IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL REFERENCE NO. 14 OF 2019

(CORAM: NDIKA, J.A., GALEBA, J.A. And MWAMPASHI, J.A.)

1. FARIDA F. MBARAK
2. FARIDA AHMED MBARAKA ..... APPLICANTS

VERSUS

1. DOMINA KAGARUKI
2. TANZANIA BUILDING AGENCY
3. THE COMMISSIONER FOR LANDS ..... RESPONDENTS
4. HONOURABLE THE ATTORNEY GENERAL
5. ELIUS MWAKALINGA

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

(Mussa, J.A)

dated the 22nd day of May, 2019
in
Civil Application No. 68/17 of 2018

RULING OF THE COURT

18th August & 20th October, 2021

MWAMPASHI, J.A.:

This is an application for Reference arising from the decision of a single Justice of this Court, Mussa, JA, in Civil Application No. 68/17 of 2018 dated 22.05.2019 wherein the applicants' application for extension of time to apply for review, was dismissed. Aggrieved, the applicants, through a letter dated 21.05.2019 written by their advocate, Mr. Rosan Mbwambo, have initiated this application in terms of Rule 62 (1)(b) of the

Tanzania Court of Appeal Rules, 2009 as amended (the Rules), seeking the said decision of the single Justice to be reversed.

Before we proceed any further, we find it apposite to give the background material facts giving rise to the instant application. The applicants were the defendants in High Court Land Case No. 51 of 2004 filed by the 1st respondent. The case between the parties was over Plot No. 105, Burundi Road, Kinondoni Dar es Salaam, under a Certificate of Title No. 1806030/6. In its judgment delivered on 21.04.2006 the High Court (Kileo, J.) (as she then was), decided against the applicants. Dissatisfied, they appealed to this Court in Civil Appeal No. 136 of 2006 which was partly allowed with an order that the 2nd respondent be joined to the suit. Thereafter, the 1st respondent amended the plaint firstly joining the 2nd respondent and later the 3rd, 4th and 5th respondents. After a full trial, the High Court (Mgetta, J.) entered judgment in favour of the applicants but on appeal by the 1st respondent the decision was reversed by the Court in Civil Appeal No. 60 of 2016.

The decision of the Court in Civil Appeal No. 60 of 2016 which was given on 19.06.2017 aggrieved the applicants who decided to challenge it by way of review in Civil Application No. 359/17 of 2017. The application

was, however, found incompetent for wrong citation of the enabling provisions of the law and it was thus struck out on 02.03.2018. Still determined to quench their thirst by re-filing the application, but being out of time, they thus lodged Civil Application No. 68/17 of 2018 for extension of time within which to file an application for review of the said judgment of this Court. As indicated earlier, that application was not successful hence the instant Reference.

In the application for extension of time before the single Justice, it was the applicants' main argument that their initial application for review which was struck out by the Court, was caught up by a newly developed principle of law in the case of the **Commissioner General, Tanzania Revenue Authority v. Pan African Energy (T) Limited**, Civil Application No. 206 of 2016 (unreported) which could not be readily and immediately accessed as it had not been reported in the law reports. It was also argued that the impugned decision was tainted with apparent illegalities in that the applicants were not heard on some of the key issues in the case.

In response to the foregoing, the respondents contended that the grounds upon which the application was predicated, were neither stated

in the notice of motion nor in the supporting affidavit but that the same were raised in the applicants' written submissions. For that reason, it was argued that the applicants failed to demonstrate any good cause for the delay. The single Justice agreed with the respondents that indeed the applicants had failed to assign any ground worthy the determination by the Court in the notice of motion. It was also found that even in the supporting affidavit no reasons for the delay had been given except for the assertion that the applicants were diligent and that they filed the application for extension of time without undue delay, the delay which was not sufficiently explained and accounted for.

In the circumstances, where the notice of motion and the supporting affidavit were barren, the single Justice considered the question whether the grounds for extension of time could be deduced from the submissions of the parties. The answer to the question was in the negative. It was held that Rule 10 read together with Rule 48 both of the Rules, imperatively require the applicant to state the grounds for relief in the notice of motion or in the accompanying affidavit.

As regards the argument that the non-citation of the enabling provision in the initial application for review did not result from any

inaction or negligence on the part of the applicants but that the application was caught up by a newly developed principle of law by the case of the **Commissioner Generaly, Tanzania Revenue Authority** (supra), it was found by the single Justice that the argument was unfounded. It was observed that the principle did not come from the case cited but from section 4 (4) of Appellate Jurisdiction Act [Cap 141 R.E. 2019] (the AJA) which came into force on 08.07.2016 while Civil Application No. 359/17 of 2017 was lodged on 10.08.2017 more than a year after the promulgation of section 4 (4) of the AJA. It was thus held that the claim by the applicants that their application was struck out on the basis of a newly developed principle of law, was in effect, a plea of ignorance of law which has never been accepted as a sufficient reason or good cause for extension of time. It was lastly held by the single Justice that the applicants did not account for the 5 days of the delay.

The following five grounds have been raised in support of this application:

(i) *That [the] Honourable single Justice overlooked the Applicants' counsel explanation on the case law position when they filed the earlier application for review, Civil Application No. 359/17 of [2017], the case of* ***OTTU on behalf of P. L. Assenga &***

106 Others and 3 Others vs AMI (T) Limited, *Civil Application No. 35 of 2011, Court of Appeal of Tanzania at Dar es Salaam (unreported) and the case law relied upon in striking out the said application for Review. i.e the case of* ***Commissioner General TRA vs Pan African Energy (T) Ltd*** *thereby holding that the Applicants' counsel pleaded ignorance of the law which is not a good reason for extension of time.*

(ii) *The Honourable single Justice overlooked the accounting for delay principle in that after the first application for Review had been struck out the Applicant acted immediately and within just five days filed the Application for extension of time as the accounting for delay requirement commences after expiry of the prescribed period within which the intended action was required to be made.*

(iii) *That the Honourable single Justice holding that the 5 days were not accounted overlooked the holding in the case of* ***Fortunatus Masha vs William Shija & Another*** *[1997] T.L.R. 154 in which this Court allowed an application for extension of time to file an appeal because it was filed immediately after the first appeal has been struck out.*

(iv) *That the Honourable single Justice erred in not finding in ground (b) in the notice of motion and paragraph 4 of the Affidavit that the Applicants demonstrated that there was breach of the rules of natural justice as to the right to be heard*

in the impugned decision which is an irregularity and or illegality that warrants the court to extend time so that the same may be looked at and where appropriate corrected on review; and

(v) *That the Honourable single Justice overlooked the fact that the Applicant did establish impliedly and or explicitly through the affidavit in support of the Application, the grounds upon which the intended review application would be predicated on, should the extension of time been granted as held in the case of* ***Elias Anderson vs. R,*** *Criminal Application No. 2 of 2013 (unreported).*

At the hearing, the applicants were represented by Mr. Rosan Mbwambo, learned advocate. On the other hand, whilst the 1st respondent was represented by Mr. Thomas Eustace Rwebangira, learned advocate, the 2nd, 3rd and 4th respondents were represented by Mr. Hangi Chang'a, learned Principal State Attorney assisted by Ms. Kause Kilonzo, also learned State Attorney. On his part, the 5th respondent had the services of Mr. Gasper Nyika, learned advocate.

In his submission in support of the application, Mr. Mbwambo began with the 2nd and 3rd grounds which he argued together. He submitted that in dismissing the application the single Justice did not appreciate the fact that the 5 days delay was accounted for and also that

the case of **Fortunatus Masha** (supra) was overlooked. It was submitted further that the two grounds were canvased both in the supporting affidavit and the notice of motion. He insisted that after the application for review had been struck out, the application for extension of time was immediately and without undue delay filed within 5 days. It was contended by him that the 5 days in question were spent for preparing the application and that apart from the fact that the period of 5 days is reasonable for preparations and filing of such an application, the said period of 5 days was well accounted for.

As on the 4th and 5th grounds which were also argued together, it was submitted by Mr. Mbwambo that the grounds on which the application for extension of time was predicated, were raised in the notice of motion and were sufficiently explained in the supporting affidavit. He argued that in the notice of motion it was clearly stated that the applicants were not afforded their right to be heard. To substantiate this, Mr. Mbwambo referred us to pages 26 and 30 of the record of the application.

Lastly, on the 1st ground it was argued by the learned advocate that the applicants never pleaded ignorance of law. He contended that by that time there was confusion on what was the enabling provision on

applications for review. To buttress his argument, Mr. Mbwambo relied on the case of **OTTU on behalf of P.L. Assenga and 106 Others v. AMI (T) Limited,** Civil Application No. 35 of 2011 and **Amour Habib Salim v Hussein Bafagi**, Civil Application No. 52 of 2009 (both unreported).

On his part, Mr. Nyika supported the application arguing that in the notice of motion reproduced in the ruling of the single Justice appearing at page 16 of the record, the point on illegality was raised and therefore that the ground sufficed to dispose of the application without considering the 5 days delay. On this, he referred us to our decision in **Mohamed Salum Nahdi v. Elizabeth Jeremiah**, Civil Reference No. 14 of 2017 (unreported). He also argued that the application ought to have been decided in consideration of its circumstances because the 5 days were spent on preparing and filing the application.

In his submissions resisting the application, Mr. Rwebangira began by attacking Mr. Nyika's argument that the delay of 5 days was justifiable as the they were spent in preparing and filing the application for extension of time. He contended that the argument by Mr. Nyika was not advanced before the single Justice and therefore that the same cannot be brought before us. To buttress his contention, Mr. Rwebangira referred us to the

case of **Athuman Mtundunya v. The District Crime Officer Ruangwa and Others,** Civil Reference No. 15/20 of 2018 (unreported). The learned advocate also argued that the delay for 5 days was not accounted for in the supporting affidavit and that the statement that the application was filed without undue delay was too general.

Regarding the 4th and 5th grounds on illegality, it was argued by Mr. Rwebangira that as it was correctly held by the single Justice, the issue needed to be explained in the supporting affidavit. He pointed out that the illegalities ought to have been clear and apparent on the face of the record. He contended further that the alleged illegalities were not clearly shown and that it was not enough for the applicants, to merely state in the notice of motion that the parties were not heard.

As regards the issue of ignorance of law, it was Mr. Rwebangira's argument that the issue was raised by the applicants themselves when they claimed that their application for review was struck out on account of being caught up by a newly developed principle of law which was not easily accessible. He went on arguing that there are no good reasons for faulting the findings of the single Justice and on this he referred us to **Athumani Mtundunya** (supra), **Eliya Anderson v. Republic,** Criminal

Application No. 2 of 2013 (unreported). He therefore prayed for the application to be dismissed with costs.

Mr. Chang'a concurred with the submission made by Mr. Rwebangira. He insisted that the alleged errors or illegalities ought to have been apparent on the face of record and that in the instant case the same were not shown neither in the notice of motion nor in the supporting affidavit. It was also submitted that the question of ignorance of law was raised by the applicants and that it was rightly determined by the single Justice. He lastly referred us to the case of **Hamimu Hamis Totoro @ Zungu and 2 Others v. Republic,** Criminal Application No. 121/07 of 2018 (unreported) and prayed for the dismissal of the Reference with costs.

In his brief rejoinder, Mr. Mbwambo reiterated his earlier submission and added that in the circumstances of the instant case there was no need of accounting for the 5 days delay because just after the application for review had been struck out, the applicants acted promptly by filing the application for extension of time. Further, he insisted that for purposes of extension of time, the illegality was sufficiently demonstrated and that at

page 69 of the record it was clearly stated in the supporting affidavit that reference was being made to the annexed documents.

We have dispassionately examined the material on record and carefully considered the submissions for and against the application including the authorities listed and cited. The issue before us is whether the applicants had in Civil Application No. 68/17 of 2018 managed to give good cause warranting extension of time in terms of Rule 10 of the Rules.

We wish to begin by restating that it is settled that granting extension of time is in the discretion of the Court and that the discretion must be exercised judiciously according to the facts of each case. For extension of time to be granted good cause must be shown. There is, however, no invariable definition or hard and fast rules as to what constitutes "good cause". In exercising its discretion and determining whether good cause has been shown to warrant extension of time, the Court, depending on the circumstances of each case, has to look at a number of factors such as whether the applicant was diligent, reasons for the delay, the length of the delay, the degree of prejudice to the respondent if time is extended, whether there is an arguable case such as whether there is a point of law or the illegality or otherwise of the

impugned decision – see **Bertha Bwire v. Alex Maganga,** Civil Application No. 7 of 2016, **Tanga Cement Co. v. Jumanne Masangwa and Another**, Civil Application No. 6 of 2001, **Dar es Salaam City Council v. Jayantilal P. Rajan**, Civil Application No. 27 of 1987 and **Tanzania Revenue Authority v. Tanga Transport Co. Ltd,** Civil Application No. 4 of 2009 (all unreported).

It is also settled that the exercise of discretion by a single Justice under Rule 10 of the Rules can rarely be interfered with. The Court would normally refrain from interfering with such exercise unless there is a good reason to do so. In **G.A.B Swale v. Tanzania Zambia Railway Authority,** Civil Reference No. 05 of 2011 (unreported) the guiding principles when determining whether to interfere with a decision of a single Justice or not in terms of Rule 62 (1) (b) of the Rules were restated by the Court as follows:

> "*The principles upon which a decision of a single Justice can be upset under Rule 62 (1) (b) of the Rules, are that:*
>
> *(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 v. Yona Hamis Mvutah,*** *Civil Reference No. 1 of 2010 (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 fact 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 v. 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*** *(1996) 1 EA 93 at page 3-4)".*

See also **Daudi Haga v. Jenitha Abdon Machafu**, Civil Reference No. 01 of 2000 and **Amada Balenga v. Francis Kataya**, Civil Reference No. 01 of 2006 (both unreported).

Guided by the above principles, we find that the crucial issue for our determination, as we have earlier pointed out, is whether the refusal for extension of time by the learned single Justice was justifiable.

Regarding the requirement for grounds or reasons upon which an application for extension of time is based to be stated in a notice of motion or supporting affidavit, the finding by the learned single Justice that the

requirement is mandatory as provided by Rule 10 read together with Rule 48 of the Rules, cannot be faulted. Rule 10 of the Rules provides as follows:

> *"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time so as extended."*

Rule 48 (1) of the Rules provides that:

> *"Subject to the provisions of sub-rule (3) and to any other rule allowing informal application,* ***every application to the Court shall be by notice of motion supported by affidavit and shall*** *cite the specific rule under which it is brought and* ***state the ground for the relief sought".*** [Emphasis added]

From the above provisions of the law, it is settled that the grounds upon which the relief of extension of time is sought, must be stated in a notice of motion and the supporting affidavit. As for the instant case, while it was the argument by Messrs. Rwebangira and Chang'a that the applicants failed to state the grounds in their notice of motion or supporting affidavit which was also the finding of the single Justice, it was

the argument by Messrs. Mbwambo and Nyika that the grounds were stated in the notice of motion and in the supporting affidavit. The disagreement between the counsel places before us the task of examining the record and find whether or not the grounds were stated in the notice of motion or the supporting affidavit.

According to the notice of motion appearing at page 25 the applicants raised two grounds upon which their application for extension of time was based, in the following form:

> "(a) *The applicants had filed an application for review of the judgment of this Court in Civil Appeal No. 60 of 2016 dated 19th June, 2017 but the application was struck out for non-citation of the enabling act under the Appellate Jurisdiction Act, Cap 149 R.E 2002 as amended provision by Act No. 3 of 2016*
>
> *(b) The intended application for review is intended to address the failure by the Court to give the applicant a chance to be heard on some of the issues in the case and several errors on the record such as the Court relying on a document not tendered at the trial in evidence."*

In the supporting affidavit appearing at page 29 of the record, the only relevant paragraph in as far as the grounds for extension of time are concerned was paragraph 11 on which it is stated that the applicants filed the application without undue delay.

Further, according to the record before us, the applicants had raised three grounds in their written submission before the single Justice, **firstly,** that they had been throughout diligent and that there was no inaction or negligence on their part in pursuing the application, **secondly**, that their application for review was struck out on account of being caught up by a newly developed principle of law which was not easily accessible and **lastly,** that the decision sought to be reviewed is fraught by the apparent illegalities which were worth consideration by the Court.

From the above, it is therefore apparent, as it was also found by the learned single Justice, that paragraph (a) of the notice of motion did not tell anything about the reasons for the delay. All what is contained in paragraph (a) are the averments on the historical background of the matter. Regarding paragraph (b) of the notice of motion, we again agree with the single Justice that what is stated therein is not an account or any reason for the delay but issues which the applicants intended to address

the Court in the intended application for review. On this the learned single Justice rightly held that:

> *"As regards paragraph (b), again, the same simply informs the issues the applicants intend to address the Court in the application for review. Thus, by paragraph (b) the applicants, rather ironically, place the cart infront of the horse and inform as to what they intend to argue in the application for review. With respect, while paragraph (b) may be relevant to the application for review itself, if granted, what is required in the application at hand is to assign good cause to deserve extension of time*".

We also find the argument by Mr. Mbwambo that the ground on illegality was stated in paragraph 4 of the supporting affidavit of no merits because what is contained therein is a mere narration of what was allegedly raised in Civil Application No. 359/17 of 2017. The notice of motion and the supporting affidavit therefore contained no ground on the reason for the delay worth determination by the single Justice- see **Iddi Nyange v. Maua Said,** Civil Application No. 7/05 of 2016, **Henry Muyaga v. TTCL Ltd,** Civil Application No. 218 of 2016, **Hadija Adamu v. Godbless Tumbo,** Civil Application No. 1 of 2013 and **Ngao Losero v. Julius Mwarabu**, Civil Application No. 150 of 2011 (all unreported).

As regards to what is stated in paragraph 11 of the supporting affidavit, it is our considered view that the mere averment that the application had been filed without undue delay with no further explanations, was not enough. Further, we find that the explanations of the delay given by the applicants in their written submission before the single Justice and also the explanations by Messrs. Mbwambo and Nyika in their respective submissions before us that the 5 days were spent in preparing and filing the application, to be statements from the bar which cannot be acted upon. As correctly held by the single Justice, the explanations needed to be given in the notice of motion or the supporting affidavit. In **Karibu Textile Mills Limited v. Commissioner General Tanzania Revenue Authority**, Civil Reference No. 21 of 2017 (unreported) the Court faced a similar scenario and held that:

> *"The explanation that he gave us in his written and oral submission, 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 submission before him."*

Before we take leave of the matter, we wish to remark that we have also noted that the refusal to extend time for the applicants, is also being faulted on the argument that it was an error on the part of the learned single Justice to conclude that the applicant had pleaded ignorance of law. It was persistently argued by Mr. Mbwambo that the applicants never pleaded ignorance of law. It is our considered view that this should not detain us at all. The contention that the applicants' application for review was held incompetent for being caught up by a newly developed principle of law which was not easily accessible to the applicants did not come from anyone else but from the applicants themselves. It is also abundantly clear that at the time when the applicants were filing their application for review on 10.08.2017 the law on how applications for review ought to be brought to the Court had already been settled since 08.07.2016 following the introduction of section 4 (4) of AJA. The law was therefore not new and the applicants' contention that the law was not accessible or that there was confusion on what was the law, as rightly found by the learned single justice, was nothing but a plea of ignorance of law which has never been accepted as a sufficient reason or good cause for extension of time.

All said and done, we find no reason to fault the decision of the learned single Justice. The learned single Justice neither misapprehended

the facts of the case or the relevant law nor did he fail to take into account relevant matters. The application for extension of time within which to file review was therefore rightly dismissed by the learned single Justice. In the final analysis, we also dismiss this application for reference with costs.

DATED at **DAR ES SALAAM** this 15th day of October, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 20th day of October, 2021 in the absence of the applicants but duly served and in the presence of Mr. George Ngemela, learned counsel for the first respondent. Ms. Leonia Maneno, learned State Attorney appeared for the second, third and fourth respondents, while fifth respondent did not appear but also duly served is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL