IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J.A., MUGASHA, J.A., And MKUYE, J.A.)

CIVIL REFERENCE NO.14/04 OF 2018

YAZIDI KASSIM MBAKILEKI..... APPLICANT

VERSUS

1. **CRDB (1996) LTD..... 1ST RESPONDENT**
2. **JACKEM AUCTION MARTS AND COURT BROKER.....2ND RESPONDENT**

(Reference from the decision of the single Justice of the Court of Tanzania at Bukoba)

(Wambali, J.A.)

dated the 6th September, 2018
in
Civil Application No. 412/4 of 2017

RULING OF THE COURT

15th & 16th May, 2019

MUGASHA, J.A.

The applicant has brought this reference against the decision of a single Justice whereby his application for extension of time to apply for leave to appeal by way of a second bite was dismissed. The grounds on which the reference is sought are four as hereunder paraphrased:

1. That the application for extension of time was wrongly dismissed on account of failure to show a good cause for the delay.

2. That Rule 10 of the Rules was misinterpreted by the single Justice *vis a vis* the Notice of motion.

3. The single Justice in dismissing the application, relied on case law which is distinguishable from the circumstances surrounding the application.

4. The single justice wrongly concluded that the applicant had not accounted for every day of delay.

Before dwelling on the application, we have found it crucial to narrate a brief background of what underlies this reference as follows: The applicant was plaintiff in Civil Case No. 48 of 2000 whereby before the District Court of Bukoba, seeking to invalidate an attachment, auctioning and proclamation of sale which was derived from a mortgage he sued the respondents herein **CRDB (1996) LTD BUKOBA Branch** and **JACKEM AUCTION MART**. As the applicant had defaulted appearance, the suit was dismissed under Order IX rule 8 of the Civil Procedure Code Cap 33 R.E.

2002. His attempt to have the decision set aside was futile. As such he appealed before the High Court whereby the appeal was dismissed by Mussa, J. as he then was. In a bid to pursue a second appeal, the applicant embarked on a move to apply for leave to appeal to the Court. However, having delayed, he unsuccessfully applied for extension of time before the High Court. His application was dismissed on account that he had not furnished good cause. This is what precipitated an application for extension of time before the single Justice which was also dismissed on ground that, the applicant had not demonstrated good cause warranting the grant of the application made by way of a second bite.

Still undaunted, the applicant has brought this reference challenging the decision of the single Justice.

At the hearing, the applicant appeared in person unrepresented whereas the respondents had the services of Mr. Aaron Kabunga, learned counsel.

The applicant filed written submissions in support of the reference which he adopted to constitute an integral part at the hearing whereas the respondents filed none. In his oral submission, the applicant faulted the

single Justice in not addressing the ground of illegality as constituting a good cause of delay because before the High Court, he was denied a right to be heard which is contrary to the provisions of Article 13(1)(a) of the Constitution of the United Republic of Tanzania, 1997 (the Constitution). To support his propositions he referred us to the case of **THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE VS DEVRAM VALLAMBHIA [1992] TLR 387.**

Since he was not elaborate on the circumstances constituting illegality, on probing by the Court he pointed out that, before the High Court the application for extension of time by way of a first bite was determined on the basis of the preliminary objection and not on the merits.

When we referred the parties to the decision of the High Court which dismissed the application for extension of time after having overruled the preliminary objections raised by the respondents, the applicant came out clearly that, he was not heard on the merits of the application in Civil Application No. 20 of 2014 before Kairo, J. He argued this to be an illegality which was not addressed by the single Justice. The applicant yet referred us to the case of **SIMON MATAFU As Liquidator of TANZANIA**

HOUSING BANK VS M/S CONCRETE STRUCTURES BUILDING CONTRACTORS, Civil Appeal No 171 of 2004 (unreported).

On the other hand, Mr. Kabunga who initially opposed the reference, after being referred to what had transpired before the High Court, he conceded that, after the hearing of the preliminary objections argued by way of written submissions, having overruled the preliminary objections, the judge proceeded to determine the merits of the application without having heard the parties. In this regard and on the way foward, Mr. Kabunga left the matter for the determination by the Court.

Having considered the submission of the parties, the issue for our determination is whether the applicant has made out a case warranting reversal of the decision of the single Justice.

We are mindful of the legal principles governing references are to the effect that:

1. On a reference, the full Court looks at the facts and submissions the basis of which the single Justice made the decision;

2. No new facts or evidence can be given by any party without prior leave of the Court; and

3. The single justice's discretion is wide, unfettered and flexible; it can only be interfered with if there is a misinterpretation of the law.

See- **DAUDI HAGA VS JENITHA ABDON MACHAFU**, Civil Reference No. 1 of 2000; **MARY UGOMBA VS RENE POINTE**, Civil Reference No, 11 of 1992; **VIP ENGINEERING AND MARKETING LTD AND OTHERS VS CITIBANK LTD**, Consolidated Civil References No. 6, 7 and 8 of 2006 (all unreported) which interpret rule 57 of the Old Rules and currently Rule 62 of the Tanzania Court of Appeal Rules, 2009).

However, at the outset we must state that, we share the predicament the single Justice might have faced due to difficulty in ascertaining the alleged illegality by the applicant. Such situation faced the parties and in particular the applicant who being a layperson was not elaborate on the matter. We also found the confusion to have been occasioned by the misdescription whereby, the application before the

single Justice wrongly indicated that the application arose from the decision of of Mussa, J.(as he then was) instead of Kairo, J who determined the application for extension of time to apply for leave to appeal. We resolved the confusion after reverting to the original case file which contained the decisions on the appeal before the High Court and the first application for extension of time to apply for leave in the first bite and gathered the following: Before the High Court the application for extension of time was confronted by preliminary objections which were raised by the respondents challenging the applicant's affidavit to have contained offensive paragraphs. Upon the instance of the parties, the High Court Judge agreed that, the preliminary objections be argued by way of written submissions. After she overruled the preliminary objections on the ground that, the omission did not affect the efficacy of the rest of the affidavit, she proceeded to determine the merits of the application on the basis of the remaining paragraphs in the affidavit and dismissed it for reason that, the applicant had not demonstrated sufficient cause to warrant the extension sought. She observed that:

> *"...thus the court will still continue to deliberate on the application basing on the remaining paragraphs.*

Having rejected the preliminary objection raised by the respondent let me now regress to the main issue that is whether sufficient reason has been adduced by the applicant to warrant the grant of extension of time to file leave to appeal."

Ultimately at page 17 of the Ruling, she dismissed the application on the ground that the applicant had not paraded sufficient cause. Apparently, none of parties was heard on the merits or otherwise of the application which is what seems to have precipitated an application by way of a second bite before the single Justice whereby in paragraphs 12 and 13 of the affidavit in support of the notice motion the applicant deposed as follows:

12. "That the said ruling of the High Court apart from dismissing my application during the hearing and determination of the preliminary objection stage, the learned judge also acted suo moto to determine the merits of the application without affording me any opportunity to be heard and advance my arguments in support of the same.

13 That as a result of that unprocedural measure taken by the Judge of the High Court I was

compelled to seek an extension of time under which to file an application for leave to appeal to this Hon Court as a second bite as I hereby do."

Having considered the arguments for and against the application, the single Justice concluded as follows:

"In this regard, in view of what I have state above and going through the application together with the supporting documents and the written submission which was placed before this Court, it cannot be said with certainty that the applicant has demonstrated sufficiently that good cause exist to enable the Court to exercise its jurisdiction to grant extension of time. I understand that the applicant stated some factors which could be considered in granting extension of time like being a layman and the issue of illegality. However, I must concede that I have gone through the notice of motion, the affidavit, the written submissions and several authorities which were submitted by the applicant, but I regret that there is no good cause which has been shown."

It is on the basis of this decision, the applicant is faulting the single justice in not considering that the High Court did not avail the applicant the right to be heard, that omission constituted illegality which warranted the grant of extension of time to apply for leave. In our considered in view the misdescription was due to wrong reference that the application arose out of the decision of Mussa, J.,(as he then was) and who decided the appeal before the High Court and the single Justice did not venture to look into what had transpired in the determination of the merits of the application before the High Court. This being the position, the High Court Judge was with respect, wrong in determining the initial application for extension of time for leave to appeal without affording the parties a chance to argue the merits of the application. A similar scenario happened in the case of **SIMON MATAFU as Liquidator of Tanzania Housing Bank and M/S CONCRETE STRUCTURES BUILDING CONTRACTORS** (supra) which was cited to us by the applicant. In that case the Court dealt with a complaint whereby after the High Court Judge had ruled that the preliminary objections had no merit, determined the application on the merits without hearing the parties. Thus the Court held:

"With due respect to the learned judge, he erred in proceeding to determine the application without hearing the parties. After dismissing the preliminary objection the logical thing for him to do was to hear the parties on the merits or otherwise of the application and then proceed to write and delivered a considered Ruling."

In the present matter, not hearing the parties on the merits of the application was a serious irregularity constituting illegality which violated the rule of natural justice requiring the court to adjudicate over a matter by according the parties full hearing before deciding a dispute. See: **NATIONAL HOUSING CORPORATION vs. TANZANIA SHOES AND OTHERS** (1995) TLR 251; and **ABBAS SHERALLY & ANOTHER vs. ABDUL S. H. M. FAZALBOY,** Civil Application No. 33 of 2002 (unreported) where the Court said:

"The right to be heard before adverse action or decision is taken against such a party has been stated and emphasised by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached

had the party been heard, because the violation is considered to be a breach of natural justice."

Furthermore, a violation of the right to be heard is not only a breach of natural justice but also an abrogation of the constitutional guarantee of the basic right to be heard as enshrined under Article 13(6)(a) of the Constitution. See - **MBEYA RUKWA AUTO PARTS AND TRANSPORT LIMITED vs. JESTINA GEORGE MWAKYOMA**, Civil Appeal No. 45 of 2000 (Unreported).

In view of the settled position of the law, we are satisfied that since none of the parties was availed an opportunity to be heard this vitiated the entire proceeding before the High Court. As such, we agree with the applicant that this was an illegality and a special circumstance constituting good cause for extension of time to apply for leave to appeal by the single Justice. See - **THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL DEFENCE VS DEVRAM P. VALAMBHIA** (supra). Thus, we reverse the decision of the single Justice and grant the applicant extension of time to apply for leave to appeal. The application should be filed not later than thirty (30) days from the date of this decision. We make no order as to

costs since parties were all equally affected by the omission which was readily conceded to by Mr. Kabunga.

DATED at **BUKOBA** this 16th day of May, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL