

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM  
(CORAM: MKUYE, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)**

**CIVIL REFERENCE NO. 10 OF 2017**

<b>1. D. N. BAHRAM LOGISTICS LTD 2. DAD KARIM B. NURMOHAMED</b>	}	..... <b>APPLICANTS</b>
<b>VERSUS</b>		

<b>1. NATIONAL BANK OF COMMERCE LTD 2. KAM COMMERCIAL SERVICES</b>	}	..... <b>RESPONDENTS</b>
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(Application for reference from the ruling of the Court of Appeal of Tanzania  
at Dar es Salaam)

(Mwangesi, J.A.)

dated the 5<sup>th</sup> day of June, 2017  
in  
**Civil Application No. 449/16 of 2016**

.....

**RULING OF THE COURT**

15<sup>th</sup> February & 4<sup>th</sup> March, 2021

**NDIKA, J.A.:**

On 5<sup>th</sup> June, 2017, a single Judge of the Court (Mwangesi, J.A.) dismissed the applicants' quest in Civil Application No. 449/16 of 2016 for extension of time in which to lodge a notice of appeal. By this reference made under Rule 62 (1) (b) of the Tanzania Court of Appeal Rules ("the Rules"), the applicant seeks the reversal of that decision on two grounds:

*"a) That the Honourable Justice of Appeal found that there was no reason disclosed in the [second] applicant's affidavit for him to exercise discretion to grant an order of extension of time while Annexure 'E' to the affidavit in Miscellaneous Commercial Case No. 124 of 2006 formed part of the affidavit and the same annexure contained reasons.*

*b) That in the notice of motion in Civil Application No. 449/16 of 2016 it was stated that on top of the affidavit other grounds and reasons shall be adduced at the hearing."*

Before determining the merits or otherwise of this application, it is vital that the essential facts of the matter be narrated.

According to the supporting affidavit of the second applicant who was also a principal officer of the first applicant, the applicants successfully sued the respondent in the District Court of Temeke in Civil Case No. 38 of 2010. Upon application for revision by the respondent, the High Court, Commercial Division, by its decision dated 5<sup>th</sup> August, 2011, quashed and set aside the trial proceedings and orders thereon. Dissatisfied, the applicants instituted Civil Appeal No. 81 of 2011 in this Court to challenge the High Court's decision but the appeal was struck out on 20<sup>th</sup> June, 2016. Desirous of refreshing their pursuit for appealing to this Court, the

applicants approached the High Court, Commercial Division through Commercial Application No. 124 of 2016 for extension of time in which to lodge a new notice of appeal. The said application was unrewarded as it was dismissed by the High Court on 5<sup>th</sup> October, 2016. Next, the applicants lodged Civil Application No. 449/16 of 2016 in this Court seeking an extension of time as a second bite, so to speak. As alluded to earlier, Mwangesi, J.A., sitting as a single Judge of the Court, dismissed that matter on 5<sup>th</sup> June, 2017 for want of merit.

It is noteworthy that in his ruling, the learned single Judge reproduced the essential averments contained in the supporting affidavit, which he examined and then reasoned as follows:

*"It is an open secret that, throughout the paragraphs of the affidavit above quoted, there is none, which has attempted to give reasons as to why the appeal intended to be lodged after the extension of time has been granted was not filed within the time prescribed by the law. The implication which one gets is that, there was basically no reason for the delay."*

The learned single Judge stated further that:

*"In his submission to amplify the application, learned counsel Mr. Jethro Turyamwesiga did*

*inform the Court that the delay was due to oversight relying on the holding of this Court in **Fortunatus Masha v. William Shija** [1997] TLR 154. Nevertheless, the ground purported to be backed up by the cited authority is nowhere to be seen in the affidavit of the [second] applicant. Since such ground was just raised from the bar, the authority that has been cited turns to be of no assistance at all."*

The application was argued before us by Messrs. Jethro Turyamwesiga and John Ignace Laswai, learned advocates for the applicants and respondent respectively.

The thrust of Mr. Turyamwesiga's argument was that the applicants sought extension of time to institute a notice of appeal to restart their pursuit to appeal after their first appeal to the Court was struck out on 20<sup>th</sup> June, 2016. That the delay involved in the matter was, therefore, not actual but technical as it arose from the striking out of the initial appeal. It was his contention that the said delay ought to have been excused in terms of the principle in **Fortunatus Masha v. William Shija** [1997] TLR 154 as the essential facts for its invocation had been averred.

On being probed by the Court if the supporting affidavit disclosed the date on which the application in the High Court was made, Mr. Turyamwesiga acknowledged the non-disclosure of that fact. Yet, the learned counsel stood to his ground and beseeched that the reference be allowed.

Mr. Laswai, on the other hand, fervently resisted the application on the ground that the application before the learned single Judge disclosed no good cause to warrant an extension of time prayed for. He contended that, as found by the learned single Judge, the delay involved was unjustified in the supporting affidavit contrary to the settled position of the Court that each and every day of delay must be accounted for. To support his submission, he referred us to the decision by a single Judge of the Court in **Sebastian Ndaula v. Grace Rwamafa (Legal Personal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014 (unreported).

In a brief rejoinder, Mr. Turyamwesiga distinguished **Sebastian Ndaula** (*supra*) from the instant case on the ground that the latter concerns explicable technical delay.

We have examined the material on record and given a careful consideration to the 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 requested extension of time. 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, to name but a few: 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).

Considering that the grant of extension of time is discretionary, this Court would normally refrain from interfering with the exercise by a single Judge 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 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 a subsequent decision in **G.A.B Swale v. Tanzania Zambia Railway Authority**, Civil Reference No. 5 of 2011 (unreported), 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.)"*

To stress the above position, we wish to extract 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]

The stance in the above passage is, without doubt, equally applicable to the exercise of discretion by a single Judge of this Court.

In determining the merits of the instant application guided by the above principles, we find it convenient to state, at first, that we recall that the learned single Judge refused the application primarily on the ground that no reason for the entire period of delay was given. In order to determine whether that finding was justified or not, unlike the learned Judge we shall look at two segments of the delay involved separately.

The first segment of the delay covers the period from 5<sup>th</sup> August, 2011 when the High Court rendered its ruling and 20<sup>th</sup> June, 2016 when this Court struck out the applicants’ appeal. The depositions in the supporting affidavit justifying the delay in this segment are contained in

paragraphs 2 to 4, which the learned single Judge extracted and considered in his ruling, are as follows:

- "2. *That the applicants filed a suit against the respondent in the District Court of Temeke vide Civil Case No. 38 of 2010.*
3. *That the respondent applied in the High Court Commercial Division for revision whereby the proceedings and orders of the District Court were quashed and set aside.*
4. *That the applicants were aggrieved by the decision of the High Court Commercial Division and **filed an appeal to this Court vide Civii Appeal No. 81 of 2011, which was struck out on 20<sup>th</sup> June, 2016.***"[Emphasis added]

Mr. Turyamwesiga characterized this segment to the learned single Judge in terms of the principle in **Fortunatus Masha** (*supra*) as a period of pure technical delay as opposed to actual or real delay but the learned single Judge did not share his view. We are aware that the principle in that case as enunciated by a single Judge of the Court was cited with approval by the full court in **Salvand K. A. Rwegasira v. China Henan International Group Co. Ltd.**, Civil Reference No. 18 of 2006 (unreported):

*"A distinction had to be drawn between cases involving real or actual delays and those such as the*

*present one which clearly only involved technical delays in the sense that **the original appeal was lodged in time but had been found to be incompetent for one or another reason** and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted.”* [Emphasis added]

See also **Zahara Kitindi & Another v. Juma Swalehe & 9 others**, Civil Application No. 4/05 of 2017; **Yara Tanzania Limited v. DB Shapriya and Co. Limited**, Civil Application No. 498/16 of 2016; **Vodacom Foundation v. Commissioner General (TRA)**, Civil Application No. 107/20/2017; **Samwel Kobelo Muhulo v. National Housing Corporation**, Civil Application No. 302/17/2017; and **Bharya Engineering & Contracting Co. Ltd. v. Hamoud Ahmed Nassor**, Civil Application No. 342/01/2017 (all unreported).

At this point, the germane issue is whether the first segment of delay in the instant case was sufficiently shown to be a period of technical delay. With respect, we do not agree with Mr. Turyamwesiga’s characterization of

the delay in that segment as technical. We so hold because the supporting affidavit was fatefully silent on two key aspects: one, whether the original appeal was lodged in time; and two, why the said appeal was struck out. In our view, the principle of technical delay is only applicable, as stated in **Fortunatus Masha** (*supra*) and approved in **Salvand K. A. Rwegasira** (*supra*), if the original appeal was lodged in time but that it was subsequently terminated on account of incompetence or some other ground. If the said appeal was struck out on account of being time-barred, the delay involved would be actual or real and on that basis it would require being fully accounted for. In the premises, we are of the respectful view that the first segment of delay was not justified.

The next segment of delay starts from 20<sup>th</sup> June, 2016 when the original appeal was terminated up to when the notice of motion for the second bite was lodged. In explaining the delay in this sector, the supporting affidavit states in paragraphs 7 and 8 that following the striking out of the appeal the applicants lodged Commercial Application No. 124 of 2016 in the High Court but that it was dismissed on 5<sup>th</sup> October, 2016. As indicated earlier, in response to our probing, Mr. Turyamwesiga acknowledged that the supporting affidavit did not disclose the date on

which the application in the High Court was made. In our considered opinion, the undisclosed detail was crucial for the learned single Judge to determine if the applicants had acted with promptitude to revive the appeal process after the pronouncement of the ruling of the Court striking out the first appeal. We would, therefore, endorse Mr. Laswai's submission, based on the authority of **Sebastian Ndaula** (*supra*), that the applicants failed to account for each and every day of delay in the instant matter – see also **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported).

By way of emphasis, we are persuaded by and wish to refer to a passage in the case of **Uitenhage Transitional Local Council v. South African Revenue Service**, 2004 (1) SA 292, where, in a similar vein, the Supreme Court of South Africa observed that:

*"Condonation is not to be had merely for the asking; **a full detailed and accurate account of the causes of the delay and its effects** must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility."*  
[Emphasis added]

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

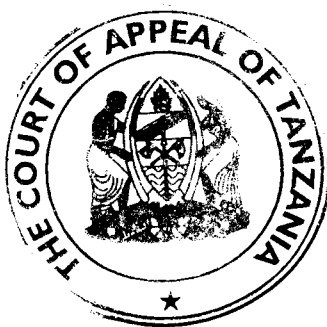
**DATED at DAR ES SALAAM this 1<sup>st</sup> day of March, 2021.**

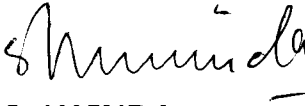
R. K. MKUYE  
**JUSTICE OF APPEAL**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

The ruling delivered on this 4<sup>th</sup> day of March, 2021 in the presence of Mr. Jethro Turyamwesiga learned counsel for the applicants who is also holding brief for Mr. John Ignas Laswai, learned counsel for the respondents, is hereby certified as a true copy of the original.



  
S. J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**