

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MMILLA, J.A., SEHEL, J.A. And MWANDAMBO, J.A.)

CIVIL REFERENCE NO. 15/20 OF 2018

ATHUMAN MTUNDUNYA.....APPLICANT

VERSUS

1. THE DISTRICT CRIME OFFICER RUANGWA.....1st RESPONDENT
2. THE REGIONAL OFFICER LINDI.....2nd RESPONDENT
3. THE ATTORNEY GENERAL.....3rd RESPONDENT

**(Application for Reference from the decision of the Single Justice of the Court
of Appeal of Tanzania at Dar es Salaam)**

(Mwambegele, J.A.)

dated the 10th day of May, 2018

in

Civil Application No. 1 of 2018

RULING OF THE COURT

22nd October, & 4th November, 2019.

SEHEL, J.A.:

This is a Reference arising from a decision of a single Justice of the Court (Mwambegele, J.A.) in Civil Application No. 1 of 2018 who declined to extend time to the applicant so that to enable him file an appeal out of time to this Court. The application before the single Justice (Mwambegele, J.A.) was made under Rule 10 of the Court of Appeal Rules, 2009 (the Rules).

Briefly the background facts giving rise to the matter is that, the applicant was dissatisfied with the decision of the High Court of Tanzania at Mtwara (Kibela, J.) in Civil Case No. 5 of 2008 whereby his case was dismissed with costs on 25th day of October, 2013. Dissatisfied with that decision, he lodged a notice of appeal but he was late in lodging his appeal. Thus, he applied for an extension of time at the High Court before Mzuna, J. in Miscellaneous Civil Application No. 4 of 2014. That application was struck out for wrong citation. After the striking out of that application, the applicant started the process afresh by filing another application in the same court seeking for an extension of time. This second application was Miscellaneous Civil Application No. 13 of 2014 which was dismissed on 31st day of March, 2015 by Mzuna, J.

On 18th day of February, 2016 after a lapse of almost eleven (11) good months from the date of the delivering of the decision of Mzuna, J., the applicant filed an application for extension of time to this Court, as a second bite. That application was also dismissed by the single Justice (Mwambegele, J.A.), hence, the filing of this Reference.

The Reference is preferred by notice of motion made under Rule 62 (1) (b) of the Rules and it is supported by an affidavit of the applicant. It suffices to state here that we had difficulty in comprehending the gist of the

applicant's application because the grounds predicated in his notice of motion talk about error on the face of the record and a denial of his fundamental right to be heard. These grounds are grounds for review. That apart, as we have been moved under Rule 62 (1) of the Rules, we took it that the applicant is seeking a reference and not review. As such, we proceeded to hear his application on that premise.

When the matter was called on for hearing, the applicant appeared in person. In his submission, he first adopted his notice of motion together with its accompanying affidavit and maintained that the reason for his delay was caused by his sickness and a belated receipt of a reply on his complaint to the Chief Justice. That, he belatedly received a letter dated 6th day of May, 2015 replying to his complaint made to the Chief Justice in respect of the handling of his Civil Case No. 5 of 2008. He alleged to have received that letter sometime in July, 2015. The letter advised him to appeal against the decision of Kibela, J. He argued that the single Justice did not take into consideration his oral account of 8 months delay although he admitted that neither in his notice of motion nor affidavit in support of an application for extension of time explained the delay of 8 months. Neither did he attach the letter to the application. Nevertheless, he beseeched us to closely scrutinize the two documents attached to his affidavit namely: a copy of the letter

dated 6th May, 2015; and a copy of the medical chits issued by Mbekenyera Dispensary. It was the applicant's contention that if the single Justice would have considered the two documents then he would have held that the applicant had advanced a good cause for his delay and thus an extension of time would have been granted to him.

Mr. Peter Musetti, learned State Attorney, who appeared for the respondent/Republic opposed the application and supported the findings of the single Justice that the applicant failed to advance good cause as required by Rule 10 of the Rules. He argued that the single Justice correctly applied his mind to the conditions set in Rule 10 of the Rules that there should have been good cause for the Court to warrant the applicant an extension of time. As such, he argued, the applicant ought to have accounted for each delay of which he failed to do so as reflected at page 11 of the Ruling of the single Justice. To cement his argument, Mr. Musetti cited the case of **Wambele Mtumwa Shahame v. Mohamed Hamis**, Civil Reference No. 8 of 2016 (unreported) where this Court emphasized the need of showing good cause and for accounting for each day of delay. He accordingly urged us to dismiss the application.

The applicant in his rejoinder reiterated his plea for us to re-evaluate his application and all the documents attached to his affidavit in order to

satisfy ourselves as to whether he had shown good cause and accounted for each day of delay.

We have dispassionately given due consideration to the arguments by both sides. As we have said, the applicant's application that was before the single Justice was for extension of time to file an appeal out of time. The Court's power to hear and determine the application for extension of time is governed by Rule 10 of the Rules that requires the applicant to show good cause. The single Justice in his Ruling first appreciated the position of the law governing an application for extension of time that is; the Court is enjoined by rule 10 of the Rules to extend time; that extension of time is a matter of discretion which has to be judiciously exercised; regard must be if there was good cause advanced by the applicant; the applicant must account for each day of delay; and that when an issue of illegality is raised concerning the proceedings of the lower court, an extension of time will always be granted even where the delay is inordinate.

The single Justice, after properly directing his mind to the position of the law, which, we fully associate with, just like parties herein as they both acknowledged that there must be good cause for the Court to grant extension, proceeded to apply the principles with the facts before him and

the submissions made by the parties. Having done so, he dismissed the application and stated as follows:

"The two elements ...that is, showing necessary delay and great diligence are wanting in the present application. If anything, the applicant has not only shown an unnecessary delay but also indilligence. As a result of which he cannot be entitled to be granted the enlargement sought."

Undaunted with that finding, the applicant has approached by Reference. Now, the issue before us is whether there are justifiable reasons to fault the decision of the single Justice that dismissed the applicant's application for extension of time to file an appeal against the decision of the High Court at Mtwara in Civil Case No. 5 of 2008.

The grounds upon which the Court under rule 62 (1) (b) of the Rules can fault the decision of the single Justice were discussed in the case of **G. A. B. Swale v. Tanzania Zambia Railway Authority**, Civil Reference No. 5 of 2011 (unreported) as follows:

"The principles upon which a decision of a single Justice can be upset under Rule 62 (1) (b) of the Rules, are that:

- (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 Hamis Mvutah**, Civil Reference No. 1 of 2010 (unreported)).*

And if the decision involves the exercise of judicial discretion:-

- (ii) *If the single Justice has taken into account irrelevant factors;*
- (iii) *If the single Justice has failed to take into account relevant matters or;*
- (iv) *If there is a 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 Muriri Doct** (1996) LLR 5434 a decision of the Court of Appeal of Kenya, which we find persuasive) (See also **Mbogo And Another v. Shah** (1996) I EA 93)." (at pages 3-4).*

On the complaint regarding medical chits which the applicant is inviting us to carefully examine it, we find that the single Justice considered it. He agreed with the submission made before him by the learned State Attorney

that the medical chits had shortcomings in that they did not bear the rubber stamp of the Dispensary. Neither did they show the name of the Dispensary. As such, the single Justice made the following observation:

"...the applicant; a layperson, has deposed in the affidavit in support of the Notice of Motion that he was sick attending medical attention at Mbekenyera Dispensary. However, the appended medical chits leave a lot to be desired in that they do not eliminate the possibility of not originating from Mbekenyera Dispensary where the applicant claims to have been admitted....For reasons stated, the medical chits left a lot to be desired. They could not justify the delay by the applicant to take necessary steps to file his appeal."

We, on our part, we have put the medical chits under magnified glass and noted that it is true they do not bear the official stamp of the Dispensary to authenticate their origin as perfectly observed by the single Justice. Hence, their genuineness is doubtful. That apart, even if they are genuine, still the applicant was attending the Dispensary as outpatient. He was not hospitalised. The medical chits show on several occasions, the applicant attended the Dispensary as outpatient. He attended on 5th day of December, 2013; 21st day of February, 2014; 5th day of August, 2014; 17th day of

February, 2015; 18th day of June, 2015; 8th day of July, 2015; and 17th day of August, 2015. In all these visitations, he was only prescribed pills, amongst them were antibiotic tablets. And that explains why the applicant was able to attend court proceedings in Miscellaneous Civil Application No. 4 of 2014 and Miscellaneous Civil Application No. 13 of 2014 that was ultimately dismissed on 13th day of March, 2015. Despite his sickness that started on 5th day of December, 2013, he managed to file and pursue two applications for extension of time. In that regard, we fully agree with the single Justice that the medical chits do not justify the reason for delay in filing the appeal. We do not see any error in the manner the single Justice exercised his discretionary power.

The complaint regarding the letter which the applicant argued that the single Justice did not take into consideration should not detain us much. First and foremost, the applicant submitted to us that that letter was not attached to his affidavit in the application for extension of time. He, however, said, he made an oral submission before the single Justice on the existence of it. Secondly, the record speaks for itself that, the single Justice when he was dealing with the issue as to whether the applicant managed to account for each day of delay, he said:

*"As stated in the affidavit supporting the Notice of Motion, the Ruling by Mzuna, J. was rendered on 31st day of March, 2015. The present application was filed on 18th day of February, 2016. **There is no iota of explanation in the Notice of Motion, affidavit in supporting it and the arguments at the oral hearing before me why he took such long time; about twelve months, to file this application.**"*
(emphasis added)

From the above Ruling, we deduce that the letter was neither mentioned in the notice of motion, nor attached to the affidavit in support of the application. It was not mentioned in the applicant's oral submission and so it could not have been considered by the single Justice. Guided by the principle set in **G. A. B. Swale** (supra) we abstained from considering that letter as it was neither raised nor considered by the single Justice. However, we are alive that the issue of jurisdiction can be raised at any stage of the proceedings even before this Court (See **Gem And Rock Ventures v. Yohana Hamis Mvutah**, Civil Reference No. 1 of 2010 (unreported)), which is not the case in this Reference. On this second complaint we also failed to find any error to justify interfering with the decision of the single Justice.

In the end, from our examination of the applicant's application and having gone through the Ruling of the single Justice, we failed to find any

impropriety or misapprehension of either law or facts. We are fully satisfied that the single Justice properly dismissed the applicant's application for extension of time.

The application is accordingly held to be without merit and we dismiss it. Given the circumstances of the application, we make no order for costs.

Order accordingly.

DATED at **MTWARA** this 2nd day of November, 2019.


B. M. MMILLA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 4th day of November, 2019 in the presence of Athumani Mtundunya, the Applicant, present in person urepresented and Mr. Paul Kimweri, learned Senior State Attorney for the 1st, 2nd, and 3rd, respondent is hereby certified as a true copy of the original




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL