

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

**CIVIL APPLICATION NO. 1 OF 2017**

**TANGA CEMENT COMPANY LIMITED ..... APPLICANT**

**VERSUS**

**YAHAYA ATHUMANI MRUMA ..... FIRST RESPONDENT**

**MANASE JONAS ..... SECOND RESPONDENT**

**JOHN SAMWEL LIPANJE ..... THIRD RESPONDENT**

**SARIA BAKARI HASSAN ..... FOURTH RESPONDENT**

**OMARI ULAYA ..... FIFTH RESPONDENT**

**t/a DALE GENERAL ENTERPRISES**

**(Application for Extension of Time to File written submissions and for leave to lodge supplementary affidavit in support of Civil Application No. 11 of 2016 in the intended appeal from Judgment of the High Court of Tanzania at Tanga)**

**(Msuya, J.)**

**dated the 19<sup>th</sup> day of September 2014**

**in**

**Civil Appeal No. 2 of 2013**

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**RULING**

10<sup>th</sup> July & 13<sup>th</sup> July 2017

**NDIKA, J.A.:**

By notice of motion made under rules 10, 48 (1) and (2) and 49 (2) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), the applicant named above applies against the respondents for extension of time within

which to lodge its Written Submissions as well as for leave to lodge a supplementary affidavit in support of Civil Application No. 11 of 2016, now pending in the Court. The application is supported by two affidavits, the first being that of Mr. Sinare Zaharan, an advocate duly instructed to act on behalf of the applicant, and the second one deposed by Mr. Edgar E. Kalunga. The respondents filed a joint affidavit in reply in opposition to the application.

The essential facts of this matter are as follows: on 11<sup>th</sup> November 2016, the applicant lodged against the respondents herein an application (i.e., Civil Application No. 11 of 2016) for an order striking out the notice of appeal lodged by the respondents on 15<sup>th</sup> October 2014 principally on the ground that the respondents' intended appeal from the decision of the High Court sitting at Tanga dated 19<sup>th</sup> September 2014 in Civil Appeal No. 2 of 2013 did not lie without leave, which the respondents had not sought and obtained. In terms of rule of 106 (1) of the Rules, the applicant, having lodged the aforesaid application, was required to lodge its written submissions in support of the application within sixty days of the lodgment of the application. By the time the said limitation period expired (i.e., on 20<sup>th</sup> January 2017) the applicant had not filed any written submissions,

hence the application for extension of time. In addition, the applicant seeks leave to lodge under rule 49 (2) of the Rules to lodge a supplementary affidavit in support of the aforesaid application.

Rule 10 of the Rules, cited as the enabling provisions for the first limb of this application, confers on this Court broad and discretionary power to enlarge the time limited by the Rules for doing any act authorized or required by the Rules where good cause is shown. While it may not be possible to lay down an invariable or constant definition of good cause so as to guide the exercise of the Court's discretion under Rule 10, the Court is enjoined to consider the merits or otherwise of the excuse cited by the applicant for failing to meet the limitation period prescribed for taking the required step or action. Apart from a valid explanation for the delay, good cause would also depend on whether the application for extension of time has been brought promptly as well as whether there was diligence on the part of the applicant in the matter (see, for instance, this Court's unreported decisions in **Dar Es Salaam City Council v Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Tanga Cement Company Limited v Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application



No. 6 of 2001; and **Yusufu Same and Hawa Dada v Hadija Yusufu**, Civil Appeal No. 1 of 2002).

As regards the second limb of the application, I would simply say at this point that there is no doubt that the Court has discretion under rule 49 (2) of the Rules to grant leave to lodge a supplementary affidavit in support of an application.

In the supporting affidavits, only one reason is given for the delay in complying with the requirement under rule 106 (1). It is averred in Paragraphs 4, 5, 6, 7 and 8 of the affidavit of Mr. Zaharan as well as Paragraphs 2, 3, 4 and 5 of the affidavit of Mr. Kalunga that the delay in filing the submissions resulted from unexpected events involving Mr. Kalunga, a Legal Officer in Mr. Zaharan's law firm (Ensafrica Tanzania Attorneys based in Dar es Salaam) who had been instructed to draw up a draft of the written submissions. It is asserted that Mr. Kalunga took up that assignment at a time between 19<sup>th</sup> December 2016 and 9<sup>th</sup> January 2017 when Mr. Zaharan's law firm was closed for the customary Christmas and New Year holidays. Before Mr. Kalunga did that task, he abruptly travelled to Iringa on 22<sup>nd</sup> December 2016 to attend to the burial of his maternal aunt only to return back on 8<sup>th</sup> January 2017. Photostat copies of bus tickets for

that trip were annexed to the affidavit as proof. It is further claimed that due to the abruptness of the trip to Iringa, Mr. Kalunga failed to inform Mr. Zaharan that he had not yet prepared or filed the written submissions and, as a result, it took Mr. Zaharan until 20<sup>th</sup> January 2017 to discover that fact. As by then the prescribed limitation period of sixty days had elapsed, he was compelled to apply for extension of time. Hence, this application was lodged for that purpose on 9<sup>th</sup> February 2017.

As regards the entreaty for leave to lodge a supplementary affidavit, it is averred in Paragraph 8 of Mr. Zaharan's affidavit that the applicant seeks to lodge a supplementary affidavit for the purpose of introducing into Civil Application No. 11 of 2016 a copy of the High Court's decision in Miscellaneous Civil Application No. 49 of 2016 referred to in Paragraph 12 of the affidavit in support of Civil Application No. 11 of 2016. The applicant, it is stated, had yet not obtained a copy of the said decision at the time Civil Application No. 11 of 2016 was lodged (i.e., 11<sup>th</sup> November 2016). A copy of the draft supplementary affidavit is annexed to Mr. Zaharan's affidavit.

At the hearing, Mr. Sinare Zaharan, learned Counsel for the applicant, urged the Court to grant the application on the strength of the supporting affidavits and written submissions lodged by the applicant. Apart from

emphasizing that the unexpected events involving Mr. Kalunga were the cause of the delay to lodge the written submissions in time, he argued that after he discovered on 20<sup>th</sup> January 2017 that the submissions had not yet been lodged, he filed the present application promptly. As regards the solicitation for leave to lodge the supplementary affidavit, he restated that it was needed for introducing a decision of the High Court a copy of which was obtained after Civil Application No. 11 of 2016 had been lodged.

Replying, Mr. Shukuru Khalifa, learned Advocate for the respondents, resisted the application arguing that the grounds presented by the applicant were insufficient and that they indicated negligence on the part of Mr. Kalunga. In relation to the first limb of the application, which related to Mr. Kalunga's trip to Iringa, he doubted that the said trip was actually made.

Mr. Kalunga's trip to Iringa, he doubted that the said trip was actually made. In relation to the second limb of the application, which related to the affidavits filed in for Mr. Kalunga and lodged the submissions in time. The learned Counsel, nonetheless, did not address the second limb of the application.

In a brief rejoinder, Mr. Zaharan contended that during the absence of Mr. Kalunga there was nobody to fill in for him from his law firm. He also emphasized that after ascertaining on 20<sup>th</sup> January 2017 that the submissions had not been filed, he drew up the papers for this application



for extension of time and had them dispatched to Tanga from Dar Es Salaam for lodgment. He maintained that he acted promptly, given the circumstances.

I propose to deal, at first, with the first limb of this application, which, brings up the essential question whether the applicant has shown good cause to be entitled to extension of time to lodge the written submissions.

It is unmistakable from the supporting affidavits that this is characteristically a case of delay, in an advocate's chambers, in doing an act required by the Rules. While the applicant had until 20<sup>th</sup> January 2017 to lodge its written submissions, that date passed without acting. In my view, Mr. Khalifa justifiably criticized this quest for extension of time, saying that the application reveals no good cause for the delay but negligence on the part of the applicant's law firm. Granted that Mr. Kalunga travelled abruptly to Iringa on 22<sup>nd</sup> December 2016 when his law firm was closed for the end-of-the-year recess, one wonders why he did not draw up the draft written submissions after he came back to the office on 8<sup>th</sup> January 2017. No explanation is given why he did not accomplish the assignment given to him. Was it because of his sloth and complacency? That it took a further period of twelve days until 20<sup>th</sup> January 2017 – the last day of the limitation

period – for Mr. Zaharan, as the supervising Partner, to learn that no draft written submissions had been drawn up by his subordinate, raises questions on how his law firm is organized and assignments executed or supervised.

I find the decision of the Court of Appeal for East Africa in **Shah H. Bharmal v Santesh Kamuri** [1961] E.A. 679 instructive at this point. In that case, the Court, after considering **Gatti v Shoosmith** (1939) 3 ALL E.R. 916, expressed the view that mistakes of an advocate may amount to 'sufficient cause' under its rules in certain circumstances. What is most important in any circumstances is, therefore, the distinction between delay arising from an excusable mistake and inordinate delay springing up from negligence, forgetfulness or default of the advocate. More or less the same stance was taken by this Court in **Institute of Finance Management v Simon Manyaki**, CAT at Dar Es Salaam, Civil Application No. 13 of 1987 (unreported) thus:

*"The point to stress here is that counsel's mistake may amount to sufficient reason only where the mistake involves a minor or slight lapse, but not where it involves a lapse of a fundamental nature."*



In **Zuberi Mussa v Shinyanga Town Council**, CAT at Tabora, Civil Application No. 3 of 2007 (unreported), this Court was also of the view that:

*"Advocates are human and they are bound to make mistakes sometime in the course of their duties. Whether such mistakes amount to lack of diligence is a question of fact to be decided against the background and circumstances of each case. If, for instance, an advocate is grossly negligent and makes the same mistake several times, that is lack of diligence. But he makes only a minor lapse or oversight only once and makes a different one the next time that would not, in my view amount to lack of negligence."*

In the circumstances of this case, the delay in the learned Counsel's chambers in drawing up and filing written submissions was most probably a result of an inexcusable negligent and slothful act as opposed to a defensible mistake, as I have demonstrated earlier.

The wretchedness of the quest for extension of time is further laid bare by the applicant's lethargy in taking appropriate action after Mr. Zaharan

became aware on the last day of the limitation period that he would not be able to draw up and lodge the submissions in time. It is beyond peradventure that he took twenty days to take the essential step to lodge this application (on 9<sup>th</sup> February 2017). His affidavit is silent on why it took that much time. In his obviously belated effort from the Bar, Mr. Zaharan contended that he could not lodge the application earlier than 9<sup>th</sup> February 2017 after establishing the need to do so on 20<sup>th</sup> February 2017 because he had to prepare the relevant papers or documents at his offices in Dar Es Salaam and have them dispatched to this Court's sub-registry in Tanga for filing. I give no credence to that argument from the Bar. It ought to have been deposed in Mr. Zaharan's affidavit for it to be cogent and plausible. In the circumstances, I am disposed to find that the pursuit for extension of time was not made with the promptness expected of a diligent applicant.

On the foregoing reasoning, I find no good cause for extension of time sought for lodgment of written submissions. That limb of the application stands dismissed.

I now deal with the applicant's entreaty for leave to lodge a supplementary affidavit.

As already noted, the sole justification for the requested leave is that the supplementary affidavit is meant to introduce into Civil Application No. 11 of 2016 a copy of the High Court's decision in Miscellaneous Civil Application No. 49 of 2016 referred to in Paragraph 12 of the affidavit in support of Civil Application No. 11 of 2016. It was contended that the applicant could not annex it to the supporting affidavit when it lodged the application because it had not obtained a copy of the said decision at the time Civil Application No. 11 of 2016 was lodged (i.e., 11<sup>th</sup> November 2016). It is evident from the exchequer receipt number 12178949 on the record, through which the applicant paid fees to the High Court on 7<sup>th</sup> December 2016 so as to be issued with a copy of the High Court's decision alluded to earlier, that the certified copy of that decision was collected on 7<sup>th</sup> December 2016. That fact gives credence to the applicant's version. I must also remark that I find it significant that apart from resisting the grant of leave through their general averment in Paragraph 7 of the affidavit in reply, the respondents, through their counsel, did not make any contrary submission on the merits of the applicant's prayers for leave. Accordingly, I am compelled to find merit in the application for leave to file supplementary affidavit.



In conclusion, this application partly succeeds as I grant leave for the applicant to lodge supplementary affidavit in Civil Application No. 11 of 2016 within fourteen days from the date of delivery of this ruling. On the other hand, the application is partly dismissed as I refuse extension of time to lodge written submissions in same application mentioned above. Costs of this matter shall be in the cause.

**DATED** at **TANGA** this 12<sup>th</sup> day of July 2017.

G. A. M. NDIKA

**JUSTICE OF APPEAL**

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

  
E.Y. MKWIZU

**DEPUTY REGISTRAR**  
**COURT OF APPEAL**

