

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

(CORAM: MWARIJA, J.A., KOROSSO, J.A., and KEREFU, J.A.)

CIVIL REFERENCE NO. 04 OF 2019

PRAYGOD MBAGA.....APPLICANT

VERSUS

**1. THE GOVERNMENT OF KENYA
CRIMINAL INVESTIGATION DEPARTMENT }RESPONDENTS
2. THE HON. ATTORNEY GENERAL OF TANZANIA }**

**(Application for Reference from the Ruling of a single Justice of the Court of
Appeal of Tanzania at Dar es Salaam)**

(Levira, J.A)

dated the 10th day of April, 2019

in

Civil Application No. 484/01 of 2017

RULING OF THE COURT

22nd August & 9th September ,2019

KEREFU, J.A.:

This application for Reference arises from the Ruling of a single Justice of this Court (Levira, J.A) dated 10th April 2019. By that Ruling the single Justice dismissed with costs an application by the applicant for extension of time to file reference against the decision of another single Justice (Mussa, J.A) in Civil Application No. 103 of 2011. The application is initiated by a letter of Mr. Protace Kato Zake, learned counsel with Ref. No. RCA/CIV.APP.484/01/17/19/1 dated 23rd April, 2019 as prescribed by

Rule 62 (1) (b) and (2) of the Tanzania Court of Appeal Rules, 2009, GN No. 368 of 2009 (the Rules).

To appreciate the gist of this application, we find it apposite to narrate a brief background leading to this reference. On 27th January, 2011 the applicant lodged an appeal before this Court to challenge the decision of the High Court (Nyerere, J.) issued in respect of Civil Case No. 9 of 2011. After lodging that appeal, the applicant was required to file written submission to support his appeal under Rule 106 (1) of the Rules, but that did not happen within the prescribed time by the law. As such, the applicant lodged Civil Application No. 103 of 2011 seeking extension of time to file the said written submission. However, on 23rd September, 2013 the said application was dismissed.

Aggrieved, the applicant lodged Civil Reference No. 03 of 2013. Unfortunately, on 10th October, 2017 the said Reference was struck out for want of attaching the decision subject to that Reference. Again, aggrieved, the applicant lodged Civil Application No. 484/01/2017 seeking for extension of time to file a reference application against that decision.

However, the said application was also dismissed. Still aggrieved, the applicant has brought this reference application.

At the hearing of this reference, the applicant was represented by Mr. Protace Kato Zake, learned counsel, while the first respondent was represented by Mr. Charles Mutinda, learned State Counsel and the second respondent enjoyed the services of Ms. Selina Kapange, learned State Attorney.

In his oral submission, in support of the reference, Mr. Zake fully adopted the contents of his written submission filed before the Court on 24th June, 2019. He then clarified that, the application before the single Justice in Civil Application No. 484/01/2017 was lodged on 27th October, 2017 after lapse of sixteen (16) days from 10th October, 2017 when the Civil Reference No. 03 of 2013 was struck out. He argued that, the single Justice dismissed the said application on the ground that the applicant failed to account for the delay of each day as required by the law. He said, according to the decision of the single Justice, the unexplained delay of sixteen (16) days was unreasonable. Mr. Zake contended further that, the single Justice misdirected herself in holding that the applicant has

failed to show good cause to warrant extension of time, based only on the ground of accounting for delay of each day. He said, accounting for the delay of each day, is no longer the only ground under which the Court should exercise its discretionary powers to warrant extension of time, but other grounds such as illegality has to be considered. To support his position he cited the case of **V.I.P. Engineering and Marketing Limited and Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported), where it was held that, *"It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time..."*

To bring his point home, Mr. Zake referred us to the Notice of Motion and paragraph 10 of the supporting affidavit which was considered by the learned single Justice and spiritedly argued that, in that paragraph the applicant has clearly indicated the illegality sought to be challenged in the intended reference, but he said, the single Justice did not consider the same. He thus urged us to consider as to whether or not the single Justice had properly addressed herself on the contents of the Notice of Motion and supporting affidavit to arrive to that finding that the applicant had failed to demonstrate or show good cause to warrant grant

of that application. Mr. Zake concluded his submission by urging us to reverse the ruling of the learned single Justice as he said, it was based on wrong appreciation of facts and principles of the law.

In response, Mr. Mutinda commenced his submission by noting that, before the single Justice they did not challenge the applicant's application, but after reading the ruling of the single Justice, they are satisfied that, indeed, the applicant had not adduced good cause to warrant grant of extension of time. He disputed the claim by Mr. Zake that the applicant had raised the ground of illegality before the single Justice. Mr. Mutinda spiritedly argued that, there was no ground of illegality raised by the applicant before the single Justice. To clarify further on that point, Mr. Mutinda referred us to the Notice of Motion and the supporting affidavit lodged by the applicant and considered by the single Justice and insisted that there was no issue of illegality raised. It was the further view of Mr. Mutinda that, the applicant is playing delaying tactics on the matter, because since 2011 to-date he lodged several incompetent applications before the Court and all of them have been either struck out or dismissed. Mr. Mutinda maintained that the ruling of the learned single Justice is based on the ground and facts submitted

before her and the same cannot be faulted. In the end, Mr. Mutinda urged us to disregard the submission made by Mr. Zake and dismiss the application with costs for lack of merit.

Like Mr. Mutinda, Ms. Kapange also started her submission by noting that, before the single Justice they did not challenge the applicant's application, but she said, they are in support of the ruling of the single Justice, as the applicant had not submitted good cause to warrant grant of extension of time. She then adopted the written submission filed on 24th July, 2019 to form part of her oral submission and clarified that, it is settled principle that whoever is applying for extension of time has to account for the delay of each day. To justify her position she cited several cases of this Court to that effect including the decisions in **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 03 of 2007 and **Wambele Mtumwa Shabaan v. Mohamed Hamis**, Civil Reference No. 08 of 2016, where this Court emphasized that delay of even a single day has to be accounted for. She then argued that, before the single Justice the applicant did not explain the reasons for the delay and therefore, his claim before this Court has no justification. She also argued that before the single Justice there was no ground of illegality as claimed

by Mr. Zake. She thus also urged us to dismiss the application with costs for lack of merit.

In rejoinder submission, Mr. Zake argued that, from the date on which Civil Reference No. 03 of 2013 was struck out; that is 10th October, 2017 to 27th October, 2017 when Civil Application No. 484/01/2017 was lodged, there was no delay. He contended that it was wrong for the single Justice to rule out that the applicant had not accounted for each day of delay, while there was no delay to be accounted for. To buttress his position, he cited Item 21 of Part III of the first Schedule to the Law of Limitation Act, Cap 89 R.E. 2002 and argued that, the prescribed time to lodge an application for extension of time is sixty (60) days. Therefore, according to him the delay of sixteen (16) days indicated by the single Justice was not justifiable, as he maintained that there was no delay. In that regard, he insisted for the application to be granted.

Having considered the submission by the counsel for the parties, the issue for our determination is whether the applicant has made out a case warranting reversal of the decision issued by the single Justice in Civil Application No. 484/01/2017.

Before considering the matter before us, we wish to state that, we are mindful of the legal principles governing references enshrined under Rule 62 of the Rules. The said principles have been interpreted by the Court in its previous decisions including, **Daudi Haga v. Jenitha Abdon Machafu**, Civil Reference No. 01 of 2000; **V.I.P Engineering and Marketing Ltd and Others** (supra) and **Amada Batenga v. Francis Kataya**, Civil Reference No. 01 of 2006 (all unreported). The said principles are:-

- 1) On a reference, the full Court looks at the facts and submissions the basis of which the single Judge 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 Judge's discretion is wide, unfettered and flexible; it can only be interfered with if there is a misinterpretation of the law.*

Now, before we apply the said principles in the matter at hand, we wish to start by stating that, the notice of motion before the learned single Justice was for extension of time to file civil reference against the decision of single Justice in Civil Application No. 03 of 2013. As such, we

find it apposite to revisit, albeit briefly, the law regarding extension of time.

Pursuant to Rule 10 of the Rules, a party seeking for an order of the Court to exercise its judicial discretion to grant the application for extension of time to do a certain thing or act, must show good cause for failing to do what he was supposed to do within the time prescribed by the law. This Rule has been interpreted in various decisions of the Court including, **Abdallah Salanga & 63 Others v. Tanzania Harbours Authority**, Civil Reference No. 08 of 2003 and **Sebastian Ndaula v. Grace Rwamafa**, Civil Application No. 04 of 2014 (all unreported).

It is also a fact that what constitutes good cause has not been defined, however this Court has, in its various decisions stated number of factors to be considered. These are *whether or not the application has been brought promptly, the absence of any valid explanation for the delay and whether the applicant has accounted for each day of delay and the lack of diligence on the part of the applicant*. See for instance the decisions of this Court in **Tanga Cement Company Limited v. Jumanne D. Masangwa & Amos A. Mwalwanda**, Civil Application No.

06 of 2001; **Omary Shabani Nyambu v. Dodoma Water and Sewerage Authority**, Civil Application No. 146 of 2016 and **Wambele Mtumwa Shabaan v. Mohamed Hamis** (supra), (all unreported), to mention but a few.

It has also been held in times without number that the ground alleging illegality may as well constitute a good cause for extension of time. Among the decisions include, **Principal Secretary Ministry of Defence and National Service Vs Divram P. Valambhia** (1992) TLR 387; **Lyamuya Construction Company Limited v. Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 02 of 2010 and **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015 (all unreported). In all these cases the Court emphasized that the alleged illegality must be apparent on the face of the record of the impugned decision. Specifically in **Lyamuya Construction Company Limited**, (supra) the Court made the following observation:-

"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in

VALAMBIA's case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises point of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that of sufficient importance and, I would add that, it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process"
[Emphasis supplied].

Again, in **Ngao Godwin Losero**, (supra) the Court emphasized that, "***The illegality in the impugned decision should be clearly visible on the face of record.***" [Emphasis added].

Now, in the application at hand, we have examined the Notice of Motion, supporting affidavit and submissions made before the single Justice and found that, the single ground submitted by the applicant in the Notice of Motion lodged on 27th October, 2017 is that:-

"The applicant be granted extension of time to file Civil Reference against the decision of single Justice in Civil Application No. 103 of 2011 on the ground that the Civil Reference No. 03 of 2013 filed earlier was struck out on the 10th day of October 2017 for want of attachment of the decision of the single Judge subject to reference."

After consideration of the above ground, the supporting affidavit and the submission made by the counsel for the parties, the learned single Justice observed that, pursuant to Rule 62 (1) of the Rules, a party who is aggrieved by the decision of the single Justice is required to apply for reference within *seven (7)* days from the date of that decision. The learned single Justice observed further that, the decision of the single Justice which was subject of that application was delivered on 10th October, 2017 and the application before her was lodged after lapse of *sixteen (16)* days and the applicant has not explained the delay of each day as required by the law. The learned single Justice reasoned that the unexplained delay is unreasonable and she dismissed the application.

We are mindful of the fact that, while submitting on the delay of the said *sixteen (16)* days, Mr. Zake referred us to Item 21 of Part III of the first Schedule to the Law of Limitation Act, (supra) and argued that the required time to lodge an application for extension of time is sixty (60) days and hence according to him there was no delay at all to be accounted for. With due respect, we find the submission of Mr. Zake on this matter to be a misconception of both law and fact, because pursuant to section 43 (b) of the law of Limitation Act, (supra) the provisions relied upon by Mr. Zake are not applicable in this Court.

We are also aware that Mr. Zake faulted the decision of the single Justice alleging that the ground of illegality he had since submitted under paragraph 10 of the supporting affidavit was not considered. We have endeavored to peruse the applicant's application before the single Justice to ascertain this point and specifically, the said paragraph 10 of the supporting affidavit. For the sake of clarity we have endeavoured to reproduce the said paragraph herein below and it provides that:-

"THAT, the 2nd respondents filed the counter affidavit, list of authorities and submitted on behalf of the 1st respondent without instructions."

Looking at the said paragraph and applying the authorities in **Lyamuya Construction Company Limited**, (supra) and **Ngao Godwin Losero**, (supra), we are not persuaded that the alleged illegality was clearly demonstrated before the single Justice as required by the law. **Firstly**, the said illegality was not among the grounds submitted by the applicant in the Notice of Motion before the learned single Justice. **Secondly**, the applicant had not demonstrated or indicated prima facie facts to show on how the impugned decision is tainted with the said alleged illegality to enable the respondent and the learned single Justice to appreciate the said issue in relation to the impugned decision. **Thirdly**, the applicant did not elaborate on how the said illegality had prejudiced the rights of the parties thereto. In the circumstances, we are in agreement with the submissions of Mr. Mutinda and Ms. Kapange that, Mr. Zake's claim to fault the decision of the learned single Justice on this matter is not justified.

It is therefore our settled view that the single Justice, who had all the material facts before her, judiciously exercised her discretion to deny extension of time on the sole ground that the applicant had failed to account for the delay of each day. Conclusively, we have found no reason

to fault the decision of the learned single Justice and we hereby dismiss the application for reference with costs.

DATED at DAR ES SALAAM this 3rd day of September, 2019.


A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 9th day of September, 2019 in the presence of Mr. Joseph Sang'udi, Counsel for the Applicant and Ms. Luciana Kilala, State Attorney for the second Respondent and in absence of the first Respondent, is hereby certified as a true copy of the Original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL