

TANZANIA / JUDGMENT

heritage insurance company ltd vs sabians mchau others 2021 tzca 523 27 september 2021

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27 September 2021

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IN THE COURT OF APPEAL OF TANZANIA AT MBEYA CIVIL APPLICATION NO. 284/09 OF 2019
HERITAGE INSURANCE COMPANY LTD. APPLICANT VERUS SABIANS
MCHAU..... 1st RESPONDENT THE PERMANENT SECRETARY MINISTRY OF
HEALTH..... 2nd RESPONDENT THE ATTORNEY GENERAL ,3rd
RESPONDENT (Appeal from the Judgment and decree of the High Court of Tanzania at
Sumbawanga) (Sambo, J.) dated 29st day of April, 2016 in Civil Case No. 1 of 2009

RULING

21st & 27th September, 2021. FIKIRINI, 3.A.: The applicant, Heritage Insurance Company (T) Ltd, by way of notice of motion moved this Court under Rules 10, 48 (1), (2), 49 (1), 97 (1), and

(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), seeking for extension of time to serve, out of time, the Memorandum of Appeal and Record of Appeal, to the respondents, in respect of the Civil Case No. 1 of

2009. The reasons advanced are contained in the notice of motion and are: 1

1. That, the applicant lodged a Notice o f A p p e a l a g a i n s t the judgm ent and decree o f the High Court o f Tanzania\ at Sumbawanga by Hon. K.M.M. Sambo J. dated 2 9 h day o f A pril 2016, in C ivil Case No. 1 o f 2009, and the same was served to each o f the respondents within time.
2. That, upon been served with the Notice o f Appeal none o f the respondents file d and served the applicant with a notice o f fu ll and sufficient address o f service.
3. That, thereafter the applicant filed Memorandum o f Appeal and Record o f Appeal and the same was adm itted as C ivil Appeal No. whereas after lodging the said appeal, the same rem ained with the Court o f Appeal Registry with instructions that it is the Court o fficia l who are responsible to serve the respondents with the Record o f Appeal.

4. That, thereafter the Court official informed that they are not the one who serves, thus we served the respondents and by the time the Memorandum of Appeal and Record of Appeal were served to the respondents, had already elapsed. The notice of motion is supported by the affidavit of one Peter Kamyalile, an advocate representing the appellant. In the affidavit, and particularly in paragraphs 6, 7, and 8, the deponent elucidated what transpired leading to this application for extension of time to serve, out of time, the respondents with the Memorandum and Record of Appeal, and in paragraph 9 the advocate deposed that the failure to serve the Memorandum and Record of Appeal to the respondents within time was not intentional or negligent. He thus prayed for the grant of the application. Mr. Mathias Budodi learned counsel filed an affidavit in reply on behalf of the 1st respondent. In his affidavit in reply, the learned counsel conceded that the respondents were served with the Memorandum and Record of Appeal, albeit out of time. The counsel, however vehemently contested the application, especially the contentions in paragraphs 5, 6, and 7 of the applicant's affidavit in support, through paragraphs 4 and 5, of the affidavit in reply that the applicant was aware that the counsel was the one representing the 1st respondent, and also that the applicant failed to name the Court officer and the position, and no affidavit of the alleged Court officer was filed to support the averments. The counsel also 3 contested the applicant's counsel's actions deponing that he is fully aware of the procedure of service of court documents. Mr. Francis Rogers, learned State Attorney as well filed an affidavit in reply on behalf of the 2nd and 3rd respondents. Disputing paragraph 5 of the applicant's affidavit, he stated that the facts are in contradiction with the contents of paragraph 4 of the applicant's affidavit. Contesting the affidavit further, the counsel stated that the applicant's counsel aside from being conversant with the procedure but also his failure to check the law was not a sufficient ground for grant of extension of time. In paragraph 6 of the affidavit in reply responding to paragraph 7 of the affidavit, the counsel asserted that the application arose from a hopeless case, no sufficient reason for the delay had been given, and the present application will not stand as there are no chances of success and also there are no disturbing features to require this Court's intervention. The learned State Attorney representing the 2nd and 3rd respondents filed written submission dated 26th June 2019, opposing the grant of this application. In short, the respondents ruled out the application to have any merit hence urged for its striking out with costs. On 22nd September 2021, when the application came up for hearing, Ms. Mary Mgaya learned counsel holding brief for Mr. Tarimo learned counsel for the applicant entered appearance and argued the application. Mr. Mathias Budodi and Mr. Lukelo Samwel learned Principal State Attorney assisted by Mr. Joseph Tibaijuka learned State Attorney represented the respondents respectively. Upon taking the floor Ms. Mgaya first adopted the contents of the notice of the motion and the affidavit filed in support thereof. She then prayed to be allowed to insert the Civil Appeal No. 57 of 2018, in the blanks reflected in paragraphs 6 and 8 of the affidavit. She also prayed to adopt the notice of motion, affidavit in support and inserting the Civil Appeal No. 57 of 2018 in the blanks, the prayers which were granted. As for the rest of her submission, it was her prayer that this application be granted as the respondents have already been served, have filed their replies, and the appeal had been scheduled for hearing only to be deferred as

there was this pending application. Challenging the affidavits in reply and the submission filed by the 2nd and 3rd respondents, she argued that they responded to a different matter. 5 Instead of dealing with an extension of time to serve the respondents, they have dealt with an extension of time to lodge an appeal, which is not the gist of the application before this Court. Mr. Budodi, objecting to the application he contended that the appeal is incompetent as service was done contrary to the law. Supporting his assertion, he advanced two reasons: one, that the alleged Court officers as indicated in paragraphs 6 and 7 of the affidavit have not been named. He went on submitting that in the 2nd and 3rd respondents' affidavits in reply there was an affidavit by the Court officer declining to have advised the applicant. According to Mr. Budodi, this means the deponent in the affidavit in support was not stating the truth. Considering it is the position of the law, the affidavit containing untruthful information cannot, therefore, be relied upon by this Court to resolve any issue, he contended. In support of his proposition cited to this Court the case of Damas Assesy & Another v Raymond Mgonda Paula & 8 Others, Civil Application No. 32/17 of 2018 (unreported), in which the Court dismissed the application for containing untruthful information. 6 Two, he contended that in paragraph 7 of the affidavit, the applicant has admitted to having already served all the respondents. This means he argued, the application has been overtaken by events and the application was thus an abuse of the court process. In that regard, he prayed for the dismissal of the application with costs. The Principal State Attorney, prefaced his submission by admitting and apologizing that their submission responded to a different issue and thus urged me to disregard it, which I will do. Submitting on the application, he essentially supported Mr. Budodi's submission and prayed to adopt it as theirs, and concluded that the application is without merit and has been overtaken by events. And as such, the application was an abuse of the court process, to which the respondents have only responded because it was the right thing to do. He thus prayed for its dismissal with costs. Rejoining, Ms. Mgaya reacting to the affidavit claimed to have been filed by the Court officer, she contended that the same was filed on 30th August 2021, but not served on the applicant, the action which was injurious to the applicant as he never got to see the affidavit and be able to counter the assertion. She further submitted that all the respondents have not countered the contents in paragraph 5 of the affidavit. She thus prayed for the application to be granted despite the assertion that it has been overtaken by events as lodging an application of this nature was part of the procedure and not the applicant's creation. This application for extension of time is predicated under Rule 10 of the Rules. It is from this provision the Court has derived its discretionary powers. For ease of reference the provision is reproduced below: "The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunals 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." [Emphasis mine] Two things that can be deduced from the provision is that one, the Court is vested with discretionary powers, which comes with a caution that those powers have to be exercised judiciously and by following the rules of reason and justice, depending on the situation in each case and not

acting arbitrarily and two, that the applicant must furnish good or sufficient cause for the delay. The term sufficient cause has not been defined, but the courts have along the years' developed guidelines to be relied on in determining whether the applicant has demonstrated good or sufficient cause. The applicant, therefore, has to place before the Court material information upon which the Court can exercise its discretion. See: Tanga Cement Company Limited v Jumanne D. Masangwa & Another, Civil Application No. 6 of 2001, Regional Manager Tanroads Kagera v Ruaha Concrete Company Limited, Civil Application No. 96 of 2007, Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010, Oswald Masatu Mwizarubi v Tanzania Fish Processors Ltd, Civil Application No. 130 of 2010, and John Lazaro v Republic, Criminal Application No. 34/4 of 2017 (all unreported). In the decisions above, the Court has put forward the following as factors to be considered in granting or not granting the extension of time sought. These include the reasons for the delay, length of the delay, whether the applicant acted diligently, degree of prejudice to the respondent if time is extended, and illegality. 9 I have carefully considered the notice of motion, affidavits, and oral submissions made by the counsel for the parties, and few points have come to light. One, the applicant in paragraph 6 gave a reason as to what transpired related to service of the Memorandum and Record of Appeal to the respondents. To appreciate this ruling, let the paragraph speak for itself: " upon making follow up for collection with a view of serving the respondents as required under the law I was advised by the Court officials that the Memorandum of Appeal and Record of Appeal are always remain with the Registry with instructions that I have to pay fees for the Court official to serve them to the respondents as it is the duty vested upon them . A copy of the exchequer receipt for fees paid to the court for service of Memorandum and Record of Appeal are annexed hereto and collectively marked as "LLA-4" and that leave is craved that they form part of this affidavit "[Emphasis mine] It is evident from this record that, first and foremost the applicant never mentioned the name of the Court officials who advised him as 10 averred in paragraph 6. This creates doubt as to the veracity of the assertion and in the absence of an affidavit of the respective Court officials, I find it implausible to agree with the applicant's explanation. Secondly, I could not come across annexure collectively marked as "LLA-4" in the whole of this record of proceedings. There is, however, an exchequer receipt issued on 27th November 2018. The receipt has not disclosed if the service referred is for the Memorandum and Record of Appeal as claimed, instead, the receipt shows that it was for "Reuro of Security and Feed". I compared that exchequer receipt supposedly is the one being referred by the applicant to another exchequer receipt issued on 15th May 2019, which specifically illustrated it was fees for "notice of motion", I was thus expecting the one for service of Memorandum and Record of Appeal, would have indicated the same. Thirdly the applicant has not even mentioned the date when the advice was given and when did he go back and advised otherwise. Furthermore, in paragraph 7 of the affidavit, the applicant has again disclosed what happened in course of his following up on the service. Paragraph 7 of the affidavit reads as follows: li "That thereafter I made an inquiry from the Court if the respondents were served by the Court officials within time and

the Court official informed me that they detected the referee that they are not the ones who are responsible to serve the respondents with the Memorandum and Record of Appeal but they are only responsible to serve the Court summons once the appeal is scheduled for hearing and that the fees I paid are for the upposes thus I take trouble to serve the respondents myself whereas the 1st respondent was served on the 12th March 2019 and the 2nd and 3rd respondents were served on the 15th March 2019. "[Emphasis mine] The applicant has once again failed to mention who informed him and when was that. Assuming the advice was given on 27th November 2018, when the payment receipt was made, it means the applicant never bothered to make follow-ups until when he served the respondents which were on 12th and 15th March 2019. In my view, this shows apparent negligence and inaction by the applicant. And I do agree with Mr. Budodi counsel for the 1st respondent's averment in paragraphs 4 and 5 of the affidavit in reply. It is undisputed fact that the applicant's counsel knew that Mr. Budodi was representing the 1st respondent, yet he did not bother to serve him with the requisite documents. He nonetheless, ultimately served the said documents through the very counsel he was alleging in paragraph 5 of the affidavit that did not file or serve him with a notice of full and sufficient address for service. The applicant's counsel being a trained lawyer is certainly aware of the procedure of service of court documents. In this instant, he seemingly opted to ignore the proper procedure in place and was even not bothered to check the law. I have no reason to disregard the 2nd and 3rd respondents' counsel averment in paragraph 5 of the affidavit in reply showing the applicant's inefficiency. On the contrary, Mr. Budodi's submission that there was an affidavit filed countering the applicant's assertion, his submission was a mere statement from the bar, as he did not mention the name of the Court officer and unfortunately, the said affidavit was not on record, for me to examine nor was it served to the applicant as pointed out by Ms. Mgaya. I, therefore, cannot act on the counsel's submission. The case of Damas 13 Assasy & Another (supra), I was referred to, though relevant it is not in the context of this application. As intimated earlier in this decision, this application is devoid of merit despite the undisputed service acknowledged by the respondents made out of time. I am thus satisfied that the applicant has not demonstrated any good or sufficient cause to warrant granting of the prayer for extension of time sought. In conclusion, this application is dismissed with costs. DATED at MBEYA this 27th day of September, 2021. P. S. FIKIRINI JUSTICE OF APPEAL The Ruling delivered this 27th day of September, 2021 in the presence of Ms. Rehema Mgeni holding brief of Ms. Mary Mgaya, learned counsel for the applicant also holding brief for Mr. Mathias Budodi learned counsel for the 1st respondent and Mr. Joseph Tibaijuka, learned Senior State Attorneys for the 2nd and 3rd respondents, is hereby certified as a true copy

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Prepared on 14 October 2026 · Esheria