

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

CIVIL APPLICATION NO. 355/17 OF 2018

- | | | |
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| <p>1. THE REGISTERED TRUSTEES OF THE
CHAMA CHA MAPINDUZI</p> <p>2. ISMAIL IDRISA, THE CCM CHAIRMAN
GEREZANI BRANCH OF CCM-DSM</p> <p>3. FATUMA ABUBAKAR, THE SECRETARY
GEREZANI BRANCH OF CCM-DSM</p> <p>4. ABDULRAHMAN TWALIBU</p> | } | APPLICANTS |
|---|---|-------------------------|

VERSUS

**MEHBOOB IBRAHIM ALIBHAI (As Legal Representative
of the late GULAMHUSSEIN ALIBHAI) RESPONDENT**

**(Application for extension of time to file written submission in Civil
Application NO. 117/17 of 2018 from the decision of the
High Court of Tanzania, at Dar es Salaam)**

(Mutungi, J.)

dated the 29th day of June, 2015

in

Case No. 81 of 2008

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RULING

6th & 17th May, 2019

KITUSI, J.A.:

The present applicants, that is, the Registered Trustees of the Chama Cha Mapinduzi, Ismail Idrisa, the CCM Chairman Gerezani Branch of CCM-DSM, Fatuma Abubakar, the Secretary Gerezani Branch of CCM Dar Es

Salaam and Abdurahman Twalib, are applicants in Civil Application No 117/17 of 2018 pending before this court for stay of execution. This application seeks extension of time within which the said applicants may file written submissions in that application, out of time. It has been taken out by a Notice of Motion under Rule 10 and 48 of the Tanzania Court of Appeal Rules, 2009, the Rules, and supported by an affidavit of Dr. Masumbuko Roman Mahunga Lamwai, learned advocate.

In the affidavit Dr. Lamwai states that under the Rules, he was supposed to have filed his submissions by 12th June, 2018, that is within 60 days of the filing of the application, but failed to do so for reasons cited under paragraphs 4 and 5. I reproduce the two paragraphs for ease of reference;

"4. further, that unfortunately, I have been a victim of persistent high blood pressure which seriously incapacitated me and thus I failed to work throughout May and June.

5. Further that in addition to my illness, my grandfather, the late Matei Shirima, my aunt the late Radeveda Shao, my

uncle the late Gasper Shao and my young brother, the late Joseph Shao, died at different times between May and July, and as head of the family I had to be fully involved in their funeral arrangement. I cannot produce evidence of their deaths because they all died in the village in Rombo where they ordinarily do not register deaths nor get burial permits."

The respondent filed an affidavit in reply taken by Mehboob Ibrahim Alibhai, in which he has stated the following in relation to paragraphs 4 and 5 of the affidavit. Again I reproduce the relevant paragraph:-

"4. That the contents of paragraph 4 and 5 of the affidavit are neither admitted nor disputed as the same best known to the deponent himself, otherwise the deponent is put under very strict proof thereof."

At the hearing of the application Dr. Masumbuko Lamwai and Ms. Mary Lamwai, learned advocates, entered appearance for the applicant as Mr. Kung'e Wabeya, learned advocate acted for the respondent. The

parties had earlier filed written submissions, which the learned advocates adopted before addressing the Court orally.

Submitting, Dr. Lamwai stated the legal requirement under Rule 10 of the Rules placing a duty on the applicant to show good cause. He submitted that what amounts to good cause is yet to be defined but the Court has developed four factors for an applicant to meet if he wants to succeed. For these four factors counsel cited the case of **Royal Insurance Tanzania Limited V. Kihangwe Strand Hotel Limited**, Civil Application No. 111 of 2009 (unreported).

The four factors for consideration by the Court are:-

- (i) Length of the delay.
- (ii) Reason for the delay.
- (iii) The degree of prejudice to the respondent is granted.
- (iv) Chances of appeal succeeding if the application is granted.

Dr. Lamwai went on to submit with the view to satisfying the Court that the application meets the factors.

Regarding the length of the delay, the learned counsel submitted that from 12th June, 2018 when the written submissions were supposed to be filed by him, to 17th July, 2018 when he filed the same it is a period of 35 days. He submitted that 35 days is not an unreasonably long period and invited the Court to hold so.

As for reasons for the delay he submitted two of them, that is, illness and bereavement on his part. These are the reasons appearing under paragraphs 4 and 5 of the supporting affidavit.

Elaborating, Dr. Lamwai submitted that he is a victim of a chronic high blood pressure which made him inactive at the time when he was supposed to file the written submissions. He further stated that he has no medical certificates to prove this fact because in such persistent indisposition, which even counsel for the respondent is aware of, victims do not move about carrying proof.

Next Dr. Lamwai submitted on the bereavement and invited the Court to accept as true the fact that he lost four relatives and that he counsel cannot tell a lie about his siblings' deaths.

Turning to the degree of prejudice, Dr. Lamwai submitted that the sought extension of time is only meant to seek permission to file written submissions which is a procedural requirement. Counsel submitted that if extension of time is granted and the applicant eventually files written submissions, the respondent will be given an opportunity to reply therefore he will not be prejudiced.

Mr. Wabeya for the respondent opposed the application and submitted that the two reasons cited by Dr. Lamwai have no merits. Beginning with the alleged illness, Mr. Wabeya submitted that the account lacks details as to when between the months of May and June was Dr. Lamwai ill. Counsel submitted that neither in the supporting affidavit nor in the written submissions is the applicant specific as to when and for how long was Dr. Lamwai indisposed.

Mr. Wabeya raised similar criticisms with regard to the second reason, that of bereavement. He submitted that paragraph 5 of the supporting affidavit generally refers to the months of May and June again without being specific as to the dates of the deaths. Counsel submitted

that he was not disputing the fact of deaths but raises issue with the dates of deaths and burials.

The learned counsel submitted that failure by the applicant's counsel to specify the dates of the illness and bereavement is failure on his part to show good cause. It is Mr. Wabeya's conclusion that the applicant has not accounted for each of the 35 days of the delay, for which he prayed for the dismissal of the application with costs.

In a rejoinder Dr. Lamwai submitted that the illness he has been suffering from is chronic and persistent therefore difficulty to specify the dates when he was down.

Both counsel are at one on the position of the law as provided under Rule 106 (1) of the Rules that written submissions have, to be filed within 60 days of lodging the Notice of Motion. There is also no dispute that the application was to file his written submissions by 12/6/2018, but did not do so. He filed this application 35 days after the expiration of the time, that is on 17th July, 2018. The issue is whether the applicant has accounted for the delay.

Now in considering the merits or otherwise of the application, I begin by accepting the invitation by Dr. Lamwai to gauge it against the four factors in the case of **Royal Insurance** (supra). They are the same as those that were followed in **Lyamuya Construction Company Limited V. Board of Registered Trustees of Young Women Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

The length of the delay is 35 days, and Dr. Lamwai for the applicant has maintained that it would not be possible for him to specifically account for each of those days. This, I wish to discuss simultaneously with the factor whether or not the applicant has demonstrated diligence. Demonstration of diligence by the applicant has been held to be a requirement in a number of decisions including; **Mbogo V. Shah** [1968] E.A. 93; **Reginald Manage, TANROADS Kagera V. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007; **Tanga Cement Company Limited V. Jumanne D. Massanga and Another**, Civil Application No. 6 of 2001.

I think, with respect to Dr. Lamwai, the account he has offered is not only casual, made with indifference, but suggests no diligence on his part.

The submission by Mr. Wabeya that Dr. Lamwai's account is lacking in specificity is sound and has not been assailed.

In my conclusion therefore Dr. Lamwai has not persuaded me that there is justification for exercising my discretion under Rule 10 of the Rules in favour of the applicant. I associate myself with the recent observation of this Court (Mwambegele, J.A.) in **Jacob Shija V. Ms. Regent Food & Drinks Limited and Mwanza City Council**, Civil Application No. 440/08 of 2017. His lordship observed:-

*"Mr. Banturaki is right in his submissions that litigants must follow procedural rules of the Court to act timely and, when they fail to do so, they should not show unnecessary delay when seeking extension. As we observed in the **Dr. Ally Shabbay** case (supra), at 306; the case cited to me by Mr. Banturaki, **those who come to Court must not show unnecessary delay in doing so. They must show great diligence.**"*

For the reasons shown above, this application is dismissed with costs for want of merits.

It is so ordered.

DATED at DAR ES SALAAM this 14th day of May, 2019

I. P. KITUSI
JUSTICE OF APPEAL

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




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL