

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL REFERENCE NO. 11 OF 2016

DAR ES SALAAM INSTITUTE OF TECHNOLOGY APPLICANT

VERSUS

DEUSDEDIT MUGASHA..... RESPONDENT

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

(Mjasiri, J.A.)

**dated the 1st day of December, 2016
in**

Civil Application No. 248 of 2016

RULING OF THE COURT

29th March & 25th April, 2019

WAMBALI, J.A.:

This application for reference which has been preferred under Rule 62 (1) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) emanates from the ruling of the learned single Justice of this Court (Mjasiri, J.A.) (as she then was) in Civil Application No. 248 of 2016. It is noted that the applicant lodged that application seeking extension of time within which to file the appeal, the written submission and some omitted documents in the record of appeal. It is worth to point out that after the learned single Justice

heard the learned counsel for the parties, she dismissed the application with costs.

At this juncture, we think it is not out of place to state albeit briefly, the background of the application that led to the dismissal of the applicant's application.

The applicant had earlier on lodged before the Court, Civil Appeal No. 106 of 2016 which involved the same parties. Subsequently thereafter the respondent through the service of his counsel lodged a notice of preliminary objection to the effect that the said appeal was time barred. Upon being served with the said notice of preliminary objection, through a service of a counsel, the applicant lodged Civil Application No. 248 of 2016 through a notice of motion supported by the affidavit deposed by Mr. Datius Novath. That application was strongly objected by the respondent through the affidavit in reply deposed by Mr. Dennis Michael Msafiri, learned advocate. Mr. Dennis Michael Msafiri deposed through paragraphs 7, 8 and 9 that the applicant's application for extension of time aimed to pre-empt the pending preliminary objection that was lodged on 12th August, 2016 seeking to strike out Civil Appeal No. 106 of 2016 for being time barred. A copy of the notice

of preliminary objection was annexed to the affidavit in reply and marked as "DM-1.

After the learned single Justice heard arguments of Mr. Novatus Rweyemamu, learned advocate for the applicant and Mr. Dennis Michael Msafiri, learned advocate for the respondent, who represented the parties then, she was fully convinced that the application before her that was lodged by the applicant aimed to pre-empt the pending notice of preliminary objection that challenged the competence of the appeal concerning the time limit. To support her holding the learned single Justice made references to the following decisions of this Court namely, **Juma Ibrahim Mtale v. K. G. Karmal** (1983) TLR 50; **Damas Ndaweka v. Ally Saidi Mtera**, Civil Application No. 5 of 1999; **Bahadurali Shamji and Another v. Republic**, Civil Application No. 156 of 2007 and **Jaluma General Supplies Limited v. Stanbic (T) Ltd**, Civil Appeal No. 34 of 2010 (all unreported).

We wish to emphasize that in **Jaluma General Supplied Limited** (supra), the Court made reference to its decision in the **Minister for Labour and Youth Development and Shirika la Usafiri Dar es Salaam, v. Gaspar Swai and 67 Others**, Civil Appeal No. 101 of 1998(unreported), where it was stated that:

"Where a preliminary objection to an appeal has been lodged in accordance with Rule 100, it is in our view improper for the appellant to seek to defeat the objection by acts designed to remove its basis. If such practice were allowed, Rule 100 would lose purpose and meaning and decency of the proceedings would be in jeopardy."

It is important to note that rule 100 of the Tanzania Court of Appeal Rules, 1979 referred in the above quoted holding of the Court is currently rule 107(1) of the Rules.

The ruling of the learned single Justice in Civil Application No. 248 of 2016 seriously prompted the applicant to lodge the current reference through a letter to the Registrar with Reference No. CA. No.106/2016/DIT/KMMN/016/VOL. II/19 dated 5th December, 2016 praying for its reversal by fronting the following grounds: -

*"1. The learned single Justice of Appeal aforesaid
misdirected herself in law in upholding the P.O.
notwithstanding that the P.O. was based on*

unascertained matters of fact contained in the following:

- (1) The Affidavit of DATIUS NOVATH signed, verified and sworn by him at Dar es Salaam on 12/8/2016 and filed in support of the Notice of Motion aforesaid which Notice of motion was also signed and dated 12/8/2016.*
- (2) The Affidavit in reply dated, signed, verified and sworn at Dar es Salaam on 24/8/2016 by Dennis Michael Msafiri, the respondent's advocate.*

2. ALTERNATIVELY, that the AFFIDAVIT IN REPLY aforesaid is fatally defective for containing speculative legal argument in paragraphs 12 and 13 thereof and an improbability in the verification regarding paragraphs 12 and 13 aforesaid."

At the hearing of the reference, both Mr. Novatus Rweyemamu and Dennis Michael Msafiri, learned counsel appeared to represent the applicant and respondent respectively as they did before the learned single Justice.

Submitting for the applicant in support of the application, Mr. Rweyemamu, emphasized that the learned single Justice in her ruling wrongly sustained the respondent's preliminary objection and dismissed the application of the applicant with costs. He firmly argued that the learned single Justice relied wrongly on the perjury contained in the affidavit in reply of Mr. Dennis Michael Msafiri, counsel for the respondent who made criminal allegations that incriminated Mr. Datius Novath who deposed the affidavit in support of the applicant's notice of motion. He was content that the affidavit in reply contained most unascertained matters of facts against the applicant which were not substantiated. He therefore emphasized that it was wrong for the learned single Justice to act on the same to sustain the preliminary objection and dismiss the application for extension of time.

Mr. Rweyemamu submitted further that the criminal allegations which were made by Mr. Dennis Michael Msafiri through the affidavit in reply did not only incriminate Mr. Datius Novath, the deponent, but also the Firm of M/s Kanywanyi, Mbakileki, Mtaki & Nditi Advocates by lowering its reputation

and that of the learned counsel. The complaint of Mr. Rweyemamu was mainly directed to the contents of paragraph 13 of the affidavit in reply of Mr. Dennis Michael Msafiri, which we deem appropriate for the purpose of our ruling to reproduce hereunder:

*"13. That the reasons stated in the affidavit of Datius Novath that he presented the record of appeal to the Court registry on 18th July 2016 just shortly before 01:00 pm, the 60th day of the period prescribed for instituting an appeal and that a Court clerk **one**, Mr. Mihayo said that Admission Civil Register was not traceable are simply not true. The application is a mere afterthought having been triggered by a preliminary objection served on 15th August, 2016."*

Mr. Rweyemamu, who did not wish to submit on ground two of the reference, which was preferred as an alternative, concluded his arguments by urging us to reverse the ruling of the learned single Justice as the same was based on wrong appreciation of facts and principles of the law. He also prayed for costs.

Mr. Msafiri's first response was to the effect that Mr. Rweyemamu failed, with respect, to appreciate the substance of the ruling of the learned single Justice and he thus ended up mixing up issues concerning the real issue that led to the dismissal of the application before her. He argued that the learned single Justice did not sustain the preliminary objection when she dismissed the application for extension of time as she decided the same based on the pleadings and the arguments of the counsel for the parties. He emphasized that a copy of the notice of preliminary objection that had been lodged by the respondent opposing the appeal of the applicant was only an annex in his affidavit in reply to show the position that faced the said appeal. He thus wondered how the said information could have been construed by Mr. Rweyemamu as containing an unascertained fact that imputed criminal allegations that not only incriminated Mr. Datius Novath, the deponent of the affidavit, but also the Firm of Kanywanyi, Mbakileki, Mtaki & Nditi Advocates as alleged by Mr. Rweyemamu.

In his submission, the learned single Justice did not decide the application on the basis of paragraph 13 of his affidavit in reply as contended by Mr. Rweyemamu, but on paragraphs 7, 8 and 9 which disclosed the

existence of the pending notice of preliminary objection that confronted the appeal which was still pending before the Court.

Second, Mr. Msafiri argued that before the learned single Justice, through the affidavit and the affidavit in reply and the arguments of the counsel for the parties, there was no dispute that Civil Appeal No. 106 of 2016 which was the subject of the application for extension of time, faced a pending notice of preliminary of objection. He submitted that the said notice of preliminary objection was served on the applicant on 12th August, 2016, just four days before the application for extension of time was filed on 16th August, 2016 and served on the respondent on 18th August, 2016. Mr. Msafiri, therefore, maintained that the ruling of the learned single Justice was based on those facts and she did not sustain the preliminary objection as submitted by Mr. Rweyemamu.

In the end, Mr. Msafiri urged us to disregard the submission of Mr. Rweyemamu and dismiss the application with costs.

Having heard the counsel for the parties, the issue for determination is whether the application for reference has merits.

Firstly, we have no hesitation to state that upon going through the affidavit in support of the notice of motion, the affidavit in reply and the ruling of the learned single Justice, there is no evidence to the effect that the application, which is the subject of the reference, was decided by sustaining the respondent's notice of preliminary objection as submitted by Mr. Rweyemamu. It is most unfortunate, with respect, that the letter of reference to this Court lodged on 6/12/2016 and the arguments of Mr. Rweyemamu before us, put much emphasis on the assertion that the learned single Justice dismissed the application with costs by sustaining the respondent's preliminary objection. As the letter of reference forms the basis of the application, we better let its first paragraph bear testimony to our observation hereunder:

*"We are advocates on the Court record as representing the applicant in the Application above mentioned wherein the Hon. Madame Justice of Appeal, Msafiri, J.A., on Thursday **01/12/2016**, delivered a **ruling** sustaining the Respondent's **Preliminary Objection** ("P.O") and dismissed the Application above – mentioned with costs."*

We wish to note however, albeit in passing, that it is most unfortunate that in the quoted paragraph above even the name of the learned single Justice is indicated as **MSAFIRI, J.A.** instead of MJASIRI, J.A.

Be that as it may, our own careful perusal of the record and close scrutiny of the arguments of the counsel for the parties, supports our findings that the ruling of the learned single Justice was solely based on the undisputed fact that the application for extension of time before her was intended to pre-empt the pending notice of preliminary objection against Civil Appeal No. 106 of 2016. We, therefore, agree with the submission of Mr. Msafiri on the circumstances that led to the dismissal of the application by the learned single Justice. On the other hand, we do not, with greatest respect, agree with the submission of Mr. Rweyemamu as the same is not supported by the record of the Court.

In this regard, we do not harbour any doubt to the effect that the ruling of the learned single Justice was essentially based on paragraphs 7,8, and 9 of the affidavit in reply which she reproduced extensively to show the fact that a notice of preliminary objection was lodged against the appeal before an application for extension of time was lodged in the Court by the applicant. The replies by Mr. Msafiri in his affidavit in reply in respect of the

said paragraphs were a response to paragraphs 7 and 8 of Mr. Datus Novath's affidavit in which it was acknowledged that the purpose of the application for extension of time before the learned single Justice was due to the fact, among others, that Civil Appeal No.106 of 2016 which was lodged on 19/7/2016, one day after the due date, that is, 18/7/2016 was out of time.

In the event, we think it is not justified, with respect, for the learned counsel for the applicant to blame the learned single Justice for her decision to dismiss the application before her with costs. Certainly, the dismissal was due to the obvious fact that the pleadings before her left no doubt that the application was not tenable as it intended to pre-empt the pending notice of preliminary objection against the appeal. Indeed, while we subscribe to the holding of the Court in the **Minister for Labour and Youth Development and Shirika la Usafiri Dar es Salaam** (supra), which was referred by the learned single Justice in her ruling, we wish also to associate ourselves with the observation of the Court in **Method Kimomogoro v. The Board of Trustees of TANAPA**, Civil Application No.1 of 2005(unreported) which was quoted in **Mary John Mitchel v. Sylvester**

Maghembe Cheyo and Others, Civil Application No. 161 of 2008 (unreported) where it was emphasized that;

"This Court has said in a number of times that it will not tolerate the practice of an advocate trying to pre-empt a preliminary objection either by raising another preliminary objection or trying rectify the error complained of".

It is thus clear that if the learned single Justice would have granted the applicant's application for extension of time, that would have pre-empted the notice of preliminary objection that challenged the competence of Civil Appeal No. 106 of 2016. In the circumstances, we find the complaint of the applicant in ground one unmerited.

Moreover, we do not, with respect, agree with the argument of Mr. Rweyemamu that the learned single Justice decided the application before her based on the affidavit in reply that contained an unascertained fact which imputed criminal allegations against Mr. Datius Novath and the Firm of M/S Kanywanyi, Mbakileki, Mtaki & Nditi Advocates. We wish to observe that although the learned single Justice did not decide the application before her on the basis of paragraph 13 as asserted by Mr. Rweyemamu, we do not,

with respect, find anything in the said paragraph which could have imputed criminal allegations against either Mr. Datius Novath or the Firm of learned advocates as alleged. It is in this regard that we felt compelled to reproduce the said paragraph above for the purpose of clarity.

We thus, wish at this juncture, to emphasize that any party who prefers an application for reference must ensure that his complaint is based on what was decided by the single Justice and be in conformity with the laid down guidelines by the law and the Court and not otherwise. Corresponding observation was made by the Court in **Amada Batenga v. Francis Kataya**, Civil Reference No. 1 of 2006 (unreported) in which reference was also made to several pertinent principles developed through various decisions of this Court.

However, for the purpose of emphasis, we wish to refer to the decision of this Court in **G.A. B. Swale v. Tanzania Zambia Railway Authority**, Civil Reference No. 5 of 2011 (unreported), in which several principles for a successful application for reference were restated 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. v. YONA
HAMISI MVUTAH***, Civil Reference No. 1 of
2001 (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 Cannery Ltd v. Titus Mwiri 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."*

Considering the above guidance of the Court, we do not find anything in ground one and in the present reference as a whole, which can fall among the principles enumerated in the said decision which can compel us to reverse the ruling of the learned single Justice in Civil Application No. 248 of

2016. We are, therefore, settled that in the light of what we have amply demonstrated above with regard to the complaint in this reference and the fairly settled law in this area, we do not have any justification to fault the decision of the learned single Justice as the application for extension of time was rightly dismissed.

In the end, we similarly have no difficulty to dismiss the reference with costs. We so order.

DATED at DAR ES SALAAM this 18th day of April, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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




B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL