

TANZANIA / JUDGMENT

henry jalison mwamlima vs robert jalison mwamlima others 2023 tzca 17949 13 december 2023

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13 December 2023

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IN THE COURT OF APPEAL OF TANZANIA AT MBEYA CIVIL APPLICATION NO. 652/06 OF 2022
HENRY JALISON MWAMLIMA APPLICANT VERSUS ROBERT JALISON MWAMLIMA AND
CHRISTIAN JALISON MWAMLIMA (As Administrators of the estate of the late Jalison
Mwamlima)..... 1st RESPONDENT NBC BANK.....
2nd RESPONDENT VITUS MGAYA..... ,3rd RESPONDENT [Application
for Extension of time to serve notice of appeal, memorandum of appeal, letter requesting to be
supplied with proceedings, judgement and decree to the 2nd and 3rd respondents out of time
against the judgment of the High Court of Tanzania at Mbeya] (Monqella, J.) dated the 19th day of
August, 2021 in Land Case No. 20 of 2017

RULING

6th & 13th December, 2023 * KAIRO, J.A.: The applicant, Henry Joseph Mwamlima, has filed this application seeking for extension of time to serve notice of appeal, memorandum of appeal, letter to the registrar requesting to be supplied with proceedings, judgement and decree to the 2nd and 3rd respondents out of time in respect of the judgment of the High Court of Tanzania at Mbeya in Land Case No 20 of 2017 delivered on 19th August, 2021. The application is preferred under rules 10 and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit of Mr. Boniface Anyisile Kanjunjumele Mwabukusi, the learned counsel representing the applicant. Briefly, the background of this application as can be discerned from the affidavit in support of the application is that; the applicant was displeased with the judgment and decree of the High Court in Land Case No 20 of 2017. He timely lodged the notice of appeal on 20th August,

2021. He further requested to be supplied with the proceedings, judgement and decree well within time on 23rd August, 2021 and timely served the documents on the 1st respondent only. The 2nd and 3rd respondents were not served on the ground deposed in paragraph 4 and 6 to the effect that, the applicant had no cause of action against them. Later, on 1st November, 2021, he wrote the Deputy Registrar of the High Court, Mbeya registry requesting for leave to serve the 2nd and 3rd respondents with the said documents.

However, the Registrar on 22nd November, 2021 responded by refusing to handle the issue administratively. Following the said response, the applicant decided to lodge a formal application for extension of time to serve the 2nd and 3rd respondents at the High Court Mbeya Registry vide Misc. Land Application No. 99 of 2021. But the application was struck out on technical ground following the notice of preliminary objection raised by the 2nd respondent. Hence this application which was filed on 1st August, 2022. There is neither an affidavit in reply by any of the respondent nor written submission by either of the parties. At the hearing, the applicant was represented by Mr. Mwabukusi as earlier stated. The 1st and 2nd respondents were represented by Messrs. James Berdon Kyando and John Ignace Laswai, both learned counsel. The 3rd respondent was absent despite being served. Upon prayer by Mr. Mwabukusi to proceed with the hearing in the absence of the 3rd respondent, which prayer was unopposed by other parties, the Court granted the same pursuant to rule 63 (2) of the Rules. In arguing the application, the applicant first adopted the notice of motion and the supporting affidavit. In his submissions, Mr. Mwabukusi narrated what transpired as stated in the background of the matter to which, I do not see the need to repeat it, to avoid monotony. He further submitted that he is aware of the legal stance that the grant of an extension of time is within the Court's discretion but beseeched the 3 Court, when exercising the said discretion, to consider that the parties intended to be served have not objected to the application. He sought reliance in the case of Sabina Masalu Mhalagani vs Julius Masalu & 4 Others, Civil Application No. 30/08 of 2022 (Unreported) to fortify his contention. He also urged the Court to consider the principle requiring service be done to all the parties to the case and cited the cases of TPB Bank PLC (successor in title to Tanzania Postal Bank) vs Rehema Alatunyamadza & 2 Others, Civil Appeal No. 155 of 2017 and National Insurance Corporation (T) LTD vs Shengena Limited, Civil Application No. 230 of 2014 (both unreported) to back up his submission. It was further the argument of the learned counsel that the delay was technical. As a conclusion he prayed the Court to grant the extension of time to serve the unserved parties so that the hearing of the appeal now pending in Court, could proceed. He also prayed the costs to be in the cause. Mr. Laswai for the 2nd respondent was so brief. He basically supported the application. He urged the Court to consider the legal principle that requires service of notice of appeal and other relevant documents for appeal purpose be effected on any person who took part in the proceedings of the High Court and referred the Court to the cited case of TPB Bank PLC (supra) in support of his argument. Further, it was Mr. Laswai's submission that the 2nd respondent would be prejudiced if she will not be included in the pending appeal. The 1st respondent opposed the application arguing that the discretion of the Court to extend time has to be exercised judiciously by taking into account all the relevant facts to the matter. Mr. Kyando submitted that the applicant has failed to abide with rule 10 of the Rules for failing to show sufficient cause for delay. Amplifying, the learned counsel submitted that according to paragraphs 4 and 6 of the supporting affidavit, the applicant did not serve the 2nd and 3rd respondents for the reason that he had no cause of action against them. It was his contention that the paragraphs show that the applicant deliberately opted not to serve them contrary to the legal requirement on that aspect. Thus, his inaction cannot move the

Court to exercise its discretion and grant the application. He made reference to the case of Omary Makunja vs Republic, Criminal Application No. 88 of 2018 (unreported) to back up his contention. Refuting the argument that the delay was technical, Mr. Kyando argued that the applicant did not account for the alleged technical delay. Elaborating, he submitted that the applicant failed to account for about 60 days from 20th August, 2020 when he filed the notice of appeal and wrote a letter to the registrar requesting for relevant documents for appeal purpose, up to 1st November, 2021 when he wrote another letter to the registrar praying for leave to serve the 2nd and 3rd respondents. Further to that, there is no accounting from 4th November, 2021 when the registrar rejected the said prayer for leave to 25th November, 2021 when he filed Misc. Application No. 99 of 2021 which was later struck out. He argued that the law is settled that the applicant has to account for all days of delay, even a single day. He cited the case of Hyasinta Malisa vs John Malisa, Civil Application No. 167/01 of 2021 to support his argument. He concluded that, since the applicant has failed to account for the delay as above shown, it goes that, he has not complied with rule 10 of the Rules and on that account, the application should suffer dismissal with costs. In his rejoinder, Mr. Mwabukusi started by distinguishing the cases of Omary Makunja (supra) and Hyasinta Malisa (supra) cited by Mr. Kyando on the ground that the applicants therein failed to account for the delay but in the case at hand, the applicant did so. He further stated that though it is true that the registrar's response letter was written on 4th November, 2021 but the applicant received it on 22nd November, 2021 at 2.05 p.m. which was Friday (sic). Thereafter, the applicant was before the High Court on the following Monday to lodge the application which was later struck out, as such, there was no inordinate delay in pursuit of the matter. He reiterated his prayer to have the application granted. Before embarking on the analysis, I wish to correct Mr. Mwabukusi that 22nd November, 2021 was Monday according to the calendar and not Friday as he submitted. In determining whether or not this application is meritorious, I will start by examining rule 10 of the Rules, which is enabling provision to move the Court to grant the extension of time. It is also under this rule the application is predicated on. It states as follows: - "The Court may, upon good cause shown extend the time limited by these Rules or by any decision of the Court or tribunal, for the doing of any act authorized or required by these Rules, 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." As to what exactly constitutes "good cause" has been left to the discretion of the Court. Essentially, there is no hard and fast rule in establishing it. Nevertheless, the case of Lyamuya Construction Company vs Board of Registered Trustees of Young Women Christian Associated of Tanzania, Civil Application No. 2 of 2010 (unreported) has laid down some factors to be considered when determining "good cause". These are as follow: - "(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 a 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." [Also see *Richard Moses vs. Republic*, Criminal Application No 1 "B" of 2015 and *Zahara Kitindi and Another vs. Juma Swalehe & Nine Others*, Civil Application no 4/05 of 2017], (both unreported). 8 The above stated legal positions will guide the Court in determining this application. After being dissatisfied with the High Court decision, it is on record that the applicant timely served the 1st respondent with the lodged notice of appeal, letters to the registrar requesting for relevant documents for appeal purpose, but omitted to serve the 2nd and 3rd respondents. Reading through paragraphs 4 and 6 of the supporting affidavit, it is crystal clear that the omission was deliberate, as rightly contended by Mr. Kyando. I also wish to state that in my conviction, I have no flicker of doubt that the applicant is being represented by the learned counsel who is well conversant with the rules governing the conduct of the proceedings before the Court, amongst them is the requirement to effect service on all the persons who took part in the proceedings of the High Court in terms of rule 84 (1) of the Rules. Yet, in his own volition, the learned counsel neglected to do so. Even if it is assumed that the requirement at first skipped the learned counsel's mind, but upon recalling that failure to serve the duo was an error, it was expected that he would have promptly took the appropriate steps to correct the error. Instead, he opted to seek an 9 informal leave before the High Court registrar. As if that was not enough, upon rejection response from the registrar, the learned counsel instituted Misc. Civil Application No. 99 of 2021 in the High Court which was later struck out, while knowing or ought to have known in his capacity as a learned counsel, that the two authorities had no jurisdiction to grant an extension of time to the applicant to serve the concerned respondents. To say the least, the inaction cannot, by all standards be stated to demonstrate diligence on the part of the applicant's advocate. Rather, it shows negligence and apathy on his part, which in law can cot constitute sufficient cause for the purpose of extending time. There is a chain of authorities to that effect like in *Exim Bank (Tz) Ltd vs Jacquiline Kweka*, Civil Application No. 348 of 2020, *Jubilee Insurance (Tanzania Limited) vs Mohamed Sameer Khan*, Civil Application No. 439/01 of 2020 and *Wambura NJ. Waryuba vs The principal Secretary Ministry of Finance and Another*, Civil Application 320 of 2023, (all unreported) to mention but a few. That apart, the applicant has argued that the delay was technical to which I am not convinced and I will explain. First and foremost, I am of the view that the defence of technical delay cannot apply in the circumstances where the advocate has failed to act within the dictates of the law, as happened in this application. But further, even if it that could have been the case, the applicant has still failed to account for the alleged technical delay. According to record, the applicant has failed to account for about 75 days from 20th August, 2020 when he filed the notice of appeal and wrote a letter to the registrar requesting for relevant documents for appeal purpose, up to 1st November, 2021 when he wrote another letter to the registrar praying for leave to serve the 2nd and 3rd respondents.

Further to that, there is no accounting from 4th November, 2021 when the registrar rejected the said prayer for leave to 25th November, 2021 when he filed Misc. Application No. 99 of 2021 which was latter struck out on the disclosed date. In between there is an accounted delay of 21 days. Again, this application was filed on 1st August, 2022 but the applicant has not stated what transpired in between to justify what he called technical delay. In my view, the delay is actual rather than technical. On the foregoing, needless to show further that the applicant has failed to account for all days of delay. It is trite law that delay of even a single day has to be accounted for and the Court has consistently ii repeated the said stance. [See: Hassan Bushiri vs Latifa Lukio Mashayo, Civil Application No. 3 of 2007, Sebastian Ndaula vs Grace Rwamafa, Civil Application No. 4 of 2014, (both unreported) and Omary Makunja (supra)]. I am aware that Mr. Mwabukusi has pleaded with the Court to grant this application relying on the case of Sabina Masalu Mhalagani to the effect that the parties to be served are not opposing the application, but with respect, I find the case distinguishable on account that, in the cited case, the Court had ruled out that the applicant was caught up in technical delay, while it is not the case in this application. Again, I am further alert that both counsel for the applicant and the 2nd respondent sought reliance in the case of TPB Bank PLC (supra) in urging the Court to allow the application on the ground that the law requires service to be effected on each party who participated in the High Court proceedings, which is true. Nevertheless, the law has set time within which to do so, failure of which, the same law stipulates the consequences to follow. Furthermore, Mr. Laswai argued that the 2nd respondent would be prejudiced if she will not be included in the pending appeal. Suffices to state that, he had the opportunity to lodge an appeal as well and in fact he still has, if in his view there is any 12 prejudice to his client instead of waiting to be incorporated into an appeal lodged by another party. As such, I found their arguments to hold no water. In fine, considering all the circumstances pertaining to this application, I find that the applicant has failed to move the Court to exercise its discretion and grant the extension of time sought. The application therefore fails, and is accordingly dismissed with costs, for want of merit. It is so ordered. DATED at MBEYA this 12th day of December, 2023. L. G. KAIRO JUSTICE OF APPEAL The Ruling delivered this 13th day of December, 2023 in the presence of Mr. Boniface A.K. Mwabukiisi, learned advocate also holding brief for Mr. James Berdon Kyando, learned Advocate for the 1st respondent, and in absence of the 2nd Respondent is hereby certified as a true copy of the

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