

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

(CORAM: JUMA, C.J., MKUYE, J.A. And KIHWELO, J.A.)

CIVIL REFERENCE NO. 1 OF 2020

HERI MICROFINANCE LIMITED 1st APPLICANT

CASSIANO LUCAS KAEGELE 2nd APPLICANT

VERSUS

CRDB BANK PLCRESPONDENT

(Application for Reference from the decision of a single Justice)

(Mwambegele, J.A.)

dated the 19th day of November, 2019

in

Civil Application No. 194/9 OF 2019

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RULING OF THE COURT

22nd & 24th February, 2022

KIHWELO, J.A.:

The controversy in this matter is in respect of the decision which was delivered by a Single Justice of the Court (Mwambegele, J.A.) in Civil Application No. 194/9 of 2019 sitting at Mbeya and pronounced on 3rd December, 2019. The sequence of events leading to the instant application can be summarized from the record as follows. The respondent herein is a judgment debtor in Land Case No. 10 of 2015 decided by the High Court of Tanzania at Sumbawanga for the decretal sum of Tanzanian Shillings Two

Billion (Tshs. 2,000,000,000/=) only plus 8% interest thereon from the date of judgment to the date of payment in full. The judgment was rendered on 08.10.2017. Unhappy, the respondent timely lodged a notice of appeal on 12.09.2017 and requested a certified copy of the proceedings thereof. The respondent also filed Miscellaneous Land Application No. 13 of 2017 for leave to appeal to the Court which was granted by the High Court (Mambi, J.) on 30.11.2017.

The respondent did not lodge the appeal timely for the reasons that the documents applied for appeal purposes were not timely availed and the certificate of delay issued by the Deputy Registrar of the High Court was defective. The learned single Justice upon hearing of the application which was gallantly resisted by the applicants found it to be meritorious and proceeded to grant. Consequently, the respondent was given sixty (60) days reckoned from the date of the delivery of the ruling to institute her intended appeal to the Court.

The applicants got wind of that decision and the attendant orders. They were disgruntled. So, on 10.12.2019 through the services of Mr. Budodi Advocates Zonal Law Chambers, lodged a reference letter to the Registrar of the Court. The application is by way of a letter taken out under rule 62 (1) (b)

of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) seeking to vary and reverse the decision of a single Justice upon the following grounds:

- (i) That the single Justice of Appeal having found that the respondents did not apply for proceedings in Land Case No. 10 of 2015 but the same were applied in Civil Case No. 10 of 2015 and Land Case No. 10 of 2017 erred in law by ruling that the omission were merely typing error of no effect and could be glossed over.*
- (ii) That the single Justice of Appeal erred in law to rule that the Certificate of delay issued by the Deputy Registrar was invalid.*
- (iii) That the single Justice of Appeal erred in law to rule that there was no proof that the respondents were served with the letter notifying them that the documents for appeal purposes were ready for collection.*
- (iv) That the single Justice of Appeal erred to rule that the respondents did not collect the documents for appeal purposes on 18/11/2018 despite the abundant evidence in record.*
- (v) That the single Justice of Appeal erred in law to reconsider applicant's written submissions having ruled out that the same were filed out of time and without leave of the Court.*

But before the application could proceed to hearing in earnest, and as a rule of practice, the Court had to contend with the preliminary point of objection, notice of which had earlier been lodged by the respondent, under

rule 107 (1), (2) and (3) of the Rules. The notice of preliminary of objection was to the effect that:

"The application for reference is incompetent for want of a complete record of proceedings in Civil Application No. 194/09 of 2019."

At the hearing of the preliminary point of objection, Mr. George Mushumba, learned counsel assisted by Mr. Mathias Budodi and Mr. Roman Lamwai both learned counsel, appeared for the applicants and Mr. Zacharia Daudi, learned counsel, appeared for the respondent.

Arguing the preliminary point of objection, Mr. Daudi, elaborated that an application for reference from the decision of a single Justice may be moved in two ways, informally when the impugned decision is pronounced or formally in writing to the Registrar. Mr. Daudi, went on to contend that, however the Rules do not provide the manner upon which an application for reference has to be made in writing to the Registrar. He further argued that, the applicants in the instant application have merely lodged a letter which clearly indicates their grounds for preferring the reference before the Court but he was of the strong opinion that, these by themselves cannot enable the Court to appreciate the matter before hand and make an informed decision in particular as to whether the learned single Justice was right or wrong. Illustrating further, he

argued that it was incumbent upon the applicants to lodge along with the letter, the necessary documents and in this case the notice of motion, affidavit in support of the notice of motion and the respondent's affidavit in reply both in Civil Application No. 194/09 of 2019, the parties rival written submissions as well as the parties list of authorities which they relied in arguing for and against the application.

Mr. Daudi, went further to submit that, in the absence of the above listed documents, it will be impracticable for the Court to arrive at a fair decision and bearing in mind that rule 62 (2) of the Rules do not allow any additional evidence at the hearing of the application for reference like the one at hand. In his considered opinion, Mr. Daudi, contended that, apart from the impugned ruling, the applicants were duty bound to lodge other relevant documents. He rounded up by arguing that it is a practice of this Court that whenever, a party seeks to move the Court, he or she is duty bound to supply all necessary documents for moving the Court. To facilitate the appreciation of the proposition put forward by the learned counsel, he referred us to page 3 of the typed decision in **VIP Engineering and Marketing Ltd v. Mechmar Corporation (Malaysia) Berhad of Malaysia**, Civil Application No. 163 of 2004, page 10 of the typed decision in **Tanzania Telecommunications Co. Ltd v. Alfred Anasa Shara**, Civil Application No. 226 of 2013 and page 10 of

the typed decision in **Britania Biscuits Limited v. National Bank of Commerce Limited and Another**, Civil Application No. 195 of 2012 (all unreported) which reaffirmed the long settled practice requiring a party who seeks to move the court in revision to attach, in the notice of motion, a copy of the proceedings as well as the decision or order sought to be revised. He therefore implored us by parity of reasoning that we should find the practice obtained in revision to be equally applicable to application for reference like the application before us. Illustrating further, he argued that the grounds for reference listed by the applicants in the letter of reference touches upon a number of key documents which ought to have been attached. Finally, Mr. Daudi, argued that failure by the applicants to attach key documents must be visited by severe consequences; including the striking out of the application

In response, Mr. Mushumba prefaced his submission by arguing that the preliminary objection has no merit as such should be dismissed. He further argued that, the applicants are challenging the decision of a single Justice and in terms of rule 62(1) of the Rules the application may be made informally by the aggrieved party or merely by lodging a complaint to the Registrar in a form of a letter and therefore the issue of attaching documents do not arise. Elaborating, he contended that the logic behind rule 62(1) of the Rules is that, since the application is made before the Registrar then it is expected that the

Registrar will transmit the record to the Court for determination and that is why a party who seeks to move the Court for reference has to do so within seven (7) days after the delivery of the impugned decision unlike in revision where the application has to be lodged within sixty (60) days from the date of the decision sought to be revised. Mr. Mushumba, finally contended that all the authorities cited by Mr. Daudi were distinguishable in that they all relate to application for revision whose procedure is very formal and the time set for lodging is lengthy than the application for reference. Mr. Mushumba, submitted that the preliminary objection is totally misplaced and misconceived and therefore, should be dismissed with costs.

In rejoinder submission, Mr. Daudi reiterated his earlier submission and upon being prompted by the Court he contended that, rule 62 of the Rules is silent on whether the Registrar will place the record before the Court and submitted further that, it is the practice of the Court to ensure that all those who seek to move the Court submit all relevant documents.

From the contending submissions of the learned trained minds, we are decidedly of the considered opinion that, the issue for determination is narrow, and that is whether the preliminary objection is meritorious. Our starting point, we think, for the better understanding of the procedure for initiating an

application for reference, it is desirable to reproduce the provisions of rule 62 of the Rules. It reads:

*"62.- (1) Where any person is dissatisfied with the decision of a single Justice exercising the powers conferred by Article 123 of the Constitution, **he may apply informally to the Justice at the time when the decision is given or by-writing, to the Registrar within seven days after the decision of the Justice-***

(a) N/A

(b) in any civil matter, to have any order, direction or decision of a single Justice varied, discharged or reversed by the Court.

(2) At the hearing by the Court of an application previously decided by a single Justice, no additional evidence shall be adduced except with the leave of the Court." [Emphasis added]

Clearly, the gist of the above quoted provision of rule 62 of the Rules is that, it specifically provides in no uncertain terms the manner and time frame for lodging application for reference from the decision of a single Justice. That is to say, an application can be made informally before a single Justice or formally to the Registrar by writing within seven days. We think, with respect,

the above provision is categorically clear and unambiguous on what is expected from anyone seeking to move the Court by way of reference.

We hasten to state that in this application Mr. Daudi, sought to invite us to interpret that a party who seeks to move the Court in reference is duty bound to attach necessary documents as is the case for an application for revision. However, we wish to state that, this argument though attractive, we don't buy it for the reason that application for reference and application for revision are two distinct species. While the procedure for institution of revision is very formal as detailed under Part IIIA rule 65 of the Rules, the procedure for reference is very simple as rightly argued by Mr. Mushumba and this is evident under rule 62 of the Rules which allows the applicant to apply informally or just write to the Registrar. There is no need for formal application in the form of a notice of motion as provided in the application for revision under rule 65(1) of the Rules. It is under those circumstances we are inclined to agree with Mr. Mushumba that, the logic behind providing for seven (7) days within which to write to the Registrar and also allowing informal application to a single Justice was to simplify the process and therefore any applicant seeking to move the Court by way of reference is not required to attach any document(s) unlike in application for revision. The applicants cannot be condemned therefore for lodging the letter to the Registrar without attaching

any supporting document(s) as that is in line with letter and spirit of rule 62 of the Rules.

Expressed modestly, we would say that the preliminary objection is most flimsy and the respondent seems to have raised it largely by way of fishing expedition. Consequently, we find that this objection is devoid of merit and we dismiss it with costs. We direct that the application for reference now be fixed for hearing on merit.

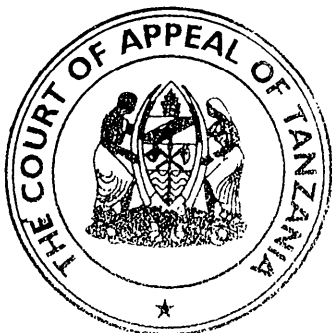
DATED at MBEYA this 24th day of February, 2022.


I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 24th day of February, 2022 in the presence of Mr. Gerald Msegeya, learned advocate holding brief for Mr. George Mushumba, Mr. Mathias Budodi and Mr. Roman Lamwai all learned advocate for the applicants also holding brief for Mr. Zacharia Daudi, learned advocate for the respondent, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL