

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

**CIVIL APPLICATION NO. 96 OF 2005
In the Matter of an Intended Appeal**

IBRAHIM MBANDO APPLICANT
VERSUS
ABBAS MTEGO RESPONDENT

**(Application for extension of time to serve Notice of Appeal
to the Respondent from the Ruling and Order of the
High Court of Tanzania at Dar es Salaam)**

(Ihema, J.)

**dated the 16th day of May, 2005
in
PC Civil Appeal NO. 40 of 2004**

27 April & 4 May 2006

R U L I N G

KAJI, J.A.:

By notice of motion filed under Rule 8 of the Court of Appeal Rules, 1979, the applicant, Ibrahim Mbando, is moving the Court to extend time in which to serve the respondent, Abbas Mtego, with the copy of the notice of appeal.

According to the affidavit accompanying the notice of motion and deponed to by the applicant, and elaborated by Mr. E. A. Msuya, learned counsel for the applicant, the applicant was the appellant in PC Civil Appeal No. 40 of 2004 in the High Court at Dar es Salaam.

The appeal was dismissed due to the absence of the applicant on the hearing date. The applicant applied for the dismissal order to be set aside but on 16.5.2005 his application was dismissed. He was aggrieved. On 18.5.2005 he filed notice of appeal and applied for copies of proceedings, ruling and order of the High Court for appeal purpose. The applicant further deponed that, thereafter he took efforts to serve the respondent with the copy of the notice of appeal and the letter applying for copies of proceedings, ruling and order but the respondent could not be traced.

On 24.5.2005, and at the very margin of time before expiry of the time in which to serve the respondent with the said notice of appeal, while accompanied by his neighbour one Steven Matemu, they came across the respondent's near relative (brother) one Mengo Steven Kisunga who, at all the time of existence of the dispute, had been accepting service on behalf of the respondent. But this time Mengo, at first, refused service. The applicant sought assistance of the police who advised him to contact the respondent's local authorities. On 26.5.2005 the applicant approached the respondent's Area Chairman one Hamisi Rashid Rijoka who persuaded Mengo Steven

Kisunga to accept service on behalf of his brother, the respondent, who could not be traced. Mengo Steven Kisunga accepted service. However he agreed to sign the copy of the letter applying for copies of proceedings, ruling and order and refused to sign for the copy of the notice of appeal and other documents although he took them.

Since by 26.5.2005 the prescribed period of seven days for service of a copy of the notice of appeal to the respondent had elapsed, on 30.5.2005 the applicant filed this application. Efforts were made to serve the respondent summons to appear for the hearing of the application, but he could not be traced. He was consequently served through substituted service by publication in the NIPASHE Newspaper of 4.4.2006, but he did not enter appearance on the hearing date on 27.4.2006. Under Rule 58 (2) of the Court of Appeal Rules, 1979, the hearing proceeded *ex parte*.

There is no doubt that under Rule 77 (1) of the Court of Appeal Rules, 1979, an intended appellant must serve the respondent with a copy of the notice of appeal within seven days from the date of lodging the notice of appeal.

In the instant case the notice of appeal was filed on 18.5.2005. The prescribed period for serving the respondent with a copy of it expired on or around 25.5.2005.

There is no dispute that by 25.5.2005 the applicant had not yet served the respondent with the copy of notice of appeal for the reasons stated above. The crucial issue is whether the delay to serve the respondent with the same was with sufficient cause.

At this juncture, I think it is worth to consider and decide whether this application is properly before the Court. It is the requirement of Rule 44 of the Court of Appeal Rules, 1979, that whenever an application may be made either to the Court or to the High Court, it shall in the first instance be made to the High Court, except in criminal matters where the Court may, in its discretion, on application or of its own motion, give leave to appeal or extend the time for the doing of any act, notwithstanding the fact that no application has been made to the High Court.

Rule 8 of the Court Rules 1979 is very clear on the jurisdiction of this Court to extend the time limited by the Court Rules or by any decision of the Court or of the High Court for the doing of any act

authorized or required by the Court Rules for sufficient reason. My worry is about the jurisdiction of the High Court, that is, whether the High Court has jurisdiction to extend time in which to serve a notice of appeal to the respondent.

Under Section 11 (1) of the Appellate Jurisdiction Act, 1979, as amended, it would appear that the jurisdiction of the High Court in respect of extending time to matters coming to this Court is limited to three categories, that is:

One, to extend time for giving notice of intention to appeal.

Two, to extend time for making an application for leave to appeal.

Three, to extend time for a certificate that the case is a fit case for appeal (certificate that a point of law is involved).

If I am right in this approach then I think, the High Court has no jurisdiction to extend time in which to serve the respondent with a notice of appeal or letter applying for copies of proceedings, ruling and order. In that respect, it is my humble view that the application is properly before the Court.

Now I move over to the crux of the matter, that is, whether the delay was with sufficient cause.

The applicant has explained the steps he took to see to it that the respondent is served within the prescribed period of seven days but the respondent could not be traced and his near relative (Mengo) at first refused service. This is supported by Matemu's affidavit. He only accepted service after being persuaded by his Area Chairman, Hamisi Rashid Rijoka on 26.5.2005 when it was already late by about one day. It is deponed in the affidavit by the applicant that the respondent's brother, one Mengo Steven Kisunga, had at all times of the existence of the dispute been accepting service on behalf of the respondent, until this time when at first he refused service until after he was persuaded by the Area Chairman. In the circumstances, it is my humble view that, he is deemed to be the respondent's agent for accepting services in this case. Service on him was as effective as if made on the respondent himself by virtue of Rule 20 of the Court of Appeal Rules, 1979, and Order V Rule 12 of the Civil Procedure Code. It is therefore my holding that the respondent was served with a copy of the notice of appeal through his agent Mengo Steven Kisunga

on 26.5.2005, which was out of time by one day. The delay for that one day was with sufficient cause for the reasons stated. Likewise the respondent was served with a copy of the letter applying for copies of proceedings, ruling and order on that same day of 26.5.2005 for the same reason.

However, I must admit that I have never come across a provision in the Court Rules, 1979 requiring service of such letter within seven days. My view is that, since the law (Rule 83 (1) (2) of the Court Rules, 1979) requires such letter to be written within thirty days from the date of lodging notice of appeal, its service to the respondent is probably also within thirty days. If I am right on this, then service of the same to the respondent through his agent within eight days from the date of lodging notice of appeal was within time.

In the event, and for the reasons stated, I grant the applicant's application for extension of time in which to serve the respondent with a copy of the notice of appeal. I extend the time to 26.5.2005 when the respondent was served through his deemed agent Mengo Steven Kisunga.

Application granted with costs.

DATED at DAR ES SALAAM this 4th day of May, 2006.

S. N. KAJI
JUSTICE OF APPEAL

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



(S. M. RUMANYIKA)
DEPUTY REGISTRAR