearing vide publication in the *Mwananchi* newspaper of 20th April, 2023 as per the order dated 5th December, 2022. In consequence, the hearing proceeded in their absence pursuant to rule 63 (2) of the Tanzania Court of Appeal Rules, 2009 ("the Rules").

Arguing in support of the application, Mr. Mutalemwa referred to paragraphs 8 and 9 reproduced above, attributing the omission to serve the documents to an inadvertence on the part of the applicant's previous advocates, Nyaruju Attorneys. He contended that as soon as Mr. Nyamwelo took over the conduct of the matter, he discovered the

omission upon scrutinizing the relevant documents and then acted promptly to remedy the situation by lodging the present application. Bolstering his submission, he cited **Michael Lessani Kweka v. John Eliafye** [1997] T.L.R. 152 as an illustration of a single judge of the Court accepting the plea of inadvertence on the part of the applicant's advocate as a justification for enlargement of time to serve documents.

I have examined the material on record and considered Mr. Mutalemwa's submissions. At the outset, it should be restated that extension of time under rule 10 of the Rules is a matter of discretion on the part of the Court, exercisable judiciously and flexibly by considering the relevant facts of the case. A prescribed limitation period may only be enlarged if good cause is shown. It has not been possible to lay down an invariable definition of good cause to guide the exercise of the Court's discretion, but the Court has consistently looked at a myriad of factors to answer that question.

As already hinted, in the instant case it has been contended on behalf of the applicant that the delay to serve the two documents arose from inadvertence. Mr. Mutalemwa cited **Michael Lessani Kweka**

(*supra*) as his trump card, urging that the oversight be excused. To be sure, in that decision the single judge of the Court observed, at page 153, that:

*"Although generally speaking a plea of inadvertence is not sufficient, nevertheless I think that extension of time may be granted upon such plea in certain cases, for example, **where the party putting forward such plea is shown to have acted reasonably diligently to discover the omission and upon such discovery, he acted promptly to seek remedy for it.**"* [Emphasis added]

It is necessary at this point to look at the above decision in its proper setting. In that case, the clerk to the applicant's advocate, who lodged the notice of appeal and letter bespeaking a copy of the proceedings, overlooked serving the respondent's advocates with the documents on 27th November, 1995 and that the applicant's advocate soon left for the Christmas court vacation unaware of the omission only to resume work after the vacation was over. He discovered the omission

upon conducting a regular check of the files on 2nd February, 1996. On this basis, the learned single judge concluded that:

*"Mr. Mbuya [the applicant's advocate] had just about two working weeks between the date of the omission by his clerk, i.e., 27 November 1995 and the date he discovered the omission on 2 February 1996. The rest of the time was taken up by the court Christmas vacation. **It seems to me that Mr. Mbuya acted reasonably diligently whereby he was able to discover the omission within the space of only two weeks.** And upon discovery of the omission on 2 February 1996 he again acted reasonably promptly by filing this notice of motion in Court on 8 February 1996 seeking to have the omission remedied."*
[Emphasis added]

In my view, the instant case presents a factual setting that does not fit within the scenario in **Michael Lessani Kweka** (*supra*). To begin with, since both documents were lodged in the Court on 22nd December, 2020 and that they had to be served on the respondents in terms of rules 84 (1) and 90 (3) of the Rules, the omission to serve

them must be reckoned from 5th January, 2021 when both prescribed periods for service had expired. By the time this matter was lodged on 11th April, 2022, there was an interlude of fourteen months since the omission occurred. By any yardstick, this period was so inordinate. It is so incomparable with the short interlude of two weeks the single judge exempted in **Michael Lessani Kweka** (*supra*).

The applicant took great pains to cast the blame upon his previous law firm for the omission. But what I cannot ignore is that while Mr. Nyamwelo deposed that he discovered the omission on 6th April, 2022 upon conducting a regular check of the files, he said nothing as to when his law firm was engaged in the place of the previous law firm. Given this non-disclosure, it cannot be held in the applicant's favour that he and his advocates acted reasonably diligently to discover the omission. Mr. Nyamwelo might have acted promptly to seek remedy after supposedly discovering the omission on 6th April, 2022, but what is critical in the instant case, in my respectful view, is the conduct of the applicant and his counsel before the alleged discovery. The failure to discover the omission for such a protracted period has all the hallmarks of an intolerable lack of diligence on the part of the applicant

and his advocates. Furthermore, looked at the interests of the parties in this matter it would be prejudicial to the respondents to grant the extension of time sought in this matter.

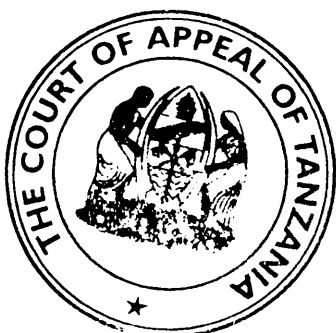
In the final analysis, I decline to exercise my discretion in the applicant's favour and proceed to dismiss the application. Given that the respondents neither submitted themselves to the jurisdiction of this Court nor appeared to resist the matter, I make no order on costs.


Ordered accordingly.

DATED at **MWANZA** this 27th day of April, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

The Ruling delivered this 28th day of April, 2023 in the presence of Mr. Costantine Mutalemwa, learned counsel for the Applicant and in absence of the Respondents, is hereby certified as a true copy of the original.




A.L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL