IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., GALEBA, J.A., And MWAMPASHI, J.A.)

CIVIL REFERENCE NO. 7 OF 2021

MOHAMED SULEIMAN GHONA ..... APPLICANT

VERSUS

MAHMOUD MWEMUS CHOTIKUNGU ..... RESPONDENT

[Application for Reference from the Ruling of the Court of Appeal of Tanzania, at Dar es Salaam]

(Ndika, J.A)

dated the 14th day of April, 2021

in

Civil Application No. 179/01 of 2020

RULING OF THE COURT

18th July & 10th August, 2023

MWAMBEGELE, J.A.:

This is an application for reference. It seeks to challenge the decision of a single Justice of the Court (Ndika, J.A) which refused the applicant Mohamed Suleiman Ghona extension of time to serve the respondent Mahmoud Mwemus Chotikungu with a memorandum and record of appeal in Civil Appeal No. 336 of 2019. The application has been made by a letter to the Registrar of the Court bearing Ref. No. 048/2021 dated 19th April, 2021 in terms of rule 62 (1) (b) of the Tanzania Court of Appeal Rules, 2009 (hereinafter referred to as the Rules). The applicant has predicated the application on three grounds; **one**, that the application for extension of time

was wrongly dismissed on account of failure to show good cause; **two**, in dismissing the application, the single Justice of the Court relied on case law which is distinguishable; and, **three**, the single Justice of the Court wrongly concluded that the applicant had not accounted for every day of delay.

Before embarking on the determination of the application on its merits, we find it apt to narrate, albeit briefly, the relevant background facts to this application. These can be discerned from the impugned Ruling as deciphered from the relevant supporting affidavit in the Ruling sought to be challenged.

The applicant was aggrieved with the decision of the Land Division of the High Court (Wambura, J.) in Land Case No. 42 of 2015 pronounced on 13th April, 2018. He thus lodged a notice of appeal and, subsequently, a memorandum and record of appeal in terms of rule 90 (1) of the Rules. In terms of rule 97 (1) of the same Rules, it was incumbent upon the applicant to serve the memorandum and record of appeal to the adversary party within seven days of their lodgment. However, the same were not timely served and, therefore, he lodged an application for extension of time whose ruling is now sought to be challenged. As the application for enlargement of time to serve the said memorandum and record of appeal was not

successful before the single Justice of the Court, the applicant now seeks to reverse that decision through this reference on the three grounds enumerated at the beginning of this Ruling.

When the application was placed for hearing before us on 18th July, 2023, both parties were represented. While the applicant was represented by Mr. Robert Rutaihwa, learned advocate, the respondent had the services of Mr. Benitho Lunyiliko Mandele, also learned advocate.

Mr. Rutaihwa was brief in his submission but to the point. The thrust of his argument was that the applicant was a victim of his advocate's conflicting interest and negligence in the matter. The single Justice of the Court, he argued, ought to have considered such negligence and, had he done that, he would not have refused the applicant extension of time to lodge the memorandum and record of appeal. Having lodged the notice of appeal and timely engaged an advocate, Mr. Rutaihwa argued, the applicant had nothing to do. As such, he argued, the single Justice of the Court should have considered the interests of justice and the oxygen principle to enlarge the time sought. To buttress this proposition, the learned advocate cited to us **Dr. A. Nkini and Associates Limited v. National Housing Corporation** (Civil Appeal 72 of 2015) [2021] TZCA 73 (12 March 2021)

TanzLII in which the Court held that negligence of an advocate should not extend to punish a party. He added that in **Dr. Nkini and Associates Limited** (supra), the Court used the oxygen principle to reach a just decision. The learned counsel also argued that given that the single Justice of the Court acknowledged at p. 2 of the impugned decision that the applicant's counsel, Mr. Kambamwene, was not in Dar es Salaam at the material time, he was supposed to grant the application as was the case in **Kambona Charles (as Administrator of the Estate of the late Charles Pangani) v. Elizabeth Charles** (Civil Application 529 of 2019) [2020] TZCA 214 (12 May 2020) TanzLII whose facts fall in all fours with the matter at hand. The learned counsel also sought reliance on our decision in **Jackline Hamson Ghikas v. Mlatie Richie Assey** (Civil Application 656 of 2021) [2022] TZCA 438 (18 July 2022) TanzLII to buttress the proposition that failure to timely serve a memorandum and record of appeal does not vitiate the appeal.

Having submitted as above, he implored us to allow the application and left an order for costs in the wisdom of the Court.

Mr. Mandele strongly opposed the application imploring us at the outset to dismiss it on the ground that the decision to reject the enlargement

of time sought was well founded. The learned counsel referred us to pp. 8 and 9 of the impugned decision where the single Justice of the Court gave reasons why he refused the application; that the application was not promptly lodged in that the applicant did not account for the delay of thirteen days. Mr. Mandele distinguished the **Kambona case** (supra) in that there, unlike here, there was no such delay which was not accounted for. He added that at p. 9 of the impugned Ruling, the single Justice stated, citing authorities, that there was no reason deposed in the founding affidavit why the applicant did not finish the process of serving the memorandum and record of appeal.

Regarding the application of the oxygen principle, Mr. Mandele urged us to refrain from applying it in that, procedure is part and parcel of our procedural law. The oxygen principle, he argued, was not intended to demean procedural law and therefore the fact that the procedure was flouted, the oxygen principle cannot rescue the situation. As both parties were heard and the single Justice of the Court took into consideration arguments from both sides, he argued, he cannot be faulted for arriving at the decision he did. He thus implored us to dismiss the application with costs.

In a short rejoinder, Mr. Rutaihwa argued that the argument that the application was not promptly filed does not out-way the fact that there was negligence on the part of the advocate for the applicant. Had the advocate taken steps in accordance with the law, the delay of thirteen days complained of would not have been an issue, he argued. If everything was to be done by the party, he contended, there would be no reason why he should engage an advocate. As the procedural law is the aid of justice, he contended, the single Justice of the Court should have applied the oxygen principle to allow the application for extension of time to lodge the memorandum and record of appeal. He reiterated his prayer to have the application allowed.

We have subjected the learned arguments from both learned counsel for the parties to a careful scrutiny they deserved. The principles governing applications of this nature are well settled in this jurisdiction. We have canvassed them in a number of our previous decisions. The decisions include **Amada Batenga v. Francis Kataya**, Civil Reference No. 1 of 2006 (unreported), **Gurmit Singh Bhachu v. Meet Singh Bhachu** (Civil Reference No. 8 of 2020) [2021] TZCA 83 (19 March 2021) TanzLII, **Phares Partson Matonya** (As the Administrator of the Estate of the late **Partson Matonya) v. Registrar, Industrial Court of Tanzania & Two Others**,

(Civil Reference No. 26 of 2019) [2023] TZCA 160 (29 March 2023) TanzLII, to mention but a few. We summarized these principles in **Amada Batenga** (supra) and recited them in **Gurmit Singh Bhachu** (supra) and **Phares Partson Matonya** (supra) as:

> *"(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".*

An improved version of the principles was set out in **G.A.B Swale v. Tanzania Zambia Railway Authority** (Civil Reference No. 5 of 2011) [2016] TZCA 863 (7 September 2016) TanzLII and recited in **Phares Partson Matonya** (supra) as:

> *"(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."*

In the matter before us the single Justice of the Court refused the applicant enlargement of time on the ground that he did not show good cause to warrant the grant of the orders sought. As rightly put by Mr. Mandele, the learned single Justice of the Court did not do so without reasons. We shall let the impugned Ruling speak for itself as appearing at its p.8:

> *"Certainly, the applicant's advocate did not suggest that he was himself supposed to serve the documents on the respondent. Instead, his responsibility was, in my opinion, to cause service of the documents to be effected on the respondent. To accomplish that, he could have instructed an assistant at his offices in Dar es Salaam or a licensed process server to effect service. Looked at the whole situation this way, his absence from his offices in Dar es Salaam is clearly irrelevant. On this basis, the learned counsel is to blame for the omission to cause the service to be effected irrespective of where he was at the material time."*

The single Justice of the Court, at the back of his mind, we respectfully think, was quite alive to the fact that a party should not be punished on account of the negligence of his advocate. That is why, on authority of **Yusufu Same and Another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 and **Zuberi Mussa v. Shinyanga Town Council**, Civil Application No. 3 of 2007 (both unreported) he was prepared to ignore the infraction as a minor lapse. However, the single Justice of the Court refrained from taking that course of action because the delay of thirteen days was not accounted for.

The single Justice of the Court found as implausible and unconvincing the applicant's another explanation for delay that he could not locate the offices of his advocate in good time. His Lordship gave reason for that stance to the effect that he could have opted for a call by cell phone or email. Nothing was deposed in the founding affidavit to show that the option was explored. Having so found, the single Justice concluded:

> *"In the final analysis, I decline to exercise my discretion in favour of the applicant as I hold that the matter at hand discloses no good cause for the delay in serving a copy of the Memorandum and Record of Appeal on the respondent. Accordingly, I dismiss the application with costs."*

We are afraid we find nowhere to fault the single Justice of the Court. The refusal for extension of time was well founded and the discretion for such refusal was exercised judiciously. This complaint was lodged without a justifiable cause. It must fail.

We are alive to the fact that Mr. Rutaihwa heavily relied on the negligence of the advocate and the overriding objective principle, otherwise known as the oxygen principle, to urge us to reverse the findings and conclusion of the single Justice of the Court. We are afraid, we are hesitant to go along with him. This is because negligence of the applicant's advocate

was not pleaded before the single Justice. Neither was the single Justice asked to engage the oxygen principle. Much as we agree that in some of our previous decisions, we have observed that negligence of an advocate should not be to the detriment of a party, that is the case only in exceptional circumstances. That is what we held in **Dr. Nkini and Associates Limited** (supra), a case relied upon by the applicant's counsel. In that case, the party's counsel was such a negligent soul to the extent that he was subpoenaed to, and appeared before the Advocates Committee to answer disciplinary charges. We found that the negligence was so glaring to amount to a gross professional misconduct and we subsequently invoked the oxygen principle to grant the orders sought. This was not the case in the matter before us. **Dr. Nkini and Associates Limited** (supra) is therefore distinguishable from the matter before us.

Therefore, in view of the foregoing, even if we were to accept that the Court was told that the applicant's advocate was negligent and the single Justice of the Court was asked to employ the oxygen principle, we would not have reversed his findings and conclusion.

In the upshot, we find no basis to meddle with the discretion of the single Justice of the Court refusing extension of time to serve the

respondent with the memorandum and record of appeal. This application for reference is without merit. It stands dismissed with costs.

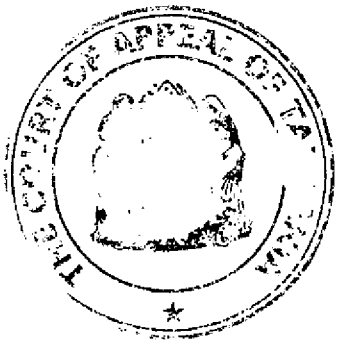
DATED at **DAR ES SALAAM** this 3rd day of August, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 10th day of August, 2023 in the presence of Mr. Theodore Primus, learned Counsel for the Applicant and also holding brief for Mr. Benitho Mandele, learned Counsel for the Respondent, is hereby certified as a true copy of the original.



R. W. Chaungu
DEPUTY REGISTRAR
COURT OF APPEAL