

IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM

CIVIL REFERENCE NO. 5 OF 2011

(CORAM: MBAROUK, J.A., MASSATI, J.A., And MUGASHA, J.A.)

G. A. B SWALE .....APPLICANT

VERSUS

TANZANIA ZAMBIA RAILWAY AUTHORITY .....RESPONDENT

(Reference from the Ruling of a single Justice  
of Court of Appeal of Tanzania)

(Kileo, J.A)

dated 17<sup>th</sup> day of August, 2011

in

Civil Application No. 49 of 2010

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RULING OF THE COURT

1<sup>st</sup> & 7<sup>th</sup> September, 2016

MASSATI, J.A.:

At the hearing of this application for reference, we allowed Mr. Godfrey Ukwong'a, learned counsel for the applicant to proceed *ex-parte* under Rule 63(2) of the Court of Appeal Rules 2009 (the Rules) upon being satisfied that the respondent was duly served on 19/8/2016 but failed to enter appearance. He supplemented his written submission by a brief oral submission.

The applicant's arguments against the order of dismissal of his application for extension of time to file his written submission by Kileo J.A

dated 17<sup>th</sup> August, 2011, are that, the learned single Justice harshly exercised her discretion in not allowing the applicant's application for extension of time in which to file his submission; and that therefore the applicant was denied the right to be heard, which was contrary to the principles of natural justice. In support of the arguments Mr. Ukwong'a has referred the Court to several decisions of this Court to show, how the Court had in the past exercised such discretion. The cases include; **MASSUNGA MISEGETE & 2 OTHERS V THE HON. ATTORNEY GENERAL & ANOTHER.** Civil Application No. 68 of 2010, **AMOUR HABIB SALUM V HUSSEN BAFAGI**, Civil Application No. 76 of 2010 and **VIP ENGINEERING & MARKETING LTD V SAID SALIM BAKHRESSA LTD**, Civil Application No. 47 of 1996, and **KHALID MWISONGO V M/S UNTIRANS (T) LTD** Civil Appeal No. 56 of 2011 (all unreported).

What was before Kileo, J.A was an application for leave to appeal to the Court of Appeal out of time which arose from High Court Civil Appeal No. 153 of 2002 at Dar es Salaam Registry and after an earlier application for leave was refused by the High Court on 7/3/2008. As the applicant had not yet filed his written submission in terms of Rule 106(1) of the

Rules, the Court asked counsel to address it on the effect of the omission. Mr. Ukwong'a is on record as having admitted to have failed to file the written submission, but prayed for extension of time to file the same, under Rule 4(2)(b) of the Rules, instead of a formal application as earlier on advised by the Registrar. Mr. Ukwong'a also admitted to having been negligent in observing the Rules of the Court. Since the informal application for extension was resisted by the respondent, and after taking into account the Court's powers under Rule 106(9) of the Rules, Kileo J.A dismissed the application; hence the present application for reference in which the applicant prays that, the decision be varied or reversed in terms of Rule 62(1) (b) of the Rules. The issue here is therefore whether we should interfere with that decision?

The principles upon which a decision of a single Justice can be upset under Rule 62(1) (b) of the Rules, are that:-

- (i) *Only those issues which were raised and considered before the single Justice may be raised in a reference. (See GEM AND ROCK VENTURES CO LTD VS YONA HAMIS MVUTAH Civil Reference No. 1 of 2010 (unreported)).*

*And if the decision involves the exercise of judicial discretion:-*

- (ii) *If the single Justice has taken into account irrelevant factors or;*
- (iii) *If the single Justice has failed to take into account relevant matters or;*
- (iv) *If there is a misapprehension or improper appreciation of the law or facts applicable to that issue or;*
- (v) *If, looked at in relation to the available evidence and law, the decision is plainly wrong. (See **KENYA CANNERS LTD V TITUS MURIRI DOCTS** (1996) LLR 5434 a decision of the Court of Appeal of Kenya, which we find persuasive) (See also **MBOGO AND ANOTHER V SHAH** (1996) I EA 93).*

The main issues before the learned single Justice were, whether, time should be extended to the applicant to file his written submission, and secondly what were the consequences of non-compliance with Rule 106(1) of the Rules. We are satisfied that in reaching her decision the learned single Justice took into account all the relevant and material factors; including, the learned counsel's negligence and laches, and insolence in ignoring the Registrar's advice. She properly rejected the applicant's invitation to invoke Rule 4(2) (b) of the Rules, as Rule 106 was exhaustive

enough. That rule cannot be used to circumvent the clear provisions of Rule 106. As to the Court's exercise of discretion under Rule 106 (9) of the Rules, the learned single Justice properly directed herself that this provision gave to the Court judicial discretion. The learned single Justice found that in the light of Mr. Ukwong'a concession to negligence, there was no good cause to tilt the Court's discretion in the applicant's favour. As shown, Mr. Ukwong'a has referred to us several decisions of this Court in an attempt to show that in some cases, this Court had extended its indulgence and extended time to parties who had not filed their written submissions. That might be so, but the general principle is that, in the exercise of judicial discretion, each set of facts, have to be looked at in their peculiarities. No particular set of facts could form the basis of a precedent to be followed in a future set of facts unless there are certain principles of law which can be extracted from them. On that account we appreciate the principles set out in **VIP ENGINEERING LTD V & SALIM SAID BAKHRESSA LTD** case that, courts should not overindulge in rules of procedure and, that, but rules of procedure differ in importance. That said, we should end by saying that all the other cases were decided on the

basis of their own facts, which are different from the ones in the present case.

Given all the circumstances in this case we have come to the conclusion that this application is devoid of substance. Considering the facts and the relevant law governing the case which is Rule 106(9) where the Court has powers to dismiss, the learned single Justice properly exercised her discretion by dismissing the applicant's application, after hearing the parties and taking into account all the relevant factors. There is no justification for faulting the decision of Kileo J.A. We therefore dismiss the application. We shall make no order as to costs.

**DATED at DAR ES SALAAM this 2<sup>nd</sup> day of September, 2016.**

M.S. MBAROUK  
**JUSTICE OF APPEAL**

S.A. MASSATI  
**JUSTICE OF APPEAL**

S.E. MUGASHA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original

  
E. Y. Mkwizu  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**