

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

TAG CIVIL APPLICATION NO. 6 OF 2001

BETWEEN

TANGA CEMENT CO. LTD. APPLICANT

AND

1. JUMANNE D. MASANGWA]

2. AMOSI A. MWALWANDA]..... RESPONDENTS

**(Application for Extension of Time to serve Notice
from the decision of the High Court of Tanzania
at Tanga)**

(Longway, J.)

dated the 5th day of September, 2001

in

Civil Appeal No. 4 of 2001

R U L I N G

NSEKELA, J.A.:

The applicant herein, Tanga Cement Company Limited, has by notice of motion under Rule 8 of the Court Rules, 1979, filed an application seeking an order for an extension of time to serve the respondents, (i) Jumanne D. Masangwa, and (ii) Amosi A. Mwalwanda, with a copy of notice of appeal and with a copy of the applicants written request to the District Registrar, Tanga, for a copy of the proceedings of the case, by either ordinary or substituted service or otherwise as the Court may direct. The application is

supported by an affidavit deposed by one Leon Edward Hooper, Managing Director of the applicant company.

From the affidavit evidence, the applicant filed notice of appeal against the decision of the High Court in Civil Appeal No. 4 of 2001 on the 17.9.2001. This was within the prescribed time. On the 18.9.2001, the applicant's learned advocate, Mr. A.J. Akaro, requested from the District Registrar, Tanga, a copy of the proceedings in the case. Again, this was within the prescribed time. Apparently, the applicant failed to serve the notice of appeal upon the respondents' in terms of Rule 77 (1) because the respondents' did not provide their respective addresses in terms of Rule 20 (1) in prior proceedings. For the same reason, the applicant was unable to send a copy of the letter to the Registrar, to the respondents' in terms of Rule 83 (1) and (2). Of particular concern to the applicant was the fact that the prescribed period for serving notice of appeal on the respondents' was due to expire on the 24.9.2001 and the whereabouts of the respondents' remained a mystery. Consequently,

perhaps as a preemptive measure the applicant filed this application on the 21.9.2001.

Both the respondents' appeared in person and without the assistance of counsel. The first respondent in his counter-affidavit stated that the applicant avoided serving him notice of appeal at the usual address but was eventually served on the 4.11.2002, out of time. In his submissions before me, he stated that the applicant was aware of his whereabouts and could easily have been contacted, being a former employee of the applicant. The second respondent adopted the contents of his counter-affidavit and like the first respondent, stressed that the applicant knew his whereabouts and this was vindicated by the address on the record of appeal. In response Mr. Akaro submitted that the record of appeal was filed on the 27.12.2002, well after this application had been filed.

The power of the Court to grant an extension of time is embodied in Rule 8 which provides –

“The Court may for sufficient reason extend the time limited by these Rules or by any decision of the Court or of the High Court for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed as a reference to that time as so extended.”

It is not in dispute that the judgment sought to be appealed against was delivered on the 5.9.2001. Notice of appeal was filed on the 17.9.2001, which was within the prescribed time. On the 18.9.2001, the applicant wrote to the District Registrar asking for a certified copy of the proceedings and judgment. This was within the thirty days reckoned from the 5.9.2001. The applicant however failed to comply with Rules 77 (1) and 83 (2) respectively. In **Ratnam v. Cumarasamy** (1965) 1 WLR 8, the Privy Council, speaking through Lord Guest, stated thus at page 12 –

"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 upon 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 time table for the conduct of litigation."

It is trite law that in terms of Rule 8 of the Court Rules, an application for extension of time is entirely in the discretion of the Court to grant or refuse it. This unfettered discretion however has to be exercised judicially and the overriding consideration is that there must be "sufficient cause" for so doing. What amounts to sufficient cause has not been defined. From decided cases, a number of factors have to be taken into account including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant. (see (CAT) Civil Application No. 27 of 1987 between **Dar-**

es- Salaam City Council and Jayantilal P. Rajani (unreported).

I have also sought inspiration from the case of **C.M. Van Stillevoeldt v. El Carriers Inc.** (1983) 1 All ER 699 at page 703 wherein Griffiths, L.J. had this to say –

“The registrar, in my judgment, took into account all the relevant matters when approaching the determination of the application before him. He stated them in the following words:

“In my judgment, all the relevant factors must be taken into account in deciding how to exercise the discretion to extend time. Those factors include the length of the delay, the reasons for the delay, whether there is an arguable case on appeal, and the degree of prejudice to the defendant if time is extended.”

The basic material placed me are the applicant’s affidavit in support and the counter-affidavits filed by the respondents’. It is evident from the affidavit in support that the applicant took a pre-

emptive move by filing the application before the expiration of the seven days under Rule 77 (1) and writing a letter to the District Registrar within thirty days of the date of the decision, 5.9.2001. Simply put, there was no delay in making the application for extension of time. The reasons for the delay in serving the notice of appeal and in sending a copy of the letter to the District Registrar, are explained in paragraphs 4 and 5 of the affidavit in support. Both the respondents' did not provide their respective addresses for service in the proceedings in the lower courts. The respondents' have not made a serious attempt to counter this except generalized assertions that as former employees of the applicant, the latter knew their whereabouts. Surely, having ceased to work for the applicant, the applicant had no incentive to know their addresses! Rule 20 (7) of the Court Rules provides in part as under –

“Where any document is required to be sent to any person, the document may be sent by hand or by registered post to that person or to any person entitled under Rule 28 to appear on his behalf ---”

The applicant could only comply with Rule 83 (2) if the respondents had provided their respective addresses. The applicant could have sent a copy of the letter by registered post. This was not possible. For the same reason, the applicant could not serve notice of appeal on the respondents under Rule 77 (1). In reaching this conclusion, I have also sought guidance from the definition of the word "service" in section 3 of the Interpretation of Laws and General Clauses Act, 1972. It provides as under –

"Service" where an act authorizes or requires any document to be served on any person, whether the expression "serve", or the expression "give", or "send", or any other expression is used, then, unless a contrary intention appears the service shall be effected by properly addressing and posting, after payment of appropriate charges, a letter containing the document, and, unless the contrary is proved, service shall be deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post."

In the result, I am satisfied that the applicant has shown sufficient reason to warrant an enlargement of time to serve notice of appeal under Rule 77 (1) and to send a copy of the letter under Rule 83 (2) of the Court Rules. The applicant should comply with these provisions of the law within fourteen (14) days of the date of delivery of this Ruling. Costs to be in the cause. It is accordingly ordered.

DATED at DAR ES SALAAM this 8th day of April, 2004.

H.R. NSEKELA
JUSTICE OF APPEAL

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


(S.M. RUMANYIKA)
DEPUTY REGISTRAR