**DN Bahram and Company Limited and others v Tanzania Postal Bank and**

**others**

**Division:** Court of Appeal of Tanzania at Dar-es-Salaam

**Date of judgment:** 8 September 2005

**Case Number:** 113/05

**Before:** Munuo JA

**Sourced by:** LawAfrica

**Summarised by:** R Rogo

*[1] Civil procedure – Extension of time – Grounds for application for extension of time to serve*

*respondents with a Notice of Appeal and stay of execution.*

**Editor’s Summary**

The three applicants through their advocate brought this application under rule 9(2)(*b*) of the Court of Appeal Rules, 1979 seeking extension of time to serve the respondents with a Notice of Appeal and stay of execution. The advocate stated that the application for leave to appeal was dismissed for want of prosecution because he had travelled to Mombasa and his counsel was sick on the hearing date. The learned Advocate, on his part at paragraph 5 of his affidavit said that he left the Notice of Appeal and the letter applying for copies of judgment, decree and proceedings at the Registry so that the Registrar would sign the same and cause the material documents to be served on the respondents. The first respondent bank however stated that the applicants were employing tactics to frustrate the process of law and that neither the alleged sickness of the applicant’s counsel nor the default to prosecute the application was communicated to the High Court so the material application had to be dismissed for want of prosecution on the 16 April, 2005. They also contended that the Notice of Appeal was not served on them due to lack of diligence on the part of the applicants and their counsel and thus, the present application should be rejected for want of merit.

**Held** – The supporting affidavits lack merit because if the applicant’s counsel was ill and if one of the applicants had travelled to Mombasa, communication would have been made to the trial court on the scheduled hearing. Had that been done, the application for leave to appeal would not have been dismissed for want of prosecution. The applicant’s delay in serving the respondent did not constitute sufficient ground for extending the sought period of serving the Notice of Appeal on the respondent. (*Inspector Sadiki and others v Gerald Nkya* [1997] TLR 290; *Francis Itengeja v Kampuni ya Kusindika Mbegu za Mafuta Limited* [1997] TLR 149; *Transport Equipment Limited v DP Valambhia* [1993] TLR 91 applied. The application was lacking in merit. Failure to serve the Notice of Appeal on the respondents rendered the intended appeal incompetent so the application for stay of execution was not sustainable in law. Application dismissed.

**Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Francis Itengeja v Kampuni ya Kusindika Mbegu za Mafuta Limited* [1997] TLR 149 – **AP**

*Inspector Sadiki and others v Gerald Nkya* [1997] TLR 290 – **AP**

*Transport Equipment Limited v DP Valambhia* [1993] TLR 91 – **AP**

**Ruling**

**Munuo JA:** The three applicants, through the services of Mr *Mkali*, learned Advocate, brought the

present application under rule l9(2)(*b*) of the Court of Appeal Rules, 1979 seeking extension of time to

serve the respondents with a Notice of Appeal and stay of execution in commercial case number 106 of

2003 in the Commercial Division of the High Court. The application is supported by the affidavits of the

applicants advocate, Mr Mohamed IA *Mkali* and Mr Dadrahman Nurmohamed Abraham which

affidavits, counsel for the applicant adopted at the hearing.

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In his affidavit, Mr Abraham stated at paragraph six that their application for leave to appeal was

dismissed for want of prosecution because he had travelled to Mombasa and his counsel was sick on the

hearing date. Mr *Mkali*, on his part, stated at paragraph 5 of his affidavit that he left the Notice of Appeal

and the letter applying for copies of judgment, decree and proceedings at the registry so that the Registrar

would sign the same and cause the material documents to be served on the respondents. He stated that

they had not been informed whether the registrar had signed the said documents. Hence the delay in

serving the respondents and the need for seeking extension of time to serve the respondents.

Mr Nkuba, a principal officer of the first respondent bank deponed to a counter-affidavit stating that

the applicants are employing delaying tactics to frustrate the process of law. He further stated that neither

the alleged sickness of the applicant’s counsel nor the default to prosecute the application for leave to

appeal to this Court was communicated to the High Court so the material application had to be dismissed

for want of prosecution on the 16 April 2005. In short the respondents contend that the Notice of Appeal

was not served on them due to lack of diligence on the part of the applicants and their counsel so the

present application should be rejected for want of merit.

Contending that the intended appeal is incompetent, Mr *Malimi* observed that the Notice of Appeal

was lodged on the 21 March 2005 and should have been served on the respondents within seven days

under rule 77(1) of the court rules. It is the contention of counsel for the respondents that there is no

sufficient ground for extending the period for serving the respondents with the Notice of Appeal. In the

absence of a valid Notice of Appeal the intended appeal is incompetent, he argued. Counsel for the

respondents cited a number of cases in which the court rejected applications for extension of time to

serve Notices of Appeal on the ground that there was no sufficient reason for extending time. He urged

the court to do the same in the present application.

It appears to me that, the affidavits in support of the application lack merit because if the applicants

counsel was ill, and, or if one of the applicants had travelled to Mombasa, communication would have

been made to trial court on the scheduled hearing. Had that been done, the application for leave to appeal

would not have been dismissed for want of prosecution.

With regard to extension of the period of serving the Notice of Appeal on the respondents, I find no

ground for doing so. In the case of *Inspector Sadiki and others v Gerald Nkya* [1997] TLR 290, the

applicants filed a Notice of Appeal within 6 days of the judgment having been granted but neither the

Notice of Appeal nor the letter requesting copies of judgment, decree and proceedings were served on the

respondents, just as was the case here. In the said case, the court held that the applicant’s delay in serving

the respondent did not constitute sufficient ground for extending the sought period of serving the said

Notice of Appeal on the respondent.

In another case, *Francis Itengeja v Kampuni ya Kusindika Mbegu za Mafuta Limited* [1997] TLR 149,

the applicant sought to strike out the appeal because the Notice of Appeal had not been served on him nor

had the appeal been lodged within fixed period of sixty days. On the issue of not serving the Notice of

Appeal on the respondent, the court held that:

“The failure to serve the applicant with a copy of the Notice of Appeal within 7 days as required by rule 77(1)

warranted striking out the appeal.”

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Likewise, the court could not find sufficient reason for extending the period of serving the respondent

with the Notice of Appeal in the case of *Transport Equipment Limited v DP Valambhia* [1993] TLR 91.

In the present case, there is simply no sufficient ground and to be fair no ground at all for extending the

period of serving the respondents because the applicant’s counsel left the Notices of Appeal at the

Registry instead of effecting, and, or seeing to it that service was effected on the respondents within

seven days pursuant to rule 77(1) of the Tanzania Court of Appeal Rules 1979.

Under the circumstances this application is lacking in merit. Failure to serve the Notice of Appeal on

the respondents rendered intended appeal incompetent so the application for stay of execution is not

sustainable in law. I accordingly dismiss the application with costs.

For the appellant:

Mr *Mkali*

For the respondent:

Mr *Malimi*