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. 26 OF 2019

PHARES PARTSON MATONYA (As the Administrator of the Estate of the late **PARTSON MATONYA)** ..... **APPLICANT**

VERSUS

1. **REGISTRAR, INDUSTRIAL COURT OF TANZANIA**
2. **TANZANIA RAILWAY CORPORATION**
3. **ATTORNEY GENERAL**

..... **RESPONDENTS**

(Application for reference from the ruling of the Court of Appeal of Tanzania at Dar es Salaam)

(Mkuye, J.A.)

dated the 6th day of August, 2019
in
Civil Application No. 84 of 2019
.....

RULING OF THE COURT

14th & 29th March, 2023

NDIKA, J.A.:

On 6th August, 2019, a single Justice of the Court (Mkuye, J.A.) dismissed the applicant's pursuit in Civil Application No. 84 of 2019 for extension of time in which to institute an appeal. By this reference made under rule 62 (1) (b) of the Tanzania Court of Appeal Rules ("the Rules"), the applicant seeks the reversal of that decision on the ground that the single Justice erred in holding that he failed to show *"a good cause for the delay to warrant"* the extension of time prayed for.

It is vital that we narrate the essential facts of the matter at the outset. They are as follows: Partson Matonya, into whose shoes Phares Partson Matonya stepped as the administrator of his estate, applied to the High Court of Tanzania at Dar es Salaam vide Miscellaneous Civil Cause No. 41 of 2005 for leave to apply for orders of certiorari and mandamus against the decision of the Industrial Court of Tanzania in terms of section 27 (1C) of the Industrial Court of Tanzania Act, Cap. 60. Following the dismissal of that matter on 30th June, 2006, Mr. Matonya appealed to this Court through Civil Appeal No. 60 of 2007, but it was struck out on 17th July, 2018 for being incompetent. Undeterred, he returned to the High Court seeking extension of time vide Civil Application No. 53 of 2018 to lodge a notice of appeal, which was granted on 14th November, 2018. On 26th November, 2018, he duly lodged the notice of appeal as well as a letter requesting for a copy of proceedings from the High Court.

On 18th December, 2018, Mr. Matonya was supplied with a copy of the proceedings and on 11th January, 2019 he applied to the High Court for a certificate of delay. Although he was supplied with a certificate of delay on 13th March, 2019, he could not institute his intended appeal upon that certificate because it excluded from computation the period from 26th November, 2018 to 18th December, 2018 when he was supplied with the

requested documents. It means that by the time he received the certificate on 13th March, 2019 the sixty days limitation period had already expired. On that basis, he lodged Civil Application No. 84 of 2019 seeking extension of time to institute his intended appeal. He swore an affidavit in support of the application, which was also flanked by an affidavit deposed by his younger brother, Anthony Mlugu. Resisting the application, the respondents had Ms. Alice Mtulo, learned State Attorney, file an affidavit in reply.

Having examined the notice of motion and affidavits on record in the light of the contending submissions of the parties, the learned single Justice reasoned as follows:

> *"The applicant was granted extension of time of 14 days within which to file a notice of appeal and the said notice of appeal was filed on 26/11/2018. Since rule 90 (1) of the Rules required him to lodge the memorandum of appeal within 60 days from when the notice of appeal was filed, that period was to expire on 26/1/2019. The record shows that on 18/12/2018, the applicant was furnished with copies of the proceedings in relation to Misc. Civil Application No. 53 of 2018 which extended time to file the notice of appeal. However, he lodged a letter requesting for a certificate of delay for [the] period between 11/7/2006 and 16/12/2018 which were, in my considered, view not required. This is so because of the dictates of the proviso to rule 90 (1) of the Rules which provides for exclusion of the time to be certified*

by the Registrar of the High Court as having been required for the preparation and delivery of the copies of proceedings, judgment and decree appealed against. This means that, as the requisite documents were already supplied to him since 18/12/2018, the applicant was not required to seek those documents."

In the premises, the learned Justice concluded that the first ground for the application offers no justification for extension of time.

Then, the learned Justice turned to the second ground, that the impugned decision of the High Court was tainted with an illegality warranting extension of time sought in consonance with the decisions of the Court, notably, **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 185; and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). To be certain, the alleged illegality was that the matter before the High Court was wrongly heard and determined by a single judge instead of a panel of three judges. The learned Justice dismissed that contention, reasoning as follows:

"On my part, I agree with Ms. Mtulo that the single judge correctly entertained the matter since it was still at the

preliminary stage of seeking leave to file an application for certiorari and mandamus leveled against the revision decision of the Industrial Court of Tanzania. Had the matter reached that stage (the application for judicial review), it would have [been] heard and determined by the full bench of the High Court in accordance with the provisions of section 28 (4) of the Industrial Court of Tanzania Act. In the circumstances, I find that the applicant has not shown any illegality in his claim to convince the Court to extend the time."

Before us, Phares Partson Matonya, the administrator of the estate of the late Partson Matonya, appeared to prosecute the reference. Pursuant to rule 57 (3) of the Rules, we joined him in the proceedings in the place of the deceased who died on 30th November, 2019. Ms. Vivian Method, learned Senior State Attorney, conducted the matter for the respondents, strongly resisting it.

The thrust of the applicant's argument was that he always took steps in pursuit of justice without any delay but that in the present case the delay was caused by the High Court, which supplied him with the required documents after the applicable limitation period had expired. He also maintained that the single judge of the High Court had no jurisdiction to determine the application, meaning that the said judge's decision intended to be appealed from was illegal.

On her part, Ms. Method started off by referring to the principles governing applications of this nature as summarized in **Praygod Mbaga v. the Government of Kenya Criminal Investigation Department and Another**, Civil Reference No. 04 of 2019 (unreported). Citing **Blue Pearl Hotel & Apartments v. Ubungo Plaza Limited**, Civil Appeal No. 78 of 2017 (unreported), she supported the learned Justice's view that the applicant was not entitled to any exemption of time under rule 90 (1) of the Rules and urged us to hold that the intended appeal ought to have been lodged by 26th January, 2019, which was the sixtieth day after the notice of appeal was lodged on 26th November, 2018.

As regards the allegation of illegality, the learned Senior State Attorney also supported the learned Justice's conclusion, contending that the Justice properly held that the learned single judge of the High Court had jurisdiction to determine the matter and that in exercise of such power he properly heard the matter and dismissed it for want of merit. Elaborating, she argued that at that stage the matter was whether leave to apply for judicial review should be granted and thus a single judge had to deal with the issue and determine it. She drew inspiration from rule 5 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, Government Notice No. 324 of 2014 ("the Judicial Review Procedure Rules"),

which crystallised the position of the law that existed at the time the single judge heard and determined the application. Indeed, the said rules were made under section 19 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 to govern the hearing and determination of applications for prerogative orders. The learned Senior State Attorney made further reference to **Emma Bayo v. The Minister for Labour and Youths Development & Two Others**, Civil Appeal No. 79 of 2012 (unreported) on the essence and rationale of the stage of application for the leave prior to filing the substantive application.

We have examined the material on record and considered the submissions for and against the reference. It is settled that extension of time under rule 10 of the Rules is a matter of discretion on the part of the Court, exercisable judiciously and flexibly by considering the relevant facts of the case. Undoubtedly, it has not been possible to lay down an invariable definition of good cause to guide the exercise of the Court's discretion. Nevertheless, the Court has consistently looked at a myriad of factors such as the length of the delay involved; the reasons for the delay; the degree of prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the

interest of a party who has a constitutionally underpinned right of appeal; whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged: see, for instance, **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001; **Eliya Anderson v. Republic**, Criminal Application No. 2 of 2013; and **William Ndingu @ Ngoso v. Republic**, Criminal Appeal No. 3 of 2014 (all unreported). See also **Devram Valambhia** (*supra*); and **Lyamuya Construction Company Limited** (*supra*).

We have consistently observed that since the grant of extension of time is discretionary, this Court would normally refrain from interfering with the exercise by a single Justice of the Court of his discretion under rule 10 of the Rules. In **Amada Batenga v. Francis Kataya**, Civil Reference No. 1 of 2006 (unreported), the Court, having revisited its previous decisions on reference, summarized the principles upon which a decision of a single Judge can be examined on a reference as follows:

> *"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."

In a subsequent decision in **G.A.B Swale v. Tanzania Zambia Railway Authority,** Civil Reference No. 5 of 2011 (unreported), the Court reaffirmed the applicable principles thus:

*"(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 VS YONA HAMIS MVUTAH**, Civil Reference No. 1 of 2001 (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 facts 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 VS 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*** *[1968] EA 93."*

Perhaps, we should stress the above position by extracting a passage from **Mbogo and Another v. Shah** [1968] EA 93, at page 94, a decision of the erstwhile Court of Appeal for East Africa cited and applied in numerous decisions of the Court including **G.A.B. Swale** (*supra*):

> *"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that the decision* ***is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong decision.****"*[Emphasis added]

Without doubt, the principle in the above passage would be equally applicable to the exercise of discretion by a single Justice of this Court.

In the present case, it is common ground that the applicant initially challenged the decision of the High Court dated 30th June, 2006 by lodging Civil Appeal No. 60 of 2007, which was struck out on 17th July, 2018 for being incompetent. He restarted the pursuit by successfully applying to the High Court for extension of time to lodge a notice of appeal, which he duly lodged on 26th November, 2018. As rightly argued by Ms. Method, the appellant's

intended appeal had to be filed, in terms of rule 90 (1) of the Rules, within sixty days of the filing of the notice of appeal. Yet, by the time the sixtieth day (that is, 25th January, 2019) passed no appeal had been filed.

The applicant's explanation that he was waiting for a certificate of delay was correctly rejected by the learned single Justice. First and foremost, he was not entitled to any exemption under rule 90 (1) of the Rules because, as an intending appellant who had restarted the appeal process after his initial appeal had collapsed, he certainly could not have complied with the precondition for the exemption under rule 90 (1) of the Rules to submit a letter to the Registrar for a copy of proceedings within thirty days of the impugned decision – see **Blue Pearl Hotel & Apartments** (*supra*). The impugned decision having been rendered on 30th June, 2006, it means that the thirty days period expired on or about 30th July, 2006.

Secondly, we recall that the applicant pressed the Registrar of the High Court for a certificate of delay for the period between 11th July, 2006 on which he previously applied for a copy of proceedings and 16th December, 2018. The learned Justice was correct in her view that he did not need any certificate for that period. Having restarted his appeal process by lodging a fresh notice of appeal on 26th November, 2018 the sixty days limitation

period had to be reckoned from that date. What happened before then was irrelevant.

Finally, it is on record that the applicant was supplied with all necessary documents by 18th December, 2018, which was thirty-seven days before the limitation period for instituting the intended appeal expired. Like the learned Justice, we wonder why he still did not lodge the appeal. The claim that he waited for a certificate of delay is misconceived and unacceptable. Of course, the delay might have been caused by his lack of grip with the procedure of the Court, but no such argument was advanced before the learned Justice.

We appreciate that a claim of illegality of the decision intended to be challenged may be a good cause for extension of time but such contention in the present matter is plainly devoid of merit. Ms. Method is correct that the single judge of the High Court had jurisdiction to hear and determine the matter at the preliminary stage. That position applied, at the material time, in terms of the practice of the High Court in consonance with sections 18 and 19 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 since no applicable rules of procedure had been prescribed under section 19 (1) of Cap. 310. We agree with the learned Senior State

Attorney that rule 5 of the Judicial Review Procedure Rules has crystallised the practice that applied previously.

The applicant's insistence that the application for leave had to be heard and determined by a panel of three judges of the High Court at that preliminary stage is a clear misconception of the provisions of section 27 (1C) of the Industrial Court of Tanzania Act, Cap. 60 under which only a full bench of the High Court had power to conduct a judicial review of an award or decision of the Industrial Court. The said provision stipulated thus:

> *"(1C) Subject to the provisions of this section, every award and decision of the Court shall be final and not liable to be challenged, reviewed, questioned or called in question in any court save on the grounds of lack of jurisdiction in which case the matter shall be heard and determined by a full bench of the High Court."*

In our view, while the above provision vested in a full bench of the High Court the power to conduct a judicial review of an award or decision of the Industrial Court, it did not waive or derogate from the requirement of leave to apply for judicial review in accordance with the procedure under Cap. 310, which was competently considered by the single Judge.

Furthermore, we are satisfied that the learned judge of the High Court rightly dismissed the matter, having heard, and determined it on the merits.

The applicant's further claim, that the said judge ought to have, instead, struck out the matter, is equally flawed – see **Ngoni Matengo Cooperative Marketing Union Ltd. v. Alimahomed Osman** [1959] EA 577.

In the final analysis, we find no basis to interfere with the learned single Justice's exercise of discretion in the matter. Consequently, we dismiss the reference, but make no order as to costs considering that this matter originated from a labour dispute.

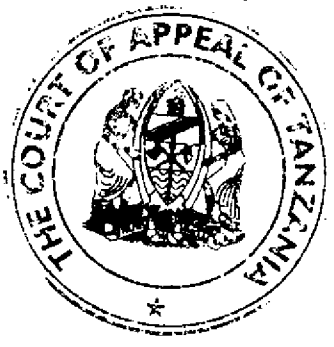
DATED at **DAR ES SALAAM** this 22nd day of March, 2023

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 29th day of March, 2023 in the presence of Mr. Phares Patson Matonya via video conference and 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