IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MWAMBEGELE, J.A., And LEVIRA, J.A.)

CIVIL REFERENCE NO. 14 OF 2017

MOHAMED SALUM NAHDI ..... APPLICANT

VERSUS

ELIZABETH JEREMIAH ..... RESPONDENT

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

(Mmilla, J.A)

dated the 5th day of June, 2017
in
Civil Application No. 474/01 of 2016

.....

RULING OF THE COURT

3rd & 14th June, 2019

MWAMBEGELE, J.A.:

This is a ruling in respect of a reference from the ruling of a single Justice of the Court (Mmilla, J.A.) in Civil Application No. 474/01 of 2016 of 05.06.2017 dismissing the applicant's quest for enlargement of time within which to file a notice of appeal against the decision of the High Court of Tanzania (Kibela, J.) in Civil Case No. 45 of 2007 handed down on 18.10.2018. The application has been instigated by a letter of Mr. Daniel Haule Ngudungi, learned counsel, bearing Ref. No. NCA/GC/201706/04

dated 14.06.2017 as prescribed by rule 62 (1) (b) of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (henceforth the Rules).

To appreciate the decision we are going to make herein, we find it apt to narrate, albeit briefly, the background material facts leading to the present reference. As good luck would have it, they are not difficult to comprehend. They go thus: On 28.10.2014, the High Court (Kibela, J.) entered judgment in favour of the respondent (the plaintiff therein) in Civil Case No. 45 of 2007 having heard her *ex parte*. The applicant was not happy with the decision and therefore filed an application to set aside the *ex parte* judgment. On 19.06.2015 that application was refused by Kibela, J. Undeterred, the applicant filed an application in the High Court for extension of time to file a notice of appeal because by then the time within which he could file a notice of appeal so as to assail the decision of Kibela, J. had already elapsed. On 21.10.2016, Mzuna, J. dismissed the application on account that no sufficient reasons were given to the satisfaction of the court. Still undaunted, for what is now commonly known as a second bite, he preferred an application in the Court seeking the same orders refused by Mzuna, J. As already alluded to above, Mmilla, J.A refused to grant extension on account that the applicant did not

advance good cause to trigger the Court to exercise its discretion under rule 10 of the Rules to grant the enlargement of time sought. Still undaunted, he has preferred the present reference protesting that the applicant had explained away every single day of the delay and that the single Justice of the Court did not address the second ground in the notice of motion presented before the Court earlier on in Civil Application No. 474/01 of 2016; the subject of this reference.

When the application was placed before us for hearing on 03.06.2019, the applicant was represented by Mr. Daniel Haule Ngudungi, learned counsel and the respondent appeared in person, unrepresented. It was Mr. Ngudungi who kicked the ball rolling. The learned counsel was very brief in his submissions but focused. He submitted that one of the grounds in the notice of motion was that in the High Court, the applicant was condemned unheard without justifiable cause. That ground, he submitted, was not considered at all by the single justice of the Court. He submitted that the ground was one on illegality which entitled the Court to grant the extension sought. The learned counsel, however, did not cite any authority to support his proposition. He thus prayed that the application be allowed so that the extension of time sought is given so that

the applicant could assail the decision of the High Court pronounced on 28.10.2014 in Civil Appeal No. 45 of 2007.

On her part, despite, initially, showing that she was resisting the application, the respondent, fending for herself, did not have any useful submissions to resist the reference. She, however, at a later stage, left her fate in the wisdom of the Court to decide whatever was just in the case and in accordance with the tenets of the law.

We have had ample time to deliberate on the submissions of the parties after combing the record before us. Having so done, we are certain that this application for reference will not detain us. But before we get down to the nitty-gritty of our determination, we find it pressing to state at this stage, that the learned counsel for the applicant dropped the ground for reference complaining that the affidavit and its annextures had explained away every day of delay. Realizing that he was skating on thin ice in convincing the Court on the point, the learned counsel for the applicant abandoned the ground and reserved all his energy to ague the complaint on illegality in the decision of the High Court sought to be challenged; the point he raised at the beginning of the hearing. Given,

the circumstances, our decision hinges on only the ground of illegality of the decision sought to be challenged.

As can be gleaned from the record before us, the notice of motion before the single Justice of the Court had three grounds. The second ground, as rightly submitted by Mr. Ngudungi, was that the applicant was not heard without justifiable cause. We will let the relevant part of the notice of motion paint the picture:

> *"(i) N/A*
>
> *(ii) the applicant's defence was not heard without justifiable cause*
>
> *(iii) N/A".*

We have gone through the ruling of the single Justice of the Court. It is evident in it that after observing that it was necessary for the applicant to take the step of setting aside the impugned judgment before exercising the right to appeal, the single Judge of the Court observed:

> *"... it is certain that the reasons given in paragraph 6 of the affidavit in support of the application have accounted for the period from 28.10.2014 when the said ex parte judgment was delivered up to*

30.10.2016 when the application for extension of time was dismissed by the High Court. Unfortunately, the learned advocate for the applicant has assigned no reasons whatsoever why they waited for 18 days without taking the appropriate steps."

The single Justice of the Court went on:

"As has often been stated, even where the delay is not inordinate, the reasons for the delay must be candidly explained. That was even more important given the respondent's outcry that the applicant is playing games to delay her rights of enjoying her decree."

After the foregoing reasoning, the single Justice went on to dismiss the application with costs.

Indeed, as may be apparent in the foregoing excepts from the ruling subject of this reference, the second ground in the notice of motion which was about an illegality in the decision of the High Court sought to be challenged, was not considered at all. The single justice of the Court addressed only the failure of the applicant to explain away every day of delay and arrived at the conclusion that the applicant had not brought to

the fore an explanation for the delay of the period of eighteen days between the date of refusal by the High Court to set aside the *ex parte* judgment to the date of filing the application for extension of time in the High Court. No mention at all was made on the question of illegality raised by the applicant in the second ground of the notice of motion. We are settled in our mind that the omission offended the justice of the case. Had the single Justice of the Court addressed his mind to the second ground of the notice of motion, we are certain, he would not have arrived at the verdict he did. We say so because the law is fairly settled that in applications of this nature, once an issue of illegality in the decision sought to be challenged is raised, that amounts to good cause and the Court, even if every day of delay is not accounted for, would grant an extension sought so as to rectify the illegality on appeal. That this is the law has been stated by the Court in a string of decisions – see: **The Principal Secretary, Ministry of Defence and National Service v. D P Valambhia** [1992] TLR 185, **The Principal Secretary, Ministry of Defence and National Service v. D P Valambhia** [1992] TLR 387, **Theresia Mahoza Mganga v. The Administrator General RITA**, Civil Application No. 85 of 2015, and **Said Nassor Zahor & 3 Others v.**

Nassor Zahor Abdallah El Nabahany, Civil Application No. 278/15 of 2016. In **The Principal Secretary, Ministry of Defence and National Service v. D P Valambhia** [1992] TLR 185; the leading case on the point, the Court, we quote from the first holding, held:

> *"Where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute "sufficient reason" within the meaning of rule 8 [now rule 10] of the Rules for extending time".*

The Court, in the second holding, also held:

> *"When the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right."*

The same position was restated in **The Principal Secretary, Ministry of Defence and National Service v. D P Valambhia** [1992] TLR 387 and has been followed in a number of cases.

To canvass the point a little bit further, we wish to direct our mind to our unreported decision in **Josephina A. Kalalu v. Isaac Michael Mallya**, Civil Reference No. 1 of 2010, whose facts fall in all fours with the present reference. There, like here, the applicant was refused extension of time to file a notice of appeal by both the High Court and this Court and filed a reference. It transpired on reference that the single Justice of the Court did not address the question of illegality which was raised in the notice of motion. The full court relied on its previous decision in **Citibank (Tanzania) Ltd v. TTCL & Others**, Civil Application No. 97 of 2003 (unreported) to observe that the Court will also enlarge time if there exist exceptional circumstances such as:

> *"... a claim of illegality or otherwise of the challenged decision or order or in the proceedings leading to the decision".*

And the full court proceeded to reverse the decision of the single Justice of the Court and granted the applicant the extension of time sought. We think the same stance should be taken in the case at hand.

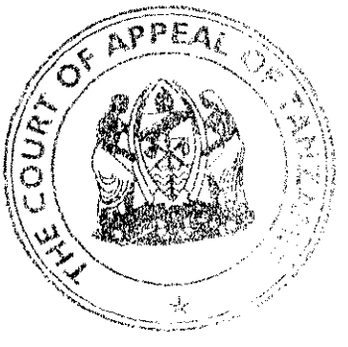
On the strength of the above authorities, we find this reference meritorious. We therefore grant it and are constrained to reverse the

decision of the single Justice of the Court. The applicant is given thirty days reckoned from the date of delivery of this ruling within which to lodge the notice of appeal against the judgment of the High Court of Tanzania in Civil Case No. 45 of 2007 pronounced on 28.10.2014. As the applicant did not pray for costs, we make no order as to costs.

It is so ordered.

DATED at **DAR ES SALAAM** the 10th day of June, 2019.

K. M. MUSSA
JUSTICE OF APPEAL



J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL