

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

CIVIL APPLICATION NO. 126/08 OF 2021

VIETEL TANZANIA LIMITED APPLICANT

VERSUS

**ASA GENERAL SUPPLIES &
CONSTRUCTION CO. LIMITED..... RESPONDENT**

**(Application from the Judgment and Decree of the High Court of Tanzania
at Mwanza)**

(Manyanda, J.)

Dated the 23rd day of October, 2020

in

Civil Appeal No. 02 of 2019

RULING

7th & 14th February, 2022

MAKUNGU, J.A.:

The applicant, Vietel General Supplies Limited, has lodged this application seeking an order for extension of time within which to serve the respondent notice of appeal out of time. The application is brought by way of notice of motion lodged under Rule 10 and 84 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). The grounds canvassed in the notice of motion are as follows, that:-

- (a) the Notice of Appeal against the decision of the Honourable F. K. Manyanda J. dated 23rd October, 2020 in the High Court Civil Appeal No. 02 of 2019 having being lodged in this Court on 23rd October, 2020 was served to the respondent on 20th November, 2020 which is after the lapsed of 14 days prescribed by the law for the reasons beyond applicant's control.*

- (b) *The applicant opted to serve the respondent at his office due to lack of instructions from the respondent's advocate. The office of the respondent was closed and mobile number of the known Principal Officer of the respondent was out of reach. That when he was later available he directed such notice to be served to his advocate one Mr. Edward John while time had elapsed.*
- (c) *All the period of struggle to serve respondent whose office were closed and his phone was not available the 14 days to make service had been lapsed.*

The application is supported by an affidavit of Mr. Joseph Kinango, learned counsel for the applicant. On the other hand, the respondent has filed an affidavit in reply sworn by Mr. Edward John, learned counsel opposing the application.

The brief background facts of this matter are that the applicant instituted a Civil Case No. 89 of 2017 before Resident Magistrate's Court at Mwanza which decided in favour of the respondent. Aggrieved by that decision, the applicant filed a Civil Appeal No. 2 of 2019 before the High Court of Tanzania at Mwanza (Manyanda, J.) which was also decided on 23rd October, 2020 in favour of the respondent. Dissatisfied with that decision, the applicant had initiated a process of appeal by lodging a notice of appeal on 23rd day of October, 2020 which was served to the respondent on 20th November, 2020 over and above the 14 days

prescribed by Rule 84 (1) of the Rules. That after discovering that he was late, he decided to lodge this application on 27th January, 2021 for the Court to condone the said delay.

In the present matter the applicant avers that the delay was not out of sheer ignorance or negligence but due to the fact that the respondent's office at Musoma was closed and the whereabouts was unknown.

Before me, the applicant was represented by Mr. Joseph Kinango, learned counsel whereas the respondent was represented by Mr. Mussa Mhingo, learned counsel.

In his brief oral submission, Mr. Kinango urged the Court to adopt his affidavit in support of the application and grant this application so that the applicant could ultimately be heard on the substantive matter for appeal. He told the Court that he delayed to file this application for two months because it was his first time to file such kind of documents and it was in the months of December and January when the Court was on vacation. He believes that this final Court on the land will be persuaded to give the applicant a chance to be heard.

On the other hand, Mr. Mhingo resisted the application. In the first place, he contended that the applicant did not give good cause for the delay. He said under Rule 84 (1) of the Tanzania Court of Appeal Rules,

2009 notice of appeal has to be served to the respondent or any other person directly effected by the appeal within 14 days after the notice has been filed, but that the applicant attempted to do so after 37 days without any sufficient explanation on the delay. He argued that the reasons given by the applicant in his affidavit are defeated by the supplementary affidavit in reply of the respondent and referred the Court to the cases of **Laureno Mseya v The Republic**, Criminal Application No. 4/06 of 2006 CAT and **Airtel Tanzania Limited v. Misterlight Electrical Installation Co. Ltd and Other**, Civil Appeal No. 37/01 of 2020, [CAT (both unreported)] to reinforce his argument. He urged the Court to dismiss this application.

I have carefully considered the competing arguments of the parties in this application. Foremost, I wish to re-emphasize that the decision whether or not to grant the application for extension of time under Rule 10 of the Rules is dependent upon the party seeking such an order assigning sufficient cause for having not done what ought to have been done within the time prescribed by the relevant statute – See **Michael Lessain Kweka v. John Eliafye** [1997] T.L.R. 152. In essence, this entails that there must be material before the Court on the basis of which to exercise such power – See the case of **Ratnam Kumarasamy** (1965) 1 WLR 8, a case which was adopted by the Court

in **Kalunga and Company Advocates v. National Bank of Commerce Ltd** [2006] T.L.R. 235. In **Ratnam Kumarasamy** case, the Supreme Court of Malasia stated in that case that:-

"The rules of Court must, prima facie, be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation."

With this in mind the begging question in the present application is whether the applicant has advanced sufficient cause for the delay.

Now, in the application at hand, it is common ground that the applicant is contending that the fourteen (14) days provided by the Rules to serve the respondent a notice of appeal are not adequate due to the respondent refusal to receive the same in time. It is the applicant's further contention that she tried to obtain the Principal Officer of the respondent within the set time but failed as the same was availed to her on 20th November, 2020 and that she lodged this application in Court on 27th day of January, 2021 after thirty seven (37)

days had elapsed. It was her argument that she should not be blamed and penalized for the delay because it was beyond her control.

It is clear that under paragraphs 10, 11 and 12 of the affidavit in support of the application together with Mr. Kinango's oral submission, the applicant is shifting the blame for delay to the Principal Officer of the respondent and advocate Edward John. Therefore, and as correctly argued by Mr. Mhingo, the applicant was expected to attach the affidavital evidence of those Officers to substantiate his assertions.

Unfortunately, that was not done. In the contrary those Officers they filed affidavit in reply and supplementary affidavit in reply respectively to challenge that allegation. In **Issack Sebegele v. Tanzania Portland Cement**, Civil Application No. 25 of 2002 (unreported) when the Court considered applicant's claims for the delay towards a Court's clerk stated that:-

"Evidence in support of the applicant's claim against the Court's clerk was necessary; The name of the said court's clerk should have been indicated in one of the paragraphs of the affidavit of the learned counsel and that, the application should have been accompanied with the affidavit of the Court Registry Officer dully sworn to that effect."

[Emphasis added].

Similarly, in this application, since Mr. Kinango is alleging that the applicant was delayed by the respondent, he was expected to substantiate his assertion with the affidavit of the Principal Officer and or advocate Edward John who delayed the applicant. I therefore agree with the counsel for the respondent that bare assertion and allegation of Mr. Kinango without proof cannot suffice in showing good cause for the delay.

Next for my consideration is whether the applicant has accounted for each day of delay in relation to the filling of the instant application. It is on record that the respondent was served with the notice of appeal on 20th November, 2020 but this application was filed on 27th January, 2021 over 66 days. That period has not been accounted for. It is settled that, any applicant seeking for extension of time under Rule 10 of the Rules is required to account for the delay of each day. Indeed, the Court has reiterated that position in numerous cases and one of them is **Bashiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007, (unreported) where the Court emphasized that:-

"...Delay of even a single day, has to be accounted for, otherwise there would be no point of having rules prescribing period within which certain steps have to be taken."

[Emphasis added].

I fully subscribe to the above authority and reasoning. Therefore, since in this application the applicant has failed to account for the delay of each day, the application cannot stand as there is no material upon which the court can exercise its discretion under Rule 10 of the Rules to grant the application.

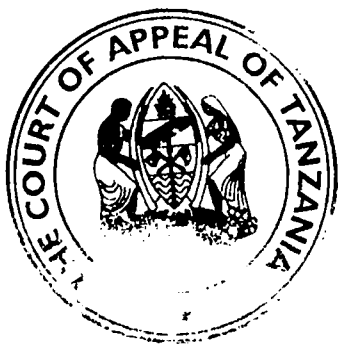
In the event, I find that this application is devoid of merit and is hereby dismissed with costs.

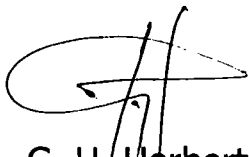
It is so ordered.

DATED at MWANZA this 11th day of February, 2022.

O. O. MAKUNGU
JUSTICE OF APPEAL

The ruling delivered this 14th day of February, 2022 in the presence of Mr. Joseph Kinango, learned counsel for the Applicant and also holding brief of Mr. Mussa Mhingo, learned counsel for the respondent is hereby certified as a true copy of original.




G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL