IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., SEHEL, J.A. And FIKIRINI, J.A.)

CIVIL REFERENCE NO. 6 OF 2018

ROSEMARY STELLA CHAMBEJAIRO..... APPLICANT

VERSUS

DAVID KITUNDU JAIRO..... RESPONDENT

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

(Ndika, J.A.)

dated the 8th day of June, 2018
in
Civil Application No. 517/01 of 2016

.....

RULING OF THE COURT

17th August & 2nd September, 2021

FIKIRINI, J.A.:

In this reference, the applicant is challenging the learned single Justice of the Court's decision dated 8th June, 2018. The reference was brought under Rule 62 (1) (b) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). The applicant has moved the Court to vary, discharge or reverse any order or direction or decision of the single Justice.

In that decision, the single Justice dismissed the application with costs for failure to show sufficient cause. The applicant was aggrieved hence this application for reference. On the ground that the notice of change of date of hearing was insufficient in time.

At the hearing of this reference on 17th August, 2021, Ms. Crescencia Rwechungura, learned counsel appeared for the applicant while Mr. Roman Selasini Lamwai, learned counsel represented the respondent.

Giving a background to this application, it was Ms. Rwechungura's submission that, aggrieved by the decision of Muruke, J. in Civil Appeal No. 79 of 2013, the applicant preferred an appeal to this Court, but since she was out of time her appeal was to be preceded by an application for extension of time. She thus, on behalf of the applicant, filed the Civil Application No. 162 of 2016, which was initially scheduled for hearing before a single Justice, on 25th of November, 2016, without her knowledge was rescheduled to 21st November, 2016; a few days before the original date. During this time Ms. Rwechungura allegedly travelled to Mafinga to attend the funeral of her friend's husband. In her absence service of notice changing the date of hearing was effected to her office.

Ms. Rwechungura did not receive the information owing to the fact that she was inaccessible due to telephone communication challenges.

On 21st November, 2016, the application was dismissed for her non-appearance. Having become aware of the dismissal of the application, she filed Civil Application No. 517/01 of 2016. The application was heard by Ndika, J.A., who upon being satisfied that the learned counsel had failed to show good cause for her absence, dismissed it on 8th June, 2018. It was Ms. Rwechungura's submission that the learned single Justice failed to appreciate that her non-appearance was due to the change of the hearing date.

The learned counsel went on to submit that the applicant was served on 15th November, 2016 while the hearing of the application was scheduled for 21st November, 2016, the notice which was served only three days before hearing was thus insufficient. Urging us to take inspiration from Rule 108 of the Rules, she argued that the notice was contrary to the Rules. She submitted further that, whereas the learned single Justice was satisfied that the notice was sufficient as reflected at page 7 of his ruling, he erred in disregarding the contents of paragraph 12 of the affidavit filed in support of the application.

With regard to the finding by the learned single Justice that the learned counsel had failed to establish that she travelled back to Dar es Salaam from Mafinga by bus, Ms. Rwechungura argued that had the learned single Justice considered the fact that Mafinga is located on the highway, he would not have discounted the bus ticket relied upon by her on the ground of lack of details such as the seat number and the name of the bus.

Responding to the foregoing, Mr. Lamwai argued that when imploring Rule 63 (2) of the Rules, the Court is supposed to act on the record before it. No new evidence should be entertained. Countering Ms. Rwechungura's submission, he contended that the averment that she was at the funeral, or that she could not charge her phone or that Mafinga is on the highway were the facts not pleaded in the affidavit in support of the application. The only fact pleaded, he said, is that she was not reachable.

When we asked Mr. Lamwai to look at page 3 of the ruling containing the submission on charging of the phone, he withdrew his submission in that regard. He nonetheless went on contending that the applicant's counsel failed to give the deceased's name. As for the reliance

on Rule 108 of the Rules, it was his contention that what was before the single Justice was not an appeal and therefore Rule 108 of the Rules was inapplicable. According to him, a notice of at least three clear days was sufficient for such application given that such time is a reasonable time for filing of the documents.

When asked if inspiration cannot be taken from Rule 108 of the Rules, he could not say anything. He left it to the Court to decide as it may deem appropriate. Amplifying his stance, he contended that the notice was sufficient and that the single Justice had wide and unfettered powers, which could only be interfered with if there is misinterpretation of the law. He went on to argue that in the present case, Ms. Rwechungura has not cited any law which provides for the time within which service should be done upon parties. He referred us to the case of **Praygod Mbaga v The Government of Kenya, Criminal Investigation Department & Another**, Civil Reference No. 04 of 2019, (unreported) at page 8, in which other cases cited such as **Daudi Haga Vs. Jenitha Abda Machanju,** Civil Reference No. 1/2000, **V.I.P Engineering & 2 Others v Citibank Tanzania Limited**, Consolidated References No. 6,

7 & 8 of 2006, and **Amada Batenga v. Francis Kataya,** Civil Reference No. 01 of 2006, (all unreported).

It was Mr. Lamwai's argument that the applicant has failed to show which provision of the law was misinterpreted by the learned single Justice. On the requisite of time for serving a party with a notice of hearing, he maintained that, since there is no rule in place, then the three days was the applicable period without substantiating his argument with any authority.

Rejoining the submission, Ms. Rwechungura, totally opposed the submission by her learned friend. Firstly, she discounted the assertion that there was new evidence introduced in her submission. She contended that all what was submitted were found in her affidavit. Secondly, she contended that Rule 108 of the Rules supports her position. She thus prayed that this application for the restoration and an order directing restoration of the dismissed application be issued so that the parties rights are determined on merit.

The issue before us for determination is whether we should interfere with the decision of a single Justice dated 8th June, 2018,

dismissing the application for failure to furnish sufficient cause to allow restoration of the dismissed application.

The decision of a single Justice can be interfered with, however there are conditions guiding the exercise as has been illustrated in a number of cases, including the case of **Gem and Rock Ventures Co Ltd v Yona Hamis Mvutah**, Civil Reference No. 1 of 2010 (unreported). In that case, it was clearly stated that only issues raised before a single Justice, should be entertained in a reference. Furthermore, since the grant of the application before the single Justice was basically upon exercise of judicial discretion, this Court's interference would only be on the following situations: *one*, if the single Justice has considered immaterial factors, *two*, has failed to take into account relevant matter placed before him, and *three,* if there is misapprehension or misinterpretation of the law or facts applicable to the issue at hand. *Four,* this Court can only interfere if based on the evidence availed and the law, the decision is nothing but plainly wrong. See also: **Mbogo and Another v Shah (1996) 1 E.A. 93.** In the course of his submission countering the application, Mr. Lamwai cited also the case of **Praygod Mbaga**

(supra) in which the principles on interfering with the judicial discretion have been illustrated.

Coming to the application before us, for the reasons to be stated herein, we find the application is merited. From the record of proceedings in Civil Application No. 517/01 of 2016, it is clear that the respondent did not file affidavit in reply to counter what was averred in the affidavit in support of the application. All what has been submitted to oppose the application were statements from the bar. The position as regard to the validity of such statement has been stated by the Court in a number of its decisions including those in the cases of **Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 and **Bish International B.V. & Rudolf Teurnis Van Winkelhof v. Charles Yaw Sarkodie &. Bish Tanzania Limited**, Land Case No. 9 of 2006 (both unreported). In the case of **The Registered Trustees of the Archdiocese of Dar es Salaam** (supra), the Court held:

> *". . . submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to*

contain arguments on the applicable law. They are not intended to be a substitute for evidence."

Now an affidavit in reply being a substitute of oral evidence ought to be sworn if a party intends to counter any fact deponed in the affidavit in support unless the point is legal, then even without an affidavit in reply, that point can be addressed. In the present situation, respondent's submissions were in response to what was deponed in the affidavit sworn by Ms. Rwechungura elucidating what transpired, but without any affidavit in reply to that effect. The respondent's submission under the circumstance was akin to testimony from the bar, the practice abhorred and discouraged by the Court, as illustrated in the two cases cited above. We can therefore say without any doubt that all the facts deponed were not disputed as there was nothing countered.

Whilst Ms. Rwechungura did not dispute service of the notice of hearing through her office as per paragraph 12 of her affidavit, however, she contested that service on the ground that the time given based on the notice of hearing served on 15th November, 2016 for the hearing scheduled on 21st November, 2016 was insufficient. The single Justice did not agree to the assertion. Instead, he found that the service was

sufficient in terms of Rule 22 (4) of the Rules. With respect, we find that, although the service was effected in accordance with the provisions of that Rule, what was at issue was the time of the notice, which is not provided by Rule 22 (1) of the Rules.

We have also considered Mr. Lamwai's submission that because the Rule does not fix the time, the practice is that 3 clear days were considered to be sufficient. With due respect, we do not agree to that argument which was not supported by any authority. Mr. Lamwai might have in mind Rule 107 of the Rules, but that rule specifically caters for service of a notice of a preliminary point of objection and does not envisage any notice of hearing.

As indicated in paragraphs 5 and 6 of her affidavit, which we think speak clearly of what transpired, we think Ms. Rwechungura has stated her case. The paragraphs are reproduced below for ease of reference:

> "5. *On the 11th of November 2016 I travelled to Mafinga to attend the burial of a close family friend by a private vehicle and throughout the period I was in Mafinga I was unreachable because there were no facilities for charging phones."*

"6.I returned to Dar es Salaam on 18th November, 2016 and arrived very late, tired and with flue. That due to flue I was forced to remain indoors for the weekend."

These assertions have not been countered and since there was no reason advanced to make us to believe otherwise, we take the averment as the truth of what happened. Similarly, we believe the account that the applicant could not enter appearance in person as averred in paragraph 11, that she resides and works for gain in South Africa as evidenced by the attached copy of her passport, not contested.

The turn of the events was that immediately after learning of the dismissal order through the late Dr. Lamwai on 21st November, 2016 and confirming that information from Mr. Mihayo, the Court Clerk, as averred in paragraphs 9 and 10 of the affidavit, Ms. Rwechungura, lodged a notice of motion pursuant to Rule 63 (3) of the Rules on 15th December, 2016. This to us is a testimony that the learned counsel's absence was not without good cause but due to the predicament which befell her. With respect therefore we find that, had the learned single Justice considered the application on the basis of the factors scrutinized above, he would not

have arrived at the decision that the absence of the applicant's counsel was not due to sufficient cause.

Having said so, we find that for the reasons stated above this application has merit. We thus grant it and proceed to restore the dismissed application Civil Application No. 162 of 2016. Costs to be borne by the respondents.

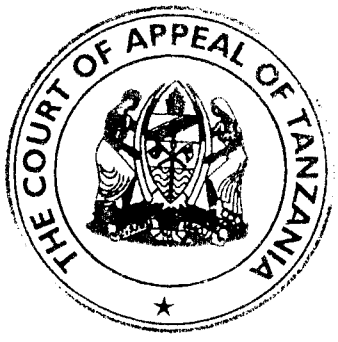
DATED at **DAR ES SALAAM** this 30th day of August, 2021

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The judgment delivered this 2nd day of September, 2021 in the presence of Ms. Cresencia Rwechungura, learned counsel for the Appellant and Mr. Roman Selasini Lamwai, learned counsel for the Respondent is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL