IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL REFERENCE NO. 13 OF 2018

(CORAM: WAMBALI, J.A., KOROSSO, J.A. And RUMANYIKA, J.A.)

SELEMANI JUMA MASALA..... APPLICANT

VERSUS

SYLIVESTER PAUL MOSHA ..... 1ST RESPONDENT
JAPHET MATIKU RYOBA ..... 2ND RESPONDENT

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

(Mugasha, J.A.)

Dated the 15th day of November, 2018
in
Civil Application No. 210/01 of 2017
.....

RULING OF THE COURT

15th July & 22nd September, 2022

RUMANYIKA, J.A.:

This is an application for reference from the ruling of the Single Justice of the Court (Mugasha, J.A.) dated 15/11/2018 predicated under rule 62(1) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

A brief account of the facts giving rise to this application is to the effect that, initially, before a Single Justice (Mmila, JA as he then was) through Civil Application No. 28 of 2015 the applicant sought extension of time to lodge an application for revision in respect of the Judgment and

Decree of the High Court of Tanzania, Land Division in Land Case No. 307 of 2014. On conclusion of the hearing, the ruling was reserved to the date that the parties would have been notified. Consequently, on 27/09/2016 the Deputy Registrar delivered the ruling in which the applicant was granted an extension of thirty days to lodge an application for revision. According to the record of the application, the ruling was delivered in the absence of the applicant. It is also on record that before the Single Justice the applicant contended that he was not aware of the delivery of the said ruling of the Court until about six months later, that is, on 21/04/2017. Consequently, as the thirty days granted earlier had expired, he filed another application, Civil Application No. 210/01 of 2017 seeking extension of time to lodge an application for revision. The said application was strongly contested by the respondents on the contention that it had no merits. On account of lack of merit, the Single Justice of the Court (Mugasha, JA) who presided over the application dismissed it with costs. The applicant is aggrieved by that decision, the subject of the present Application for Reference.

Basically, the application is premised on five grounds which we reproduce as follows:

"1. A single Judge of the Court of Appeal of Tanzania failed to properly evaluate evidence (affidavital) placed before her as a result she reached a wrong decision.

2. A single Judge of the Court of Appeal of Tanzania erred in law in failing to hold that the applicant's counsel was not served in view of two contradicting court documents; one indicating that the applicant's counsel was duly served but failed to appear and the other indicating that "Nimekwenda kwa wakili sikumkuta mtu,".

3. *A single Judge of the Court of Appeal of Tanzania erred in law in holding that there was a need to solicit affidavit from process server one Salum in total disregard of a fact that the words endorsed by process server on the copy of summons filed in the Court's file was enough proof that the applicant's counsel was never served.*

4. *A single Judge of the Court of Appeal erred in law in holding that the application was time barred in total disregard of the decision of this Court that application at hand filed under Rule 10 of the Tanzania Court of Appeal Rules, 2009 is not subject to time limitation.*

5. The decision and order of the High Court sought to be revised is problematic and if ieft to stand applicant's propriety rights/interests over Plot. No. 248 Block 'E' Mbezi Area Dar es Salaam will be illegally taken away and without affording the applicant a hearing."

However, we wish to remark that what the applicant indicates in this Reference as the sixth ground, is not a ground as such. Essentially, it is a prayer that the application be allowed with costs. Therefore, in determining the application, we will not treat it as a ground of reference.

At the hearing of this application, Mr. Michael Jeremiah Kamba, learned counsel appeared for the applicant, whereas the 1st and 2nd respondents had the services of Messrs. Godwin Musa Mwapongo and Mashiku Sabasaba, learned counsel, respectively.

During the hearing, Mr. Kamba argued the grounds in support of the application for Reference generally. He strongly blamed the Single Justice for failure to evaluate the evidence submitted by the applicant through the affidavit supported by the written submission. In his opinion, the material on record demonstrated without doubt that the delay was not caused by the negligence or lack of diligence on the part of the applicant. He

emphasized that through the affidavit, as the applicant's advocate, he explained the efforts he made to contact the registry officer of the Court, Mr. Eliuther to inquire on the status of the delivery of the reserved ruling, but he was on several occasion informed that it was still pending. He added that to his surprise, later when he visited the Court's Registry and obtained permission to peruse the Court file in respect of Civil Application No. 28 of 2015 on 21/4/2017, he learnt that the ruling was delivered on 27/9/2016.

The learned advocate submitted further that as demonstrated in the affidavit, during the perusal of the Court's file he also noted that Mr. Salum, the process server, affirmed and endorsed in the affidavit of service that he did not find the applicant's advocate at his office on 26/9/ 2016 when he went to serve the notice of delivery of the ruling. This is contrary, he argued, to the indication of the Deputy Registrar on 27/9/2016 that the ruling was delivered in the absence of the applicant's advocate who was duly served to appear.

In the circumstances, Mr. Kamba argued that had the Single Justice thoroughly analyzed the affidavit in support of the application for extension of time and considered the written submission, she would have found that the applicant's advocate was diligent in following up the matter and that he

was not duly served to appear for the delivery of the ruling on 27/9/2016. He added that considering the strength of his affidavit, he had no reason to support his assertion by the affidavit of Mr. Eliuther in order to show the efforts he made to contact the Registry of the Court for information on the delivery of the ruling. Similarly, he argued, he had no reason to solicit and attach the affidavit of Mr. Salum to show that he was not duly served as the record of the Court was clear on that issue. In essence, Mr. Kamba emphasized that he was not duly served as properly endorsed by Mr. Salum, the process server in the copy of the returned notice and that the ruling granting the applicant extension of thirty days was delivered in his absence.

In this regard, Mr. Kamba reiterated his firm stand that had the Single Justice considered the materials on record placed before her, she should have discounted the contrary indication by the Deputy Registrar that on 27/9/2016 he was absent though duly served. Therefore, considering the material on record she should have held that there was no necessity for the applicant to attach the affidavits of Mr. Eliuther and Mr. Salum to support his allegations.

Alternatively, Mr. Kamba submitted that even if it is assumed that the applicant's application was time barred, the Court's failure to serve him to receive the long-reserved ruling constituted sufficient cause and for that reason the Single Justice should have dispensed with the requirement of accounting for each day of the delay.

He maintained that it is settled law that an application for extension of time has no time limit contrary to the holding of the Single Justice. To emphasize his argument, he cited our decisions in **Rutagatina C. L. v. The Advocates Committee and Clavery Mtindo Ngalapa,** Civil Application No. 98 of 2010 and **Patrobert D. Ishengoma v. Kahama Mining Corporation Ltd & 2 Others,** Civil Application No. 2 of 2013 (both unreported). In the premises, he faulted the Single Justice for holding to the contrary, and thereby denying the applicant extension of time to lodge an application for revision.

Regarding illegality, Mr. Kamba submitted that the decision of the High Court in Land Case No. 307 of 2014 is problematic for being tainted with illegality on account that the applicant was deprived of the right to be heard in respect of the ownership of the property on Plot No. 248 Block 'E' Mbezi Area Dar es Salaam. In his opinion, the allegation of illegality alone constitutes sufficient cause for extension of time. To support his point, he

cited our decision in **The Principal Secretary Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 185.

Lastly, Mr. Kamba submitted that should the Court grant the application, none of the respondents would be prejudiced as they did not file written submissions to oppose the application.

In reply, Mr. Mwapongo submitted that considering the materials placed before the Single Justice by the applicant, she exercised her discretion properly to refuse extension of time and therefore she cannot be faulted. He argued that it was the duty of the applicant to put before the Single Justice sufficient materials that demonstrated the reasons for the delay. Unfortunately, he argued, the assertions in the affidavit in support of the application were not supported by the affidavits of Mr. Eliuther and Mr. Salum mentioned therein as held by the Single Justice. Mr. Mwapongo therefore argued that the decisions of the Court cited by Mr. Kamba in support of his submissions are distinguishable, because, before the Single Justice, the applicant not only failed to account for the reasons of delay, but also for each day of delay in respect of the thirteen days.

Mr. Mwapongo also submitted that the complaint of the applicant that the Single Justice ruled that the application for extension of time was time barred has no merit as it is not supported by the record of the

application. In short, he stated that there is nothing to that effect in the ruling, the subject of the Reference.

As regards the alleged illegality of the impugned decision being the basis of extension of time, Mr. Mwapongo submitted that this point was neither indicated in the notice of motion nor deposed in the affidavit supporting the application. Besides, he argued, it was not raised before the Single Justice at the hearing to require parties' argument and therefore it was not determined. He added that it is an afterthought and liable to be dismissed with costs. In totality, he fully supported the ruling of the Single Justice and pressed the Court to dismiss the Reference with costs.

On his part, Mr. Sabasaba entirely subscribed to the submissions by Mr. Mwapongo. Additionally, he submitted that in view of the materials in the record of the application, the applicant had never been serious, diligent and prompt, as he did not give sufficient reasons for the delay to deserve extension of time. He thus joined hands with Mr. Mwapongo and prayed that the application be dismissed with costs.

On our part, having heard the submissions of the learned counsel for the parties, the issue for our determination is whether, before the Single Justice the applicant demonstrated good cause for the delay to deserve

extension of time for the second time after the thirty days granted earlier expired.

Basically, we subscribe to the Single Justice's finding that the materials placed before her by the applicant did not demonstrate sufficiently that the inability of his advocate to appear for the delivery of the ruling on 27/9/2016 before the Deputy Registrar was not caused by his lack of diligence. We hold this view because, as correctly observed by the Single Justice, despite Mr. Kamba's assertion in the affidavit in support of the application that he contacted Mr. Eliuther, the registry officer, seeking information on the status of the delivery of the reserved ruling, the same was not supported by the latter's affidavit. The averment therefore remained bare assertion. Moreover, Mr. Kamba's averment that he saw the affidavit of Mr. Salum in the Court's file showing an affirmation and endorsement that he did not find him at his office on 27/9/2016, was not substantiated by the respective person's affidavit as properly observed by the Single Justice. Fortunately, the Single Justice reproduced the relevant paragraphs of Mr. Kamba's affidavit and that of Mr. Ipyana Alinani Mboya on the issue. It is clear from those affidavits that apart from the respective averments, no affidavits of Mr. Eliuther and Mr. Salum were attached to

confirm what the deponents stated and verified to be from their own knowledge and information.

In the circumstances, we agree with the learned counsel for the respondent's that the Single Justice properly exercised her discretion to decline the applicant's application for extension of time based on the materials placed before her. Most importantly, the allegation of Mr. Kamba that after he perused the file he found the affidavit of Mr. Salum showing that "*Nimeenda ofisini kwa wakili sikumkuta mtu...*" remain to his personal knowledge as averred in his affidavit because Mr. Salum's affidavit was not shown to the Single Justice and the respondents.

We thus hold that the Single Justice evaluated the evidence on record properly before she reached the conclusion. In the result, we find that the first, second and third grounds of the Reference have no basis to convince us to interfere with the finding of the Single Judge on the issue of the reasons for the delay.

With regard to the issue of time limit in lodging the application for extension of time, we must state out rightly that our thorough reading of the ruling of the Single Justice has not led us to the conclusion which the applicant has suggested in the fourth ground of the Reference.

Apparently, there is nowhere in the ruling of the Single Justice in which she held that the law provides for the time limit for an application for extension of time. On the contrary, according to that ruling, reference to the decision of **Rulagatina CL v. The Advocates Committee and Clavery Mtindo Ngalapa** (supra) in support of the position that an application for extension of time has no time limit was made by Mr. Kamba for the applicant and Mr. Mwapongo for the first respondent during their submissions.

On the other hand, the Single Justice made reference to the **Rutagatina CL's** decision to support the position that an application under rule 10 of the Rules may be granted upon showing good cause. Gauging from the record of the application placed before us, we unreservedly note that there is nowhere in the ruling where the Single Justice held that an application for extension of time has time limit and applied that stance as a basis of denying extension of time to the applicant.

On the contrary, we note that the Single Justice was essentially concerned with the issue whether even if she had to agree with the reasons for the delay until when the applicant was supplied with ruling, the question would still have been whether he had accounted the period of

delay from that date, that is, 24th April,2017 to 9th May, 2017 when the application, the subject of the Reference, was lodged in Court. Specifically, the Single Justice stated that:

> *"Notwithstanding the aforesaid, even if I were to agree with Mr. Kamba that all the seven months from September, 2016 to April, 2017, the applicant had to sit back waiting to be served with the notice of the delivery of the Ruling which granted the applicant thirty (30) days within which to apply for the revision, the applicant has not accounted for each day of delay from 24th April, 2017 when he received a copy of the Ruling in question to 9th May, 2017 when the present application was filed. This detail is not in the affidavit accompanying the application.*
>
> *The settled position of law is that, where there has been a delay in doing any act in compliance with the requirement of the law, each day of the delay has to be accounted for. The law is also settled that; the dismissal of the application is the consequences befalling the applicant seeking an extension of time who fails to account for each day of delay..."*

The Single Justice then supported the stand by quoting what the Court stated in **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil

Application No. 3 of 2007 and made reference to other decisions in **Crispin Juma Mkude v. Republic,** Criminal Application No. 34 of 2012 and **Bariki Israel v. Republic,** Criminal Application No. 4 of 2011 (all unreported) and concluded:

> *"In the present case, the applicant has not accounted for the thirteen (13) days of delay after receiving the Ruling which earlier granted extension."*

In the circumstances, we must emphasize that the Court record cannot be impeached easily as it is taken to be authentic until the contrary is proved. For this stance, see our previous decisions in **Iddy Salum @ Fredy v. Republic,** Criminal Appeal 192 of 2018 (unreported), **Haldan Sudi** v. **Abieza Chichil** [1998] TLR 527 cited in **Ex-D.8656 CPL Senga Idd Nyembo & 7 Others v. Republic,** Criminal Appeal No. 16 of 2018 (unreported).

Ultimately, we are settled that in the present application, the applicant has not managed to impeach the authenticity of what is contained in the record of Civil Application No.210/01 of 2017, the subject of the present application.

In the event, we agree with the respondents' counsel that the complaint in the fourth ground is baseless.

Regarding Mr. Kamba's complaint of the alleged illegality of the impugned decision of the High Court, we are of the firm view that this point should not have been raised before us in the first place. As properly argued by the respondents' counsel, the applicant was supposed to raise it in the notice of motion and the affidavit in support of the application submitted before the Single Justice. Unfortunately, according to the record, there is nothing with regard to the issue of the alleged illegality which was placed for the attention and determination by the Single Justice. As a result, no argument from the parties were made for and against and thus, no decision was made by the Single Justice.

We must emphasise that in an Application for Reference, the Court is not mandated to entertain any newly introduced facts or evidence. To do so is to go against the settled position of the law. In the circumstances, we respectfully hold that, though the decision of the Court in **The Principal Secretary Ministry of Defence and National Service** (supra) is an authority in considering the issue of illegality, we are afraid that it is not applicable in the circumstances of the application at hand.

At this juncture, we find it pertinent to reiterate what the Court stated in **G. A. B. Swale v. Tanzania Zambia Railway Authority,** Civil Reference No. 05 of 2011 (unreported) on the guiding principles on which

the decision of the Single Justice can be upset upon application for Reference under rule 62(1)(b) of the Rules:

(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 the 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)."*

In the result, considering the foregoing deliberation with regard to the determination of the grounds of the reference, we decline an invitation by

the applicant to interfere with the Single Justice's exercise of the discretion because he has not demonstrated the existence of good reasons to do so. Consequently, we dismiss the Application for Reference with costs.

DATED at **DAR ES SALAAM** this 16th day of September, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The ruling delivered this 22nd day of September, 2022 in the presence of the applicant in person and Mr. Mashiku Sabasaba holding brief for Mr. Godwin Musa, learned counsel for the 1st Respondent and also appeared for the 2nd Respondent, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL