

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

**(CORAM: MBAROUK, J.A., MWARIJA, J.A., And NDIKA, J.A.)**

**CIVIL REFERENCE NO. 7 OF 2016**

**BERTHA BWIRE ..... APPLICANT**

**VERSUS**

**ALEX MAGANGA ..... RESPONDENT**

**(Application for reference from the ruling of the Court of Appeal of Tanzania at  
Dar es Salaam)**

**(Mussa, J.A.)  
dated 19<sup>th</sup> day of September 2016  
in  
Civil Application No. 103 of 2016  
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**RULING OF THE COURT**

23<sup>rd</sup> October & 4<sup>th</sup> December, 2017

**NDIKA J.A.:**

This is a reference from the ruling of a single Justice of the Court (Mussa, J.A.) in Civil Application No. 7 of 2016 dated 19<sup>th</sup> September, 2016 dismissing the quest by the applicant herein for extension of time within which to lodge an application for leave to appeal against the decision of the High Court of Tanzania (Ihema, J.) in Civil Revision No. 30 of 1999.

In order to appreciate the context in which this reference was instituted, we find it necessary to begin with a brief chronicle of the essential facts of the dispute between the parties herein.

It all began at the Resident Magistrate's Court at Kisumu ("the trial court") where the respondent herein sued the applicant in Civil Case No. 19 of 1988 over ownership of a piece of land. That action ended with the respondent emerging successful upon an *ex parte* judgment dated 26<sup>th</sup> May, 1988 entered in his favour. Aggrieved, the applicant unsuccessfully pursued objection proceedings before the trial court against the execution of the *ex parte* decree. Her appeal from the decision of the trial court as the executing court came to naught as the High Court (Bubeshi, J.) rejected it summarily on 6<sup>th</sup> December, 1994. Subsequently, the applicant re-approached the trial court seeking a review of the *ex parte* judgment in favour of the respondent. By a ruling dated 18<sup>th</sup> January, 1996, the trial court set aside the aforesaid *ex parte* judgment and decree. As a result, the execution process was effectively terminated. Dissatisfied, the applicant preferred an application for revision (Civil Revision No. 30 of 1999) before the High Court challenging the trial court's decision to set aside its *ex parte* judgment and decree. In its ruling dated 26<sup>th</sup> October, 2005, the High Court (Ihema, J.) reversed the impugned decision of the trial court and restored the trial court's *ex parte* judgment and decree in favour of the respondent.

The next stage of the litigation between the protagonists in this matter ensued as the applicant approached the High Court and beseeched from it

extension of time to apply for leave to appeal to the Court of Appeal so as to challenge the decision of Ihema, J. That application was dismissed by the High Court (Mandia, J., as he then was) for want of good cause on 27<sup>th</sup> October, 2012. A further application, lodged subsequently for the same prayers, was rejected by the High Court (Twaib, J.) for being misconceived and devoid of substance.

Undeterred, the applicant took the matter to the next level as she knocked at the doors of this Court on 31<sup>st</sup> October, 2013 seeking a second bite through Civil Application No. 189 of 2013. By a decision handed down on 17<sup>th</sup> February, 2014, a single Justice of this Court (Bwana, J.A.) granted the requested extension of time for applying for leave to appeal against the aforesaid decision of Ihema, J. The relevant part of the ruling reads as follows:

*"I grant the applicant extension of time within which to file an application to this Court for leave to appeal out of time. The said application to be filed within fourteen days from the date of delivery of this Ruling."*

As it turned out, the applicant did not file any such application by the expiry of the fourteen days fixed by the Court (that is, on or about 3<sup>rd</sup> March 2014). Actually, she took no action for more than two years until 14<sup>th</sup> April,

2016 when she lodged Civil Application No. 103 of 2016, which is the subject of this reference. In that matter, the applicant rehashed her prayers for extension of time within which to apply for leave to appeal against the decision of Ihema, J. She sought to justify her quest on the following contentions: first, that while her initial application for extension of time (Civil Application No. 189 of 2013) was still pending, she lodged Civil Application No. 1 of 2014 for extension of time to lodge written submissions in support of her motion in Civil Application No. 189 of 2013. Secondly, the Court determined, at first, Civil Application No. 189 of 2013 on 17<sup>th</sup> February, 2014 and granted her fourteen days extension to lodge her quest for leave and that Civil Application No. 1 of 2014 was not determined, at first, as she had expected. Thirdly, while inadvertently believing that the Court had dealt with her subsequent derivative application at first and granted her extension of time to lodge her written submissions in support of her motion in the earlier substantive application (i.e., Civil Application No. 189 of 2013), she proceeded to lodge the submissions on the said substantive application. Finally, she did not file any application for leave within the prescribed period of fourteen days principally because the ruling and order issued in Civil Application No. 189 of 2013 set conflicting directives and confused her totally.

Having heard the parties, the learned single Justice of the Court (Mussa, J.A) found no good cause for enlargement of time and proceeded to dismiss the application on the following reasoning:

*"the matter under my consideration involves the same parties and issues which were definitively decided in Civil Application No. 189 of 2013. The latter decision clearly spelt out that the application for extension of time was granted and, that being so, **the applicant cannot be heard to claim that conflicting directives were issued by the Court. The applicant's alleged inadvertence only admits to lack of diligence on her part.** There is a salutary maxim that there should be an end to litigation, and, in my opinion, it will be **most intolerable and most prejudicial if matters once decided by the Court could be reopened on account of an alleged misapprehension of the initiating party.**"*

[Emphasis added]

In this reference, the applicant urges us to reverse the decision of the learned single Justice on the premise of the same facts that she presented in her notice of motion in Civil Application No. 103 of 2016.

Before us, both parties appeared in person, unrepresented. In her very brief oral submissions, the applicant adopted her written submissions and maintained that she could not lodge any application for leave in time after being granted extension of time to do so, in Civil Application No. 189 of 2013, because of the confusion that arose from the conflict between the ruling and the order of the Court in that matter. She elaborated that while the ruling directed her to file her “application for leave” within fourteen days, the order extracted from the aforesaid ruling contradicted that ruling as it stated that the extension of time for fourteen days was for filing “an application for extension of time.” It was her strong belief that had the learned single Justice fully taken this fact into consideration, he would have granted her application.

On his part, the respondent had little to say but he prayed that the application be dismissed as it was devoid of merit.

We have scrutinized the material on the record and given careful consideration to the submissions of the parties on whether good cause had been given in terms of Rule 10 of the Tanzania Court of Appeal Rules, 2009 (“the Rules”) to warrant the requested extension of time. It is trite that extension of time is a matter of discretion on the part of the Court and that such discretion must be exercised judiciously and flexibly with regard to the

relevant facts of the particular case. Whilst 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, the Court is enjoined to consider, *inter alia*, the reasons for the delay, the length of the delay, whether the applicant was diligent and the degree of prejudice to the respondent if time is extended: (see, e.g., this Court's decisions in **Dar es Salaam City Council v Jayantilal P. Rajani**, Civil Application No. 27 of 1987 and **Tanga Cement Company Limited v Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 (both unreported)).

Since the grant of extension of time is discretionary, this Court would not normally interfere with the exercise by a single Justice of his discretion under Rule 10 of the Rules. In the unreported decision in **G.A.B. Swale v Tanzania Zambia Railway Authority**, Civil Reference No. 5 of 2011, the Court restated the principles upon which a decision of a single Justice can be disturbed in a reference under Rule 62 (1) (b) of the Rules as follows:

*"(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 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 VS 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** [1968] EA 93.”*

By way of emphasis, we wish to reproduce a passage from **Mbogo and Another v Shah** [1968] EA 93, at page 94, a decision of Court of Appeal for East Africa which was cited and applied in **G.A.B. Swale** (supra) and numerous other decisions:

*"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision **is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.**" [Emphasis added]*



We have no doubt that the position in the above passage is equally applicable to the exercise of discretion by a single Justice of this Court.

Applying the above principles to this matter, we are satisfied that there is no basis for faulting the decision of the learned single Justice. We so hold as we find that the learned single Justice took into account all the relevant and material facts, which included the applicant's attribution of the delay to existence of conflicting directives of the Court vide its ruling and drawn order in Civil Application No. 189 of 2013. We find it significant that the record before us bears it out that the applicant was present in Court on 19<sup>th</sup> February, 2014 when the ruling in Civil Application No. 189 of 2013, granting her extension of time to file the application for leave within fourteen days, was delivered. Had she been diligent, she would have taken issue rather promptly upon being issued with the drawn order that conflicted or contradicted the aforesaid ruling. It is also our view, the learned single Justice correctly inferred a lack of diligence on the part of the applicant from her own admission of inadvertence in filing written submissions in Civil Application No. 189 of 2013 when that matter had already been conclusively determined. That she took no further action for more than two years until 14<sup>th</sup> April, 2016 when she lodged Civil Application No. 103 of 2016 confirms her indolence and a lack of diligence.

Perhaps, we should interject a remark that we were puzzled as to why the applicant herein opted to lodge a fresh application for extension vide Civil Application No. 103 of 2016 while her entreaty for extension of time had been granted in Civil Application No. 189 of 2013. If it is assumed, for the sake of argument, that she had a good cause for the delay in lodging the application for leave to appeal within the fourteen days period prescribed by the Court in Civil Application No. 189 of 2013 on 17<sup>th</sup> February, 2013, the proper course would have been to seek extension of the aforesaid fourteen days limitation period instead of filing a fresh application as she did by lodging Civil Application No. 103 of 2016.

Given all the circumstances as discussed above, we find no substance in this reference. We dismiss it with costs.

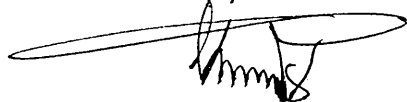
**DATED** at **DAR ES SALAAM** this 20<sup>th</sup> day of November, 2017.

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

A.G. MWARIJA  
**JUSTICE OF APPEAL**

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

I certify that this is a true copy of the original



J. R. KAHYOZA  
**REGISTRAR**  
**COURT OF APPEAL**