

TANZANIA / JUDGMENT

zephrenus clement marushwa vs the attorney general others 2024 tzca 54 19 february 2024

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19 February 2024

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IN THE COURT OF APPEAL OF TANZANIA AT MWANZA CIVIL APPLICATION NO. 352/08 OF 2020
ZEPHRENUS CLEMENT MARUSHWA.....APPLICANT VERSUS

1. THE ATTORNEY GENERAL
2. COMMISSIONER FOR LANDS
3. ILEMELA MUNICIPAL COUNCIL RESPONDENTS
4. SHIREN ALIBHAI RAI
5. RAMADHANI YAHAYA HUSSEIN (Appeal from the Ruling and Order of the High Court of Tanzania at Mwanza) (Mqevewa, 3} dated the 16th day of August, 2019 in Land Case No. 37 of 2018

RULING

12th & 19th February, 2024 MLACHA. J.A.: The applicant has lodged this application seeking extension of time to serve the respondents with a notice of appeal against the decision of the High Court of Tanzania made in Land Case No. 37 of 2018 (Mgeyekwa 1, as she then was). The application is brought by way of a notice of motion made under Rule 10 of Tanzania Court of Appeal Rules, 2009 (the Rules) and is supported by affidavit of the applicant, Zephrenus Clement Marushwa. The applicant has premised his application on one ground set out in the notice of motion which reads as here under:

1. That, the act of not serving the respondents with a Notice of Appeal within time was due to delay of the Court Process Server to serve within time. A copy of the notice of appeal lodged on 13th September, 2019, a complaint letter of the applicant lodged to the Deputy Registrar (the DR) dated 19th March, 2020 and the response of the DR dated 25th March 2020 are attached to the affidavit. The background facts of the matter as could be found in the affidavit supporting the application is as follows: The applicant was a plaintiff in Land Case No. 37 of 2018 at the High Court of Tanzania at Mwanza. The respondents were the

defendants. For reasons which are not apparent in the affidavit supporting the application, the case was dismissed on 16th August,

2019. The applicant was aggrieved and lodged a notice of appeal on 13th September, 2019. He engaged a Process Server on 29th October, 2019 to effect service of the notice of appeal to the respondents who could not do so up to 20th March, 2020 when the applicant decided to write a letter of complaint to the DR. The DR replied on 25th March, 2020 by demanding explanation from the Process Server. A copy of the letter was served to the applicant. No service was done to date despite the intervention of the DR. 2 The tale of the 1st, 2nd, and 3rd respondents as found in their joint affidavit in reply is as follows: That, the applicant was negligent in pursuing his right by failure to serve the respondents with the notice of appeal within the time stipulated under the law. They stated that by the time when the applicant engaged the Process Server on 29th October 2019 to serve the respondents with the notice of appeal, the 14 days prescribed under the law had already elapsed. They added that, making calculations from 13th September 2019 when the notice of appeal was lodged to 29th October, 2019 when the process server was assigned to effect the same to the respondent, there is a gap of 46 days which is a long period. That, even if the respondents were traced and served, still the service could have been out of time. The 4th respondent did not file any affidavit in reply. We could not get his side of the story. The 5th respondent denied the allegations in the applicant's affidavit. He stressed that he never happened to be served with the notice of appeal. At the hearing, the applicant was present in person unrepresented while the 1st, 2nd and 3rd respondents were represented by Ms. Careen Masonda assisted by Mr. Uiso Luoga, both learned Senior State Attorneys. The 4th respondent did not enter appearance despite publication of the notice of hearing in Mwananchi newspaper of 5th February 2024. The 5th respondent appeared in person unrepresented. No written submissions were filed as required by rule 106(1) of the Rules. The parties addressed the Court orally in terms of rule 106(10) of the Rules. In his oral submissions, the applicant intimated that he was delayed by the Court Process Server who did not do his job as required by the law. That, one day he decided to inquire as to why service was not effected to Ramadhani (5th respondent) and was told that Ramadhani was outside the country. When made his personal inquiry, he saw him on 11th February, 2020 at the RM'S Court Mwanza. He could not be served despite a promise of the Process Server to do so. He complained to the DR but there was no good response. He went on to submit that, he was involved in a motorcycle accident on 19th February 2020 and was hospitalized at Sekoture Hospital for 3 weeks. This also contributed in the delay. In view of what had befallen the applicant, he decided to file the present application seeking an enlargement of time. Submitting for the 1st, 2nd and 3rd respondents, Ms. Masonda State Attorney, intimated that the service was supposed to be effected to the respondents within 14 days from the date of lodging a notice of appeal; that is by 29th September, 2019. That was not done and the blame is thrown to the Court Process Server who was engaged on 29th October, 2019 which was 31 days after expiry of the date of service. No good explanation was given on this delay, she submitted. Counsel intimated that, the applicant has no good

cause as required by Rule 10 of the Rules because he was already time barred at the times of engaging the Process Server. To amplify this point, he made reference to our decision in *Lyamuya Construction Company Limited v. Board of Trustees of Young women Christian Association of Tanzania*, Civil Application No. 2 of 2010 (unreported), Pages 6 and 7 where we stated: "As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities however, the following guidelines may be formulated;

- 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
- d) If the Court feels that there are 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".
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Counsel urged the Court to dismiss the application saying the applicant has failed to fulfil the conditions set in this case. The 5th respondent had nothing to add. In his brief rejoinder, the applicant reiterated that the problem was the Court Process Server, not him. He urged me to neglect what has been submitted by the state attorney and grant the application. Having heard the parties' submissions and perused the record of the application, the main issue before me is whether the applicant has established good cause upon which to extend the time as required by rule 10 of the Rules. What is good cause has not been defined by the Rules but the Court consider such factors like; (i) the length of delay involved and the reasons for the delay; (ii) the degree of prejudice, if any, that each party stands suffer in case the Court opt to exercise its discretion; (ii) the conduct of parties, and the need to balance the interests of a party who has a decision in his favour against the interests of a party who has a constitutional right of appeal. See *Dar es salaam City Council v. Jantilal P. Rajan*, Civil Application No. 27 of 1987 (unreported), *Kalunga & Company Advocates Ltd v. National Bank of Commerce Ltd* [2006] TLR 235; *Elia Anderson*

v. *R, Criminal Appeal No. 2 of 2013, Attorney General v. Tanzania Ports Authority & Another*, Civil Application No. 87 of 2016 and *Airtel 6 Tanzania Limited v. Masterlight Electrical Installation Co. Limited & Another*, Civil Application No. 37/01 of 2020 (both unreported). Now, in the present application, can we say that the applicant has managed to demonstrate good cause warranting the grant for an order for extension of time to serve the notice of appeal on the respondents? I will hasten to say no. I will try to demonstrate. As correctly pointed out by the State Attorney, the notice of appeal was lodged on 13th September, 2019, but the appellant engaged the Process Server of 29th October, 2019. No action was taken from 13th September, 2019 up to 29th October, 2019, a period of 36 days. The affidavit of the applicant is silence on what had befallen him and cause a failure to take action in that period. While before me, the applicant intimated that he had a motorcycle accident and hospitalized

for three weeks. This statement did not find its way to the affidavit supporting the notice of motion, so, it has no evidential value. But even if for the sake of argument, we decide to take it and find it to be true, as the applicant wants me to believe, still the dates he pointed out defeats the purpose. He said he was involved in an accident on 19th February 2020 while he was supposed to serve the respondent on or before 29th September 2019. This is a misconceived argument and cannot assist the applicant. I will in the end find that the applicant has failed to account for the delay from 29th September 2019 when the notice of appeal was due for service to 7th May 2020, when this application was filed, more than 8 months. On this obvious finding, there is no reason to discuss the other points whose discussion may only be academic. I find the application to be devoid of merit and is hereby dismissed. I make no order for costs. DATED at MWANZA this 16th day of February, 2024. L. M. MLACHA JUSTICE OF APPEAL The Ruling delivered this 19th day of February, 2024 in the presence of the Applicant appeared in person and Mr. Allen Mbuya assisted by Ms. Mariam Omary, both learned State Attorneys for the 1st, 2nd and 3rd respondents, the 4th respondent did not enter appearance and the 5th respondent appeared in person, is hereby certified as a true copy of the 8

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