IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., LILA, J.A., And MKUYE, J.A.)

CIVIL REFERENCE NO. 8 OF 2016

WAMBELE MTUMWA SHAHAME.....APPLICANT

VERSUS

MOHAMED HAMIS.....RESPONDENT

(Application for a reference from the decision of the single JA of the Court of Appeal of Tanzania at Dar es Salaam)

(Oriyo, J.A.)

dated the 12th day of October, 2016

in

Civil Application No. 138 of 2016

RULING OF THE COURT

29th June & 9th August, 2018

MKUYE, J.A.:

This is an application for Reference against the Ruling of a single Justice, Oriyo, J.A., (as she then was) dated 12/10/2016 in Civil Application No. 138 of 2016 in which she declined the applicant's application for extension of time within which he could lodge an application for reference against the decision of Juma, J.A., (as he then was) dated 16/11/2015 in Civil Application No. 197 of 2014. In that decision Juma, J.A., had refused the applicant's application to lodge an application for restoration of

Civil Application No 16 of 2013 that was dismissed on 21/11/2013 in which the applicant was seeking extension of time to file an application for review of the decision of this Court (Msoffe, J.A., Luanda, J.A,. and Massati, J.A.) in Civil Application No. 124 of 2009 handed down on 15/10/2012. The application is by way of a letter dated 17/10/2016 taken under Rule 62(1)(b) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

When the application was called on for hearing on 29/6/2018, the applicant had the services of Mr. Godfrey Ukwong'a, learned counsel, whereas the respondent was being advocated by Mr. Ibrahim Bendera also learned counsel.

In his submission in support of the application, Mr. Ukwong'a, in the first place sought, and was granted leave for his written submission to be adopted to form part of his submission. In elaboration, he contended that the single Justice's (Oriyo, JA) decision that the applicant ought to account for each day for delay was harsh, more so, when taking into account that under Rule 10 of the Rules to which the application was premised requires the applicant to show a good cause for the delay. Mr. Ukwong'a argued further that the conditions which were set out at page 14-

15 of Justice Oriyo's Ruling which the Court ought to consider fell squarely to that application. The conditions which were set out in that Ruling are as follows: -

> *"(1). length of delay;*
>
> *(2). reasons of the delay;*
>
> *(3). the degree of prejudice to the other party, if granted;*
>
> *(4). the chances of success, if the application is granted."*

Elaborating the above conditions, Mr. Ukwong'a contended that the Court ought to have considered **one,** the length of delay which was not dilatory; **two**, the reasons for delay given by the applicant that he was not aware of the litigation procedures and financial constrains; **three,** the degree of prejudice to both the applicant and the respondent as the applicant was being denied the right of being heard; and **four,** that if the applicant is given time to have the Court's decision considered it stands a great chance of success.

On his part, Mr. Bendera after having informed the Court that he had filed the written submission in reply he sought and we granted leave for the same to be adopted to form part of his

submission. From the outset he resisted the application. He submitted that the decision sought to be challenged was quite proper. In his written submission in reply, Mr. Bendera basically, contended that the requirement under Rule 10 of the Rules to show a good cause for the delay was appropriately applied by the Court and as the time limit was prescribed for filing such application it was justifiable for each day of delay to be accounted for. This, he said, neither the applicant nor his advocate, did account for. As for the reason by the applicant that he was not able to engage an advocate due to financial constraint, Mr. Bendera said, Rule 62(1) (b) of the Rules does not require such representation by the advocate as the applicant could apply for Reference informally to the Justice of Appeal at the time when decision is given; or by writing to the Registrar within seven days after the decision is given. For those reasons, he urged the Court to disallow the application with costs.

The issue for consideration by this Court is whether the applicant had in Civil Application No. 138 of 2016, advanced sufficient reason(s) to warrant the grant of extension of time; and in particular, whether the principle of accounting for each day for delay was harsh.

We wish to take off by examining the provisions of Rule 10 of the Rules which states: -

> *"The Court may,* ***upon good cause shown extend the time limited by these Rules or by any decision of the High Court or tribunal for the doing of any act authorised 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 so extended."*
> [Emphasis added].

As it can be seen, the emphasis in the above rule, as was rightly argued by both counsel, is for the applicant to show a good cause. There are, however, no hard and fast rules as to what constitutes "good cause". An attempt has been made in **Black's Law Dictionary** (Ninth Edition) by Bryan and Garner where "good cause" has been defined to mean "legally sufficient reason". But in most cases the Court, while having in mind of its scope of exercising its discretion on those powers judiciously, has been

construing such good cause depending on the circumstances of each case.

In the case of **Bertha Bwire Vs. Alex Maganga**, Civil Reference No. 7 of 2016, this Court stated as follows: -

> *"...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 for example this Court's decisions in* ***Dar es Salaam City Council Vs. Jayantilal P. Rajani****, Civil Application No. 27 of 1987; and* ***Tanga Cement Company Limited Vs. Jumanne D. Masangwa and Amos A. Mwalwanda,***

Civil Application No. 6 of 2001 (unreported)."

In the case of **Bushfire Hassan Vs. Latina Lucia Masanya**, Civil Application No. 3 of 2007 (unreported) this Court when addressing the issue of delay held that: -

> *"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..."*

This stance was followed in many decisions among them being the case of **Mustafa Mohamed Raze Vs. Mehboob Hassanali Versi**, Civil Application No. 168 of 2014 (unreported).

Mr. Ukwong'a has forcefully argued that the single Justice ought to have taken into account such factors as the length of delay, the applicant's ignorance of the litigation procedures and financial constraint, prejudice to both the applicant and the respondent, and the overwhelming chances of success.

After we had subjected those principles stated above to the application at hand, we are of the settled mind that there is no reason for faulting the decision of the single Justice. We say so

because the single Justice had properly taken into account among other principles, the principle of accounting for each day of delay by the applicant. To appreciate what transpired in that decision we take the liberty to reproduce what the single Justice stated in the said Ruling as hereunder: -

> *"What can be gathered from his affidavit, the applicant's delay was due to his ignorance of the law as he did not know anything about an application for a reference until the time when he secured the services of an advocate. Further, he delayed to engage an advocate due to financial constraints as he did not have money to pay court fees and counsel fees."*

The single Justice then went on to conclude as follows:

> *"Considering the* ***applicant's reasons for the delay and the failure to account for each day of delay;*** *on my part, I find no good cause to enlarge time for the applicant to file a reference against the decision of the Court"*
> *[Emphasis added]*

From the above passages, it is clear that the single Justice did not only consider the applicant's failure to account for each day

of delay but also considered the applicant's other reasons for the delay which were his ignorance of the law of not knowing about application of reference; and his financial constraint for engaging an advocate and payment of Court fees. The learned advocate's claim that the principle of accounting each day of delay is harsh, we think, cannot stand because it was not a new invention. It is already a well settled rule since more than ten years ago in unbroken chain of this Court's decisions to the effect that in the application of this nature the applicant is obliged to account for the delay for everyday within the prescribed period. (See for example, **Bushfire Hassan Vs. Mohamed Raze (supra)**; **Bariki Israel Vs. The Republic**, Criminal Application No. 4 of 2011; **Sebastian Ndaula Vs. Grace Rwamafa** (Legal Representative of Joshwa Rwamafa), Civil Application No. 4 of 2014; and **Bushiri Hassan Vs. Latifa Mashayo**, Civil Application No. 3 of 2007 (All unreported). In **Bashiri Hassan's** case (supra) which was decided more than ten years ago, in a more strict form, the Court stated as follows: -

> *"**Delay even of 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."

We have also considered the other reasons for the delay which, Mr. Ukwong'a argued that the single Justice ought to have considered which, are ignorance of the law and financial constraint of the applicant which disabled him to engage an advocate and to pay the Court's fee. Despite the fact that those reasons were considered, we are afraid the same cannot rescue him.

It is trite law that ignorance of the law is not an excuse and hence, cannot stand as a good cause for delay. This position was stated in the case of **Hadija Adamu Vs. Godbless Tumba**, Civil Application No. 14 of 2013 where this Court held that: -

"As regards the applicant's apparent ignorance of law and its attendant rules of procedure, I wish to briefly observe that such ignorance has never been accepted as a sufficient reason or good cause for extension of time." [Emphasis added].

(See also **Charles Machota Salugi Vs. Republic**, Criminal Appeal No. 3 of 2011; **Ngao Godwin Losero Vs Julius**

Mwarabu, Civil Application No 10 of 2015 (both unreported). In **Ngao's case** (supra), for example, it was held that:

> *"As has been held times out of number, ignorance of law has never featured as a good cause for extension of time (see, for instance, the unreported ARS. Criminal Application No. 4 of 2011 -* ***Bariki Israel Vs. The Republic;*** *and MZA. Criminal Application No. 3 of 2011 –* ***Charles Salugi Vs. The Republic.)"***

It was expected that if the applicant could have been diligent enough he could have been availed with the procedures involved including utilizing another avenue of reference rather than coming up with excuses he is now raising.

As regards the issue of financial constraint, again that is not a sufficient reason for extending the time as was held in the case of **Yusufu Same & Another Vs. Hadija Yusufu**, Civil Appeal No. 1 of 2002 where the Court stated as hereunder: -

> *"We are aware that financial constraint is not a sufficient ground for extension of time. See* ***Zabitis Kawuka Vs. Abdul***

***Karim**, (EACA) Civil Appeal No. 18 of 1937."*

We also agree with Mr Bendera that the application for reference is simplified in the sense that it is not a requirement under Rule 62(1) of the Rules for the applicant to engage an advocate. What is required under the Rule is for the applicant to indicate his wish to file a reference at the time the decision is delivered; or in writing to the Registrar within seven days from the date of decision. So, the claim that the applicant was raising money to enable him engage an advocate and for payment of the Court fees is immaterial.

As regards the prejudice to both applicant and the other party if the application is granted, we think, the applicant is bringing a new innovation. The principle as it now stands and as was quoted by Oriyo J.A., does not provide for the prejudice on the part of the applicant. We, do not agree that the applicant is being denied the right to be heard. We say so because, the right to be heard is not absolute. It has to be enjoyed within certain limits prescribed by the law. After all, no authority was produced by Mr. Ukwong'a to substantiate his proposition.

With regard to the chances of success if the application is granted again, it cannot rescue the applicant. On this, we are guided by the decision in the case of **Shanti Vs. Handocha** (1973) EA 2007 where the East African Court of Appeal made a distinction between an application for extension of time and that for leave to appeal. The said Court stated: -

> *"The position of an application for extension of time is entirely different from an application for leave to appeal. He is concerned with showing* ***"sufficient reason" why he should be given more time*** *and the most persuasive reason he can show is that the delay has not been caused or contributed to by dilatory conduct on his part. But there may be other reasons and these are all matters of degree. He does not necessarily have to* ***show that his appeal has a reasonable prospects of success or even that he has an arguable case."***
>
> [Emphasis added].

The notable criteria in applications for extension of time is to show a good cause and not over whelming chances of success. In any case, that would amount to considering the appeal's merits.

Having scrutinized the application and the submissions in their totality we are settled in our mind that the applicant has not been able to convince the Court on what went wrong in the decision put under reference. In our view, the learned single Justice properly invoked the principles guiding the extension of time. In that application, the applicant had basically failed to advance sufficient reason(s) for the delay including accounting for each day of delay.

In view of the foregoing, we find the application for reference devoid of merit. It is accordingly dismissed with costs.

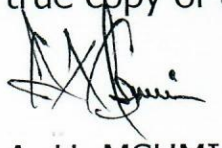
DATED at **DAR ES SALAAM** this 6th day of August, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL