IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., NDIKA, J.A., And KWARIKO, J.A.)

CIVIL REFERENCE NO. 3 OF 2016

1. **EDPB CONSTRUCTION CO. LTD**
2. **ISACK BUGALI MWAMASIKA** ..... **APPLICANTS**
3. **JOHN MWAMBIGIJA**

VERSUS

CRDB BANK PLC ..... RESPONDENT

(Application for reference from the decision of a single Judge of the Court of Appeal of Tanzania at Dar es Salaam)

(Juma, J.A)

dated the 25th day of February, 2016
in
Civil Application No. 50 of 2015

.....

RULING OF THE COURT

20th February & 6th March 2019

NDIKA, J.A.:

This is a reference under Rule 62 (1) (b) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") from the ruling of a single Judge of the Court (Juma, J.A., as he then was) in Civil Application No. 50 of 2015 dated 25th February, 2015 granting the respondent herein an extension of time within which to apply for revision of the decision of the ruling of the High

Court of Tanzania, Commercial Division in Commercial Case No. 36 of 2014.

As a preliminary point, we wish to put it on the record that when this reference came up for hearing, we noted that the parties had been wrongly cited: while the parties that lodged the application for reference – EDPB Construction Co. Ltd., Isack Bugali Mwamasika and John Mwambigija – were mentioned as the first, second and third respondents, CRDB Bank PLC against the application was lodged was cited as the applicant. By the order of the Court, upon agreement of the parties, the "three respondents" cited in the application were re-designated as the applicants while the "applicant" bank was re-cited the respondent.

The brief history of this matter is as follows: the respondent herein sued the applicants along with one Harold Isaack Mwamasika jointly and severally before the High Court, Commercial Division at Dar es Salaam in Commercial Case No. 36 of 2014 claiming US$ 8,500,000.00. In their joint written statement of defence, the respondent raised points of preliminary objection to the effect that the suit was *sub judice* in view of the pendency in the High Court, Dar es Salaam District Registry of Civil Case No. 79 of 2012. In its ruling dated 11th August, 2014, the High Court (Nyangarika, J.)

sustained the preliminary objection and, as a result, stayed the Commercial Case No. 36 of 2014 pending the determination of Civil Case No. 79 of 2012.

On 20th August, 2014, the respondent's advocates, R K Rweyongeza & Co. Advocates, wrote a letter to the Registrar of the Commercial Division of the High Court requesting for a copy of the ruling of Nyangarika, J. for the respondent's "records and further steps." On 29th August, 2014, that is nine days after the first letter was submitted, the respondent's law firm submitted another letter to the same Registrar this time applying for the supply of a copy of proceedings for the purpose of instituting an application for revision in this Court. The respondent waited until 7th January, 2015 when the Registrar notified it vide a letter that copies of proceedings, drawn order and ruling were ready for collection. On 26th January, 2015 the respondent was supplied with copies of the ruling and proceedings but without a copy of the drawn order, which was also an essential document in applying for revision. On 28th January, 2015 the respondent submitted another letter asking for a copy of the drawn order. By 17th March, 2015 when the respondent lodged the application for extension of time from which this reference arises, the respondent had not yet been supplied with a copy of the drawn order.

The applicants strongly opposed the application for extension of time. In that regard, the second applicant herein swore an affidavit in reply blaming the respondent for the delay averring that it waited for five months until 28th January, 2015 to apply for a copy of the drawn order which was not asked for in the first two requests dated 20th August, 2014 and 29th August, 2014.

At the hearing before the single Judge, Mr. Richard Rweyongeza, learned counsel for the respondent herein (the applicant at the time) was at odds with Mr. Mpaya Kamara, learned counsel for the applicants (the then respondents) over the timing of the request for the supply of the drawn order. While Mr. Kamara forcefully contended that the respondent had no reason to complain about the missing copy of the drawn order as it was not specifically requested in the first two letters of 20th and 29th August, 2014 and that it was actually requested five months later on 28th January, 2015, Mr. Rweyongeza attributed the failure to lodge the intended revision to the High Court's delay in supplying "all the proceedings" as requested in the 29th August, 2014 letter. It was his submission that while the 20th August, 2014 was a request for a copy of the ruling, the 29th August, 2014 letter constituted a request for all the documents including the drawn order.

In his ruling, the single Judge of the Court noted, citing the Court's decision in **Chrisostom H. Lugiko v. Ahmednoor Mohamed Ally**, Civil Application No. 5 of 2013 (unreported), that in every application for revision **all the proceedings** must be attached to the notice of motion. Accordingly, he took the view that when a party requests the Registrar to supply him with a copy of proceedings for the purpose of instituting an application for revision, it means "all proceedings" must be supplied. Having examined the respondent's requests to the Registrar, the single Judge concluded that while the 20th August, 2014 letter only applied for a copy of the ruling of Nyangarika, J., the 29th August, 2014 letter was more forthcoming as it applied for the supply of **a copy of all proceedings for the revision purpose**. We find it instructive to let the relevant part of the single Judge's holding speak for itself:

> *"The above excerpt from the letter of 29th August, 2014 clearly shows that RK Rweyongeza applied for copies of proceedings, ruling and drawn order for purposes of applying for revision. Further, because the learned counsel for the applicant [the respondent herein] indicated revision as the intended purpose of the supply of documents, he was entitled to wait for the Registrar to supply him what this Court in* ***Chrisostom H. Lugiko v.***

Ahmednoor Mohamed Ally *(supra) described as* ***'all proceedings'*** *or documents that will give the revision Court* ***'full picture."***

In the final analysis, the single Judge condoned the delay by the respondent to lodge the application for revision within the prescribed time due to the delay by the Registrar to supply the full set of requested proceedings.

It is contended in this reference by the applicants that the single Judge erred in law and fact in extending time to the respondent to apply for revision whereas the respondent had failed to account for the delay to apply for revision within the prescribed time. At the hearing, the applicants were represented by Mr. Gabriel Mnyele and Mr. Mpaya Kamara, both learned counsel, while the respondent was advocated for by Mr. Richard K. Rweyongeza.

Before us, Mr. Mnyele argued that the respondent was not entitled to condonation of delay because it failed to account for the entire period of delay. He elaborated that while the ruling intended to be challenged by revision was issued on 11th August, 2014, the respondent dawdled for eighteen days until 29th August, 2014 when it applied for a copy of

proceedings. He added that the supporting affidavit is silent on why the respondent did not act promptly.

Mr. Mnyele argued further that while Paragraphs 7 through 9 of the supporting affidavit indicate that the respondent was supplied with a copy of proceedings on 26th January, 2015, once again it vacillated for fifty-two days until 17th March, 2015 when it lodged the quest for extension of time that the single Judge dealt with. He strongly criticized the respondent for failing to account for a total of fifty-two days between 26th January, 2015 and 17th March, 2015. To bolster his submissions, Mr. Mnyele relied on the authority of two decisions that the entire period of delay must be accounted for: **Bharya Engineering and Contracting Co. Ltd., v. Hamoud Ahmed Nassor**, Civil Application No. 342/01 of 2017; and **Bruno Wenceslaus Nyalifa v. The Permanent Secretary, Ministry of Home Affairs and the Honourable Attorney General**, Civil Appeal No. 82 of 2017 (both unreported).

On the contrary, Mr. Rweyongeza submitted that the issue before the Court concerned delay in lodging the application for revision, not delay in applying for a copy of proceedings. He contended that the sixty days' limitation period prescribed for applying for revision by Rule 65 (4) of the

Rules should have ordinarily been counted from the moment the respondent was supplied with the full set of proceedings for applying for revision. He urged us to draw inspiration from the section 19 of the Law of Limitation Act, Cap. 89 RE 2002 and Rule 90 (1) of the Rules, which make provisions for exclusion of the period necessary for preparation and delivery of the record of proceedings once an application for the supply is made within the prescribed time or reasonable time.

In a brief rejoinder, Mr. Mnyele claimed that Mr. Rweyongeza had failed to account for an aggregated period of seventy days. He also disputed the need for inspiration from section 19 of Cap. 89 (supra) and Rule 90 (1) of the Rules.

We have scrutinized the material on the record and given a careful consideration to the submissions of the parties on whether good cause was given in terms of Rule 10 of the Rules to warrant the requested extension of time to apply for revision. It is trite that extension of time is a matter of discretion on the part of the Court and that such discretion must be exercised judiciously and flexibly with regard to the relevant facts of the particular case. Whilst it may not be possible to lay down an invariable definition of good cause so as to guide the exercise of the Court's

discretion, the Court is enjoined to consider, *inter alia*, the reasons for the delay, the length of the delay, whether the applicant was diligent, the degree of prejudice to the respondent if time is extended, and so on: [see, for instance, this Court's decisions in **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987 and **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 (both unreported)].

Bearing in mind that the grant of extension of time is discretionary, this Court would not normally interfere with the exercise by a single Judge of the Court of his discretion under Rule 10 of the Rules. In the decision in **Amada Batenga v. Francis Kataya**, Civil Reference No. 1 of 2006 (unreported), the Court, having revisited its previous decisions on reference, summarized the principles upon which a decision of a single Judge can be examined in a reference under Rule 62 (1) (b) of the Rules as follows:

> *"a) On a reference, the full Court looks at the facts and submissions the basis of which the single Judge made the decision.*
>
> *b) No new facts or evidence can be given by any party without prior leave of the Court; and*

c) the single Judge's discretion is wide, unfettered and flexible; it can only be interfered with if there is a misinterpretation of the law."

In **G.A.B Swale v. Tanzania Zambia Railway Authority**, Civil Reference No. 5 of 2011 (unreported), the Court restated the principles in the following terms:

*"(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 VS YONA HAMIS 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 CANNERS LTD VS TITUS MURIRI 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."*

By way of emphasis, we wish to reproduce a passage from **Mbogo and Another v. Shah** [1968] EA 93, at page 94, a decision of the erstwhile Court of Appeal for East Africa which was cited and applied in numerous decisions including **G.A.B. Swale** (supra):

> *"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that the decision* ***is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong decision."*** [Emphasis added]

We have no doubt that the position in the above passage is equally applicable to the exercise of discretion by a single Judge of this Court.

As indicated earlier, the complaint by the applicants in the instant case is that the respondent failed to account for the delay in the context of two periods: the first period stretched over eighteen days from 11th August, 2014 when the impugned ruling was handed down and 29th August, 2014

when the respondent finally applied for a copy of proceedings. The second period was for fifty-two days from 26th January, 2015 when the copy of proceedings was supplied to 17th March, 2015 when the application to the single Judge was lodged.

We have no difficulty in dismissing the complaint regarding the first period on two grounds. First and foremost, it is not lost on us that this point was not raised by any of the parties for the consideration of the single Judge and, therefore, it cannot form any legal basis for varying or upsetting the condonation of delay. That point is clearly an afterthought. It should be recalled that the main issue of contention before the single Judge concerned the timing of the respondent's request for a copy of the drawn order. While the applicants herein blamed the respondent for dawdling for over five months until 28th January, 2015 when it applied for a copy of the drawn order, the respondent disagreed as it contended that the said order was timely requested vide the 29th August, 2014 letter. On this issue, the single Judge found in favour of the respondent.

Secondly, even though we cannot speculate on how the single Judge would have decided the allegation of delay for eighteen days had it been brought to his attention by the parties, we are unable to characterize the

said period as plainly unaccounted for. We are of the settled opinion, in view of the circumstances of this case, that the respondent acted reasonably and with promptitude initially by applying for a copy of the ruling vide the 20th August, 2014 letter and subsequently by applying for a copy of the proceedings nine days thereafter on 29th August, 2014.

Coming to complaint regarding the second period of fifty-two days, we are also of the decided opinion that it lacks merit. Like the complaint in respect of the first period, this grievance too was not raised to the attention of the single Judge; so it was raised to us on a second thought. That apart, we do not agree with Mr. Mnyele, with respect, that there was, indeed, a period of fifty-two days of inaction between 26th January, 2015 when the respondent was supplied with a copy of the proceedings and 17th March, 2015 when the application for extension of time was made to the single Judge. It is uncontroverted that the copy of the proceedings supplied to the respondent on 26th January, 2015 did not contain a copy of the drawn order. After the respondent had detected that omission, it applied two days later (that is, on 28th January, 2015) to the Registrar of the Commercial Division of the High Court for a copy of the drawn order. It is also on the record that by the time the application for extension of time was made to the single Judge, the respondent was yet to be supplied with

a copy of the drawn order, which was an essential document for instituting the intended revision proceedings. In the premises, the contention that there was a period between 26th January, 2015 and 17th March, 2015 that was unaccounted for is unfounded.

Given all the circumstances as discussed above, we find no substance in this reference. We dismiss it with costs.

DATED at **DAR ES SALAAM** this 1st day of March 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I certify that this is a true copy of the original

THE COURT OF APPEAL OF TANZANIA

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL