

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

CIVIL APPLICATION NO. 222/15 OF 2021

ZANZIBAR TELECOM LTD APPLICANT

VERSUS

THE COMMISSIONER GENERAL (TRA) RESPONDENT

**(Appeal from the judgment of the Zanzibar Tax Appeals Tribunal
at Zanzibar)**

(Issa - Chairperson)

dated the 26th day of February, 2021

in

Tax Appeal No. 1 of 2019

RULING

15th & 17th June, 2022

MWANDAMBO, J.A.:

Before me in this ruling is an application for extension of time to serve of a copy of notice of appeal on the respondent. The notice of appeal emanates from the decision of the Tax Appeals Tribunal at Zanzibar made against the applicant on 26/02/2021 in Tax Appeal No. 1 of 2019.

The tale behind the instant application is told by the affidavits of Salum Ali Mussa and Oswald Rusibamayila annexed to the notice of motion. It goes thus: following the decision of the Tribunal, M/s East

Africa Law Chambers, a law firm of advocates based in Dar es Salaam prepared a notice of appeal which was lodged before the Tribunal at Zanzibar on 03/03/2021 by Salum Ali Mussa; the applicant's Principal Officer. In terms of rule 84 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant had an obligation to serve a copy of the notice of appeal before or within 14 days after lodging it. According to the affidavit of Salum Ali Mussa, he inadvertently left all copies of the notice of appeal with the Tribunal's registry on the mistaken understanding of the relevant procedure after the lodgement. By the time the applicant's advocate realised that a copy of the notice of appeal had not yet been served on the respondent in April 2021, time for doing so had already elapsed. All the same, the applicant's advocates went ahead and lodged a record and memorandum of appeal in the Court on 28/04/2021 and had a copy served on the respondent on 06/05/2021. Five days later, on 11/05/2021, to be exact, the applicant served the respondent with a copy of the notice of appeal followed by the instant application filed on 21/05/2011.

The applicant has premised her application on three grounds set out in the notice of motion to wit; misunderstanding of the instructions by Mr.

Salum Ali Mussa from his counsel on the procedure to serve a copy of notice of appeal, the respondent has already been served with the copy and, the delay in serving the copy has not prejudiced or occasioned any injustice on the respondent.

Resisting the application, the respondent has filed two affidavits in reply noting most of the averments in the founding affidavits but disputing just a few of them. In particular, the respondent avers that the misunderstanding of the instructions to serve a copy of notice of appeal notwithstanding, the applicant had an obligation to serve it within the prescribed period and since this was not done, the applicant was bound to explain away the delay.

At the hearing of the application, Mr. Lulinga Jonathan Lulinga, learned advocate represented the applicant. Essentially, Mr. Lulinga's submissions were a repeat of the grounds in the notice of motion and the averments in the affidavit all boiling down to the averments made by Salum Ali Mussa stated in his affidavit stating that that he left copies of the notice of appeal with the Tribunal's registry on a mistaken understanding that a copy will be served on the respondent by the Tribunal's staff. The learned advocate referred to the affidavit of Oswald

and Rusibamayila regarding the discovery that a notice of appeal was not served on the respondent and the efforts taken thereafter to serve the copy, albeit belatedly on 11/05/2021, five days after the service of the record and memorandum of appeal on the respondent and subsequently, lodging the application for extension of time. By those averments, the learned advocate impressed upon the Court to find that the application has exhibited good cause warranting the exercise of discretion under rule 10 of the Rules.

According to Mr. Lulinga, the applicant has advanced a valid reason for the delay in serving a copy of the notice of appeal and had fully explained away the delay in line with the principles set out in **Lyamuya Construction Co. Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

Besides, Mr. Lulinga contended that the granting of the application will not prejudice the respondent and referred me to the Court's decision in **Registered Trustees of Evangelical Assemblies of God (T) (EAGT) v. Reverend Dr. John Mahene**, Civil Application No. 518/4 of 2017 (unreported) stressing that proposition. The learned advocate urged

the Court to exercise its discretion in the applicant's favour by extending time to serve a copy of notice of appeal on the respondent.

Mr. Hospis Maswanyia learned Senior State Attorney appeared for the respondent, assisted by Ms. Fatma Abdallah also Senior State Attorney to resist the application. Predicating his submission on **Lyamuya Construction** (supra) and **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported), Mr. Maswanyia urged the Court to dismiss the application. However, the learned Senior State Attorney did not appear to challenge the reason behind the delay in serving a copy of the notice of appeal but argued that the affidavit of Salum Ali Mussa has not fully accounted for each day of delay which militated against the exercise of discretion in her favour. According to him, the delay in question was inordinate enough to be condoned.

As to whether the respondent will be prejudiced by the grant of the application, Mr. Maswanyia was emphatic that the respondent will indeed be prejudiced because he has now been placed in a position to halt collection of the tax. He made that argument even though by para 21 of the affidavit in reply deposed by Fatma Abdallah Hassan, the deponent had averred that no tax collection measures had been taken or being

contemplated other than reminding the applicant of the tax debt obligations. On the whole, the learned Senior State Attorney charged that the applicant cannot be talking of prejudice in a case where she has not been diligent in serving a copy of the notice of appeal within the prescribed period or, at best, filing the application for extension of time immediately upon discovery that the respondent had not been served with such copy. He invited me to have regard to the decision of the Court in **Karibu Textile Mills Ltd v. Commissioner General (TRA)**, Civil Application No. 192/20 of 2016 (unreported) on the principle that exercise of discretion in favour of the applicant is conditional upon existence of some material before the Court which were lacking in the instant application.

With the foregoing background and the substance of the learned counsel's submissions, I will now turn my attention the discussion on the merits of the application which requires the court to satisfy itself whether sufficient material has been placed for the exercise of discretion in favour of the applicant.

For a start, although it may not be entirely necessary, I propose to highlight the rationale behind service of notice of appeal on the

respondent provided by rule 84 (1) of the Rules; a replica of rule 77 (1) of the revoked Court of Appeal Rules, 1979. The rationale has been underscored by the Court in its decisions and stated to ensure that the respondent is made aware of the intended appeal against him. See for instance; **National Microfinance Bank v. Muyodeso**, Civil Appeal No. 289 of 2019 referred subsequently in **Grumet Reserves Ltd v. Morice Akiri**, Civil Appeal No. 334 of 2019 and **Raphael Andrea Ologi v. Musoma Urban Water Supply and Sanitation Authority**, Civil Appeal No. 468 of 2020 (all unreported). It has been held that failure to serve a copy of notice of appeal timeously or at all is fatal omission to the appeal for it amounts to failure to take one of the essential steps in the appeal warranting an order striking out the notice of appeal under rule 89 (2) of the Rules. See the Court's decisions in **Kantibhai M. Patel v. Dahyabhai F. Mistry** [2003] T.L.R. 437, **Francis Itengeja v. Kampuni ya Kusindika Mafuta Ltd** [1997] T.L.R. 148 cited in **John Nyakimwi v. The Registered Trustees of Catholic Diocese of Musoma**, Civil Application No. 85/08 of 2017 (unreported). See also: **Boniphace Anyisile Mwabukusi v. Atupele Fredy Mwakibete & Others**, Civil Appeal No. 46 of 2021 (unreported). This would explain why the applicant

had to seek the Court's indulgence through this application even though she had served the respondent with a record and memorandum of appeal within a period of slightly above two months from the date of the impugned decision.

I need not be detained on what it takes for the Court to exercise its discretion, for the law is so settled that one need not cite any authority in that regard. I will only cite **Lyamuya Construction Co. Ltd** (supra) which summarizes the factors to be taken into account in considering whether time should be extended. However, it should be borne in mind that such factors are only a guide rather than fixed formula to be applied with mathematical precision in each and every case it being trite law that each case has to be decided on own peculiar facts.

One of the factors to be considered is the reason for the delay. There is hardly any dispute on that and indeed, Mr. Maswanyia did not offer any contrary argument against that. I would thus accept the applicant's reason for the delay that it was due to failure to understand the nature of the instructions Salum Ali Mussa got from Oswald Rusibamayila regarding requirement to serve a copy on the respondent after lodging the notice of appeal before the Tribunal registry in Zanzibar.

This is more so considering that the applicant's advocates are based in Dar es Salaam and hence the instruction to Salum Ali Mussa, a Principal Officer and presumably a layperson to lodge which it which he did but failed to serve a copy on the respondent on a mistaken understanding that the service would be done by the Tribunal staff.

Next for my consideration is the length of the delay. Mr. Maswanyia impressed upon me to accept that a delay of more than one month was too inordinate to be condoned. That may be so depending on the peculiar circumstances. However, Mindful of the rationale behind service of a notice of appeal on the respondent can it be said that the delay in this application is inordinate? As indicated earlier, the respondent has noted most of the averments in the founding affidavits including the fact that the applicant's advocate based in Dar es Salaam, discovered the want of service late in April, 2021 at the time of compiling a record of appeal. In my view, mindful of the rationale behind service of notice of appeal, there can be no doubt that the respondent became aware of the existence of the appeal as opposed to an intended appeal on 06/05/2021 upon being served with a record and memorandum of appeal. By that time, it was obvious that the applicant had not complied with rule 84 (1)

of the Rules which would have triggered in an application for striking out the notice of appeal under rule 89 (2) of the Rules. The respondent did not wish to pursue that and if he had such an intention, he was pre-empted by the application lodged on 21/05/2021, ten days after being served with a copy of the notice of appeal, albeit belatedly and mistakenly since there was no order extending time within which to do so. Viewed in that context, I cannot say with any degree of certitude that the applicant was not diligent as Mr. Maswanyia urged me to hold. Neither am I prepared to accept that the delay was so inordinate to be condoned. I agree that the applicant engaged herself in efforts to serve the respondent with a notice of appeal on 11/05/2021 instead of filing an application for extension of time but that can only be viewed from poor judgment rather than lack of diligence; one of the factors to be considered in considering applications for extension of time, as it were.

Having held that the length of the delay was not inordinate and that in the circumstances the applicant did not exhibit lack of diligence, it seems to me that, taken in its totality, there can be no doubt that the applicant has, on balance of probabilities, explained away the delay warranting the exercise of discretion in her favour. That takes me to yet

another factor to be considered in applications such as this one; will the respondent be prejudiced if the time sought is extended? The word prejudice is defined by the **Black's Law Dictionary**, 8th Edition, Bryan A. Garner to mean:

"Damage or detriment to one's legal rights or claims" [At p. 1218]

In paragraph 21 of the affidavit in reply deposed by Fatma Abdallah Hassan responding to para 20 of the affidavit of Salum Ali Mussa, the deponent denied having commenced or harboring any intention to commence execution of the decree of the Tribunal. During the hearing, Mr. Maswanya was adamant that the grant of the application will be prejudicial on the respondent because it will impact on his right to collect the tax due. The learned Senior State Attorney did not say anything on the kind of prejudice or detriment likely to be suffered in relation to the appeal or the hearing of it. Be that as it may, it is trite that through section 24(4) of the Tax Revenue Appeals Act [Cap 408 R.E. 2019] the mere notice of appeal does not bar the execution of the decree of the Tribunal. That is the same position of the law under rule 11 (3) of the Rules. It defeats logic and commonsense for the respondent who has

denied taking any tax recovery measures following the decision of the Tribunal to contend as he does that the grant of the application to serve on her a copy of the notice of appeal will be detrimental to the enforcement of his right to collect the tax due following the decision of the Tribunal made in his favour.

At any rate, it has not been suggested that the applicant delayed service of the notice of appeal on the respondent with a view to benefiting from such course considering that the lodgment of a notice of appeal is not a bar to execution. Neither has it been suggested that the respondent has been prejudiced from the hearing of the appeal by reason of the delay in serving a copy of the notice of appeal considering that the appeal has not yet been scheduled for hearing.

In the upshot, guided by the **Registered Trustees of Evangelical Assemblies of God (T) EAGT** (supra) that taken in their totality, the facts in this application warrant the Court's exercise of discretion in the applicant's favour. In my view, doing otherwise will militate against the warning sounded in **VIP Engineering and Marketing Limited v. Salim Said Bakhressa**, Civil Application No. 47 of 1996 (unreported)

thus; not every procedural sins shall result in the death of justice. The following excerpt will serve to express the warning:

"While the importance of litigants complying with the rules of procedure cannot be overemphasized, it must not be forgotten that there is danger of consumers of justice losing confidence in the courts if judicial officers are obsessed more with strict compliance with procedural rules than what the merits of the disputes before them are. To stray into that, error is to aid the judicatures grave diggers."

Whilst I do not condone the non-compliance with rule 84 (1) of the Rules, I am far from being persuaded that, viewed on its own facts, the delay in this application, was so grave a sin resulting into refusing the application for enlargement of time.

In the event, guided by the Court's decision on the effect of applications for extension of time to be retrospective in their nature underscored in **Tanzania Harbours Authority v. Mohamed R. Mohamed** [2003] T.L.R. 76, I grant the application and extend the time sought to 11/05/2021, the date on which the applicant served a copy of

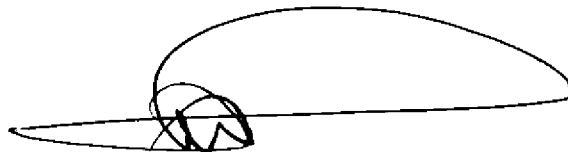
notice of appeal on the respondent. Costs shall abide the outcome of the appeal.

It is so ordered.

DATED at **ZANZIBAR** this 17th day of June, 2022.

L.J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 17th day of June, 2022 in the presence of Mr. Omar Mzee, learned counsel holding brief for Mr. Jonathan Lulinga, learned counsel for the Applicant and Mrs. Fatma Abdalla Hassan, learned Senior State Attorney for the Respondent is hereby certified as a true copy of original.

A handwritten signature in black ink, consisting of a large, sweeping loop followed by a smaller, more intricate scribble.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL