

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KENTE, J.A., And, RUMANYIKA, J.A.)

CRIMINAL REFERENCE NO. 2/11 OF 2020

INOTA GISHIAPPLICANT

VERSUS

THE REPUBLIC..... RESPONDENT

**(Application for Reference from the decision of the Single Justice of the Court
of Appeal of Tanzania)**

(Mkuye, J.A.)

dated 13th December, 2019

in

Criminal Application No. 60/11 of 2017)

RULING OF THE COURT

5th June & 9th August, 2023

RUMANYIKA, J.A.:

This reference arises from a decision of single Justice of the Court. Before her, the applicant unsuccessfully applied under Rules 10 and 62 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules) vide Civil Application No. 60/11 of 2017 for extension of time within which the applicant could file an application for review of the Judgment of the Court dated 16th June, 2010. The applicant had presented one ground which is about the alleged illegal transfer of Criminal Case No. 18 of 2003 from the

High Court at Tabora to the Resident Magistrate's Court of Tabora, at Tabora (Awasi, PRM extended jurisdiction).

In that case, the applicant and three others were together and jointly charged with an offence of murder. Consequently, they were convicted as charged and sentenced to death by hanging. Aggrieved by that decision, they appealed before the Court to challenge it. In the end, only the three others who are not parties to this appeal succeeded. Not satisfied by that decision, the applicant wished the Court to review it but was time-barred. He filed Criminal Application No. 60/11 of 2017 seeking an extension of time to file review. On 13th December, 2019, a single Justice of the Court (Mkuye, J.A.) struck it out for being incompetent. Undaunted, by way of reference, the applicant filed the instant application for extension of time to file review. In his previous application for extension of time, he relied on illegality of the trial court's decision but he was late. The reason he gave for the delay is that, it took him quite some time beyond the prescribed time to secure legal assistance.

Under Rule 62 (1) (a) of the Rules, therefore, the applicant is asking the Court to re-evaluate the record of the application and reverse the impugned decision.

Appearing in person without representation at the hearing, the applicant let Mr. Clement Masua who was assisted by Ms. Nura both learned State Attorneys to submit first while reserving a right to rejoin should that need arise.

Mr. Clement contended that, there might have been an improper transfer of the case from the High Court to the trial court, the alleged illegality of the trial court's decision. However, he argued, the said application did not meet a requisite condition for the grant of extension of time to lodge review which is to show which part of rule 66 (1) of the Rules the intended review is going to be predicated, if an extension of time was granted. However, upon being prompted by the Court, on a reflection Mr. Clement supported the application for being merited.

Rejoining, the applicant agreed with Mr. Clement's concession as being the right stance and on that account, beseeched us to grant the application.

We understand that, the Court's power to grant an application for extension of time is governed by Rule 10 of the Rules where the bottom line is good cause to be shown by the party seeking it.

As regards the alleged illegality of the trial court's decision, the single justice of the Court, after properly directing her mind to the law applicable, she was satisfied that, the said Criminal Sessions case No. 18 of 2003 was improperly transferred from the High Court to the RM's Court (the trial court) which illegality constituted a good cause. However, she dismissed the application on account of the applicant's failure to disclose the grounds under rule 66(1) of the Rules upon which the applicant intended to predicate the application for review. It was the single Justice's view that the applicant had failed to fulfill the conditions cumulatively as required by the law.

Upon hearing of the parties' contending submissions, the issue which is before us for determination is not whether the applicant has shown illegality for the grant of an extension of time but whether he has also shown which ground, under rule 66(1) of the Rules, the intended application for review would be predicated upon if extension of time was granted.

For the Court to grant an extension of time to do any act required under the Court Rules, as was before the single Justice of the Court,

showing good cause is paramount as required under rule 10 of the Rules.

It reads thus:

The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules... (Emphasis added).

As applies in the above cited rule, good cause is a relative term because there are no any hard and fast rules to determine what it constitutes. The Court has stated so in a number of cases, including **Oswald Masatu Mwizarubi v. Tanzania Fish Processing Ltd.**, Civil Application No. 13 of 2010 (unreported). It all depends on the party seeking an order for extension of time and the material presented to persuade the court to exercise its discretion.

As earlier on indicated, in the instant application, the applicant had cited illegality in the decision sought to be challenged for being founded on an improperly transferred case from the High Court to the trial court. This fact was not controverted by the respondent. The single justice of the

Court also appreciated that anomaly as it appears at page 11 of her ruling where she stated as follows:

...the illegalities raised by the applicant have been readily conceded by the learned State Attorney. On my part, based on the above cited authority, I agree with both counsel that the shortcoming especially of the transfer of the case to the PRM with Extended Jurisdiction is an illegality which constitutes good cause... (Emphasis added).

We agree with the single Justice of the Court on the above cited finding. The law is settled thus, that once a party seeking an order of extension of time has established illegality, that one constitutes good cause. The Court has held so in a number of its previous decisions including **The Principal Secretary, Minister of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 185 and **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). See- for instance **Devram Valambhia** (supra) at page 118 where the Court stated that:

... where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute "sufficient reason"... for extending time...

Nonetheless, as indicated above, the single Justice of the Court refused the applicant an extension of time on account of the alleged failure to indicate, in his notice of motion under which part of rule 66 (1) (a)-(e) of the Rules he intended to apply for review, should he be granted an extension of time. In deciding so, the single Justice relied on our unreported decisions in **Mwita Mhere v. R**, Criminal Application No. 7 of 2011, **Eliya Anderson v. R**, Criminal Appeal No. 2 of 2013 and **Nyakua Orondo v. R**, Criminal Appeal No. 2 of 2014 to substantiate the legal stance she took. We find it thus, to be one of the requisites for the grant of extension of time to file an application for review.

The Court took the above stance, in **Mwita Mhere (supra)** which we have been referring to in a plethora of our decisions including in the cases of **Iddy Salum @ Fredy v. Republic**, Criminal Application No. 03/01 of 2021 and **Robert Nyengela v. Republic**, Criminal Application

No. 42/13 of 2019 (both unreported). For instance, in **Mwita Mhere** (supra), the Court held that:

*"But in application of this nature, the law demands that the applicant should do more than accounting for the delay. To succeed in showing that he has good cause under Rule 10 of the Rules, **it must be shown further that the applicant has an arguable case...that demonstrates that the intended grounds of review is at least one of those listed in Rule 66 (1) of the Rules.**"*

Applying the above cited principle to the present case, and in order to satisfy ourselves whether or not the requirements envisaged under rule 66 (1) (a)-(e) of the Rules were complied, we shall reproduce rule 66 (1) of the Rules as follows: --

Rule 66. -(1) The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds-

(a)...note applicable

(b)...not applicable

*(c) **the court's decision is a nullity; or***

(d) the court had no jurisdiction to entertain the case;

(e) ... not applicable".

(Emphasis added).

Considering the above observation and the preceding cited rule, the issue whether or not the said Criminal Case No. 18 of 2003 was improperly transferred to the trial court may not be relevant for the determination of this application. However, in terms of section 3A of the Appellate Jurisdiction Act Cap 141 the interest of substantive justice require us to find, as we hereby do, that the alleged illegality constituted good cause for the grant of an extension of time as sought. We take note thus, that, if proved, the alleged illegality in the said case transferring, which is undisputed had the effect of vitiating the entire trial court's proceedings. Much as we appreciate the applicant's failure to cite rule 66 (1) (a)-(e) of the Rules to show ground(s) under which the intended application for review would be predicated was such an irregularity but not fatal in the circumstance.

In the upshot, we find merit in the application and proceed to grant it. Accordingly, we order the applicant to lodge an application for review within sixty days from the date of this ruling.

DATED at DAR ES SALAAM this 7th day of August, 2023.


A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The ruling delivered this 9th day of August, 2023 in the presence of the applicant appeared in person via video link at High Court Tabora and Ms. Salome Matunga, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL