

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: KOROSSO, J.A., FIKIRINI, J.A., And MAKUNGU, J.A.)**

**CIVIL REFERENCE NO. 5 OF 2021**

**SWAHIBA IBRAHIM SHAHA ..... APPLICANT**

**VERSUS**

**THE REGISTERED TRUSTEES MASJID QUIBLATAIN..... RESPONDENT**

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

**(Galeba, J.A)**

**Dated the 23<sup>rd</sup> day of March, 2021**

**in**

**Civil Application No. 445/01 of 2019**

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**RULING OF THE COURT**

*31<sup>st</sup> May & 15<sup>th</sup> June, 2023*

**MAKUNGU, J.A.:**

This is an application for reference that is predicated under Rule 62 of the Tanzania Court of Appeal Rules, 2009 (the Rules) in which the applicant seeks this Court to vary and reverse the decision of the Single Justice in Civil Application No. 445/01 of 2019 which denied the prayer for extension of time within which the applicant could lodge a notice of appeal. This was the second bite application after the first applicant's application for extension of time (Misc. Civil Application No. 592 of 2018) was refused by the High Court (Munisi,J) on 1<sup>st</sup> August, 2019. The notice of motion is supported by an

affidavit deposed by Novatus Michael Muhangwa, the applicant's advocate.

This application is opposed by the respondent through her affidavit in reply.

The grounds for this application are that:

- 1) The learned Single Justice of the Court erred in law and facts when he ruled that Civil Application No. 445/01 of 2019 which was filed before this Court on 15<sup>th</sup> October, 2019 was filed out of time.*
- 2) The learned Single Justice of the Court erred in law and facts for failure to rule that the fourteen (14) days required by Rule 45A (1) within which to file an application for extension of time within which to file a notice of appeal by way of second bite reckoned from 30<sup>th</sup> September, 2019 when the applicant was notified that the requested documents (Ruling, Proceedings and drawn order) were ready for collection following the applicant's letter dated 9<sup>th</sup> August, 2019 which was in conformity with Rule 45A (2) and (3) of the Court of Appeal Rules, 2009 as amended.*
- 3) The learned Single Justice of the Court erred in law for failure to observe that in computing the days within which to file an application for extension of time within which to file notice of appeal by way of second bite, time reckons from 30<sup>th</sup> September, 2019 when the applicant was notified that the requested documents were ready for collection and when the application was lodged on 15<sup>th</sup> October, 2019, it was filed well within time.*

When the application was called on for hearing, the applicant was represented by Mr. Novatus Michael Muhangwa, learned advocate; whereas the respondent enjoyed the services of Mr. Alexander Kyaruzi, learned advocate.

On being availed an opportunity to expound on the application, Mr. Muhangwa adopted the grounds in the notice of motion, and the supporting affidavit filed earlier on. After having done so, he contended that he subsequently learnt that 14<sup>th</sup> October, 2019 was a public holiday (Nyerere day), so he should not have conceded that the application had been filed out of 14 days required by law. He submitted therefore, that there was misapprehension of facts and law by the learned Single Justice when he ruled that Civil Application No. 445/01 of 2019 which was filed on 15<sup>th</sup> October, 2019 was filed out of time, thus incompetent. He referred us to two cases of **Athumani Amiri v. Hamza Amiri and Others**, Civil Application No. 133/02 of 2018 and **Philip Tilya v. Vedastina Bwogi**, Civil Application No. 546/01 of 2017 (both unreported).

He ultimately prayed to Court to grant the application and vary the decision of the Single Justice and order the hearing of the said application before another Single Justice.

In reply, Mr. Kyaruzi strongly opposed the application submitting that the applicant's learned advocate conceded before the Court that the application was filed out of time. It was his argument that the applicant has failed to account for 16 days of the delay as observed by the Single Justice. He further stated that the argument of the applicant's advocate that 14<sup>th</sup> October, 2019 was a public holiday is an afterthought. The applicant did not place that information before the Single Justice to draw his attention. He added that even if that day was excluded, the application is still out of time, therefore the decision of the Single Justice is to remain.

Based on the above submissions, Mr. Kyaruzi prayed that this application should be dismissed with costs.

In his brief rejoinder, Mr. Muhangwa argued that once the formal application for the copies of ruling, drawn order and proceedings is made in time to the Deputy Registrar time ceased to run and will be revived from the date indicated in the certificate of delay. In our case, he said, the certificate of delay excluded the time up to 30<sup>th</sup> September, 2019 up to the date of filing the application which is 15<sup>th</sup> October, 2019 with the exclusion of one (1) day of 14<sup>th</sup> October, 2019 which was the public holiday. He maintained that the second bite application was timely filed.

We have examined the material brought before us and considered the rival submissions by the parties and we think, the issue for our determination is whether the second bite application before the Court was timely filed.

We wish to take off by re-restating the principles which govern applications for reference which are that; **one**, the Court looks at the facts and submissions the basis of which the Single Justice made the decision; **two**, no new facts or evidence would be given by any party without the prior leave of the Court; and **three**, the Single Justice's discretion is wide, unfettered and flexible, that it can only be interfered with if there is a misinterpretation of the law. In the case of **Philip Chumbuka v. Masudi Ally Kasele**, Civil Reference No. 14 of 2005 (unreported), the Court stated as follows:

*"It is an accepted principle that in reference, the full Court considers what was presented and argued before the Single Justice and see whether the learned judge was right or wrong. The full Court will not interfere with the decision of the Single Justice on the basis of fresh facts or submissions which were not available to the Single Justice".*

[See also **Amada Batenga v. Francis Kataya**, Civil Reference No. 1 of 2006 and **C.A.B. Swale v. Tanzania Zambia Railway Authority**, Civil Reference No. 5 of 2011 (both unreported)].

On top of that, it is trite law that extension of time may be granted by the Court in exercise of its discretion which is to be exercised judicially. This is as per Rule 10 of the Rules.

In this case, the Single Justice in finding that the applicant had failed to account for each day of delay stated as follows:

*“That is to say, the number of days to be excluded by the certificate do not go up to the date the certificate is issued. In this matter, the seventy-six (76) days delayed, only 60 days has explanation; the first eight (8) days, (from 01.08.2019 to 08.08.2019) the applicant was still within the 14 days permitted by statute. The other period allowable is the fifty – two (52) days excluded by the certificate of delay. That leaves sixteen (16) days without explanation”.*

The record shows that the first application for extending time to allow the applicant to lodge the notice of appeal was filed before the High Court and on 1<sup>st</sup> August, 2019, the High Court dismissed it. Timely, on 9<sup>th</sup> August, 2019 the copies of ruling, drawn order and proceedings were requested.

Acting on that request, the Deputy Registrar on 30<sup>th</sup> September, 2019 notified the applicant on the readiness of the documents. On 4<sup>th</sup> October, 2019 the certificate of delay was issued to the applicant which excluded a total of 52 days from the date when the documents were requested on 9<sup>th</sup> August, 2019 to 30<sup>th</sup> September, 2019 when the applicant was notified to collect the documents.

The applicant was thus required to apply for extension of time before the Court as the second bite within 14 days as per Rule 45A (1) (c) of the Rules. Despite that limitation the law goes further to give direction on the computation of that time under the provision of Rule 45 A (2) which provides:

*"45A. (2) In computing the time within which to lodge an application under this rule, there shall be excluded such time as may be certified by the Registrar of the High Court as having been required for preparation of a copy of the decision and the order".*

In the spirit of the above provision, it is our understanding that once the formal application for the copies of ruling, drawn order and proceedings is made to the Deputy Registrar time ceased to run and will be revived from the date indicated in the certificate of delay. We are of the considered view that since the issued certificate of delay excluded the time up to 30<sup>th</sup>

September, 2019 thus fourteen (14) days ought to have been computed from 30<sup>th</sup> September, 2019 up to the date of filing the application on 15<sup>th</sup> October, 2019 with the exclusion of one (1) day the 14<sup>th</sup> October, 2019 which was a public holiday (Nyerere day). Counting on those date it is clear that the second bite application was timely filed.

It is true as submitted by Mr. Kyaruzi that the applicant has not placed before the Single Justice that information of holiday on which to decide the issue. However, section 59 (1) (g) of the Evidence Act [Cap. 6 R.E. 2019] stipulates:

“59 (1) (g) A court shall take judicial notice of the following facts:

*(g) the division of time, the geographical divisions of the world, and public festivals, feasts and holidays notified in the Gazette.”*

That is the only basis for us to determine this application.

On the basis of the above information, which we take judicial notice of 14<sup>th</sup> October, 2019 was a public holiday and that the applicant could not have lodged the application on that date. Since this aspect of holiday escaped the attention of the learned Single Justice, it is therefore, our



conclusion that it was an apparent error to strike out the application for being filed out of time.

In fine, we allow this application and reverse the decision of the Single Justice dated 15<sup>th</sup> March, 2021. We vacate the order striking out Civil Application No. 445/01 of 2019 and order the same to proceed for hearing before another Single Justice on a date to be fixed by the Registrar.

It is so ordered.

**DATED at DAR ES SALAAM** this 14<sup>th</sup> day of June, 2023.

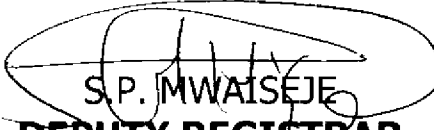
W. B. KOROSSO  
**JUSTICE OF APPEAL**

P. S. FIKIRINI  
**JUSTICE OF APPEAL**

O.O. MAKUNGU  
**JUSTICE OF APPEAL**

The Ruling delivered this 15<sup>th</sup> day of June, 2023 in the presence of Applicant in person and Mr. Alexander Kyaruzi, counsel for the Respondent, is hereby certified as a true copy of the original.



  
**S.P. MWAISEJE**  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**