

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 448/01 OF 2020

MURTAZA MOHAMED RAZA VIRANI.....1ST APPLICANT
MRS RUBAB MOHAMED RAZA VIRANI..... 2ND APPLICANT

VERSUS

MEHBOOB HASSANALI VERSI.....RESPONDENT

**(Application for extension of time from the decision of the High Court of
Tanzania, Commercial Division at Dar es Salaam)
(Mruma, J.)**

**dated the 13th day of December, 2016
in
Commercial Case No. 281 of 2002**

RULING

31st October, 2022 & 07th February, 2023.

SEHEL, J.A.:

By notice of motion made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), the applicants are seeking for extension of time to serve a memorandum and record of appeal out of time. The application is supported by the affidavit deposed by one, Murtaza Mohamed Raza Virani, the 1st applicant. In that affidavit it is deposed that the applicant is also an appellant in Civil Appeal No. 312 of 2020. That, the Memorandum of appeal was prepared and signed by his counsel, one Silvester Shayo on 14th September, 2020. Thereafter, the said

counsel became indisposed hence he was instructed to finalize the preparation of the record of appeal which he did and duly filed the appeal on 15th September, 2020. That, on 17th September, 2020 he went to the offices of Rwebangira Eustace & Co. Advocates to serve the respondent with two documents; the reply submission for Civil Application No. 213 of 2020 and the record of appeal for Civil Appeal No. 312 of 2020. That, secretary in the offices of Rwebangira Eustace & Co. Advocates kept him waiting till late hours of Friday prayer to start. That, having received the documents from the secretary, he did not examine them there and then as he had to rush for Friday prayer. Later, he noticed that the secretary acknowledged receipt of the reply submission and did not stamp on the record of appeal. Since he was not feeling well on that day, he could not return to the offices of Rwebangira Eustace & Co. Advocates. That, he went to re-serve the unstamped documents on 29th September, 2020 after he had recovered from his sickness. That, his counsel advised him that he was late in serving the respondent hence he filed the present application seeking for extension of time. In addition, pursuant to Rule 106 (1) of the Rules, the applicants filed written submission on 11th December, 2020 and list of authorities to be relied upon on 19th October, 2022.

On the other hand, the respondent resisted the application by filing an affidavit in reply deposed by Mr. Thomas Eustace Rwebangira, learned advocate for the respondent. He disputed the allegations that the secretary kept the 1st applicant waiting for a long time without assisting him. He further contended that if such allegation is true the name of the said secretary was not disclosed. He further deposed that there had never been any complaint when the memorandum and record of appeal were served upon them on 29th September, 2020 which was out of time. The respondent also complied with the provisions of Rule 106 (7) of the Rules by filing submissions in reply to oppose the application.

At the hearing of the application, the 1st applicant belatedly appeared in person, unrepresented. He entered into my chambers after the counsel for the respondent was afforded the opportunity to present his oral arguments since the application was treated as having been argued in terms of Rule 106 (12) (b) of the Rules. On that hearing date, Mr. Thomas Eustace Rwebangira assisted by Ms. Wivina Rwebangira, both learned advocates appeared for the respondent.

It was Mr. Rwebangira who made a reply submission. He first adopted the affidavit and submissions in reply as part of his oral submissions and

clarified that the applicants did not act diligently in serving the documents to the respondent. He pointed out that according to annexure R-S attached to the affidavit in support of the application, the memorandum and record of appeal were drawn, signed, endorsed and filed by Sylvester Shayo, learned advocate and served upon the respondent on 29th September, 2020. He thus contended that the 1st applicant was not telling the truth in his affidavit that he served the documents to the respondent on 17th September, 2020.

He further contended that the applicants ought to have attached the affidavit of the learned advocate, Mr. Shayo who prepared and filed the documents. To cement his argument that the affidavit of Mr. Shayo was necessary, he cited the cases of **Phares Wambura and 15 Others v. Tanzania Electric Supply Company Limited**, Civil Application No. 186 of 2016 and **Bharya Engineering and Construction Co. Ltd. v. Rev. Godfrey J. Walalaze**, Civil Application No. 510/01 of 2018 (both unreported).

It was also his submission that the sickness of the 1st applicant was not sufficiently established because he did not mention exactly as to when he fell sick and recovered from such sickness. He added that the sick chit

attached to the affidavit in support of the application shows that the 1st applicant was not seriously ill because he was not exempted from duty (ED) nor was he hospitalized. He argued that he was just prescribed to take some medicines.

Mr. Rwebangira further argued that the applicants failed to account for each and every day of delay from 17th September, 2020 to 29th September, 2020 when the documents were belatedly served upon the respondent. To support his submission that the applicants have to account each and every day of delay, he referred me the cases of **A-One Products and Brothers v. Abdallah Almas and 25 Others**, Civil Application No. 586/18 of 2017 and **Mtesigwa Lugola v. The Attorney General and Another**, Civil Application No. 34/06 of 2017 (both unreported). He thus argued that the applicants have failed to advance good cause to justify the extension of time and urged me to dismiss the application with costs.

In rejoinder, the 1st applicant insisted that he visited the offices of Rwebangira & Company Advocates on 17th September, 2020 with the intention and actually served the respondent with the written submissions in respect of Civil Application No. 213/16 of 2020 and copies of Memorandum and Record of appeal of Civil Appeal No. 312 of 2020 but the

secretary only acknowledged and signed receipt of the written submissions. He insisted further that after he attended the Friday prayer he fell ill and had all the symptoms of Covid 19. He was thus advised to quarantine himself for two weeks that is why he went to reserve the documents on 29th September, 2020 but later he was advised by his lawyer, Mr. Shayo that the service was belatedly done hence the present application.

He admitted that there is no affidavit of the secretary but he argued that the secretary who was the defaulting party could not have accepted to swear an affidavit. He distinguished the cases of **Phares Wambura and 15 Others** (supra) and **Bharya Engineering and Construction Co. Ltd** (supra) that the persons who were required to swear the affidavits were neutral persons unlike in the present matter where the secretary was the defaulting party. He explained further that Mr. Shayo was not a proper person to swear the affidavit because he was not the one who served the documents upon the respondents. Lastly, he urged me to look at the attached Memorandum of appeal to find that the intended appeal raised serious issues of illegalities sufficient for extension of time. He therefore prayed for the application to be granted as prayed.

Having considered the notice of motion, the affidavit in support and the affidavit in reply and having gone through the written submissions filed by the counsel for the parties, the main issue stands for my determination is whether the applicants had advanced good cause to warrant the Court to exercise its discretionary power to extend time within which to serve the memorandum and the record of appeal.

Rule 10 of the Rules empowers the Court to grant extension of time for doing any act limited by the law. The said Rule provides:

"The Court may, upon good cause shown, extend the 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 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."

It follows then that it is upon the party seeking extension of time to advance good cause for the Court to exercise its discretionary power - see:

Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited, Civil Application No. 96 of 2007; **Oswald Masatu**

Mwizarubi v. Tanzania Fish Processing Ltd., Civil Application No. 13 of 2010; and **Victoria Real Estate Development Limited v. Tanzania Investment Bank & 3 Others**, Civil Application No. 225 of 2014 (all unreported). It should be noted that the Rules do not define as to what constitutes good cause but the Court in its numerous decisions has laid down certain factors that may be taken into account in order to assess as to whether the applicant had advanced good cause for the Court to grant the extension of time. For instance, in the case of **Lyamuya Construction Company Ltd. v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), the Court set out the following factors:

- "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; and*
- (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."*

In the present application, the applicant stated in the affidavit that he went to serve the respondent with two documents on 17th September, 2020 but the secretary only acknowledged one document by putting a stamp on it and left out the memorandum of appeal in Civil Appeal No. 312 of 2020 which the applicants are now seeking extension of time to serve it. The counsel for the respondents seemed not to believe the assertion made by the 1st applicant. He called that assertion a lie because he failed to name the secretary nor were there any affidavit of such secretary nor of Mr. Shayo.

Indeed, in number of times this Court held that an affidavit of a material person had to be filed to explain the delay see- for instance, the case of **Phares Wambura and 15 Others** and **Bharya Engineering & Construction Co. Ltd.** (supra). However, each case has to be determined according to its own peculiar facts. In the case at hand, given the scenario depicted by the 1st applicant that the secretary kept him waiting for so long and only acknowledged one copy of two documents he sent, I find that it would not have been easy for him to get an affidavit of the person who he claimed was at fault. Further in respect of the affidavit of advocate Shayo, I do not find that it was necessary because the fact that the 1st applicant

was instructed by his advocate was within his knowledge and required no further evidence from advocate Shayo to prove it.

I now turn to the issue of sickness of the 1st applicant. The 1st applicant argued that he could not serve in time the respondent with the memorandum and record of appeal because, after he had performed his Friday prayer, he fell sick. He further deposed that he recovered after fourteen (14) days, hence, he managed to serve the respondent on 29th September, 2020. Upon service of the same, he was advised by his advocate that he was late. Therefore, he filed the present application. The illness of the 1st applicant is vigorously challenged by the counsel for the respondent that he was not seriously ill for him not to be able to serve the respondent on time.

In the case of **John David Kashekya v. The Attorney General**, Civil Application No. 1 of 2012 (unreported), the Court discussed in detail the issue of sickness where it stated:

"...sickness is a condition which is experienced by the person who is sick. It is not a shared experience. Except for children who are not yet in a position to express their feelings, it is the sick person who can express his/her condition whether

he/she has strength to move, work and do whatever kind of work he is required to do. In this regard it is the applicant who says he was sick and he produced medical chits to show that he reported to a doctor for check-up for one year. There is no evidence from the respondent to show that after that period, his condition immediately became better and he was able to come to Court and pursue his case. Under such circumstances, I do not see reasons for doubting his health condition. I find the reason of sickness given by the applicant to be sufficient reason for granting the application for extension of time to file notice of appeal and the memorandum of appeal out of time.”

As stated earlier, the 1st applicant herein has in his affidavit and throughout his re-joinder insisted that he could not go back to the offices of Rwebangira and Co. Advocates to serve the respondent with the memorandum and record of appeal due to his poor health condition. Given sickness is a condition which is experienced by a sick person and since the 1st applicant said due to his sickness, he failed to serve the respondent in time and has attached evidence to prove that he was sick then I see no reason to doubt his condition at that time.

Furthermore, I have scrutinized the medical chit and noticed that it was issued on 17th September, 2020, a date stated by the 1st applicant and not disputed by the respondent. The sick chit shows that the patient had flue, chest infections and asthma which were common symptoms of Covid 19 during that time. Therefore, with that evidence on record, I am convinced that the 1st applicant fell sick on 17th September, 2020 and recovered after two weeks, that is, when he went to reserve the documents, though belatedly, on 29th September, 2020 that is when he was feeling better. It suffices to state here that the counsel for the respondent does not dispute that the documents were served on 29th September, 2020. For that reason, I find that the applicants accounted for every day of delayed. From 17th September, 2020 to 29th September, 2020 the 1st applicant was sick and from 29th September, 2020 to 7th October, 2020 I find that the period was not inordinate given that the applicants needed time to prepare and file the application. My position is fortified by the decision of this Court in the case of **Attorney General v. Oysterbay Villas Limited & Kinondoni Municipal Council**, Civil Application 299/16 of 2016 where the delay of 45 days was described as not inordinate

considering one has to prepare and file an application for extension of time.

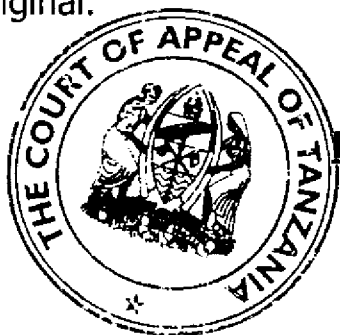
In the end, I am satisfied that, the applicants have advanced sufficient cause for delay which I consider good cause. Accordingly, the application for extension of time to serve Memorandum and record of appeal is granted to the applicants. The same have to be served to the respondent within seven (07) days from the date of the delivery of this ruling. Costs shall abide to the outcome of the Civil Appeal No. 312 of 2020.

DATED at DAR ES SALAAM this 06th day of February, 2023.

B. M. A. SEHEL

JUSTICE OF APPEAL

The Ruling delivered this 07th day of February, 2023 in the presence of Mr. Murtaza Mohamed Raza Virani for the 1st Applicant and in the absence for the 2nd applicant and Mr. Thomas Eustace Rwebangira, learned counsel for the Respondent, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be "G. H. Herbert", is written over the printed name.

G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL