**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: NDIKA, J.A., KITUSI, J.A. And MASHAKA, J.A.)**

**CIVIL REFERENCE NO. 13 OF 2019**

**CHARLES RICHARD KOMBE ..... APPLICANT**

**VERSUS**

**KINONDONI MUNICIPAL COUNCIL ..... RESPONDENT**

**(Application for reference from the Ruling and Orders of the Court of Appeal of Tanzania at Dar es Salaam)**

**(Kerefu, J.A.)**

**dated the 16th day of May, 2019**
**in**
**Civil Application No. 379/01 of 2018**

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## RULING OF THE COURT

13th & 23rd March, 2023

**KITUSI, J.A.:**

In terms of Rule 62 (1) (b) of the Court of Appeal Rules, 2009, (the Rules), the applicant has referred to us the decision in Civil Application No. 13 of 2019 by Kerefu J.A. sitting as a Single Justice, and invited us to reverse it. The learned Single Justice dismissed with costs the applicant's application for extension of time within which to apply for leave to appeal to the Court. There were mainly two reasons cited by the applicant namely that there was a delay in supplying him with the

documents necessary for making the intended application for leave; and secondly that there is an illegality in the decision intended to be appealed against such that by applying the settled principle in the case of **Principal Secretary Ministry of Defence and National Service v. Divram P Valambia** [1992] T.L.R. 387, extension of time ought to have been granted.

In dismissing the application, the learned single Justice was satisfied that the applicant had the requisite documents by 25th July 2018 but could not file the application for extension of time until 10th August, 2018, that is 16 days later. Taking cognizance of the settled law in many of our decisions such as in **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2002 (unreported), she concluded that the applicant had not accounted for each day of the delay.

As regards the alleged illegality, the learned single Justice took the view that the applicant's contention that the trial court failed to analyze and evaluate the evidence did not constitute an illegality and if anything, it would only be discovered upon a long-drawn argument.

Before us, Mr. Richard Madibi, learned counsel representing the applicant almost argued along the same path as previously argued by

Ms. Raya Nassir, learned advocate who appeared before the single Justice, insisting that there was a delay of 15 days and that the learned single Justice should not have taken that period to be inordinate. He cited a number of cases including **Benedicto Mumello v. Bank of Tanzania**, Civil Appeal No. 12 of 2002 and; **Isere Selly v. Serikali ya Kijiji Cha Chemchem**, Civil Application No. 18 of 2013 (both unreported) for the argument that delay in supplying necessary documents constitutes good cause. With respect, that is not actually the point for our determination here as it will be appreciated shortly later.

On the illegality, Mr. Madibi has maintained that as a Court of last call, we should expand instances of illegality beyond issues of limitation, jurisdiction and denial of right to be heard. When we do so, he argued, failure to evaluate the evidence has a potential of being added as a factor constituting illegality. However, Mr. Madibi had no authority for this rather novel suggestion.

Mr. Deodatus Nyoni, learned Principal State Attorney argued the respondent's case, appearing along with Mr. Daniel Nyakiha, learned State Attorney. Mr. Nyoni's brief submissions are that the single Justice's conclusion that the applicant did not account for each day of the delay

from 28/7/2018 to 10/8/2018 cannot be faulted. On the illegality, the learned Principal State Attorney submitted that failure to analyze evidence is not an illegality because it requires a long-drawn process to discover it.

It is our duty to note, and during the hearing we put this to the parties, that under rule 45 (b) of the Rules, the application before Kerefu, J.A. being in the nature of second bite, ought to have been made within 14 days of the refusal of the first application. When the parties have that position of the law in mind, they will appreciate that the period of the delay which the applicant owes us explanation on, begins much earlier than 28th July, 2018. It begins on 10th May, 2018 when the first application was refused by the High Court. It is not therefore correct to argue, as did Mr. Madibi in his written submissions, that:-

> *"It will be noted that from 25th July, 2018 to 10th August, 2018 is 16 days. If time would have been counted from the 25th July, 2018 to 10th August, 2018 discounting the 25th July, 2018 day in terms of Rule 8 of the Court of Appeal Rules GN 368 of 2009, the delay is only one day, as the application in the Court of Appeal should have*

*been filed on 9th August, 2018, which is the 14th day and last day for lodging the application in terms of Rule 45 of the Court of Appeal Rules."*

The above contention is, sadly, misconceived and unacceptable for under rule 45 (b) of the Rules the date of reckoning was 10th May, 2018 when Mutungi J. rejected the first application for leave. Granted, the applicant accounted for the delay from 10th May, 2018 to 25th July, 2018 when the necessary documents had not been supplied to him, but that does not justify his arguing that time started to run from that date i.e 25th July, 2018.

In digression if the applicant believed that the time started to run from 25th July, 2018, we wonder why he resorted to rule 10 of the Rules to apply for extension of time instead of invoking the proviso to rule 45 (b) of the Rules which entitles such an applicant to a certificate of delay. But having stated that the period started to run from 10th May, 2018 and that by 25th July, 2018 the applicant had the requisite documents, he needed to account for the 16 days from that date to 10th August, 2018 when he filed the application before the single Justice.

In conclusion, there is no way the learned single Justice can be faulted for holding, within her discretion, that 16 days was too long a

period to be ignored. Therefore, we have neither the intention nor reasons for reversing that decision because there are authorities for the principle that in an application for reference as the instant, the Court is preoccupied with considering three main factors, one of which is whether the single Justice may be faulted for the exercise of discretion. See the case of **Praygod Mbaga v. The Government of Kenya Criminal Investigation Department, and Another,** Civil Reference No. 4 of 2019 (unreported).

Therefore, as we observed earlier the question is not whether delay in supplying necessary documents to the applicant is good cause or not because we know it is, but whether the delay of 16 days after obtaining those documents was accounted for or not and whether the learned single Justice properly exercised her discretion in determining that issue.

For the reasons we have shown we dismiss the first ground of reference because the learned single Justice properly exercised her discretion and learned counsel for the applicant has not placed material for us to determine otherwise.

We now turn to the second ground alleging that there was illegality in the decision intended to be impugned, should extension of time be granted. It is settled law that not any error on a point of law constitutes an illegality. See the case of **Lyamuya Construction Limited v. Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) and others. In this case we go along with Mr. Nyoni that no instance of illegality has been cited. In our view having argued so, the learned Principal State Attorney should not have gone further to argue that it requires a long-drawn argument to discover it. No amount of argument, we think, would lead to discovery of a non-existent illegality.

The term illegality as defined in Black's Law Dictionary 11th Edition, Page 815, means:

> *"1. An act that is not authorized by law*
>
> *2. The state of not being legally authorized."*

The above definition is consistent with Mulla's Code of Civil Procedure where the learned authors write at page 1381 that:-

> *"It is settled law that where a court has jurisdiction to determine a question and it determines that question, it cannot be said that it*

*has acted illegally or with material irregularity, merely because it has come to an erroneous decision on a question of fact or even of law."*

From the above definitions, it is our conclusion that for a decision to be attacked on ground of illegality, one has to successfully argue that the court acted illegally for want of jurisdiction, or for denial of right to be heard or that the matter was time barred. In **Chunila Dahyabhai v. Dharamshi Nanji and Others,** AIR 1969 Guj 213 (1969) GLR 734, which we find persuasive, the following paragraph was quoted from the decision of the Supreme Court of India in AIR 1953 SC 23:-

*"...the words 'illegally' and 'material irregularity' do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not errors of either law or fact after the formalities which the law prescribes have been complied with".*

The court went on to state that: *"It is clear from these observations that a mere error of law in the exercise of jurisdiction is not enough".* In view of what we have demonstrated, we are of the opinion that Mr. Madibi's

suggestion that we should treat the alleged failure to evaluate evidence as constituting illegality is far off the mark and we dismiss it. In any event it is a new argument which was not placed before the single Justice therefore it does not qualify as a ground of reference.

Consequently, we dismiss the application with costs for want of merit.

**DATED** at **DAR ES SALAAM** this 22nd day of March, 2023.

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

I. P. KITUSI
**JUSTICE OF APPEAL**

L. L. MASHAKA
**JUSTICE OF APPEAL**

The Ruling delivered this 23rd day of March, 2023 in the presence of Mr. Bahati Makamba, learned counsel for the Applicant and Mr. Daniel Nyakiha, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.


R. W. CHAUNGU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**