

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: LILA, J.A., NDIKA, J.A. And MWAMBEGELE, J.A.)

CIVIL REFERENCE NO. 8/2 OF 2020

GURMIT SINGH BHACHU APPLICANT

VERSUS

MEET SINGH BHACHU RESPONDENT

**(An application for Reference against the Ruling and Order of the Single
Justice of the Court of Appeal of Tanzania)**

(Korosso, JA.)

Dated the 13th day of December, 2019

In

Civil Application No. 463/02 of 2018

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RULING OF THE COURT

14th Dec. 2020 & 19th March, 2021

LILA, J.A.:

The grant of extension of time to lodge an appeal to this Court by a single justice of this Court forms the crux of this reference. That was done in Civil Application No. 463/02 of 2018. The respondent was granted extension of time to lodge an appeal against the judgment of the High Court of Tanzania at Arusha dated 1/3/2016 in Civil Case No. 9 of 2013. The applicant was dissatisfied with the decision; hence this reference. He wants the full Court to fault and reverse the decision of the single judge.

For easy appreciation of the reason why the parties are before us, we think we should, very briefly, narrate the facts we consider to be relevant to this case as we could gather from the materials availed to us. It is common ground that the parties are blood related; they are siblings. Upon death of their father one Gurbax Singh Arjan Ram, the respondent petitioned before the High Court to be appointed administrator of the estate of their deceased father. As it turned out, the applicant contested the application by lodging a caveat. As a matter of law, the petition turned out to be a suit whereby the applicant became a plaintiff and the respondent became a defendant. The suit was crowned Civil Case No. 9 of 2013. The High Court rendered its decision on 1/3/2016 in which neither the respondent nor the applicant emerged the winner, for; the High Court annulled the will and appointed the Administrator General to administer the estate. Aggrieved, the respondent wished to pursue an appeal. He timely lodged a notice of appeal on 16/3/2016. He could not, however, lodge an appeal within time. That prompted him to lodge an application for extension of time, Civil Application No. 463/02 of 2018, the subject of this reference.

Before the single judge, the respondent advanced three grounds for the delay in lodging the appeal; delay in being supplied with the requisite documents for appeal purposes by the High Court, his indisposition for the period between 26/9/2016 and 31/10/2016 and that there existed pertinent points of law for consideration by the Court. Such points were reflected in memorandum of appeal which was annexed to the application for extension of time. The major allegation in the points of law was that there are illegalities in the impugned decision. For reasons explicit in the ruling, the learned judge was not convinced that the first two grounds passed the test of being good cause for the delay and dismissed them. The last ground, after citing the Court's decision in **Lyamuya Construction Company Ltd vs Registered Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) and appreciating the principles laid down as providing guidance to the Court in granting extension of time on account of illegalities that the point of law must be of sufficient importance and must be apparent on the face of the record such as jurisdiction; not one that would be discovered by a long drawn argument or process, the learned judge considered that ground and agreed with the respondent that there

existed illegalities warranting grant of extension of time and she proceeded to grant the same. This is what she said:-

"It is also important to note further that in the notice of motion, in terms of grounds that predicate the application, ground "b" states that, points of law and facts are involved in the decision and decree intended to be appealed against and that requires consideration and determination by the Court of Appeal. Also when you look at paragraph 6 of the supporting affidavit, it addresses the fact that the Hon. High Court Judge nullified the will of the deceased and appointed the Administrator General to administer the deceased estate. One of the legal points raised by the learned counsel for the applicant is whether the said finding complied with respective legal requirements. There is also paragraph 12 of the notice of motion, that claims there was a finding on the issue of whether or not leave to appeal was a legal requirement alleged to be an issue determined by the High Court judge without involving the parties. Thus without scrutinizing the intended memorandum of appeal, I find that these are points of law which are apparent and need the attention of the Court of Appeal.

*Therefore, this being the case, I find that the perceived irregularities apparent in the decision of the High Court amount to good cause, within the boundaries of what was held in **Jehangir Aziz Abdulrasul vs. Balazi Ibrahim Abubakar and Another**, Civil Application No. 79 of 2016 (unreported), which stated:*

"the Court has a duty even if it means extending the time for the purpose of ascertaining the point and take appropriate measures".

The applicant is now seeking the reversal of the single judge's order granting extension of time to the respondent to file an appeal on these grounds:-

*"1. The Honourable Justice of Appeal erred in law in entertaining the Application before the determination of the Civil Application No. 9 of 2018 for striking out the Notice of Appeal filed on 13.4.2018 filed prior to the Application Number **463/02 OF 2018** and by omitting to determine the said issue raised in paragraph 1(b) of the Reply Submission of the Respondent filed on 26.9.2019 and paragraph 15 of the affidavit in Reply filed 3.7.2018 to the prejudice of the Applicant/ Original Respondent.*

2. *The Honourable Justice of Appeal, in so doing, by implication, without hearing the parties, prematurely determined the said Civil Application No. 9 of 2018 for striking out notice of appeal filed on 13.4.2018 to the prejudice of the Applicant/Original Respondent.*
3. *The Honourable Justice of Appeal erred in law misapplying the doctrine of illegality to the facts of this case extending time to file appeal by wrongly holding that the issue of nullification of will of the deceased was apparent irregularity and a point of law and needs the attention of the Court of Appeal.*
4. *The Honourable Justice of Appeal further erred in law by misapplying the doctrine of illegality to the facts that the finding of the trial Judge in Misc. Application No. 111 of 2018 application on the issue that whether leave to appeal was a legal requirement without involving parties was apparent and needs the attention of the Court of Appeal.*
5. *The Honourable Justice of Appeal erred in law by assuming that the Notice of Appeal of the Respondent/Original Applicant was valid and subsisting while the same is deemed to have been withdrawn under Rule 91 (1) (a) of the Tanzania Court of Appeal Rules, 2009 as amended in particular, in face of the*

Applicant's own admission that he failed to file his intended appeal within the prescribed period of 60 days.

6. The Honourable Justice of Appeal erred in law by not holding that the Respondent/Original Applicant Meet Singh had no locus in Application Number 463/02 of 2018 without joining the Administrator General the Court appointed Administrator of the estate of the deceased – Gurbax Singh Bhachu.”

Before us the applicant was represented by Mr. Bharat B. Chadha, learned advocate while the respondent was represented by Mr. Alute Mughwai, learned advocate. The learned advocates filed written submissions and also made some oral submissions elaborating on some areas each side thought necessary, in support of the application and in opposition to the application, respectively. We commend them for their learned and detailed submissions which to a large extent unfolded what transpired before the single judge. But for the course we have taken in the determination of this application, we will be excused for not reciting all of them. Instead, we shall refer to only that part of the respective submissions which we shall consider relevant.

To start with, we shall preface our decision by exposition of the principles governing determination of references. In **VIP Engineering and Marketing Limited and Two Others vs CITIBANK Tanzania Limited**, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported) the case of **Daudi Haga vs Jenitha Abdon Machafu**, Civil Reference No. 1 of 2000, **Mary Ugomba vs Rene Pointe**, Civil Reference No. 11 of 1992 (both unreported) and **African Airlines International Ltd vs Eastern & Southern Trade and Development Bank** [2003] EA 1, were cited in which the following principles were laid down:

- (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*

The Court reiterated the same principles but in much clearer terms in the case of **Philip Chumbuka vs Masudi Ally Kasele**, Civil Reference No. 14 of 2005 (unreported) in these words:-

*"It is an accepted principle that in reference, the full court considers what was presented and argued before the single judge and see whether the learned judge was right or wrong. The full Court will not interfere with the decision of the single judge on the basis of fresh facts or submissions which were not available to the single judge – see **Daudi Haga vs Jemitha Abdon Machafu**- civil reference No. 1 of 2000 (unreported)."*

In essence, in the cases cited above, the Court had emphasized that in determination of a reference, this Court is entitled to go beyond the record of the reference and see what materials were available to the single judge so as to determine whether he was right in his decision. On that accord, we called and examined the record in Civil Application No. 463/02 of 2018 which was before the single justice. It is vivid, therefore, that the applicant (then respondent), in his reply submission (at page 1 and 2) raised two preliminary issues for the Court's determination. These are:-

"1. Before going to the merits, the respondent invites this Honourable Court to consider the following preliminary issues:-

- a. Whether the applicant is entitled to come to this Court directly for extension of time to file appeal out of time without having made his application in the High Court in the first instance as required by Rule 47 of CAT Rules 2009 as amended?*
- b. Whether the applicant is entitled to move the Court without an existing proper Notice of Appeal in particular when the Civil Application No. 9 of 2018 for striking out the Notice of Appeal filed on 13. 4. 2018 (prior to the present Application) pending before the Honourable Court?"*

The record in Civil Application No. 463/02 of 2018 and in particular the ruling of the learned single judge bears out clearly that the issue raised in paragraph 1(a) was considered and determined by the single judge as reflected on pages 3 to 11 of the typed ruling. But, both the record and the ruling are silent on what happened to the second issue in paragraph 1(b).

In any event, it is clear the second issue was not considered. Failure by the single judge to consider the above issue forms the basis of the applicant's first and second complaints before us. In both the written and

oral submissions by Mr. Chadha faults the single judge that it was improper for her to hear and determine the application for extension of time to lodge an appeal whereas the notice of appeal was being challenged in another application (Civil Application No. 9 of 2018) which was still pending in Court. By doing so, Mr. Chadha contended, she prematurely determined the pending application.

Fortunately, the respondent did not dispute the second issue being raised before the single justice. This is clearly borne out by the reply submission in which he stated at page 3 that:-

*"We argue ground No. 1 and 2 of the reference together because they are related. In our humble reply, the above grounds for Reference do not meet the first test that was enumerated in the **ATHUMAN MTUNDUYA** case referred above. The point about the alleged prematurity of the respondent's application was raised casually by the Applicant's counsel and was not considered by the single Justice in her decision. It was not considered because the Applicant's Counsel did not press it in either his written submission or during his oral argument before the single justice."*

We hasten to hold that the above submission by the respondent amounts to a concession that the existence of Civil Application No. 9 of 2018 was brought to the attention of the learned single judge and the parties submitted on it. We have, however, found ourselves unable to accept the line of reasoning taken by Mr. Mughwai that the applicant did not press for the issue to be determined by the single judge. That is close to saying that it is necessary for a party or his counsel to press so much to the court so that a certain legal issue can be taken up and adjudicated by the Court. We do not think so. It is enough for a party or his advocate to bring to the attention of the Court certain issues and leave them for the Court to consider and determine the same. That said, we hold that the issue was sufficiently brought to the attention of the single judge for her to consider and determine it.

The crucial issue for our determination is therefore whether it was proper for the learned single judge to determine the application for extension of time to lodge an appeal before the application to strike out a notice of appeal is heard and determined.

From the submissions by the parties, it is common ground that Civil Application No. 9 of 2018 for striking out notice of appeal was lodged on

13/4/2018 and Civil Application No. 463/02/2018 for extension of time to file an appeal was lodged on 26/9/2018. It is obvious therefore that the application for striking out a notice of appeal was filed prior to the filing of the application for extension of time to file an appeal. The validity of the notice of appeal faced a challenge before the application for extension of time was lodged. We, in the circumstances, asked ourselves whether it was proper for the single judge to deal with the application for extension of time to lodge an appeal when the notice of appeal was being challenged.

The institution of appeals to the Court is provided for under the provisions of Rule 90 of the Tanzania Court of Appeal Rules, 2009. That Rule states:-

*"90 (1) subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry, **within sixty days of the date when the notice of appeal was lodged with-***

- a) a memorandum of appeal in quintuplicate;*
- b) the record of appeal in quintuplicate;*
- c) security for costs of the appeal, save that where an application for a copy of the proceedings in the High Court has been made within sixty days of the date of the decision against which it is desired to appeal, there shall,*

in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant.”(Emphasis added)

The emboldened part of the excerpt in very certain terms tells it all that lodgment of an appeal is preceded by the lodgment of a notice appeal. That means there must be a valid notice of appeal before a valid appeal can be lodged. In instances where the validity of the notice of appeal is being challenged and an adverse party is seeking it to be struck out, as was the case in this case, prudence therefore dictates that the validity of notice of appeal be determined first before a party is granted extension of time to lodge an appeal. Validity of the notice of appeal was therefore a crucial issue to be determined first by the Court before considering an application for extension of time to lodge an appeal. Unfortunately, that was done. In fairness to the learned single judge, we think she made an oversight on the second issue and that is what probably led her to not appreciate the importance of the application for striking out the notice of appeal that was pending in Court. Certain as we are, had she considered that issue and its relevance in the appeal process, she would have

definitely refrained from entertaining the application for extension of time to lodge an appeal and would have adjourned the hearing of it to a later time so as to pave way for the application to strike out the notice of appeal to be heard and determined first. Obviously, in the event notice of appeal would be found invalid, the application for extension of time would be rendered redundant.

The above said, we entirely agree with the applicant that the application for striking out a notice of appeal (Civil Application No. 9 of 2018) ought to have been heard and determined prior to the application for extension of time to lodge an appeal (Civil Application No. 463/02/2018). The grant of extension of time to file an appeal meant that the notice of appeal was in order. But as shown above the validity of the notice of appeal was being challenged in Civil Application No. 9 of 2018. That leads us to the inescapable conclusion that Civil Application No. 9 of 2018, as rightly submitted by Mr. Chadha, was prematurely determined.

The shortfalls we have endeavoured to demonstrate above justify our interference with the learned single justice's exercise of his discretion to grant extension of time. This disposes of the application. We therefore see no reason to delve into the remaining grounds.

For the foregoing reasons, we allow the reference by reversing the decision of the single judge which granted the respondent extension of time to file an appeal to this Court. The application for extension of time (Civil Application No. 463/02 of 2018) reverts to its earlier position that it was not heard and determined. And, we direct Civil Application No. 9 of 2018 for striking out the notice of appeal be heard and determined first. Given the circumstances of this case, we order each party to bear its own costs.

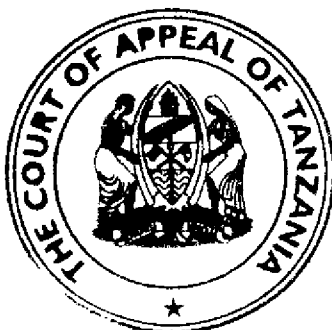
DATED at DAR ES SALAAM this 16th day of March, 2021.

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The ruling delivered on this 19th day March, 2021, via video conference in the presence of Mr. Bharat Chadha learned counsel for the applicant who also holding brief Mr. Alute Mugwai counsel for the respondent, is hereby certified as a true copy of the original.




E.G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL