

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

CIVIL APPLICATION NO. 46/08 OF 2020

FRANK MOSHI NHANDI (Administrator
of the Estate of late **LADSLAUS MGANGA**) **APPLICANT**

VERSUS

BADUGU GINNING COMPANY LTD **1ST RESPONDENT**
UBAPA CO. LTD AND TRIBUNAL BROKER **2ND RESPONDENT**
GODFREY KITILA **3RD RESPONDENT**

(Application for extension of time to serve the respondents with copies
of notice of appeal and letter applying for a copy of proceedings
from the Judgment and Decree of the High Court
of Tanzania at Mwanza)

(Makaramba, J.)

dated the 14th day of December, 2016

in

Land Case No. 1 of 2013

RULING

7th & 14th December, 2023

ISSA, J.A.:

The applicant, Frank Mushi Nhandi acting as the administrator of the estate of the late Ladislaus Mganga, seeks extension of time within which to serve Badugu Ginning Company Ltd, Ubapa Co. Ltd and Tribunal Broker, and Godfrey Kitila, the first, second, and third respondents, copies of the notice of appeal and the letter to the Registrar of the High Court applying for a copy of proceedings.

The following brief background facts will serve the purpose of appreciating the essence of the present application. On 10.5.2008, the 1st respondent entered into a contract of agency with the late Ladslaus Mganga (Mganga) for purchasing cotton seeds in Mara Region. The 1st respondent advanced money for the purchase of cotton seeds and Mganga mortgaged his house as security in case he defaulted in delivering the seeds. The 1st respondent advanced TZS. 55,125,000 for the season of 2008/2009 and Mganga purchased the cotton seeds, but there was a default of TZS. 12,560,960. Mganga failed to repay the money, hence, the 1st respondent through the 2nd respondent sold the house to the 3rd respondent on 10.5.2009.

Mganga was devastated by the loss of his house, he filed at the High Court, Land Case No. 1 of 2013, for the declaration that the 1st respondent unlawfully instructed the 2nd respondent auction off his house. The High Court on 14.12.2016 dismissed the suit and declared the 3rd respondent a bona fide purchaser of the house.

Aggrieved with that decision, Mganga manifested his intention to appeal by lodging his notice of appeal on 27.12.2016, and on the same day he applied for copy of the proceedings. Unfortunately, he did not take further steps in pursuit of his intended appeal. He neither served the copy

of the notice of appeal on the respondents within 14 days after lodging it as required under rule 84(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) nor did he serve a copy of the letter requesting for proceedings on the respondents. Mganga woke up from the slumber when he received a letter from the Registrar of the High Court dated 28.1.2020 to go and collect the copy of the proceedings.

He discovered that, he has not served the respondents with the copy of the notice of appeal and the letter applying for proceedings, but time was no longer on his side. He filed the present application, that is Civil Application No. 46/08 of 2020 applying for extension of time within which to serve the respondents, copies of the notice of appeal and the letter to the Registrar applying for the copy of proceedings. When the application was called on for hearing on 6.12.2022, it transpired that, Mganga had not served the 1st and 2nd respondents with the notice of motion and the supporting affidavit as required by rule 55(1) of the Rules. The Court (Kairo, J.A.) adjourned the hearing, but she granted Mganga 7 days to serve the 1st and 2nd respondents.

This matter was called again for hearing on 25.4.2023, but Mganga was no more. He passed away on 5.1.2023. His son (Frank Moshi Nhandi) appeared in person, and the 3rd respondent was represented by Mr.

Dennis Kahangwa, learned advocate. The 1st and 2nd respondents did not enter appearance and their whereabouts were not known. On 25.4.2023, the Court (Kihwelo, J.A.) granted the application of Frank Moshi Nhandi to join in the case. It also ordered Mr. Nhandi to serve the 1st and 2nd respondents through substituted service by publishing summons in the newspaper.

The instant application was called again for hearing today, 7.12.2023. The applicant, Frank Moshi Nhandi appeared in person, whereas the 1st and 2nd respondents did not enter appearance. The 3rd respondent was represented by Mr. Dennis Kahangwa, learned advocate. The applicant produced a Mwananchi Newspaper of 29.11.2023, and Uhuru Newspaper of 28.11.2023 showing that, summons have been published ordering the 1st and 2nd respondents to appear in this Court on 4.12.2023. Therefore, under rule 63 (2) of the Rules, the Court ordered the hearing to proceed in the absence of the 1st and 2nd respondents.

The applicant adopted the affidavit sworn by late Ladslaus Mganga and the written submission filed earlier on. He added that, after his father's house was sold his father was hit by a motorcycle. He was sick for nine years and he was attending a traditional clinic.

Mr. Kahangwa, on the other hand, adopted his affidavit and written submission he has filed earlier. He submitted that, extension of time is on the discretion of the Court, but there are guidelines to be followed. Unfortunately, in the affidavit supporting the notice of motion there are no reasons for the delay which were advanced.

The learned counsel added that, the case of **Michael Lessani Kweka v. John Eliafya**, [1997] T.L.R. 152 cited by the applicant in his written submission is irrelevant to this case where the delay of three years is very long. He bolstered his argument by our decision in **Mussa Shadrack Kwiya (administrator of the Estate of the Late Buzuka Mandago) v. Mektrida Nkinga and Another**, Civil Application No. 233/08 of 2022 (unreported) where the Court refused to extend the time due to an intolerable lack of diligence. Mr. Kahangwa added that, the issue of sickness and getting treatment for nine years had not featured in the affidavit. He prayed for this application to be dismissed with costs.

In the rejoinder, the applicant did not have much to say. He insisted that, his application is genuine and he should be granted extension of time so that he may be heard on appeal.

The task ahead of me is one, to determine whether the applicant as advanced good cause to grant him extension of time. In the affidavit

supporting the application, the applicant averred that he lodged notice of appeal and applied for copy of the proceedings on 27.12.2016 within time allowed by the Rules. On 28.1.2020 he was notified by the Registrar of the High Court that, the copy of the proceedings was ready for collection. He did collect the proceedings, and on 29.1.2020 he discovered the omission that, he has not served all the respondents with the notice of appeal and the letter requesting for a copy of the proceedings. He immediately lodged this matter on 30.1.2020. He submitted that, he acted promptly and he was not negligent.

From the above facts, it is clear that, it took the applicant more than three years to discover that he has not served the respondents. The period is between 27.12.2016 to 29.1.2020. The applicant takes refuge in our decision in **Michael Lessani Kweka v. John Eliafye** (supra) where a single Justice confronted with a case involving a delay of two weeks wrote:

"Although generally speaking a plea of inadvertence is not sufficient, nevertheless I think that extension of time may be granted upon such plea in certain cases, for example, where the party putting forward such plea is shown to have acted reasonably diligently to discover the omission and upon such discovery, he acted promptly to seek remedy for it."

This being applicant's case, it is submitted that in awarding extension of time the Court has to consider the prevailing circumstances of each case in the light of the laid down principles governing extension of time. We have expessed those principles in many cases including: **Lyamuya Construction Co. Ltd v. Board of Registered Trustees of Young Women's Christians Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

The power to grant extension of time is only exercisable if good cause is shown. Whereas there is no universal definition of what constitutes good cause, the Court is bound to consider the prevailing circumstances of the particular case and should also be guided by a number of factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent and whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged. See: **The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] T.L.R. 387 and **Lyamuya Construction Co. Ltd** (supra). Further, in **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported) the

Court stressed that the party applying for extension of time must account for each day of the delay. It said:

"...Delay of even a single day, has to be accounted for, otherwise there would be not point of having rules prescribing period within which certain steps have to be taken."

Having said that, the prevailing circumstances of the instant case is different to the case in **Michael Lessani Kweka**. In the instant case, there is a delay of more than three years and there is no explanation in the affidavit of the applicant except that he discovered the omission after a lapse of three years. This fact by itself is sufficient to show that, the applicant did not act diligently to discover the omission. He was sloppy and negligent. Faced with similar situation, a single Justice in **Mussa Shadrack Kwiukwa** (supra) said:

*"In my view, the instant case presents a factual setting that does not fit within the scenario in **Michael Lessani Kweka** (supra)... By the time the matter was lodged on 11th April, there was an interlude of fourteen months since the omission occurred. By any yardstick, this period was so inordinate. It is so incomparable with short*

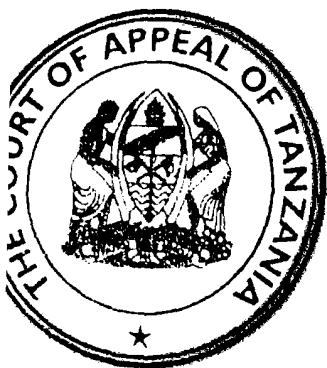
*interlude of two weeks the single judge exempted
in **Michael Lessani Kweka** (supra)."*

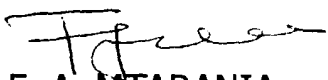
In the present application, the Court finds the delay of three years very inordinate and there is no explanation which can be called a good cause justifying such a delay. Therefore, in the final analysis, I decline to grant the extension of time to the applicant and proceed to dismiss the application. The third respondent shall have his costs.

DATED at **MWANZA** this 13th day of December, 2023.

A. A. ISSA
JUSTICE OF APPEAL

Ruling delivered this 14th day of December, 2023 in the presence of the Applicant appeared in person, Mr. Dennis Kahangwa, learned counsel for the 3rd Respondent and in the absence of the 1st and 2nd Respondents, is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL