

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 481/17 OF 2017

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|---|---------------------------------|
| 1. MZEE MOHAMMED AKIDA | 1ST APPLICANT |
| 2. SALUM MOHAMMED AKIDA | 2ND APPLICANT |
| 3. MARIAM MOHAMMED AKIDA | 3RD APPLICANT |
| 4. IDD MOHAMMED AKIDA | 4TH APPLICANT |
| 5. SALAMA MOHAMMED AKIDA | 5TH APPLICANT |
| 6. ABDULRAHAMANI ALLY TWALIB | 6TH APPLICANT |
| 7. WAHIDA MOHAMMED ALLY TWALIB | 7TH APPLICANT |
| 8. KHADIJA HUSSEIN ALLY TWALIB | 8TH APPLICANT |

VERSUS

- | | |
|--------------------------------|----------------------------------|
| 1. LOW SHEK KON | 1ST RESPONDENT |
| 2. SUBHASH MAWJI | 2ND RESPONDENT |
| 3. OIL COM.CO LTD | 3RD RESPONDENT |

**(Application for extension of time within which to serve the Respondents
with the Notice of Appeal arising from the decision of the High Court of
Tanzania, Land Division, at Dar es Salaam)**

dated the 28th day of June, 2017

(Makuru, J.)

in

Land Case No. 186 of 2008.

RULING

09th & 21st February, 2023

MWAMPASHI, J.A.:

This is an application by way of a notice of motion under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), seeking for

extension of time within which to serve the respondents with copies of the notice of appeal arising from the decision of the High Court of Tanzania, Land Division at Dar es Salaam in Land Case No. 186 of 2008. The application is supported by an affidavit sworn by the then advocate for the applicants, Dr. Masumbuko Roman Mahunga Lamwai (now deceased) and it is resisted by an affidavit in reply sworn by Mr. Mashaka Edgar Mfala, learned advocate for the respondents.

The relevant facts from which the instant application arises, *albeit* in brief, goes as follows: Land Case No.186 of 2008 which was instituted by the applicants against the respondents, was dismissed by the High Court on 28.06.2017. Dissatisfied with the decision and desirous of appealing against it, the applicants duly lodged a notice of appeal on 19.07.2017. They however failed to serve copies of the notice of appeal on the respondents within 14 days after lodging it as required by rule 84 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) hence the instant application for extension of time within which to do so.

According to the notice of motion, the application is predicated upon a single ground, to wit:

"That, the notice of appeal was filed by an intern who has since left and who upon bringing it back did not take

measures to serve the Respondents out of lack of clear knowledge of Court of Appeal practice”.

At the hearing of the application the applicants were represented by Mr. Roman Lamwai, learned advocate, whereas the 2nd and 3rd respondents had the services of Messrs. Aloyce Sekule and Ramadhan Karume, both learned advocates, respectively. As for the 1st respondent, the hearing had to proceed in his absence following the unopposed prayer by Mr. Lamwai on account that after the 1st respondent had passed away in 2019, no application has been made by any interested person for the Court to cause his legal representative to be made a party in his place within twelve (12) months as required by rule 57 (3) and (4) of the Rules.

In his submissions in support of the application, Mr. Lamwai adopted the supporting affidavit and the written submissions earlier filed on 17.10.2017 under rule 106 (1) of the Rules. He contended that the submissions are exhaustive and sufficiently support the application which has to be granted as prayed.

According to the written submissions, it is contended that the applicants' advocate instructed his intern, one Mr. David Pongolela from the Law School of Tanzania who had been attending internship

programme in his Law Chambers, to lodge the notice of appeal and thereafter serve its copies on the respondents. The notice of appeal was duly lodged by the intern on 19.07.2017 but he did not serve the copies on the respondents and it was not until 24.08.2017 when the advocate discovered that the copies of the notice had not been served on the respondents hence his prompt lodgement of the instant application on 28.08.2017. It is further submitted that in delegating and instructing the intern to lodge the notice of appeal and serve the respondent, the advocate for the applicants aimed at enabling him to learn the Court of Appeal rules and practice. It was maintained that the failure to serve the respondents was not out of negligence on part of the advocate for the applicants but out of the fact that he trusted that he had properly trained the said intern and further that, since the intern had since then left the applicants' advocate chambers and was working in Geita, his affidavit could not be procured in time.

It was therefore finally argued that good cause warranting extension of time has been established and that the Court should disregard the delay and the technicalities and focus on dispensation of justice by granting the application which will not occasion any injustice to the respondents.

Messrs. Sekule and Karume opposed the application. Having firstly adopted the affidavit in reply and the written submissions in reply earlier filed on 20.11.2017 in terms of rule 106 (7) of the Rules, they submitted that the applicants have failed to show good cause for the Court to exercise its discretion in favour of the applicants under rule 10 of the Rules. To cement their argument they referred me to the decision of the Court in **Amani Centre for Street Children v. Viso Construction Company Limited**, Civil Application No.105 of 2013 (unreported) where the Court stated that good cause will usually consist of some good reason why which is sought should be granted. It was insisted that the failure by the intern to serve the respondents with copies of the notice of appeal due to his lack of knowledge of Court rules does not constitute good cause for extension of time. They further cited the case of **Insignia Limited v. Commissioner General, Tanzania Revenue Authority**, Civil Application No. 2 of 2007 (unreported) and submitted that in an application for extension of time what is needed is for the applicant to show sufficient reason why he should be given more time and that the most persuasive reason he can give is that the delay had not been caused or contributed to by dilatory conduct on his part.

It was further submitted against the application that, the delay to serve the respondents was a result of the applicants' advocate

negligence and dilatory conduct. It was argued that the advocate for the applicants cannot blame the intern while it was his duty to ensure that service on the respondents is duly effected. The advocates for the respondents further submitted that in the circumstances of this matter where the intern current address was well known, it was imperative for the applicants to obtain an affidavit of the said intern. In conclusion it was insisted that no good cause has been shown for extension of time and that the application should be dismissed with costs.

In his rejoinder, Mr. Lamwai reiterated his argument that the delay was caused by the intern who having duly lodged the notice of appeal, out of lack of knowledge of Court of Appeal rules and practice, failed to serve the respondents with the copies of the notice of appeal. He however also raised two other issues, **firstly**, that the respondents cannot be heard arguing that an affidavit of the intern who failed to serve the copies of the notice of appeal on the respondent, ought to have been filed in support of the application. He contended that the respondents cannot so be heard because the facts regarding the failure by the said intern to serve the respondents in the supporting affidavit has not been countered to by the respondents in their affidavit in reply. **Secondly**, Mr. Lamwai contended that the 3rd respondent's resistance to the application should be disregarded by the Court because the

hearing and determination of the suit by the High Court proceeded *ex parte* against the 3rd respondent and that the 3rd respondent is not a party who will be affected by the intended appeal. He further argued that the 3rd respondent was, in the first place, not a party entitled to be served with the copy of the notice of appeal.

It suffices to state at this juncture, that the two issues raised by Mr. Lamwai were sternly opposed by the advocates for the respondents for being baseless and misconceived. On my part, I am in agreement with the learned advocates for the respondents. The first issue raised by Mr. Lamwai is unfounded because according to the respondents' affidavit in reply, the respondents did not only clearly express their discontent with the applicants' failure to procure the affidavit of the intern but they also expressed their disagreement with the respondents' justification for the failure. In paragraph 5 of the affidavit in reply it is stated that since the intern's address is known his affidavit could have been easily procured by the applicants. The first issue by Mr. Lamwai is therefore overruled for being baseless.

Regarding the second complaint, it is a firm position of this Court that whether the hearing and determination of the suit in the High Court proceeded *ex parte* against the 3rd respondent or not, the law entitles her to be served with a copy of the notice of appeal. Rule 84 (1) of the

Rules clearly provides, among other things, that an intended appellant shall, before, or within fourteen days after lodging a notice of appeal, serve copies of it to all persons who seem to him to be directly affected by the appeal. If the applicants wanted the 3rd respondent to be excluded from being served with the copies of the notice of appeal on ground that it did not take part in the proceedings before the High Court, then the law, under the same rule 84 (1) of the Rules, requires the applicants to have firstly sought leave from the Court by making an *ex parte* application to that effect. Since no such application has been made and granted, and as the 3rd respondent is undoubtedly likely to be directly affected by the appellants' appeal, it is entitled to be served with copies of the notice of appeal. That being the position, the second issue by Mr. Lamwai fails too.

Turning to the merits of the application, the only issue which calls for my determination is whether or not the applicants have managed to show good cause for extension of time as sought by them.

The powers of this Court in extension of time is derived from Rule 10 of the Rules which provides thus:-

"The Court, may, upon good cause shown, extend time limited by these Rules or by any decision of the High Court or Tribunal, for the

doing of any act authorized or required by these Rules, whether before or after 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”.

It is clear from the above provision that the Court’s powers on extension of time, is both broad and discretionary. More importantly, the discretion under rule 10 of the Rules, is judicial and it must be exercised according to the rules of reason and justice and not according to private opinion or arbitrary. See- **Lyamuya Construction v. Board of Young Christians Association**, Civil Application No. 2 of 2010 (unreported).

It is only when good cause is shown for the delay, that the Court can exercise its discretionary powers given by rule 10 of the Rules. In exercising its discretion under the said provision, the Court is bound to consider the prevailing circumstances of the particular case and should also be guided by a number of 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 a point of law of sufficient importance such as illegality of the decision sought to be challenged. See- **The Principal Secretary, Ministry of Defence and National Service v. Devram P.**

Valambhia [1992] T.L.R 387, **Dar es Salaam City Council v. Jayantilal P. Rajan**, Civil Application No. 27 of 1987 (unreported) and **Lyamuya Construction Company Limited** (supra).

I have dispassionately and earnestly examined the affidavits filed in support and in opposing the application. I have also considered the submissions made for and against the application as well as the relevant law and in particular rule 10 of the Rules and reached at the considered view, as rightly argued by the advocates for the respondents, that no good cause has been established by the applicants to warrant extension of time within which to serve the respondents with copies of the notice of appeal as sought by the applicants.

As I have alluded to earlier, the applicants' sole reason for the delay to serve copies of the notice of appeal on the respondents is that Mr. David Pongolela, an intern from the Law School, who was doing his internship programme in the applicants' advocate chambers and who was instructed by that advocate to lodge the notice of appeal and serve the respondents, out of being not knowledgeable about the Court of Appeal rules and practice, only lodged the notice and failed to serve the respondents. It is explained that after the intern had lodged the notice of appeal on 19.07.2017 he left the copies of the notice in the pile of other documents that have pending issues before he left the Chamber

and went to work with Geita Gold Mines in Geita. It is contended that the advocate for the applicants did not know that the copies had not been served on the respondent until on 24.08.2017 when he found them among other documents that had pending issues.

My first observation on the above given reason for the delay, as advanced by the applicants is that, under the circumstances of this case, the allegations and the blame by the advocate for the applicants on the intern, that it was him who, acting on the instructions from the advocate, failed to duly serve the respondents, leaves a lot to be desired. I find the evidence on that fact insufficient and agree with the advocates for the respondents that to substantiate that fact, an affidavit of the said intern ought to have been filed. Since the whereabouts and the address of the intern was well known, there was no reason why his affidavit could not be procured. It is trite law that where an affidavit in support of a certain material fact mentions another person on that point, that other person should also take an affidavit in support of that fact. See- **Franconia Investments Limited v. TIB Development Bank Limited**, Civii Application No. 270/01 of 2020, **Dianarose Spareparts Limited v. Commissioner General Tanzania Revenue Authority**, Civil Application No. 245/20 of 2021 and **Phares Wambura and 15**

Others v. Tanzania Electric Supply Company Limited, Civil Application No. 186 of 2016 (all unreported).

In **Phares Wambura and 15 Others** (supra), the applicants whose application had been struck out for non-appearance, sought for the restoration of the application and one of their grounds was that they were misled by a court clerk and went to the wrong chamber of Justice of the Court before whom they were supposed to appear. In emphasising the need of an affidavit of the court clerk to substantiate the applicants' assertion that they came to Court and that they were so misled, the Court stated that:

"The applicants' averments therefore remain to be a bare claim with no proof. In the circumstances I agree with the counsel for the respondent that there was a need for the said Court Clerk to swear affidavit to prove what the applicants and their counsel had alleged in their supporting affidavits. ...the Court Clerk could have been useful to substantiate the applicants' assertions of her/his involvement in the matter".

Basing on the above observations and the law, it therefore my settled view that the claim that it was the intern who failed to serve the respondents with copies of the notice of appeal has not been established.

The second reason I find that no good cause has been established to warrant the grant of the application which is an addition to the first reason given above, is the fact that even if we assume that the advocate for the applicants really instructed the intern to lodge the notice of appeal and serve its copies to the respondents and that the intern lodged the notice but failed to serve the respondents, still the advocate cannot avoid being held responsible for the failure by the intern. I am of the considered view that where an advocate instructs or asks another person to perform or do a certain act in compliance with the law, he has the duty to check and make sure that the act is duly done or performed as per his instructions. In the instant application, the advocate for the applicants did not make follow-ups to check if the copies of the notice of appeal had been duly served on the respondents by the intern. It took him about 35 days from 19.07.2017 when the intern lodged the notice of appeal to 24.08.2017 when he discovered that the copies of the notice of appeal had not been served on the respondents. Under the circumstances of this matter, 35 days is a considerable long period of time and the failure by the advocate to check and make sure that the copies had been duly served on the respondent is an exhibition of nothing else but negligence on part of the advocate.

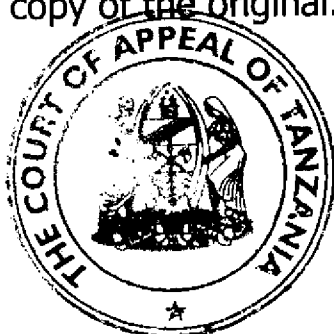
Finally, there has been an argument for the applicants that the failure by the intern to serve the respondents with copies of the notice of appeal resulted from him being not knowledgeable about the Court of Appeal rules and practice. This argument cannot be of any assistance to the applicants simply because it is a fundamental principle of law that ignorance of law is not a defence.


In the event and for the above given reasons, I find and conclude that no good cause has been established by the applicants upon which I can exercise my discretion and extend time within which to serve copies of the notice of appeal on the respondents. The application is therefore accordingly dismissed with costs.

DATED at DAR ES SALAAM this 20th day of February, 2023.

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 21st day of February, 2023 in absence of the Applicant and in the presence of Ramadhan Karume learned advocate for the 3rd respondent also holding brief for Mr. Aloyce Sekule learned advocate for the 1st and 2nd respondents is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL