

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

(CORAM: LILA, J.A., FIKIRINI, J.A, And MURUKE, J.A.)

CIVIL REFERENCE NO. 20 OF 2019

JACOB SHIJA..... APPLICANT

VERSUS

M/S REGENT FOOD & DRINKS LIMITED.....1st RESPONDENT

THE MWANZA CITY COUNCIL.....2nd RESPONDENT

(Arising from the Decision of the Court of Appeal of Tanzania, at Mwanza)

(Mwambegele, J.A.)

dated the 5th day of April, 2019

in

Civil Application No. 440/08 of 2017

.....

RULING OF THE COURT

14th & 19th July, 2023.

FIKIRINI, J.A.:

The applicant, Jacob Shija by way of notice of motion preferred under rule 62 (1) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules), moved the Court seeking reversal of the decision in Civil Application No. 440/08 of 2017 delivered on 5th April, 2019. The application before the Single Justice was for extension of time, in which the applicant was praying

that he could be allowed to do the following: (i) serve the respondents with a notice of appeal, (ii) write a letter to the Registrar requesting to be supplied with the necessary documents required in the preparation of the record of appeal and (iii) to lodge a notice of appeal out of time.

The Single Justice, satisfied that the applicant had failed to show good cause for the delay dismissed the application. Displeased with the decision the applicant lodged the present application for reference. His grounds and reasons for reference are:

1. The said trial Justice of Appeal erred in law and in fact in dismissing the said application.
2. The said trial Justice of Appeal erred in law and in fact in not considering the fact that the applicant therein received an assistance from the third party and had never been resisted by the respondents prior to the same is before the Court by way otherwise of preliminary objection.
3. The said trial Justice of Appeal erred in law and in fact in not holding that the discretionary power had to be judiciously made, for the applicant took diligent steps in correcting the matter,

based on the information supplied by the third person, which was well verified in the affidavit, before embarking into the lodging of the intended appeal which was immediately after been granted the leave for the same.

Mr. Joseph Richard Vungwa learned Senior State Attorney and Mr. Alex Banturaki learned counsel, appeared for their respective parties, the 1st and 2nd respondents, while the applicant, Jacob Shija appeared in person, unrepresented, on 14th July, 2023, the day the application was fixed for hearing.

Submitting in support of his application, the applicant contended that the Single Justice did not consider what he averred in paragraphs 5, 6, 7 and 8 of his affidavit in support of the application for extension of time. According to him, he explained the reasons for the delay, that he did not serve the respondents knowing it was the Court's obligation. While admitting that no service of those documents was effected on the respondents, he was equally of the submission that no preliminary point of objection was raised by the respondents, so his application should have been granted.

Besides, what transpired in his dismissed application for extension of time, the applicant in persuading the Court pleaded that he did not understand the language and had to seek assistance from a lawyer who unfortunately did not explain to him the contents of the application. He as well asserted that due to his age, he had issues with remembering what he was required to do. Stressing on the grant of his application, the applicant urged the Court not to be tied with the procedures in place, instead, it should in its wisdom consider the application in his favour and reverse the Single Justice's decision and grant him an extension of time to comply with what he was to accomplish.

Mr. Banturaki on his part opposed the grant of the application and the submissions by the applicant. He argued that the submissions were contrary to what was in the notice of motion. Pointing out what was contained in the notice of motion, he contended that the applicant has referred to a third party but there was none listed or mentioned. Besides, challenging the submissions, he contended to have found nothing to fault the Single Justice's decision. The fact that the Single Justice was not

convinced that good cause has been shown as required in law, he therefore supported that the application was appropriately dismissed.

Countering the argument of forgetfulness, Mr. Banturaki dismissed that as not one of the reasons which could amount to a good cause. He further contended that there were almost 500 lawyers who could provide legal aid. Failure by the applicant not to seek and/or use their services was not on anyone to blame except himself. Moreover, without pointing out the fault by the Single Justice in the said decision, the applicant's application is unmerited and should hence be dismissed with costs, implored Mr. Banturaki.

Mr. Vungwa on his part prefaced his submission by raising a point of law that the application for reference was filed in contravention of rule 62 (1) of the Rules which requires the letter to the Registrar to be lodged within seven (7) days from the date of the decision. The ruling was delivered on 3rd April, 2019, the applicant was thus required to lodge his letter the latest on 9th April, 2019. The letter in the present application was lodged on 12th April, 2019, meaning a delay of three (3) days. When probed by the Court to look at rule 8 (a) – (d) of the Rules, after going

through the provision, he still was of the submission that the applicant delayed for a day, taking into account the exclusion of the first day after the day of the ruling and the last day, the applicant was thus to lodge his letter the latest 10th April, 2019. And since the 10th April, 2019 was a Wednesday and not a holiday, weekend or the day the Court was not operational, the application was filed out of time, making it incompetent meriting to be struck out.

Submitting on the application itself, he was of the argument that there are already guiding principles governing the grant of application for reference. Buttressing his proposition, he cited to us the case of **Felix H. Masha & Another v. Exim Bank Tanzania Limited**, Civil Reference No. 12 of 2017 (unreported), in which the Court had illustrated those guiding factors: (i) that the Court will examine what was submitted before a Single Justice, (ii) without leave the Court will not receive new evidence and (iii) the Single Justice discretion is wide, unfettered and flexible; there could be interference, only if there is a misinterpretation of the law.

Based on the above principles, he contended that what is contained in the applicant's application, particularly the second and third grounds in

the notice of motion and submitted on, a third party issue, his old age and forgetting what he was supposed to do were not raised before the Single Justice to permit him to decide one way or the other. These were new evidence and he bade us not to consider it.

On the ground that the applicant was ignorant of the law or had little knowledge, Mr. Vungwa vehemently contested the submission. He contended that has never been an excuse and hence could not stand as a good cause for delay. Fortifying his submission, he cited to us the cases of **Wambele Mtumwa Shahame v. Mohamed Hamis**, Civil Reference No. 8 of 2016 in which the case **Hadija Adamu v. Godbless Tumba**, Civil Application No. 14 of 2013 was referred (both unreported).

Mr. Vungwa went on to submit that the applicant had alleged the Single Justice to have erred but did not point out the faults. Maintaining that the application was without merit, since no good cause was shown, Mr. Vungwa found the Single Justice to have correctly dismissed the application before him. In the same breath, he urged us to dismiss the present application for reference for lacking in merit.

The applicant in his brief rejoinder, appealed to the Court to discount the respondents' counsel's submissions and apply its wisdom since not all matters are to be adjudicated relying on written laws. Holding on to his point, he submitted that there are other unwritten traditional laws that were good and applicable. On the basis of his proposition, he urged us to apply our wisdom.

On the point raised by Mr. Vungwa that the application was filed out of time, the applicant was candid to say he did not know the law, and all along he has been assisted by a lawyer who prepared the documents without telling him the contents therein. Against that background, he prayed to leave the matter to the Court to apply wisdom.

We have dispassionately reviewed the notice of motion and the rival submissions by the parties and the authorities referred. We find that there are two issues for determination: one, whether the application was filed in compliance to rule 62 (1) of the Rules, and two, if the first issue is in affirmative, whether there is a reason to fault the Single Justice's decision declining grant of extension of time.

But before we get there, we think sound logic demands that we start with the law and basic principles governing (i) the time frame within which to apply for reference and (ii) guiding principles when dealing with an application for reference.

The time within which a party can apply for reference, is provided for under rule 62 (1) of the Rules, which provides thus:-

*"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.**"* [Emphasis added]

From the rule, the applicant was required to lodge his application for reference within seven (7) days from the date of the decision. The computation of time which binds parties in processing their appeals or applications is an area which has been well illustrated under rule 8 of the Rules. For ease of reference the rule is reproduced herein below:-

"8. Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions-

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done;

(b) if the last day of the period is a court vacation the period shall include the next following day not being a court vacation;

(c) where, by these rules or by any order of the Court any step is required to be taken in connection with any cause, appeal, or matter before the Court that step shall, unless the context otherwise requires, be taken in the Registry; and

(d) where any particular number of days is prescribed by these rules, or is fixed by an order of the Court, in computing the same, the day from which the said period is to be reckoned shall be excluded, and, if the last day expires on a day when the Court is closed, that day and any succeeding days on which the Court remains closed shall also be excluded."

In the present application, the applicant lodged his complaint on 12th April, 2019, whereas the latest he was required to lodge his complaint was 10th April, 2019, considering the ruling was delivered on 3rd April, 2019. Since no leave was sought and granted to lodge the application out of the

prescribed time, we associate ourselves with Mr. Vungwa's submission, that there was a delay of one (1) day, having in mind that the last day of lodging the letter was a Wednesday and not a weekend, public holiday or that the Court was not operational. In the case of **Ratman v. Cumarasamy and Another** (1964) 3 All ER, the Court emphasized the importance of adhering to the rules when it stated:-

*“The rules of court must be obeyed, and in order to justify a court in extending the time during which some step in the procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time **which would defeat the purpose of the rules, which is to provide a timetable for the conduct of litigation.**”* [Emphasis added]

In light of the elucidated principles in the above case, we find this application is incompetent for being lodged out of the time prescribed under rule 62 (1) of the Rules.

Despite the conclusion that the present application was filed out of time and ordinarily, the application would have been struck out, we have, however, for completeness decided to proceed with determining its merits.

Turning to the application itself, the principles governing reference can be traced from a long list of authorities on the subject, such as **Phares Partson Matonya v. Registrar**, Industrial Court of Tanzania & Others, Civil Reference No. 26 of 2019 in which the case of **G. A. B Swale v. Tanzania Zambia Railway Authority**, Civil Reference No. 5 of 2019 was referred, **VIP Engineering and Marketing Limited and Two Others v. CITIBANK Tanzania Limited**, Consolidated Civil References No. 6, 7 and 8 of 2006, **Daudi Haga v. Jenitha Abdon Machafu**, Civil Reference No. 1 of 2000, **Mary Ugomba v. Rene Pointe**, Civil Reference No. 11 of 1992 (all unreported) and **African Airlines International Ltd v. Eastern & Southern Trade and Development Bank** [2003] EA 1, and the cases cited by the learned Senior State Attorney, **Felix Masha & Another** and **Wambele Mtumwa Shahame** (supra) to name but a few. In **Phares Partson Matonya** (supra) the Court reaffirmed principles governing reference endorsed in **G. A. B Swale v. Tanzania Zambia Railway**

Authority, Civil Reference No. 5 of 2011 (unreported), in which the Court instructively stated:-

- (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 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 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 Cannery Ltd v. Titus Muriri Doct** (1996) LLR 5434, a decision of the Court of Appeal Kenya, which we find persuasive) (See also: **Mbogo & Another v. Shah** [1968] E. A 93.”

Before the Single Justice, the applicant stated that he relied on the third party, the reason which did not sail through as a good cause advanced to justify granting the application for extension of time. Ignorance of the law or little knowledge and not understanding the court's procedures and language did not as well suffice as a good cause. Additionally, even the reason of age and forgetfulness though not raised before the Single Justice but could not serve as a good cause for the delay.

In the notice of motion, ill-advisedly the applicant raised new evidence on his 2nd and 3rd grounds while the requirement is, only those issues dealt with by the Single Justice are the ones that should be placed under scrutiny and if anything then leave of the Court must be sought and granted to present new evidence. As submitted by Mr. Vungwa the submission we endorse, the applicant's new evidence cannot be entertained at this stage.

Correspondingly, we find that though the applicant alleged the Single Justice erred in law on his 1st ground, yet he has not pointed out the faults he was complaining about. Failure to do that, renders his complaint to be unsubstantiated and it leaves the Court with no option, but to conclude

that the Single Justice correctly dismissed the application for extension of time.

From the above scrutiny, we find the application lacks merit for failure to point out a ground faulting the Single Justice decision refusing to grant extension of time. The application is accordingly dismissed with costs.

It is so ordered.

DATED at **MWANZA** this 19th day of July, 2023.

S. A. LILA.

JUSTICE OF APPEAL

P. S. FIKIRINI.


JUSTICE OF APPEAL

Z. G. MURUKE.

JUSTICE OF APPEAL

The Ruling delivered this 19th day of July, 2023 in the presence of the Applicant in person, Mr. Banjuraki, learned counsel for the 1st Respondent and also holding brief for Mr. Joseph Richard Vungwa, learned Senior State Attorney for the 2nd Respondent is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL