

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 221/18/2018**

**ZAWADI MSEMAKWELI ..... APPLICANT  
VERSUS**

**NMB PLC ..... RESPONDENT**

**(Application for extension of time within which to serve the respondent with copies of the notice of appeal and letter requesting for copy of proceedings from the Judgment and Decree of the High Court of Tanzania, Labour Division at Dar es Salaam)**

**(Nyerere, J.)**

**dated the 29<sup>th</sup> day of March, 2017**

**in**

**Revision No. 427 of 2016**

\*\*\*\*\*

**RULING**

5<sup>st</sup> June & 25<sup>th</sup> July 2018

**NDIKA, J.A.:**

By a notice of motion made under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), Zawadi Msemakweli, the applicant herein, prays against NMB PLC, the respondent, for extension of time within which to serve the respondent with copies of notice of appeal and letter applying for a copy of proceedings in the respect of her intended appeal from the judgment and decree of the High Court, Labour Division at Dar es Salaam in Revision No. 427 of 2016. The application is supported by an affidavit deposed by Ms. Stella Simkoko, an advocate having the conduct of the

matter on behalf of the applicant. In opposition to the application, the respondent filed an affidavit in reply deposed by Ms. Lilian Komuhangiro, a principal officer of the respondent.

To facilitate appreciation of the issue involved in this matter, it is necessary to begin with the background to this application as can be gathered from the notice of motion and the supporting affidavit.

Briefly, Zawadi Msemakweli, the applicant herein, was employed by the respondent as a Bank Teller. On 27<sup>th</sup> August, 2013 the respondent terminated her employment. Desirous of challenging the aforesaid termination before the Commission for Mediation and Arbitration (CMA) when, at the time, the prescribed limitation period for instituting proceedings before the CMA had elapsed, she formally applied to the CMA on 27<sup>th</sup> October, 2015 for a condonation of the delay. Her application was dismissed for failing to account for the delay. Resenting the dismissal, she approached the High Court, Labour Division vide Revision No. 427 of 2016 calling upon the Court to examine and revise the proceedings before the CMA. In its judgment dated 29<sup>th</sup> March, 2017, the High Court (Nyerere, J.) upheld the CMA's decision and proceeded to dismiss the application for revision.

The applicant remained aggrieved and wished to appeal to this Court from the aforesaid decision of the High Court. In pursuit of the intended appeal, the applicant requested from the High Court for a copy of proceedings vide her letter of 29<sup>th</sup> March, 2017 and then duly lodged her notice of intention to appeal on 12<sup>th</sup> April, 2017. As it turned out, neither did she serve a copy of the letter on the respondent as required under rule 90 (1) and (2) of the Rules within thirty days of the impugned judgment nor did she serve a copy of the notice of appeal on the respondent within fourteen days after lodging it as required under rule 84 (1) of the Rules.

In justifying condonation of the delay in serving the two documents on the respondent, it is contended on the notice of motion that:

*"... the advocate for the applicant failed to serve the notice of appeal and the letter requesting for a copy of proceedings, judgment and decree upon the respondent on time due to being indisposed and excused duty for seven days, which was within the last six days of the time within which the advocate was to serve the respondent with the notice of appeal."*

At the hearing before me, Ms. Stella Simkoko, learned counsel, represented the applicant while the respondent had the services of Mr. Joseph Ndazi, learned counsel.

Having adopted the notice of motion, the affidavit and the written submissions supporting the motion, Ms. Simkoko elaborated the contention that the failure to serve the two documents was due to her illness. She said that after she duly applied from the High Court for a copy of the proceedings on 29<sup>th</sup> March, 2017 and lodged the notice of appeal on 12<sup>th</sup> April, 2017, she fell severely sick on 21<sup>st</sup> April, 2017 while she was at the Muhimbili National Hospital for a routine medical checkup on her left lower limb. She was, there and then, attended to as an outpatient and her doctor exempted her from duty for seven days as is evident from the Muhimbili OPD consultation receipt and duly filled prescription form annexed to the affidavit. Further elaboration is made in Paragraphs 6 through 8 of the supporting affidavit as follows:

*"6. That the said seven days in which I was excused duty were within the remaining six days within which I was required to serve the respondent with a copy of the notice of appeal and the letter applying for the copy of the proceedings, judgment and decree.*

*7. That being in so much pain I couldn't remember to instruct my messenger to serve the respondent.*

*8. That when I resumed duty on 28/4/2017 I noted that the time within which I was required to serve the respondent with a copy of the notice of appeal and the letter applying for the copy of the proceedings, judgment and decree had elapsed (fourteen days ended on 27/4/2017 as 26/4/2017 was a public holiday), hence this application."*

In the circumstances, I was urged to hold that the applicant's failure to serve the two documents arose from Ms. Simkoko's sudden illness as opposed to dilatoriness on the part of the applicant.

Before she concluded, Ms. Simkoko assailed the affidavit in reply made by Ms. Lilian Komuhangiro and lodged on behalf of the respondent. She prayed that it be struck out on the ground that it was fatally defective in that although it was made by the said Ms. Lilian Komuhangiro, it was signed and verified by one Ms. Consolatha Resto.

Replying, Mr. Ndazi began by conceding that the impugned affidavit in reply was indeed incurably defective for not being signed and verified by the deponent but a different person. He was at one with Ms. Simkoko that the said affidavit was liable to be struck out. I should interpose here and

express my agreement that the impugned affidavit in reply is, indeed, incurably defective in the manner stated by Ms. Simkoko and acknowledged by Mr. Ndazi. Accordingly, it stands struck out.

As regards the merits of the application, Mr. Ndazi adopted the written submissions he had filed and then argued, in few words, that the application discloses no good case to warrant extension of time. In the written submissions, he contended as follows: first, that despite Ms. Simkoko's illness, the failure to serve the two documents is stated in Paragraph 7 of the supporting affidavit as being that she forgot to instruct her messenger to effect service on the respondent due to severe pains in her body. While contending that "forgetfulness" was not a good cause, the learned counsel added that the applicant failed to account for each and every day of the entire period of delay. He relied on the unreported decisions of this Court in **Bushiri Hassan v. Latifa Mashayo**, Civil Application No. 2 of 2007 and **Vodacom Foundation v. Commissioner General (TRA)**, Civil Application no. 107/20 of 2017 on the proposition that each and every day of delay has to be accounted for. Further reliance was placed on two decisions of this Court: first, **Dr. Ally Shabbay v. Tanga Bohora Jamaat**, [1997] TLR 305 at 306 for the proposition that those who come to court must not show unnecessary delay in doing so;

and secondly, **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 (unreported) for the imperative that an applicant must place before the Court material that will move it to exercise its power to extend time.

In a brief rejoinder, Ms. Simkoko reiterated her prayer that the application discloses good cause for condonation of delay.

I have carefully considered the notice of motion, the supporting affidavit, the competing learned submissions and authorities cited. I think it bears reciting that although the Court's power for extending time under rule 10 of the Rules is both broad and discretionary, it can only be exercised if good cause is shown. Whereas it may not be possible to lay down an invariable definition of good cause so as to guide the exercise of the Court's discretion under rule 10, the Court must consider 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, 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: (see, for instance, this Court's unreported decisions in **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Tanga**

**Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001; **Eliya Anderson v. Republic**, Criminal Application No. 2 of 2013; **William Ndingu @ Ngoso v. Republic**, Criminal Appeal No. 3 of 2014; **The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] TLR 387; and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010).

Turning to the merits of this application, it is unchallenged that the applicant duly lodged the notice of appeal on 12<sup>th</sup> April 2017 and that the letter applying for a copy of proceedings was submitted on 29<sup>th</sup> March, 2017. Reckoning the prescribed limitation periods accordingly, the notice of appeal ought to have been served by 27<sup>th</sup> April, 2017 while the deadline for service of the letter applying for proceedings was 28<sup>th</sup> April, 2017. It might well be true that the applicant's counsel could not serve the copies of the notice of appeal and the letter applying for proceedings before 28<sup>th</sup> April, 2017 because she had fallen ill on 21<sup>st</sup> April, 2017 and that she took leave of absence for seven days until 28<sup>th</sup> April, 2017. Nonetheless, that explanation only accounts for the delay to serve the two documents until 28<sup>th</sup> April, 2017 when the applicant's advocate resumed her duties. Noting

that the applicant waited until 22<sup>nd</sup> May, 2017 to lodge this application for extension of time, it is evident that a span of twenty-four days is unaccounted for from 28<sup>th</sup> April, 2017 up to 22<sup>nd</sup> May, 2017. In my view, had the applicant been diligent she would have promptly applied for extension of time. I find it fitting at this point to stress, taking cue from **Dr. Ally Shabbay** (supra) cited to me by Mr. Ndazi, that the applicant ought to have not shown unnecessary delay in coming to this Court for extension of time. The unaccounted period of twenty-four days is a relatively extended period. I cannot ignore it.

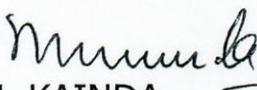
In the upshot, it is my finding that this matter discloses no good cause for the Court to exercise its jurisdiction to enlarge time. Accordingly, I dismiss this application in its entirety with costs.

**DATED at DAR ES SALAAM** this 20<sup>th</sup> day of July, 2018.

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



  
S.J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**