

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 80/01 OF 2021**

**B.P. TANZANIA LIMITED (Now PUMA ENERGY  
TANZANIA LIMITED.....APPLICANT**

**VERSUS**

**SANYOU SERVICES STATION LIMITED.....RESPONDENT**

**(Application for extension of time from the decision of the High Court  
of Tanzania at Dar es Salaam)**

**(Massati, J.)**

**dated the 6<sup>th</sup> day of May, 2005**

**in**

**Civil Appeal No. 329 of 2002**

.....

**RULING**

25<sup>th</sup> October & 17<sup>th</sup> November, 2022.

**SEHEL, J.A.:**

This ruling is for an application for extension of time to lodge a memorandum and record of appeal out time. The application is made under Rules 10, 48 (1) (2) and 49 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) and it is supported by an affidavit deposed by Gasper Nyika, learned advocate for the applicant. On the other hand, the respondent opposed the application by filing an affidavit

in reply deposed by one, Ajay Somani, the principal officer of the respondent.

The relevant facts giving rise to the present application are such that; the respondent instituted a suit, Civil Case No. 329 of 2002 against the applicant before the High Court of Tanzania at Dar es Salaam claiming for; the return of the 107 Liquid Petroleum Gas (LPG) cylinders, payment of TZS. 781,110,000.00 as loss of profit, damages, interests and costs of the suit. On 6<sup>th</sup> May, 2005 the High Court (Massati, J. as he then was) delivered a judgment in favour of the respondent and awarded it TZS. 500,000,000.00 as loss suffered for non-use of cylinders, TZS. 150,000,000.00 as general damages, interests at 20% per annum from the date of filing the suit to the date of judgment and interest on decretal sum at 7% per annum from the date of judgment till payment in full. Aggrieved, the applicant lodged a notice of appeal followed with the filing of the appeal, Civil Appeal No. 74 of 2009.

When the said appeal was called on for hearing, the counsel for the appellant conceded to the raised preliminary point of law that the

record of appeal was invalid because the judgment and decree bear different dates. As the result, the appeal was struck out with costs.

As the applicant still desired to challenge the decision of the High Court, it went back to the High Court and filed an application for the rectification of the judgment and the decree. On 3<sup>rd</sup> July, 2012, the High Court (Shangwa, J.) pronounced the corrected judgment and on 6<sup>th</sup> July, 2012 the applicant lodged a notice of appeal. On 21<sup>st</sup> August, 2012, the applicant through the legal services of Mpoki & Associates Advocates wrote a letter requesting to be supplied with the proper decree for the purpose of appeal. On 11<sup>th</sup> February, 2021, the Deputy Registrar, High Court wrote a letter to the applicant notifying it that the requested documents are ready for collection. The said letter was received on 15<sup>th</sup> February, 2021 by IMMMA Advocates on behalf of the applicant. A certificate of delay dated 11<sup>th</sup> February, 2021 was also issued to the applicant. The said certificate of delay excluded the period in computing time for filing an appeal to the Court from 21<sup>st</sup> August, 2012 to 11<sup>th</sup> February, 2021. Upon receipt of the said certificate of delay, the applicant deposed that, it sought rectification to reflect the letter dated

6<sup>th</sup> July, 2012 and not a reminder letter dated 21<sup>st</sup> August, 2012. However, it was not possible to rectify as the said letter could not be traced from the court file hence the applicant was forced to lodge the present application.

The grounds stated in the motion for extension of time are:

- i) That, the applicant could not file the memorandum of appeal sixty (60) days from the date when the notice of appeal was filed because the proceedings, judgment, decree, and exhibits which are documents necessary to be included in the notice of appeal were yet to be provided to the applicant.*
- ii) That, upon the documents being provided on 15<sup>th</sup> February, 2021 the applicant could not proceed to lodge the appeal because the letter dated 6<sup>th</sup> July, 2012 which would have been a basis of a certificate of delay to be issued by the High Court is missing from the Court's record and attempts to locate the same in Court proved futile.*
- iii) That, the original letter could also not be produced by us because on 26<sup>th</sup> August, 2017 IMMMA Advocates' Dar office was bombed and some case files which included the file involving this case were*

*destroyed. Attempt to obtain a copy of the letter if any existed from the applicant's former counsel Mpoki & Company Advocates and the respondent counsel Mark and Associates were also not fruitful.*

*iv) That, in the absence of the letter dated 6<sup>th</sup> July, 2012 the applicant could not benefit from the exclusion of time provided in the proviso to Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009, as amended."*

Pursuant to Rule 106 (1) and (8) of the Rules, the applicant and the respondent filed written submission and submission in reply, respectively.

At the hearing of the application, Mr. Gasper Nyika, learned advocate, appeared for the applicant, whereas, Mr. Samson Mbamba assisted by Ms. Aziza Msangi, both learned advocates, appeared for the respondent. Messrs. Nyika and Mbamba, each, adopted the already filed submissions with no more.

It was the submission of the applicant that it could not lodge the memorandum and record of appeal in time because: **one**, the certified copies of proceedings, judgment and decree were belatedly supplied on

15<sup>th</sup> February, 2021; **two**, the applicant could not rely on the exclusion period provided under the proviso of Rule 90 (1) of the Rules because the letter requesting for copies of proceedings, judgment and decree could not be found; **three**, the certificate of delay is incompetent as it refers to a letter dated 21<sup>st</sup> August 2012 instead of 6<sup>th</sup> July, 2012; and **four**, the original letter could not be produced for the reasons that it is missing from the court record, IMMMA Advocates office in Dar es Salaam was bombed hence some files were destroyed including this case file and attempts to locate it from the applicant's former counsel was unsuccessful.

The applicant further submitted that it had been diligent all along in making a follow up of its appeal from the date of lodging its notice of appeal till the filing of the present application. It was pointed out that from the date when the limitation of time to lodge an appeal expired on 10<sup>th</sup> September, 2012 to 15<sup>th</sup> February, 2021 when supplied with the necessary documents for appeal purposes, the applicant was waiting to be supplied with such necessary documents. It was further explained that from 15<sup>th</sup> February, 2021 to 16<sup>th</sup> March, 2021 when the present

application was filed, the applicant was trying to locate the letter dated 6<sup>th</sup> July, 2012. He submitted that given that the applicant was diligent and accounted for every day of delay, Mr. Nyika beseeched me to find that the applicant had advanced good cause. To fortify the submission that diligence and account for every single day of delay amount to good cause, he cited the cases of **Lyamuya Construction Company Ltd. v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 and **Zitto Zuberi Kabwe and 2 Others v. The Honourable Attorney General**, Civil Application No. 365/01 of 2019 (both unreported).

At the end, the applicant submitted that the narrated set of facts amounts to good cause since there is no clear definition as to what amounts to good cause. He cited the cases of **Benedict Mumello v. Bank of Tanzania**, Civil Appeal No. 12 of 2002 and **Tanga Cement Company Limited v. Jumanne D. Masangwa and Another**, Civil Application No. 6 of 2001 (both unreported). Mr. Nyika therefore prayed for the extension of time to be granted.

In the reply submission, the respondent opposed the application by arguing that the basis of the request for the extension of time is the letter dated 6<sup>th</sup> July, 2012 whereas there is no indication that such a letter was ever written within 30 days and served upon the respondent as required by Rule 90 (1) and (3) of the Rules. It was further submitted that there is also no affidavital evidence from the court's registry officer to substantiate the claim that the letter dated 6<sup>th</sup> July, 2012 is untraceable in the court file. Neither was there any affidavit from the applicant's former advocates to support the claim that the said letter could not be found in their offices. Lastly, it was contended that even the contents of the letter dated 21<sup>st</sup> August, 2012 do not suggest that it was a reminder letter. For these reasons, it was submitted that the applicant failed to advance good cause for the Court to exercise its discretionary power in granting the extension of time.

Mr. Nyika briefly re-joined that the letter dated 6<sup>th</sup> July, 2012 is not the basis of the applicant's application for extension of time. He contended that it was cited as a base as to why the applicant cannot benefit from the exclusion period provided under the proviso of Rule 90

(1) of the Rules. He therefore reiterated his earlier prayer that the applicant's application be granted.

Having considered the applicant's notice of motion, the affidavit in support and the affidavit in reply and having gone through the written submissions filed by the counsel for the parties, the main issue stands for my determination is whether the applicant had advanced good cause to warrant the Court to exercise its discretionary power to extend time within which to file the memorandum and the record of appeal.

I will start with Rule 10 of the Rules that empowers the Court to grant extension of time for doing an act limited by the law. The said Rule provides:

*"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and 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."*

It follows then that it is upon the party seeking extension of time to advance good cause for the Court to exercise its discretionary power - see: **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007; **Oswald Masatu Mwizarubi v. Tanzania Fish Processing Ltd.**, Civil Application No. 13 of 2010; and **Victoria Real Estate Development Limited v. Tanzania Investment Bank and 3 Others**, Civil Application No. 225 of 2014 (all unreported).

As correctly submitted by the counsel for the applicant, there is no exact definition as to what constitutes good cause but certain factors may be taken into account to assess whether the reasons given by the applicant are good cause for a party not being able to take action within the prescribed time.

In the case of **Lyamuya Construction Company Ltd. v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), the Court set out the following guidelines that may be considered in ascertaining as to

whether there is a good cause:

*"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; and*

*(d) If the court feels that there are other 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."*

In the present application, the applicant stated in the notice of motion and affidavit that after the requested documents were supplied to it on 15<sup>th</sup> February, 2021, it could not file the memorandum and record of appeal because; **one**, the letter requesting for copies of proceedings, judgment and decree dated 6<sup>th</sup> July, 2012 is missing from the High Court record and attempts to locate and trace the same had been futile. **Two**, IMMMA Advocates' Office in Dar es Salaam was bombed and some of the files, including the one involving the present matter were destroyed. **Lastly**, in the absence of the letter dated 6<sup>th</sup>

July, 2012 the applicant could not benefit from the exclusion period provided under the proviso of Rule 90 (1) of the Rules.

Indeed, a valid certificate of delay could have assisted the applicant to file the memorandum and record of appeal in time. However, having gone through the letter dated 21<sup>st</sup> August, 2012 attached to the affidavit in support of the application for extension of time, I noted that it was written by the former counsel for the applicant, one Mpoki & Associates Advocates and addressed to the Registrar, High Court of Tanzania. The gist of that letter was to request for the supply of a correct decree as the one supplied was wrongly dated 6<sup>th</sup> May, 2005 instead of 3<sup>rd</sup> July, 2012. In that respect, it is not true as alleged by the counsel for the applicant that the letter dated 21<sup>st</sup> August, 2012 was a reminder letter.

Be as it may, I find that the letter dated 6<sup>th</sup> July, 2012 is a key document which if traced could have assisted the applicant to authenticate that it was indeed written within the time prescribed under Rule 90 (1) of the Rules, that is, within thirty days from the date of judgment and served upon the respondent. It is the position of the law

that for the appellant to benefit from the exception provided under Rule 90 (1) of the Rules regarding computation of time to lodge an appeal to the Court, the intended appellant is mandatorily required to make the application within thirty days from the date of judgment to the Registrar of the High Court in writing and serve the copy of such application upon the respondent (s).

The applicant deposed in its affidavit that it wrote the letter dated 6<sup>th</sup> July, 2012 but it is untraceable from the High Court file and former counsel of the applicant. Further, the offices of the IMMMA Advocates were bombed and some files were destroyed. Much as I might be persuaded by the claim that the offices of the learned counsel for the applicant were bombed and some files were destroyed but I find it hard to go along with the submissions that the alleged letter could not be traced. I say so because I failed to find any good reason advanced by the applicant. As stated earlier, the law requires the applicant to advance good cause to explain the delay. In that respect, where the applicant deposed on matters which requires proof from the third part, it ought to have brought such proof. The applicant deposed in the affidavit

that the letter was missing from the court file, I thus expected the applicant to seek and obtain an affidavit from the court's registry officer to substantiate such a claim. Similarly, it ought to have sought and obtained an affidavit from the applicant's former advocate that indeed the said letter is missing from their offices. In the case of **Workers Development Corp. Ltd. v. Vocal Networks Ltd.**, Civil Application No. 28 of 2008 (unreported), this Court held that the affidavit of a person whose evidence is material to the issue had to be filed to explain the delay. Failure to bring the affidavit of the material person renders the claims unsubstantiated. I therefore find and agree with the submission by the respondent that the facts of the application do not suggest existence of a letter dated 6<sup>th</sup> July, 2012. Worst still, it was not stated by the applicant that it was served upon the respondent.

Further, the applicant deponed from 6<sup>th</sup> July, 2012, it was waiting to be supplied with the documents requested for filing an appeal which were supplied on 15<sup>th</sup> February, 2021. Unfortunately, that waiting period does not help the applicant because for it to benefit from the exception for computation of time to lodge an appeal provided under the proviso

of Rule 90 (1) of the Rules, it ought to have complied with the requirements of that Rule. Since there is no scintilla of evidence that it wrote a letter dated 6<sup>th</sup> July, 2012 and served upon the respondent, I am compelled to hold that the applicant failed to account for delay from 5<sup>th</sup> September, 2012. Accordingly, I find that the applicant failed to advance reasons for delay let alone good cause for the Court to grant the requested extension of time.

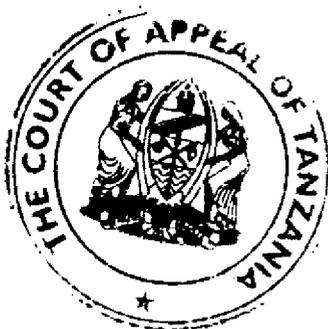
In the end, I find that the application is lacking merit and it is hereby dismissed with costs.

**DATED at DAR ES SALAAM this 16<sup>th</sup> day of November, 2022.**

B. M. A. SEHEL

**JUSTICE OF APPEAL**

The Ruling delivered this 17<sup>th</sup> day of November, 2022 in the presence of Mr. Antonia Gapiti, learned counsel for the Applicant also holding brief for Mr. Samson Mbamba, learned counsel for the Respondent, is hereby certified as a true copy of the original.



  
R. W. Chaungu  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**