

IN THE COURT OF APPEAL OF TANZANIA
AT MOSHI

CIVIL APPLICATION NO. 265/05 OF 2020

BENJAMIN H.NDESARIO t/a
HARAMBEE BUS SERVICES/ UB 40 BUS SERVICE APPLICANT
VERSUS

M/S RAHISI GENERAL MERCHANT LTD 1ST RESPONDENT

M/S UHURU PEAK SERVICE STATION 2ND RESPONDENT

**(Application for extension of time to serve notice of Appeal and a Letter to
the Deputy Registrar for the intended appeal from the Judgment of the
High Court of Tanzania at Moshi)**

(Twaib, J.)

dated the 13th day of December, 2019

in

Civil Appeal No. 1 of 2019

R U L I N G

6th & 20th July, 2023

MDEMU, J.A.:

Through a notice of motion preferred under the provisions of rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant lodged this application for extension of time within which to serve the respondents with notice of appeal and a letter to the Deputy Registrar requesting for copies of judgment, decree and proceedings in the High Court for appeal purposes.

The notice of motion is supported by an affidavit of the applicant where he averred as follows: On 13th December, 2019 the High Court of

Tanzania, sitting at Moshi (Twaib, J.-Retired) in Civil Appeal No. 1 of 2019, dismissed the appeal of the applicant for want of merits. Dissatisfied, the applicant lodged a notice of appeal on 24th December, 2019. He also, on the same day, applied to the Deputy Registrar for certified copies of judgment, decree and proceedings for appeal purposes. However, the notice of appeal and the said letter were not served to the respondent within fourteen days as required by the law, hence this application.

The respondents opposed the application through an affidavit in reply deposed by Benjamin H. Ndesario t/a Harambee Bus Services/UB 40Bus Service. In terms of rule 106 (1) and (7) of the Rules, both parties filed their respective written submissions for and against the application.

When the application was called on for hearing, the applicant was represented by Mr. Yussuf M. Mwangazambili, learned advocate, whereas Mr. Gwakisa Kakusulo Sambo, also learned advocate, appeared for the respondents. In his submissions in support of the application, Mr. Mwangazambili adopted the affidavit of the applicant together with his written submissions. He however abandoned his prayer for extension of time within which to serve the respondent a letter applying for a copy of proceedings in the High Court.

Accounting on the delay to serve notice of appeal on the respondent, the learned counsel argued that, the same was occasioned by the court staff one Noel Shida @ Mgeta. He explained that, although the notice of appeal was filed on 24th December, 2019, it was not until 8th March, 2020 when the applicant received a phone call from the said Noel Shida @ Mgeta requiring him to collect a copy of the notice of appeal. He thus collected it on 9th March, 2020 and since time within which to serve the same on the respondent had already lapsed, the applicant then lodged this application on 2nd April, 2020 for enlargement of time.

Mr. Mwangazambili argued further that, the time between 9th March, 2020 and 2nd April, 2020 was deployed to research on what course to take regarding the case. In support of this contention, the learned counsel cited the decision of the Court in **Symbion Power Tanzania Limited v. Oilcom & Tanzania Electric Supply Company Limited (TANESCO)**, Civil application No. 4976/01 of 2017 (unreported) insisting on a research conducted to be an indicator of being diligent on the part of the applicant in handling the matter, thus constituting a good cause.

In addition to the case of **Symbion Power Tanzania Limited** (supra), the learned counsel also made reference to the cases of **Loshilu Karaine and Three Others v. Abraham Melkizedeck Kaaya** (suing

as **Legal Representative of Gladness Kaaya**), Civil Application No. 140/02 of 2018 and **Benjamin H. Ndesario t/a Harambee Bus Service/UB 40 Bus Service v. Rahisi General Merchant Ltd & Uhuru Peak Services Station**, Civil Application No. 9/5 of 2021 (both unreported) in support of that assertion. The learned counsel concluded in this ground that, in all the cases he cited, courts' delay in supplying requisite documents to parties was construed to constitute good cause.

In his further submissions, the learned counsel argued that, no prejudice will be occasioned to the respondent should the application be granted because determination of the intended appeal will also protect rights of the respondent in the impugned judgment. In this, he made reference to the case of **National Housing Corporation v. Etienes Hotel**, Civil Application No. 10 of 2005 (unreported) insisting that, each case has to be determined on its merits. Basing on his submission, Mr. Mwangazambili thus urged me to grant the prayers sought for.

In response, Mr. Sambo first adopted his affidavit in reply and the filed written submissions and thereafter made some oral clarifications. He opposed the application for the reason that, the applicant has failed to establish that the delay was with sufficient cause. He argued that, there was negligence on the applicant's side to follow up the notice of appeal.

He added that, assertion such as one Noel Shida @ Mgeta informing the applicant on 8th March, 2020 to collect the notice of appeal, require affidavit of that person for proof thereof. Cementing on this assertion, Mr. Sambo cited the case of the **Guardian Limited and Another v. Justin Nyari**, Civil Application No. 87 of 2011 (unreported).

He further fronted that, on assumption that the applicant was served with the requisite notice of appeal on 9th March, 2020 as intimated, yet he failed to account for the 24 aggregate days to 2nd April, 2020 when this application was lodged. In his argument, making research for 24 days cannot constitute good cause. He thus referred to me the case of **Tanzania Coffee Board v. Rombo Millers Ltd**, Civil Application No. 13 of 2015 (unreported) insisting on what constitutes good cause. Specific on conducting research submitted by the learned counsel for the applicant to constitute good cause, Mr. Sambo was of the view that, the applicant's counsel being a practicing advocate, ought to possess the requisite knowledge of both procedural and substantive laws in advising his client.

He contended further that, the respondent will be prejudiced when time is enlarged because the application at hand has compelled him to incur unnecessary costs in this application and also for non-enjoyment of the fruits of the decree. He therefore distinguished all the cited cases for

in those cases, there were proof that documents were not supplied by the court in time unlike in the instant application in which the affidavit is silent on that aspect. He thus concluded that, rules of procedure are important because realization of rights is dependent on their application. He thus argued that, failure to follow such rules of procedure is also a denial of parties' rights.

In rejoinder, Mr. Mwangazambili reiterated his earlier submission and added that, an affidavit is not the only means a party may rely on for establishing existence of certain facts, though did not however mention those other means he was comprehending.

Following submissions by the learned counsel for the parties for and against the applications, the issue which calls for determination is whether the applicant has shown good cause upon which to grant this application. As already alluded to in the foregoing, this application has been brought under the provisions of rule 10 of the Rules. In the rule, and as decided in array of cases, the Court is endowed with discretionary power to enlarge time upon being satisfied that actions leading to delay were with good cause. In underscoring this principle, the Court in **Loshilu Karaine & Three Others** (supra), at page 8 observed that:

*Rule 10 of the Rules bestows the Court with discretionary powers to grant extension of time upon being satisfied that good cause has been shown for the delay. However, the scope of discretion was explained with lucidity in the case of **Henry Muyaga v. Tanzania Telecommunication Company Ltd**, Civil Application No. 8 of 2011 (unreported) that:*

*"The discretion of the Court to extend time under Rule 10 is unfettered, but has also been held that, in considering an application under the Rule, the Court may take into consideration such factors as, the length of the delay, the reason for the delay, the chances of success of the intended appeal and the degree of prejudice that the respondent may suffer if the application is granted. [See **Tanzania Revenue Authority v. Tango Transport Co. Ltd**, Consolidated Civil Applications No. 4 of 2009 and 9 of 2008 (unreported)]."*

According to the affidavit and submissions of the counsel for the applicant, reasons for delay to serve the notice of appeal in time is in twofold: **One** is in respect of failure by the Deputy Registrar to supply the applicant with notice of appeal in time. The learned counsel treated this

as a technical delay. **Two**, is on research conducted by the counsel for the applicant for 24 days to inform him the action to take.

I should begin with the latter that is, the issue of delay occasioned by conducting research on the counsel's side. In my considered view, this should not detain me because the applicant did not depose this fact in his affidavit. As submitted by Mr. Sambo, which I entirely agree, it is a settled principle of law that, matters of facts may not be proved by parties in court in the course of making submission. See **Ultimate Security (T) Ltd v. Chande Ally Lubugile & Three Others**, Civil Application No.428/01 of 2021; **Attorney General v. Mkongo Building and Civil Works Contractors Ltd. & Namtumbo District Council**, Civil Application No.81/16 of 2019 and **Tina &Co. Ltd and Two Others v. Eurafrican bank (T) Ltd now known as BOA Bank (T) Ltd**, Civil Application No.86 of 2015 (all unreported).

Essentially, in the affidavit of the applicant in support of the notice of motion, none out of the 6 paragraphs deposed by the applicant is embedded with facts pertaining to conduct of research being the basis or grounds upon which enlargement of time may base. He has failed therefore to account for the days of delay. My reason is a simple one that, a person cannot account for days of delay basing on facts which are not

coached or deposed in the affidavit. In fact, such assertions which is not backed up in the affidavit, as said, is a mere submissions from the bar which has never been recognized as evidence.

Now to the blames directed to the Deputy Registrar on failure to supply the lodged notice of appeal in time. As submitted by the parties and also as per the record of application, the notice of appeal was lodged on 24th December, 2019 intending to appeal from the decision of the High Court of Tanzania at Moshi, in Civil Appeal No. 01 of 2019. According to the affidavit, the applicant herein was supplied with the said notice of appeal on 9th March, 2020 and filed the instant application on 1st April, 2020. The question which follows is whether the applicant has made satisfactory explanations for the delay.

Opposing to the foregoing, Mr. Sambo argued that, unless Noel Shida @ Mgeta, a court staff allegedly to have phoned the applicant on 8th March, 2020 to collect the notice of appeal on 9th March, 2020 swears an affidavit, that information remain a hearsay. Mr. Mwangazambili banked on the case of **Symbion Power Tanzania Limited** (supra). However, as observed by Mr. Sambo, this case is distinguishable. In that case, particularly from page 8 through 10, the applicant wrote to the High Court twice reminding to be supplied with necessary documents for appeal

purposes. In the instant application, there is no evidence in the affidavit on efforts deployed by the applicant in following up the notice of appeal.

The alleged technical delay which essentially hinges on telephone communication between the applicant and the said Noel Shida @ Mgeta is pleaded in the notice of motion and deposed in paragraph 4 of the supporting affidavit. Let the said paragraph first be reproduced as hereunder for easy of reference and /or clarity:

4. *That being lay person immediately, I did orally ask to be supplied with the copies of already lodged notice as well I tends to be in the Court corridor to look for the said copies and further, I was told that, once already I will be called to collect those copies through mobile phone communication and till on 8/3/2020, I was called through aforementioned communication to collect the said copies of notice of appeal and on 9/3/2020 physically received the said copies of notice of appeal from Noel Shida @ Mgeta, staff of High Court of Tanzania at Moshi who is involved in sub Registry of Court of Appeal hence found to be out of prescribed time limit within which to serve the copy of notice of appeal to respondents.*

My approach regarding the foregoing paragraph has a focus on the credibility of the information in the alleged telephone communication. Mr. Sambo resisted this assertion and cited the case of the **Guardian**

Limited & Printa Afrique Limited (supra) insisting that, there must be an affidavit of the said Noel Shida @ Mgeta or else the information would be a hearsay. Mr. Mwangazambili however argued that the requirement is not mandatory. At page 9 of the ruling it was held that:-

This means it is the court staff who could establish the fact that the notice was not yet ready for collection. None of the unnamed staff swore an affidavit to that effect.

In the instant application, besides naming the said court staff in paragraph 4 of the affidavit, there is no standalone affidavit by Noel Shida @ Mgeta to show that the applicant was waiting to be phoned to go and collect the notice of appeal. The said affidavit would also serve another purpose, that is, apart from telephone call by Noel Shida @ Mgeta, the applicant on several occasions, as deposed in paragraph 4 of the affidavit, was in court corridors in quest of the said notice of appeal. That said and as observed by Mr. Sambo and also in terms of legal principles stated in the case of **Guardian Limited & Printa Afrique Limited** (supra), the affidavit of Noel Shida @ Mgeta was necessary under the circumstances.

From the foregoing, no good and sufficient cause for enlargement of time has been shown by the applicant. As it was observed in **Tanzania Coffee Board** (supra), the applicant has a duty to account for days of the delay, which he did not do anyway. See also in **Lyamuya**

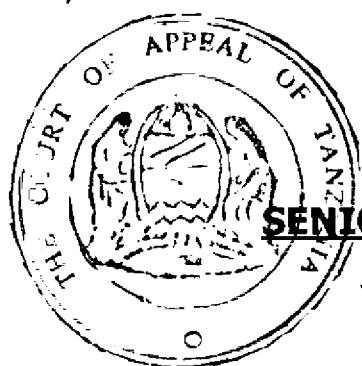
Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 (unreported). Even if it is assumed according to the assertions of the applicant that he received the notice of appeal on 9th March, 2020, yet he has failed to account for the 24 days of delay as he filed this application on 2nd April, 2020.

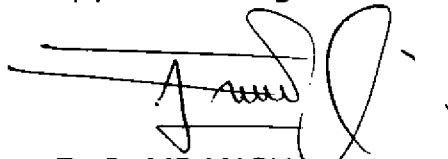
Consequently therefore, this application thus fails and is accordingly dismissed with costs.

DATED at MOSHI this 20th day of July, 2023.

G. J. MDEMU
JUSTICE OF APPEAL

The Ruling delivered on 20th day of July, 2023 in the presence of Mr. Yussuf Mwangazambili, learned counsel for the applicant and Mr. Gwakisa Mwakisa Kakusulo Sambo, learned counsel for the Respondent, is hereby certified as a true copy of the original.




E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL