IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 41 OF 1997
In the Matter of an Intended Appeal

BETWEEN

LEONSI SILAYO NGALAI ..... APPLICANT

AND

1. HON. JUSTINE ALFRED SALAKANA..1ST RESPONDENT
2. THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

(Application for Extension of Time to serve Notice of Appeal to the Respondent from the Decision of the High Court of Tanzania at Moshi)

(Munuo, J.)

dated the 8th day of April, 1997

in

Misc. Civil Cause No. 5 of 1995

R U L I N G

KISANGA, J.A.:

This is an application for extension of time to serve a copy of the notice of appeal on the first respondent, The Hon. Justine Alfred Salakana, M.P., and to institute the appeal in terms of rule 83 of the Court of Appeal Rules. The application is brought by a notice of motion duly supported by the affidavit of the applicant, Mr. Leonsi Silayo Ngalai, who appeared and argued the matter in person before me. The first respondent was represented by Mr. C.J. Maruma, learned advocate, while Mr. Kamba, learned Senior State Attorney advocated for the second respondent, the Attorney-General.

It is common ground that the judgement which it is intended to appeal against was delivered on 8.4.97 and the notice of intention to appeal was given in time on 10.4.97. However, a copy of the notice of appeal was not served on the respondents within seven days of the notice as required by rule 77(1) of the Court of Appeal Rules. To be exact, the second respondent was served with such notice out of time on 30.5.97, while the first respondent was not served at all.

Thus on the first leg of the application, the applicant seeks an extension of time during which to serve the first respondent with a copy of the notice of appeal, and his explanation was that the administration of the High Court at Moshi was wholly responsible for the delay or omission of the service on the respondents. That explanation is couched in paragraphs 7, 8 and 9 of his affidavit dated 21.7.97 which for purposes of clarity are set out in extenso herein below:

> "7. That I, being a layman not conversant with the law and practice of the Courts, and in total ignorance of the provision of Rule 77(1) of the Court of Appeal Rules 1979 I requested the administration of the High Court at Moshi to serve the copy of the Notice of Appeal to the Respondents. Such a request was accepted;

8. That the copies of the Notice of Appeal were served upon the Respondents by the Moshi High Court Messenger one Mrs. Scola Mwanamaula through a despatch book on the 30th day of May, 1997;

9. That the State Attorney accepted the copy of the Notice but Mr. Maruma, Advocate for the First Respondent refused to accept it on the ground that the First Respondent Justine Alfred Salakana had never been in his office since the delivery of the judgment;"

The first respondent filed a counter-affidavit, and at the hearing of the application learned counsel for both respondents opposed the application on the ground that no sufficient cause was disclosed for granting the extension of time sought. Mr. Kamba had an additional ground of complaint. His office was served with a copy of the notice of appeal out of time on 30.5.95. He submitted in effect that while the service was accepted only out of courtesy, that did not regularize the omission. It did not relieve the applicant of his legal obligation to serve the respondent within the time prescribed by rule 77(1), or out of the prescribed time, with the leave of the Court.

Since the applicant had discharged neither obligation, Mr. Kamba not only objected to the application, but also

urged me to strike out the notice of appeal for the applicant's failure to take the essential step in the appeal i.e. for failing to serve him in law with a copy of the notice of appeal.

The gravamen of the applicant's explanation as can be gleaned from paragraphs 7, 8 and 9 of his affidavit reproduced above is that the delay or omission to serve the respondents with a copy of the notice of appeal was caused by the administration of the High Court at Moshi who had accepted his request to serve copies of that notice on the respondents. This is obviously hearsay. The applicant did not require anyone from the administration of the High Court at Moshi to file affidavit in support of his assertion that the administration there had accepted the responsibility to serve the respondents. Neither was Mrs. Scola Mwanamaula, the alleged Moshi High Court messenger mentioned in paragraph 8 of the affidavit, required to file an affidavit to confirm that she is the person who belatedly served the second respondent on 30.5.97 and if so on whose instructions, nor was the dispatch book allegedly used for the purpose exhibited in these proceedings for scrutiny.

When at the hearing the applicant was confronted with this unsatisfactory state of affairs, he applied for an adjournment and for leave to adduce further evidence through additional or supplementary affidavit or affidavits in order to remedy the situation. This, however,

was objected to very strongly by counsel for both respondents. I sustained the objection largely because the type of further evidence which the applicant is seeking to adduce was available at the time of compiling and prefering this application, and he has given no reasons why he did not adduce it then. Parties to applications should make sure that as far as possible they marshall all the evidence they need before the matter comes up for hearing. After the hearing has started I think the matter should not be adjourned simply to enable a party to look for evidence or further evidence in support of his case; in my opinion to do so would tend to undermine efficient administration of justice.

As I said before, the applicant's assertion that the administration of the High Court at Moshi had accepted his request to serve the respondents with copies of the notice of appeal is hearsay. As such the assertion was inadmissible. The net result, therefore is that the applicant has not explained adequately or at all the failure to serve copies of the notice of appeal on the respondents within the prescribed time or at all.

The applicant's claim in paragraph 7 of his affidavit that he is a layman not conversant with the law and practice of the courts, and totally ignorant of the provisions of rule 77(1) of the Court of Appeal Rules is completely false. The first respondent appended to his counter-affidavit a copy of the Ruling by this Court

in Olele Rural Co-operative Society Ltd. v. The Director of Public Prosecutions AR Civ. Application No. 8 of 1992 (unreported) which amply demonstrates this view. That was a matter or case in which this very applicant, then chairman of and representing the Olele Rural Co-operative Society Ltd., had applied for an order to strike out the notice of appeal for failure by the appellant Director of Public Prosecutions to serve a copy of the notice of appeal on the respondent, the Olele Rural Co-operative Society. Conceding the omission, the representative of the Director of Public Prosecutions sought for an extension of time to serve a copy of the notice on the said Co-operative Society. According to the Ruling, among the responses to that application was this:-

> "Mr. Ngalai asked the Court to reject the application for extension of time and prayed that the notice of appeal be struck out for failure by the respondent (The Director of Public Prosecutions) to comply with the provisions of rule 77(1) of the Court of Appeal Rules."

The passage shows that the applicant is conversant with the provisions of rule 77(1) of the Rules. If he was able to invoke the rule in his favour, he cannot now plead ignorance of it when it is being invoked against him.

In that same Ruling the Court went on to reproduce the provisions of rule 77(1) as follows:-

> "77-(1) An intended appellant shall, before or within seven days after lodging a notice of appeal, serve copies of it on all persons who seem to him directly affected by the appeal; but the Court may on an ex-parte application direct that service need not be effected on any person who took no part in the proceedings in the High Court."

That provision further made it abundantly clear to the applicant that the obligation to serve the respondents with copies of the notice of appeal was squarely on him, and on no one else. Since he was well aware of this, then even if, for the mere sake of argument, the applicant had asked the administration of the High Court at Moshi to serve the respondents, as he claims, that could not, in my opinion, have relieved him of his legal obligation to ensure that the service on the respondents was in fact effected within the time specified. I need not stress that I am merely assuming that the applicant had asked the High Court administration to serve the respondents, because I have already held that there was no cogent evidence to support that assertion by the applicant.

For the reasons set out above, therefore, the application for enlargement of time to serve the first respondent with a copy of the notice of appeal must fail.

I now turn to the second leg of the application seeking the extension of time to lodge the record of appeal. The application was duly supported by the applicant's affidavit dated 25.7.97. As in the previous case the application was strongly opposed by counsel for both respondents on the ground that no sufficient cause is shown for granting the extension.

As stated earlier the notice of appeal was filed on 10.4.97. In his affidavit the applicant stated, and he was not contradicted, that on 5.5.97 he applied to the Registrar for copies of the proceedings and the same were supplied in two instalments, the last instalment having been supplied on 22.7.97. It is apparent that on the basis of that information the limitation period started to run on 22.7.97 when the last instalment was supplied, and in terms of rule 83 of the Court of Appeal Rules the appeal ought to have been instituted on or before 22.9.97. However, the applicant filed this application on 25.7.97. Obviously that was premature and misconceived; he should have spent his time processing the record of appeal rather than processing the application.

Be that as it may, when the application came before me on 21.10.97 the matter was ripe and mature, and properly before me because, as shown above, the limitation period had run out on 22.9.97. Since the appeal was not instituted within 60 days of the notice of appeal, it was necessary for the applicant to rely on the exception

to sub-rule (1) of rule 83 which is to the effect that in computing the 60 days, the time taken to obtain the copy of proceedings from the Registrar shall be excluded. However, in order to rely on that exception it was further necessary for the applicant to show that he had sent to the respondent copies of his letter to the Registrar asking for a copy of the proceedings.

As I said before, the applicant has shown that he did write to the Registrar asking for a copy of the proceedings. From a copy of that letter it also appears that copies of it were addressed to both respondents. However, the applicant in his affidavit does not make any suggestion that the copies of this letter were sent to the respondents. Once again the applicant sought to salvage the situation by seeking an extension of time to serve the respondents with copies of his letter to the Registrar, but for reasons set out in the first leg of this application I declined to grant it. Thus I uphold the submissions by counsel for both respondents that extension of time to institute the appeal could not be granted because an essential condition for it had not been satisfied.

I now turn to Mr. Kamba's contention that the applicant's notice of appeal ought to be struck out. As submitted by the learned counsel the notice of appeal was served on him belatedly, and todate there has been no application to serve him out of time. I entirely agree that the belated service effected on him not pursuant to any Court order was no service in law. And since up to

the date of hearing there had been no application to serve the notice on him out of time, then the applicant was clearly in breach of the requirement under rule 77(1) of the Rules. He had failed to take an essential step in the appeal which under rule 82 of the Rules would justify striking out the notice of appeal.

My refusal to grant the applicant's two applications for the extension of time meant two things: First, the applicant likewise in breach of rule 77(1), had failed to serve the first respondent with a copy of the notice of appeal, which again would justify striking out the notice of appeal under rule 82 for failing to take an essential step in the appeal. Secondly it meant that under rule 84 of the Rules the applicant is deemed to have withdrawn his notice of appeal for failure to institute the appeal within 60 days of the notice of appeal which also warrants striking out the notice of appeal.

In response to all this the applicant reiterated his plea of ignorance of the law and court procedures and insisted on his being granted an adjournment to do what he had omitted to do, but for the reasons stated earlier I refused the adjournment.

In the result, therefore, the application fails. The extension of time sought to serve the first respondent with a copy of the notice of appeal and to institute the appeal is refused, and for the reasons I have also endeavoured to give the applicant's notice of appeal is

struck out. The applicant is to bear the costs of this application.

DATED at DAR ES SALAAM this 28th day of October, 1997.

R. H. KISANGA
JUSTICE OF APPEAL

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

(M.S. SHANGALI)
DEPUTY REGISTRAR