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. 21 OF 2017

KARIBU TEXTILE MILLS LIMITED ..... APPLICANT

VERSUS

COMMISSIONER GENERAL,
TANZANIA REVENUE AUTHORITY ..... RESPONDENT
(Application for reference from the ruling of the Court of Appeal of Tanzania at Dar es Salaam)
(Mwambegele, J.A.)

dated the 15th day of August, 2017
in
Civil Application No. 192/20 of 2017
.....

RULING OF THE COURT

1st & 10th June, 2021

NDIKA, J.A.:

On 15th August, 2017, a single Justice of the Court (Mwambegele, J.A.) dismissed the applicant's quest vide Civil Application No. 449/16 of 2016 for extension of time to lodge a memorandum and record of appeal so as to institute an appeal from the judgment and decree of the Tax Revenue Appeals Tribunal sitting at Dar es Salaam (hereafter "the Tribunal") dated 8th October, 2010 in Tax Appeal No. 12 of 2010. By this reference made under Rule 62 (1) (b) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), the applicant seeks the reversal of that decision.

Before determining the merits or otherwise of this reference, it is vital that the essential facts of the matter be narrated. These were summarized by the learned single Justice in his ruling based on the affidavit supporting the applicant's notice of motion as follows: the applicant lost its appeal to the Tribunal in Tax Appeal No. 12 of 2010 against the decision of the Tax Revenue Appeals Board (henceforth "the Board"). Aggrieved, the applicant instituted an appeal to this Court. While the said appeal was pending, this Court ruled in **Midcom Tanzania Limited v. Commissioner General (TRA),** Civil Appeal No. 11 of 2011 (unreported), that pursuant to Rule 21 of the Tax Revenue Appeals Rules, 2001, as amended, the proceedings, decisions and drawn orders of the Tribunal would only be valid if signed and certified by the Chairman or Vice chairman and all members who presided over the matter. As the applicant's appeal suffered these deficiencies, meaning that it would ultimately be found incompetent, the applicant had the appeal marked withdrawn on 28th May, 2015.

The applicant then refreshed her quest for appealing by applying for duly signed and certified papers from the Tribunal as well as seeking and obtaining extension of time to lodge a fresh notice of appeal. Accordingly, she lodged a new notice of appeal on 25th April, 2016. While waiting to be supplied with properly signed and certified decrees by the Board and the

Tribunal, the Court handed down yet another ruling in **G.S Contractors Limited v. Commissioner General (TRA)**, Civil Appeal No. 80 of 2015 (henceforth "**G.S Contractors I**"), which affected the applicant's endeavours. In that case, the Court ruled that an appeal to it from the Tribunal was a third appeal and thus it required a certificate on a point or points of law by the Tribunal. To comply with this decision, the applicant sought and obtained a certificate from the Tribunal on 31st May, 2016. However, **G.S Contractors I** was varied upon review in **G.S Contractors Limited v. Commissioner General (TRA),** Civil Application No. 155 of 2016 (henceforth " **G.S Contractors II**") as the Court held that appeals from the Tribunal are not third appeals but second appeals lying to the Court without any certificate on a point or points of law as a condition precedent.

It was further averred that, following a ruling delivered by the Court on 16th September, 2016 vide **African Barrick Gold Mine PLC v. Commissioner General (TRA),** Civil Appeal No. 77 of 2016 (unreported), the applicant also discovered that an omission to include in the record of appeal documents enumerated under Rule 96 of the Rules would make the record incomplete, rendering the appeal incompetent. This compelled the applicant, again, to apply for certified opinions of individual members of

the Board and Tribunal as well as certified copies of exhibits tendered at the Board. The applicant was supplied with a copy of the decree duly signed by members of the Board on 22nd March 2017 and with certified exhibits on 27th March, 2017. Although at that point the applicant had a complete set of the required documents for appealing, she was already out of time, hence the application before the learned single Justice of the Court for extension of time to institute the intended appeal.

It was submitted for the applicant before the learned single Justice that the application disclosed good cause for the Court to exercise its discretion to grant the extension sought. It was contended that that the initial appeal that the applicant was compelled to withdraw was lodged well within the prescribed time and that all along the applicant was diligently pursuing the matter to make the intended appeal meaningful in compliance with the decisions of the Court. The applicant relied on **Amani Centre for Street Children v. Viso Construction Company Ltd,** Civil Application No. 105 of 2013 (unreported) for the proposition that extension of time under Rule 10 of the Rules involves the Court's exercise of its discretion, which must be exercised judiciously in view of the particular circumstances of the matter. Further reliance was placed on **Insignia Limited v. Commissioner General (TRA),** Civil Application No. 2 of 2007

(unreported); and **Fortunatus Masha v. William Shija & another** [1997] TLR 155.

Although the respondent unreservedly conceded to the application, the learned single Justice stated at page 6 of the typed ruling that he still had to investigate and determine if, indeed, the application had met the threshold requirement for condonation of the delay involved. Therefore, the sticking issue before the learned single Justice was whether the application disclosed good cause for extending time to institute the intended appeal.

In determining the above issue, the learned single Justice was cognizant that the applicant had duly lodged her initial appeal, which, then she had withdrawn and that she afterwards took proper steps and actions so as to file a proper appeal in compliance with the decisions of the Court. Nonetheless, he took the view that the applicant had failed to account for a period of thirty days reckoned after she was supplied with all the certified documents. For clarity, we extract the relevant part of the typed ruling at pages 9 and 10:

> *"There is sufficient explanation of delay from the moment the former appeal was withdrawn up to the moment when the certified exhibits were supplied*

to her on 27.03.2017. However, the period between the time the certified exhibits tendered at the trial were availed to the applicant on 27.03.2017 and the time when the present application was lodged on 27.04.2017, has, in my considered view, not only been insufficiently explained but not explained at ail. At para 17 of the affidavit supporting the application the applicant deposes through her principal officer that she was supplied with certified copies of exhibits tendered at the trial on 27.03.2017 and that at that moment she was already out of time hence the present application. Nothing is mentioned why the present application was filed one month thereafter; on 27.04.2017, thirty clear days after the endeavours to comply with the decisions of the Court were accomplished."

Referring to a number of the decisions of the Court including **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported) on the imperious requirement in an application for extension of time for each day of delay to be accounted for, the learned single Justice dismissed the application for the applicant's failure to account for a period of one month after she was supplied with all required documents for the intended appeal.

At the hearing before us, Mr. Thompson Luhanga, learned advocate, who was assisted by Mr. Gerald Sanga, also learned advocate, highlighted the written submissions filed in support of the application, urging us to reverse the learned single Justice's refusal of extension of time. In the first limb of his submissions, Mr. Luhanga censured the learned single Justice for proceeding to investigate and refuse the application while the matter was non-contentious following the respondent's concession to it. He contended that the learned single Justice raised the issue for determination *suo motu* and proceeded to determine it without affording the parties an opportunity to clarify on the issue, which was, therefore, a breach of the principles of natural justice.

In the second limb of his submissions, Mr. Luhanga assailed the learned single Justice's holding that the applicant failed to account for each day of delay. Here his argument was two-fold: first, he argued that the rule for accounting for each day of delay only applied under the previous Rule 8 of the Court of Appeal Rules, 1979 (henceforth "the previous Rules") which pegged extension of time upon "sufficient cause" being shown. He added that while the decisions of the Court interpreting Rule 8 of the previous Rules required an applicant to account for each day of the delay involved, Rule 10 of the Rules only requires the existence of a good cause to warrant

enlargement of time. Secondly, the learned counsel stoutly contended that the applicant could not file the application for extension of time immediately after being supplied with all the requested documents because she had to prepare and draft an application that had:

> *"to include all factual background culminating into the application for extension of time, preparation and photocopying of necessary documents in support of the application for extension of time, signing and attestation, as well as time spent in complying with the processes of filing of the application."*

On being probed by the Court if the supporting affidavit explained the thirty days delay canvassed by the learned single Justice, Mr. Luhanga owned up that no explanation was given. However, he hastened to stress that it was during the said period that the applicant drew up and filed the application that was before the learned single Justice. In the premises, he urged us to hold, in the circumstances of the matter, that the applicant acted with promptitude to apply for extension of time. To buttress his point, the learned counsel referred us to **Eliakim Swai and Another v. Thobias Karawa Shoo**, Civil Application No. 2 of 2016 (unreported) where Mwambegele, J.A., again sitting as a single Justice of the Court, held

that the two applicants in that matter, who lodged their application after an interlude of two weeks, "acted within the ambits of requisite promptness" lodging their application.

Mr. Luhanga also relied on **G.A.B. Swale v. Tanzania Zambia Railway Authority**, Civil Reference No. 5 of 2011 (unreported), a decision of the Court restating the principles upon which a decision of single Justice can be examined in a reference. In the light of this decision, he argued that the learned single Justice's decision was based on misapprehension and improper appreciation of the facts of the case; that he failed to take into account that the application for extension of time could not be lodged within a day after all the documents had been received; that he misapprehended and failed to appreciate that the applicant had a right to a hearing on the points raised by the Court *suo motu*; and that the thirty-days intervening period was not inordinate.

For the respondent, Mr. Noah Tito, learned State Attorney, adopted the written submissions filed in opposition to the reference and made two points: First, he argued that the Court had jurisdiction to ascertain the facts and reasons adduced in support of an application so as to exercise its discretion judiciously and that the respondent's concession was not a bar

to the Court's due consideration of the matter. Secondly, the learned counsel contended that the learned single Justice rightly dismissed the application for the applicant's failure to account for each of the thirty days of delay from 27th March, 2017.

We have examined the material on record and given a careful consideration to the written and oral submissions of the learned counsel for the parties on whether good cause was given in terms of Rule 10 of the Rules to warrant the enlargement of time sought. It is settled 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. Admittedly, it has not been possible to lay down an invariable definition of good cause so as to guide the exercise of the Court's discretion. Nevertheless, the Court has consistently looked at a number of factors such as 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: see, for instance, **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 normally refrain from interfering with the exercise by a single Justice of the Court of his discretion under Rule 10 of the Rules. 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 Justice 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 a subsequent decision in **G.A.B. Swale** (*supra*), cited to us by Mr. Luhanga, the Court restated the applicable principles thus:

> *"(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."*

We wish to stress the above position by excerpting 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 shouid not have acted or because it has failed to take into consideration matters which it shouid have taken into consideration and in doing so arrived at a wrong decision."
[Emphasis added]

Without doubt, the above stance is equally applicable to the exercise of discretion by a single Justice of this Court.

What we are enjoined to determine in this matter are two issues: **first**, whether the learned single Justice raised issues *suo motu* in a non-contentious matter and proceeded to determine them without affording the parties an opportunity to clarify on the matters so raised. **Secondly**, whether the learned single Justice's refusal of extension for the applicant's failure to account for the delay of thirty days was justified.

We begin with the first issue. Having scanned the material before the learned single Justice as well as the impugned ruling, we agree with Mr. Tito that there is utterly no basis for faulting the approach taken by the learned Justice. Although the respondent unreservedly conceded to the application, the learned single Justice stated at page 6 of the typed ruling, rightly so in our view, that he still had to investigate and determine if,

indeed, the application had met the threshold requirement for condonation of the delay involved. For clarity, we wish to let the record speak for itself:

> *"The respondent's concession notwithstanding, the Court is still enjoined to investigate If the applicant has advanced good cause to warrant it exercise the discretion to enlarge time as prayed by the applicant. That is to say, the respondent's concession in no way exonerates the applicant from showing existence of good cause for the delay so as to enable the Court exercise its discretion to grant the extension sought."*

With respect, we go along with Mr. Tito's submission that the learned single Justice had jurisdiction to ascertain the facts as well as the reasons adduced in support of an application so as to exercise his discretion judiciously. The mere fact that the respondent conceded to the application did not waive the learned single Justice's power as well as duty to ascertain the merits or otherwise of the application and come to his own conclusion as to whether the application had disclosed good cause.

We have also examined the complaint that in his consideration of the matter, the learned single Justice brought up new matters on which he decided the application without affording the parties a hearing. With

respect to Mr. Luhanga, this complaint flies in the face of the record. It is evident from page 6 through page 13 of the typed ruling that the learned single Justice determined the sole issue whether there was good cause for the delay involved, focusing his attention to the period of thirty days of delay that occurred after the applicant had obtained all the certified documents on 27th March, 2017. This was plainly not a new issue raised by the learned single *suo motu* but one borne out of the material before him.

In resolving the issue before him, the learned single Justice considered nothing else but the supporting affidavit and the submissions of the counsel. He paid special attention to the averment in paragraph 17 of the supporting affidavit that by 27th March, 2017 the applicant had been supplied with all the required documents but that there was no explanation as to why the application before him was filed a month later. Accordingly, we answer the first issue in the negative.

We now turn to the issue whether the learned single Justice's refusal of extension for the applicant's failure to account for the delay of thirty days was justified.

As indicated earlier, Mr. Luhanga, at forefront, submitted that while the decisions of the Court interpreting Rule 8 of the previous Rules

required an applicant to account for each day of the delay involved, Rule 10 of the Rules only requires the existence of good cause to warrant enlargement of time. We think Mr. Luhanga's view is based on a misconception that there is world of difference between the requirement of "sufficient cause" under Rule 8 of the previous Rules and the current threshold of "good cause" under Rule 10 of the Rules. In **Mexon Energy Limited v. Mogas Tanzania Limited**, Civil Application No. 264/16 of 2017 (unreported), a single Justice of the Court observed, rightly so in our view, that there is a thin line of distinction between the two concepts which is that "good cause" is milder in its proof than "sufficient cause." The learned single Justice relied on **Arjun Singh v. Mohindra Kumar and Others** [1964] 5 SCR 946; [1964] AIR 993 in which the Supreme Court of India held:

> *"... we do not see any material difference between the facts to be established for satisfying the two tests of 'good cause' and 'sufficient cause.' We are unable to conceive of a 'good cause' which is not 'sufficient' as affording an explanation for non-appearance, nor conversely of a 'sufficient cause' which is not a good one and we would add that either of these is not different from 'good and sufficient cause' which is used in this context in*

other statutes. If, on the other hand, there is any difference between the two it can only be that the requirement of a 'good cause' is complied with on a lesser degree of proof than that of 'sufficient cause.'"

[At https://indiankanoon.org/doc/1608703/ accessed on 06.06.2018]

With respect, we think that despite the phrase "good cause" under Rule 10 of the Rules requiring a lesser degree of proof it is too plain for argument that an applicant for enlargement of time under the aforesaid rule must account for each day of the delay involved so as to allow the Court to determine the degree of the delay involved, the party's diligence in the pursuit of the matter, the soundness of the reason for the delay as well as whether the applicant acted expeditiously. Admittedly, the learned single Justice relied on **Bushiri Hassan** (*supra*) as his authority for the delay accounting principle under Rule 8 of the previous Rules, but the said principle has been adopted by the Court in its numerous decisions interpreting Rule 10 of the Rules, some of which were cited by the learned single Justice in his ruling: **Mgombaeka Investment Company Limited & Two Others v. DCB Commercial Bank PLC,** Civil Application No. 500/16 of 2016, **Vodacom Foundation v. Commissioner General**

(TRA), Civil Application No. 300/17 of 2016 and **Mwita Mataluma Ibaso v. Republic,** Criminal Application No. 6 of 2013 (all unreported). See also **Bariki Israel v. Republic,** Criminal Application No. 4 of 2011; and **Sebastian Ndaula v. Grace Rwamafa (Legal Personal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014 (both unreported).

As to whether the learned single Justice properly refused the extension of time sought, we are satisfied that he rightly held that the applicant had the onus to account for each day of the delay involved but that she failed to account for the delay of thirty days from 27th March, 2017 as the supporting affidavit was silent on that aspect. It is significant that Mr. Luhanga admitted that the delay was not explained away in the supporting affidavit. The explanation that he gave us in his written and oral submissions, that the applicant spent the thirty days period preparing, drawing up and filing the application for extension of time, is nothing but a statement from the bar that cannot be acted upon. Nor could it have been acted upon by the learned single Justice had it been made in the applicant's submissions before him. At this point, we are of the firm view that the learned single Justice neither misapprehended the facts of the case nor did he fail to take into account a relevant consideration. In

consequence, we uphold his finding that no good cause had been shown to warrant him to exercise his discretion in the applicant's favour.

In the final analysis, we find no basis to interfere with the learned single Justice's exercise of discretion in the matter. The reference stands dismissed with costs.

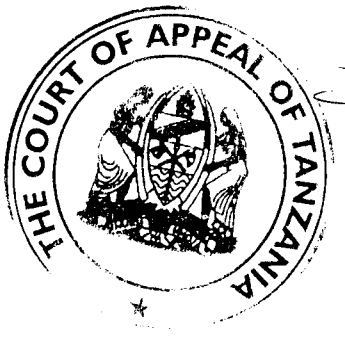
DATED at **DAR ES SALAAM** this 8th day of June, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered on this 10th day June, 2021, in the presence of Mr. Thompson Luhanga, learned counsel for the applicant who is also holding brief for Mr. Noah Tito, learned counsel for the respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL