IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL REFERENCE NO. 12 OF 2017

1. **FELIX H. MOSHA**
2. **ANNA FELIX MOSHA** .....**APPLICANTS**

VERSUS

EXIM BANK TANZANIA LIMITED.....**RESPONDENT**

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

(Mwarija, J.A.)

dated the 6th day of June, 2017

Civil Application No. 434/16 of 2016

RULING OF THE COURT

31st May & 14th June, 2021

KWARIKO, J.A.:

This application for reference is against the decision of a single Justice of the Court (Mwarija, J.A) in an application for extension of time for the applicants to serve on the respondent a copy of their notice of appeal. That application was dismissed following a failure by the applicants to file written submissions in terms of Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules").

Before the single Justice, the applicants had applied informally for an order waiving compliance with the requirement to file written submissions in accordance with Rule 106 (19) of the Rules. The

applicants' reasons for non-compliance were inadvertence, that the application for extension of time was a simple one and that the respondent had not raised a preliminary objection regarding failure to file the written submissions.

For her part, the respondent objected to the prayer for waiver arguing that the requirement to file written submissions was mandatory under Rule 106 (1) of the Rules. She argued that the applicants ought to have applied for extension of time to file the submissions in terms of Rule 106 (9) of the Rules and that the applicants had not provided exceptional circumstances upon which the Court could have exercised its discretion vested on it under Rule 106 (19) of the Rules. Upon consideration of the applicants' prayer, the single Justice found that inadvertence, non-complexity of the matter and failure for the respondent to raise a preliminary objection not exceptional circumstances upon which to exercise his discretion to waive compliance with Rule 106 (1) of the Rules. The application was thus dismissed under Rule 106 (9) of the Rules.

Before us the applicants have raised the following grounds to fault the decision of the single Justice:

1. *That, the Hon. single Justice of Appeal erred in law and in fact in finding and holding that the factors relied on by the Applicants in their oral application for waiver of filing written submissions do not constitute exceptional situations or incidents warranting the waiver applied for;*

2. *That, the Hon. single Justice of Appeal erred in law and in fact in holding that remedy for the Applicants' failure to file written submissions is to dismiss their application;*

3. *That, the Hon. single Justice of Appeal erred in law and in fact in dismissing the Applicants' application with costs under Rule 106 (9) of the Tanzania Court of Appeal Rules, 2009; and*

4. *That, the decision of the Hon. single Justice of Appeal is inconsistent with two other previous decisions of the Court of Appeal in Civil Appeal No. 56 of 2011 between* ***Khaiid Mwasongo and M/s Unitrans (T) Ltd*** *and* ***Civil Appeal No. 117 of 2014*** *between* ***Leonard Magesa*** *and* ***M/s Olam (T) Ltd*** *(both unreported).*

At the hearing of the application, Messrs. Michael Ngalo and Gabriel Mnyele, learned advocates, appeared for the applicants and respondent, respectively.

When he took the floor to argue the application, Mr. Ngalo submitted that with the coming into operation of Government Notice No. 362 of 2017 amending Rule 106 of the Rules, the grounds in support of the application have been overtaken by events and he accordingly abandoned them. He thus argued that, since procedural rules operate retrospectively, he urged us to grant the application and order the hearing on merit of the application which was dismissed by the single Justice. He refrained from pressing for costs.

On the other hand, Mr. Mnyele opposed the application and argued that the single Justice applied the law as it was then which required the applicant to comply with Rule 106 (1) of the Rules to file written submissions. He added that, the consequences for the failure to file written submissions were stipulated by then Rule 106 (9) of the Rules and that the Court had discretion to either dismiss the matter or allow a party to file the submissions. It was Mr. Mnyele's further submission that the applicant did not satisfy the Court that there were exceptional circumstances for not filing the submissions thus its decision was justified. He argued that the applicant ought to have applied for extension of time to file written submissions. To bolster his argument, the learned counsel referred us to the case of **Mechmar Corporation**

(Malaysia) Berhad v. VIP Engineering and Marketing Ltd, Civil Application No. 9 of 2011 (unreported).

The learned counsel argued further that the applicant's prayer for restoration of the application is misconceived because this Court ought to apply the law as it was when the single Justice decided the application. He added that, the new provision cannot apply retrospectively because there is no provision to that effect. To wind up his submissions, the learned counsel argued that, should the Court grant the applicants' prayer, it will bring chaos in the administration of justice. He urged us to dismiss the application for being devoid of merit.

In his rejoinder, Mr. Ngalo argued that should the Court apply the amended law, it would amount to applying a dead law. He submitted that, it would have been different if the application had been heard before the amendment to the Rules. The learned counsel argued further that there will not be any chaos if the amended law is applied retrospectively because this is the apex Court of the land and it can handle any number of cases. Concerning the cited case, Mr. Ngalo submitted that the same applied Rule 106 (9) of the Rules as it was then.

We have considered the submissions by the counsel for the parties and the question which needs our determination is whether the decision of the single Justice can be faulted. The court record indicates that the impugned decision was delivered on 6th June, 2017 whereas this application was filed on 13th June, 2017. Before this application was heard, Rule 106 was amended by the Tanzania Court of Appeal (Amendments) Rules, GN. No. 362 of 2017 which became operative on 22nd September, 2017. The amendment deleted subrule (9) of Rule 106 of the Rules which provided thus:

> *"Where the appellant files the record of appeal or lodges the notice of motion, and fails to file the written submissions within sixty days prescribed under this rule and there is no application for extension of time within which to file the submissions, the Court may dismiss the appeal or application."*

According to this provision, it was mandatory for the appellant or applicant to file written submissions within sixty days of the filing unless time was extended within which to do so. The said amendment replaced subrule (9) with subrule (10) as follow:

> *"Failure to file written submission under sub-rule (1) or a reply under sub-rule (8) shall not be a*

ground for applying for additional time for oral submission under provisions of this rule."

This requirement has also been reiterated in the amendments made to the Rules by GN. No. 344 of 2019. Mr. Ngalo has urged us to invoke these amended versions of the Rules retrospectively and allow the application which was dismissed to be heard and determined on merit. The question which follows is whether the amendment to Rule 106 should be applied retrospectively. We are mindful of the position of the law that when an amendment of the law affects a procedural step or matter only, it acts retrospectively, unless good reason to the contrary is shown. For instance, in the case of **Makorongo v. Consigilio** [2005] 1 EA 247, the Court stated thus:

"The general rule is that unless there is a clear indication either from the subject matter or from the working of the Parliament, that Act should not be given a retrospective construction. One of the rules of construction that a court uses to ascertain the intention behind the legislation is that if the legislation affects substantive rights, it will not be construed to have retrospective operation, unless a clear intention to that effect is manifested, whereas if it affects procedure only,

prima facie it operates retrospectively unless there is good reason to the contrary."

Other decisions of the Court which gave effect to this rule include; **The Director of Public Prosecutions v. Jackson Sifael Mtares & Three Others,** Criminal Appeal No. 2 of 2018, **Gasper Peter v. Mtwara Urban Water Supply Authority (MTUWASA),** Civil Appeal No. 35 of 2017 and **Lala Wino v. Karatu District Council,** Civil Application No. 132/02 of 2018 (all unreported).

However, notwithstanding the above stated position of the law, we are of the considered opinion that the circumstances in the present application are different for the following reasons. **One;** by the time the Rules were amended, the decision of the single Justice had already been made on the substance of the applicable law. **Two;** the present application is not premised on challenging the inability of the single Justice to acknowledge the amendment but on the substance of his decision. **Three;** the amendment could only apply if by the time of coming into operation no decision had been made on the application. This is not the case as even the intention of the present application is not to challenge that issue. Thus, it would amount to injustice to the other party if the current rules are applied retrospectively. Besides, the application before the single Justice is not pending. **Four;** the grounds

in the present application do not intend to challenge the non-application of the new Rules but the substance of the decision of the single Justice on the law as it was. However, even if the grounds were challenging the new Rules, unfortunately, the applicant has abandoned them and we are left with nothing to fault the decision of the single Justice.

Despite the fact that the applicant has abandoned the grounds in support of the application, if we were to consider the application on merit, we would have decided as follows.

To start with, we wish to restate principles governing references under Rule 62 of the Rules as have been enunciated in the various decisions of the Court. They are as follows: **One;** on reference, the full Court looks at the facts and submissions the basis of which the single Justice made the decision; **two;** no new facts or evidence can be given by any party without prior leave of the Court; and **three;** the single Judge's discretion is wide, unfettered and flexible; it can only be interfered with if there is a misinterpretation of the law. See **Mary Ugomba v. Rene Pointe,** Civil Reference No. 11 of 1992, **VIP Engineering and Marketing Ltd and Others v. Citibank Tanzania Ltd,** Consolidated Civil Reference Nos. 6,7 & 8 and **Amada Batenga v. Francis Kataya,** Civil Reference No. 1 of 2006 (all unreported).

On our part, we have scrutinized the reasons upon which the applicant prayed for waiver to file written submissions and the decision of the single Justice, we are satisfied that we have nothing to fault him as he had properly exercised his discretion and applied the law as it was then.

In the event, we find the application devoid of merit and accordingly dismiss it with costs.

It is ordered accordingly.

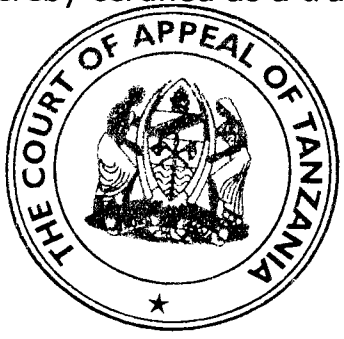
DATED at **DAR ES SALAAM** this 10th day of June, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The ruling delivered this 14th day of June, 2021 in the presence of Mr. Michael Ngalo, learned counsel for the applicants, who also holding brief for Mr. Gabriel Mnyele learned counsel for the respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL