

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

**CIVIL APPLICATION NO. 218 OF 2016**

**INTERCHICK COMPANY LIMITED ..... APPLICANT**

**VERSUS**

**MWAITENDA AHOBOKILE MICHAEL ..... RESPONDENT**

**(Application for Extension of Time for respondent to file written submission  
from the decision of the High Court of Tanzania at Dar es Salaam)**

**(Mipawa, J.)**

**dated the 25<sup>th</sup> day of March, 2014**

**in**

**Civil Appeal No. 37 of 2016**

**R U L I N G**

17<sup>th</sup> February & 14<sup>th</sup> March 2017

**NDIKA, J.A.:**

By a notice of motion lodged on 14<sup>th</sup> July 2016 under Rule 10 of the Tanzania Court of Appeal Rules, 2009, Interchick Company Limited ("the Applicant") applies for extension of time to file written submissions in opposition to Civil Appeal No. 37 of 2016 before this Court instituted against it by Mwaitenda Ahobokile Michael ("the Respondent"). The application is supported by the affidavit deposed by Mr. Mathew Simon Kakamba, an advocate instructed by the Applicant to represent it in the aforesaid appeal.

In opposition to the application, the Respondent filed an affidavit in reply sworn by Mr. Benjamin Mwakagamba, learned Advocate.

The facts of this matter are briefly as follows: the deponent avers in Paragraphs 1, 2 and 3 of the supporting affidavit his understanding that in terms of Rule 106 (1) of the Rules, the Applicant, as respondent to Civil Appeal No. 37 of 2016, was at liberty to file its written submissions in opposition to the appeal within sixty days from the lodgment of the record of appeal on 10<sup>th</sup> March 2016. While acknowledging to have been served with the record, the deponent admits further that the Applicant filed no such submissions within the prescribed period. Desirous of seeking extension of time to file written submissions, the Applicant lodged the present application.

At this juncture, I find it germane to interpose and observe that the Applicant's self-confessed understanding that it had to lodge its written submissions in opposition to the appeal in accordance with Rule 106 (1) of the Rules, within sixty days of the filing of the of the record of appeal, is evidently incorrect. I can surmise that the said misapprehension arose from the apparent abstruseness of the text in Rule 106 (1). But, when the whole

text of Rule 106 is carefully read and construed, it is evident, in my view, that the Applicant herein, as respondent to the appeal, was required to file a reply to the written submissions of the appellant (the Respondent herein) under sub-rule (8) of Rule 106 as opposed to sub-rule (1) of Rule 106. For ease of reference, I reproduce sub-rule (8) hereunder:

***"A respondent shall file a copy of a **reply to the submissions of the appellant not later than thirty (30) days from the date of service by the appellant upon him.**"***

The Applicant's manifest misapprehension aside, I am disposed to deal with this matter on the basis that the requested extension of time is in respect of lodgment of submissions under sub-rule (8) of Rule 106.

It is also essential to note that on 13<sup>th</sup> December 2016, this Court (Mugasha, J.A.) dismissed two sets of preliminary objections against this application that had been raised and argued by Mr. Mwakagamba, on behalf of the Respondent, and countered by Mr. Kakamba, on behalf of the Applicant. Nonetheless, the Court, having agreed that the notice of motion

the Applicant lodged contained a misstatement of the corresponding designations of the parties in the matter, ordered the Applicant to amend the notice of motion within fourteen days from that date. Furthermore, the Court ordered the Applicant in terms of Rule 106 (19) of the Rules to file its written submissions in support of the application within thirty days of the date of that order.

When the matter came up for hearing before me on 17<sup>th</sup> February 2017, it was noted that Mr. Mwakagamba had filed another notice of preliminary objection to the effect that the:

*"Applicant has contravened the Ruling and Order of this Court (Hon. S.E.A. Mugasha) dated 13<sup>th</sup> day of December, 2016."*

For the sake of accelerating the hearing and disposal of this matter the Court ordered, upon the agreement of both Counsel, that the preliminary objection be argued conjointly with the substantive application. As ordered by the Court, both Counsel addressed the Court on the preliminary objection and then on the substance of the application.

In his address on the preliminary objection, Mr. Mwakagamba, argued that the Applicant had flouted the Court's order of 13<sup>th</sup> December 2016, which extended the time to file written submissions by thirty days after the Applicant had failed to lodge any submissions on the application in accordance with Rule 106 (1) of the Rules. While acknowledging that the Applicant had complied with the order of the Court that required it to file amended notice of motion, he assailed the Applicant's failure to lodge the submissions and suggested that it was an abuse of the court process because the Applicant had now missed two opportunities to lodge submissions on the application. He thus prayed that the application be dismissed with costs under Rule 106 (9) of the Rules.

Replying, Mr. Kakamba argued that the Applicant did not contravene the Court's order, as alleged by Mr. Mwakagamba, but failed to comply with it. He notified the Court that the circumstances for the said non-compliance were fully explained in an application by a notice of motion and supporting affidavit that the Applicant had recently filed for extension of time to lodge the delayed written submissions in this matter. That application, he said, was lodged as Civil Application No. 37/18/2017.

Mr. Kakamba further argued that Mr. Mwakagamba's reliance on Rule 106 (9) of the Rules for dismissal of the application was misconceived because the said provisions could only be invoked if submissions are not filed and that there is no application for extension of time to file the delayed submissions. He said that since the Applicant had already applied for extension of time vide Civil Application No. 37/18/2017, the aforesaid Rule 106 (9) was inapplicable. In the end, Mr. Kakamba urged that the Court invoke its discretion under Rule 106 (19) to dispense with the filing of written submissions and allow the parties to argue the application orally.

Rejoining, Mr. Mwakagamba expressed his concern that since the first extension of time to file submissions on this matter was made under Rule 106 (19), it would be an abuse of the judicial process for the Applicant to be granted a further extension under the said provisions.

From the contending submissions of the parties on the preliminary objection, the question that arises is whether the Applicant's failure to file written submissions on the present application within the thirty days period extended by the Court on 13<sup>th</sup> December 2016 constitutes a ground for dismissal of the application under Rule 106 (9) of the Rules.

I must say promptly that having considered the competing arguments of the parties, I am persuaded by Mr. Kakamba that the Applicant's failure to lodge its written submissions is not a contravention or violation of a proscription of the Court. The failure to lodge the submissions is obviously a non-compliance of the said order, which cannot trigger the application of the sanction under Rule 109 (6) of the Rules as the Applicant has already applied for extension of time vide Civil Application No. 37/18/2017. For the Court's discretion under Rule 109 (6) to dismiss an application (or appeal) arises following failure to file written submissions within sixty days of lodgment of the notice of motion or record of appeal, as the case may be, and if there is no application for extension of time within which to file the submissions.

Apart from Mr. Mwakagamba's argument in support of the preliminary objection being unsustainable, I am of the view that the circumstances of this matter are such that the parties ought to be allowed to address the substance of the application orally without the necessity of filing written submissions. On this basis, I would, under Rule 106 (19) of the Rules, waive the requirement for filing written submissions in this matter. The preliminary objection stands overruled.

Having disposed of the preliminary protestation, I now proceed to consider the substance of the present application for extension of time.

Submitting on the application, Mr. Kakamba blamed his ill-health as the cause of the delay to lodge the submissions as averred in Paragraphs 4 and 5 of the supporting affidavit. He elaborated that after the Applicant was served with a copy of the record of appeal filed on 10<sup>th</sup> March 2016 he was unable to draw and file the submissions because he experienced "sporadic rising of high blood pressure" as he has been a known case of hypertension since November 2015. He annexed to his supporting affidavit copies of medical reports as follows: the first report is issued by Muhimbili National Hospital dated 29<sup>th</sup> June 2016 indicating that he was attended to as hypertensive patient following a referral from Rabininsia Memorial Hospital. The second report dated 6<sup>th</sup> March 2016 was issued by a healthcare facility known as PK Kibaoni Dispensary, Tegeta, Dar Es Salaam. It indicates that the deponent was attended to and diagnosed with hypertension. He was, then, put on three kinds of medication and exempted from duty for four days apart from being advised to take bed rest.



While conceding that illness can be good cause for extension to time, Mr. Mwakagamba countered that the supporting affidavit makes a general claim that the deponent was sick without giving any detail about when exactly he was sick. He was also concerned that, as shown in Paragraph 7 of the affidavit in reply, that the Applicant filed its written submissions out of time without any leave of the Court and that the Applicant was silent on that fact. In the circumstances, he prayed that the application be dismissed with costs because it was an abuse of the court process.

In a brief rejoinder, Mr. Kakamba claimed his illness was peculiar in that it made him succumb to unpredictable but frequent bouts of rising blood pressure that left him debilitated. He acknowledged that the Applicant had filed the written submissions out of time, as alleged by Mr. Mwakagamba, but then, said that it was necessary that the present application be granted so that the said submissions could be deemed as having been formally lodged.

It is apposite to restate that although the Court's power to extend time under Rule 10 of the Rules is both broad and discretionary, it can only be exercised if good cause is shown. While it may not be possible to lay

down an invariable definition of good cause so as to guide the exercise of the Court's discretion in this regard, the Court must 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 valid explanation for the delay, good cause would also depend on whether the application for extension of time has been brought promptly and whether there was diligence on the part of the applicant (see, e.g., this Court's decisions in **Dar Es Salaam City Council v Jayantilal P. Rajani**, Civil Application No. 27 of 1987 (unreported); and **Tanga Cement Company Limited v Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 (unreported)).

From the contending submissions of the two learned advocates, it behooves the Court to determine whether in terms of Rule 10 of the Rules, the Applicant has shown good cause for the Court to extend time to enable it to lodge its submissions in opposition to the appeal.

As summarized above, the Applicant's explanation of the delay to lodge the submissions is given in the context of the obligation to file "submissions in opposition of an appeal" under Rule 106 (1). Consequently,

it has not been specifically addressed why the Applicant did not file under Rule 106 (8) any reply to the submissions lodged by the Respondent herein as appellant in the appeal. I should also remark that while I note from the record of appeal in Civil Appeal No. 37 of 2016 that the Respondent herein lodged his submissions in support of the appeal on 6<sup>th</sup> May 2016, there is no indication of the date on which the said submissions were served on the Applicant. That date is necessary for it is the day from which the thirty days limitation for filing a reply to the appellant's submissions under Rule 106 (8) would be reckoned.

Whatever the case, the reason that has been advanced for the delay in lodging the submissions is that Mr. Kakamba, the Applicant's advocate, succumbed to intermittent hypertensive condition that disabled him from attending to his duties. While both parties agreed that infirmity could be a good cause for extension of time, Mr. Mwakagamba was critical that the supporting affidavit made a general claim that the deponent was sick without giving any specific facts about when exactly he was sick.

I think Mr. Mwakagamba's criticism is fully justified. None of the paragraphs in the supporting affidavit provides any specific facts regarding

the duration of the indisposition of Mr. Kakamba apart from the two medical reports annexed to it. What the aforementioned reports indicate is that Mr. Kakamba was sick and attended to, at first, on 6<sup>th</sup> March 2016 and, subsequently, on 29<sup>th</sup> June 2016. While on the first occasion he was put on medication and then instructed to take complete rest for four days, on the second occasion he was attended to at the Muhimbili National Hospital and given additional medication but was not exempted from duty. If Mr. Kakamba's illness was only intermittent as opposed to being continuous or unceasing, one wonders why he did not draw up and file the submissions before 22<sup>nd</sup> July 2016 when he purportedly lodged "submissions in opposition to the appeal" out of time without leave. Apart from overlooking to state when the Applicant was served with a copy of the Respondent's submissions after they were lodged on 6<sup>th</sup> May 2016, the deponent did not give details on his alleged indisposition for the whole of May 2016 as well as a part of June 2016. In my view this is the period not accounted for.

It is this Court's firmly entrenched position that any applicant seeking extension of time under Rule 10 of the Rules is required to account for each day of delay. Indeed, the Court has reiterated that position in numerous

cases including **Bushiri Hassan v Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported) where it held as follows:

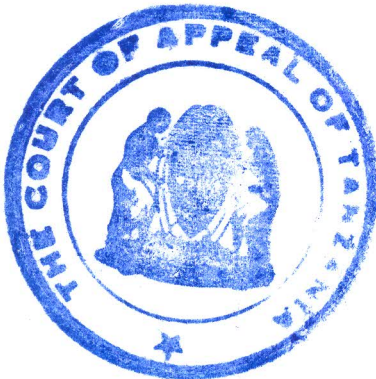
*"...Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."*


In sum, I find that the Applicant has not shown any good cause for the Court to exercise its discretion to extend time. Accordingly, I dismiss the application in its entirety with costs.

DATED at DAR ES SALAAM this 8<sup>th</sup> day of March 2017.

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

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



  
A.H. MSUMI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**