IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

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

CIVIL REFERENCE NO. 6 OF 2020

JOHN ACKLEY MATOI.....APPLICANT

VERSUS

KHALID BAKARI KILEO.....RESPONDENT

(Application for Reference from the Decision of the single Justice of the Court of Appeal of Tanzania at Arusha)

(Korosso, J.A.,)

dated the 13th day of December, 2019

in

Civil Application No. 11/05 of 2017

.....

RULING OF THE COURT

28th & 31st August, 2023

MWAMPASHI, J.A.:

The applicant's application for extension of time within which to serve the respondent with a notice of appeal, file a memorandum and record of appeal to this Court, *vide* Civil Application No. 11/05 of 2017, was dismissed by a single Justice of this Court (Korosso, JA.) on 12.12.2019. Aggrieved, the applicant, by a letter to the Registrar dated 17.12.2019, has moved the Court under rule 62 (1)(b) of the Tanzania Court of Appeal Rules, 2009 (the Rules), seeking the reversal of the said decision of the learned single Justice.

Briefly, the facts from which the instant application arises are as follows; The respondent herein, Khalid Bakari Kileo, sued the applicant, John Ackley Matoi, for trespass to land before the Kirua Vunjo Ward Tribunal (the Ward Tribunal). In that case, the Respondent was adjudged the winner. Aggrieved, the applicant preferred an appeal to the Moshi District Land and Housing Tribunal (the DLHT) where he emerged the winner as the decision by the Ward Tribunal, which was in favour of the respondent, was reversed by the DLHT on 13.07.2010. Dissatisfied, the respondent, vide Land Appeal No. 13 of 2010, successfully appealed to the High Court whereby, on 13.05.2011, the DLHT decision was quashed and that of the Ward Tribunal which was in favour of the respondent, was restored.

Aggrieved by the High Court decision and determined to appeal against the said decision to this Court, the applicant applied for a copy of the proceedings for appeal purposes on 13.05.2011. He also duly filed a notice of appeal on 19.05.2011 but did not serve it to the respondent till 07.06.2011. The applicant did also not apply for leave and for a certificate on points of law in time but having successfully applied for extension of time to do so on 19.05.2015 *vide* Misc. Land Application No. 40 of 2013, the same were finally granted to him by the High Court on 13.09.2016 in Misc. Land Application No. 34 of 2015.

Despite being granted leave to appeal and the certificate on points of law, the applicant could still not prefer his appeal to this Court. He faced another stumbling block. As we have earlier alluded to, the notice of appeal served upon the respondent on 07.06.2011 was not served in time. It was served beyond 14 days contrary to rule 84 (1) of the Rules. That being the situation, on 11.11.2016, the applicant filed to this Court Civil Application No. 11/05 of 2017, before the single Justice of the Court, for extension of time within which to serve the notice of appeal to the respondent and file the memorandum and record of appeal to the Court.

As we have earlier alluded to, Civil Application No. 11/05 of 2017 was dismissed by the learned single Justice. Reasons for the dismissal was the applicant's failure to show good cause. First, it was found that the applicant had failed to account for each day of delay. For instance, the period between 13.09.2016 when leave to appeal and the certificate on points of law, were granted and 11.11.2016 when Civil Application No. 11/05 of 2017 was filed to the Court was found not to have been accounted for. The learned single Justice did also find that though the counsel for the applicant had referred in his oral submissions to three instances which he alleged to be illegalities, such instances had not been stated neither in the notice of motion nor in the supporting affidavit. It

was thus concluded that the alleged illegalities were nothing but an afterthought.

According to the applicant's letter to the Registrar from which the instant application is initiated, the application is predicated upon the following five (5) grounds:

1. *That, the Hon. single Justice of Appeal misinterpreted the law in dismissing the applicant's application on the ground that the applicant's affidavit failed to explain the delay to serve the respondent on time or file the memorandum and record of appeal.*
2. *That, the Hon. single Justice of Appeal misinterpreted the law in dismissing the applicant's application on the ground of failure to account for each day of delay that was never raised in the respondent's affidavit in reply and without affording parties an opportunity to be heard on that point.*
3. *That, the Hon. single Justice of Appeal misinterpreted the law in holding that the notice of motion and the affidavit supporting the notice of motion do not show the three instances of illegalities submitted on by the applicant's counsel at the hearing of the application.*
4. *That, the Hon. single Justice of Appeal misinterpreted the law in holding that the applicant's allegations and irregularities in the decision of the High Court seems to have been an afterthought.*

5. *That, the Hon. single Justice of Appeal misinterpreted the law in holding that the applicant's application failed to demonstrate any good cause to entitle him extension of time.*

At the hearing of the application, the applicant was represented by Mr. John Materu, learned advocate, whereas the respondent appeared in person unrepresented. He fended for himself.

In his submission in support of the application, Mr. Materu began by adopting the grounds upon which the application is predicated. He then argued the five grounds under two heads, **one**, that the period of delay was accounted for and **two**, that grounds of illegality were properly raised and substantiated. As on whether the period of delay was accounted for, it was submitted by him that the leaned single Justice erred in concluding that the applicant failed to account for the delay. Mr. Materu took us to pages 14 and 15 of the impugned ruling and contended that the learned single Justice accepted the applicant's explanation for the delay of about three days from 04.06.2011 when the applicant ought to have served the respondent with the notice of appeal to 07.06.2011 when the notice was served, the delay which was attributed by the fact that the applicant was sick.

Mr. Materu further argued that the delay from 07.06.2011 to 13.09.2016 when the applicant was granted leave to appeal and the

certificate on points of law, was technical and thus excusable. He explained that, at first, Misc. Land Case Application No. 25 of 2011 for leave to appeal was filed on 15.06.2011 by the applicant on his own but it was later withdrawn on 24.07.2013 at the instance of the applicant's advocate for being incompetent. Thereafter, Misc. Land Application No. 40 of 2013 for extension of time within which to apply for leave and a certificate on points of law was preferred and on 14.05.2015, the same was granted. This was followed by Misc. Land Application No. 34 of 2015 for leave to appeal and for a certificate of points of law which was granted on 13.09.2016. It was thus argued by Mr. Materu that the learned single Justice ought to have accepted that the delay of five years from 07.06.2011 to 13.09.2016 was justifiable for being a technical delay.

Mr. Materu did also submit that after obtaining leave to appeal and the certificate on points of law, the applicant could not have filed a competent appeal because he had not served the respondent with the notice of appeal within the prescribed period of 14 days. He further argued that, as in accordance with the decision of the Court in **Metro Petroleum Tanzania Limited and 3 Others v. United Bank for Africa,** Civil Application No 530/16 of 2018 (unreported), the High Court has no jurisdiction to extend time for serving the notice of appeal to the

respondent, the applicant had to file such an application to this Court hence Civil Application No. 11/05 of 2017 which was filed on 11.09.2016. As on the delay from 13.09.2016 when leave to appeal was granted to 11.11.2016 when the application before the learned single Justice was filed, it was submitted by him that the applicant was waiting for the copy of the ruling. He however, agreed that there was no evidence showing that a request for the said ruling was ever made by the applicant. Having so argued, Mr. Materu turned to the second head of his submission on the issue of illegality.

On illegality, Mr. Materu faulted the finding by the learned single Justice that the applicant did not raise any ground of illegality neither in the notice of motion nor in the supporting affidavit. He pointed out that under ground 6 in the notice of motion, illegality was raised in regard to limitation, that is, that the appeal to the High Court was time barred. He further submitted that other illegality grounds regarding the issue of the visit by the DLHT to the *locus in quo* and on whether it was right for the High Court to have quashed the decision by the DLHT without ordering for a re-hearing of the appeal, were raised in the document annexed to the supporting affidavit, the documents which, according to the decision of the Court in **Bruno Wenceslaus Nyalifa v. The Permanent Secretary, Ministry of Home Affairs and Another,** Civil Appeal No.

82 of 2017 (unreported), are part of the affidavit. Mr. Materu insisted that grounds on illegalities were raised in the notice of motion and in the documents annexed to the supporting affidavit.

Finally, Mr. Materu argued that if the applicant failed to account for the delay, then the learned single Justice ought to have granted the application on the grounds of illegalities. He contended that illegality by itself constitutes a sufficient cause for extension of time. On this, he referred us to the decisions of the Court in **The Attorney General v. Emmanuel Marangakisi (As Attorney of Anastansious Anagnostou) and 3 Others**, Civil Application No. 138 of 2019, **Attorney General v. Oysterbay Villas Limited and Another**, Civil Application No. 299/16 of 2016 and **Yazidi Kassim Mbakileki v. CRDB (1996) Ltd and Another,** Civil Reference No. 14/04 of 2018 (all unreported). He thus prayed for the application to be granted by revising the decision of the learned single Justice with no order as to costs.

In his short response to the submissions made by Mr. Materu, the respondent urged us to dismiss the application because it is baseless as the learned single Justice did not err in dismissing the applicant's application. He argued that the applicant was not diligent and was not sick to the extent of not being able to serve the copy of the notice of

appeal to him. The respondent wondered how the applicant could not have served him with the notice of appeal in time while at that point in time, when he claimed he was sick, he kept on making follow ups of his case including attending to the court on 13.05.2011 when the High Court delivered its judgment. He also pointed out that the applicant took other necessary steps like applying for leave to appeal during when he was allegedly sick. He thus insisted that the applicant did not account for the delay and that the cases cited by Mr. Materu are distinguishable from the instant case. He contended that the facts and grounds raised in the cases cited by Mr. Materu are different from that of the instant case. Finally, in substantiating his submission, the applicant referred us to the High Court decision in **Ally Salum Said v. Iddi Athumani Ndaki,** Misc. Land Case Application No. 718 of 2020 (unreported) and urged us to dismiss the application with costs.

In his brief rejoinder, Mr. Materu reiterated his earlier argument that the applicant was sick and that the learned single Justice accepted that the sickness prevented him from serving the respondent with the notice of appeal in time. He again urged us to allow the application on the ground of illegality should we find that the applicant did not account for the delay.

Having heard the submissions for and against the application and after examining the record, we are of the considered view that the issue for our consideration is whether, in the application before the learned single Justice, good cause was shown by the applicant to warrant the grant of extension of time sought by the applicant. In particular, the issue is whether the applicant accounted for all the period of delay and whether he properly raised any ground of illegality and if he did so, whether he substantiated it.

To begin with, we should first restate the principles governing references which are to the effect that; **one**, on reference, the full Court looks at the facts and submissions the basis which the single Justice made the decision, **two,** no new facts or evidence can be given by any party without prior leave of the Court and **three**, the single Justice's discretion is wide, unfettered and flexible, it can only be interfered with if there is a misinterpretation of the law. See – **Yazidi Kassim Mbakileki** (supra), **Mary Ugomba v. Rene Pointe**, Civil Reference No. 11 of 1992, **Daudi Haga v. Jenitha Abdon Machafu,** Civil Reference No. 1 of 2000 and **G.A.B Swale v. Tanzania Zambia Railway Authority**, Civil Reference No. 5 of 2011 (all unreported). The exercise of discretion under rule 10 of the Rules, can therefore, rarely be interfered with unless there is a good cause to do so.

The position is also settled that in applications for extension of time, every day of delay must be accounted for. This has been emphasized in various decisions of the Court including in **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 and **Sebastian Ndaula v. Grace Rwamafa (Legal Representative of Joshua Rwamata)**, Civil Application No. 4 of 2014 (both unreported).

Beginning with the question whether the applicant accounted for the whole period of delay, which should not detain us, we do not see any justification of faulting the conclusion by the learned single Justice that the applicant did not account for the whole period of delay. Even if the period spent when the applicant was in court corridors before the High Court seeking for extension of time within which to apply for leave and for the certificate on the points of law till when the same were granted on 13.09.2016, is excused for being technical delay, the period of about 58 days from that date, that is, 13.09.2016 to 11.11.2016 when the application before the learned single Justice was filed, was not accounted for. Mr. Materu has argued that the delay was attributed by the fact that the applicant was waiting for the copy of the High Court's ruling. He, however agreed with us that the said reason for the delay was not substantiated because there was even no evidence that the applicant had requested for such a copy. As we have alluded to above,

we agree with the learned single Justice that the applicant failed to account for the whole period of delay. This disposes of the 1st and 2nd grounds of the application.

Turning to the issue of illegality as a ground for extension of time, we agree with Mr. Materu that it a settled that by itself, a ground on illegality constitutes sufficient reason for the grant of extension of time. In **VIP Engineering and Marketing Limited and 2 Others v. Citibank Tanzania Limited**, Consolidated References Nos. 6, 7 and 8 of 2006 (unreported), the Court stated:

> *"We have already accepted it as established law in this country that where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes "sufficient reason" within the meaning of rule 8 (now rule 10) of the Rules for extending time".*

Of importance too, is the settled position that extension of time will not be granted in every application whenever illegality is raised. See – **Tanzania Harbours Authority v. Mohamed R. Mohamed** [2003] T.L.R. 76.

We should also point out that, the scope of application of the principle on illegality as a ground for extension of time, was elaborated

by the Court in **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Association of Tanzania,** Civil Application No. 02 of 2010 (unreported), where the Court came out and stated that:

> *"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, it cannot in my view, be said that in VALAMBHIA's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right be granted extension of time if he applies for one.* ***The Court there emphasized that such point of law must be that of sufficient importance and, I would add that it must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process****".*
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> [Emphasis supplied]

Guided by the above settled positions of the law, let us revert to the issue which is relevant to the instant case on whether any ground of illegality was raised in the application before the learned single Justice. As we have earlier intimated, the learned single Justice found that the

applicant had not raised any such ground, neither in the notice of motion nor in the supporting affidavit. This is however, being faulted by Mr. Materu whose argument is that under ground 6 in the notice of motion, a ground of illegality on limitation was raised. He also argued that other grounds of illegality on the visit of the *locus in quo* and on the complaint that after quashing the decision of the DLHT, the High Court ought to have ordered for re-hearing of the appeal by the DLHT, were raised in the documents annexed to the supporting affidavits.

In tackling the issue whether illegality on limitation was raised under ground 6 in the notice of motion as contended by Mr. Materu, and for ease of reference, we find it apt to reproduce the said ground thus;

> *"the intended appeal to this Honourable Court stands overwhelming chances of success on among other grounds that the learned appellate Judge erred in law in not finding that the respondent's appeal in the High Court was filed out of time".*

The question we have asked ourselves is whether by looking at the above ground, it can be said that the issue of limitation referred to in the ground, was raised as an illegality ground for extension of time. Having scrutinized the said ground we are of a settled view that the issue of limitation, in that ground, was not intended to be raised as a

ground of illegality for purposes of extension of time rather it was intended to reinforce the said ground as a ground in the intended appeal. That it was not raised as a ground of illegality for extension of time is evident from the fact that the same was not even amplified or expounded in the supporting affidavit. We wish to emphasise that where illegality is intended to be the basis for extension of time, it should be explicitly shown and stated so in the notice of motion, if not, then in the supporting affidavit. Ground 6 does not show that the alleged issue of time bar was being raised as the basis for extension of time. We have also gone through the supporting affidavit and there is nowhere illegality was raised as a ground for extension of time. It is for the above reasons that we are in agreement with the learned single Justice that no ground of illegality was raised neither in the notice of motion nor in the supporting affidavit.

Regarding the argument by Mr. Materu that, other grounds of illegality were raised in the documents annexed to the supporting affidavit and further that the annexed documents are part of the supporting affidavit, we should first restate that according to rule 48 (1) of the Rules, grounds for every application before the Court must be stated in the notice of motion. It is also settled position that if such grounds are not stated in the notice of motion, then they can be stated

in the supporting affidavit. We are far from being convinced by Mr. Materu and we are not ready to accept his invitation that the scope of application of rule 48 (1) of the Rules, be expanded to the extent of allowing grounds for reliefs sought in the notice of motion, to be stated in the documents annexed to the supporting affidavit.

A comparable attempt to move the Court expand the scope of application of rule 48 (1) of the Rules, was made in **Farida F. Mbarak and Another v. Domina Kagaruki and 4 Others**, Civil Application No. 68/17 of 2018 (unreported) where the Court was asked to deduce grounds for an extension of time from the submissions made by the parties. In declining the invitation, the Court stated:

> *"Thus, the vexing issue is whether or not the Court may deduce the grounds for an extension from the submissions of the parties where, as the case here, the Notice of Motion and its accompanying affidavit are barren. I think the answer is in the negative... as the Court was moved under Rule 10 which, when read in conjunction with [Rule] 48 of the Rules imperatively requires the application to, inter alia, state the grounds for relief in the Notice of Motion or the accompanying affidavit".*

In his attempt to move us to go digging and hunting for grounds of illegality in the documents annexed to the supporting affidavit, Mr. Materu has relied on our decision in **Bruno Wenceslaus Nyalifa** (supra). While we agree with Mr. Materu that, in that case, we held, among other things, that documents attached to an affidavit are part of the affidavit, we however, respectfully differ with him that the decision had anything to do with the requirements under rule 48 (1) of the Rules. In the said case, the Court stated that the documents attached to the affidavit ought not to have been disregarded on the ground that they were not tendered in evidence. It was stressed that affidavit is evidence and the annexture thereto is intended to substantiate the allegations made in the affidavit. We thus find the case of **Bruno Wenceslaus Nyalila** (supra) cited to us by Mr. Materu, distinguishable from the instant case.

It is for the above reasons that we again, agree with the learned single Justice that no ground of illegality was raised by the applicant in support of his application for extension of time within which to serve the respondent with the notice of appeal and to file the memorandum and record of appeal to the Court. That being the case, grounds 3, 4, and 5 are also dismissed for being unmeritorious.

In view of the foregoing, we find the application for reference devoid of merit and we accordingly dismiss it with costs.

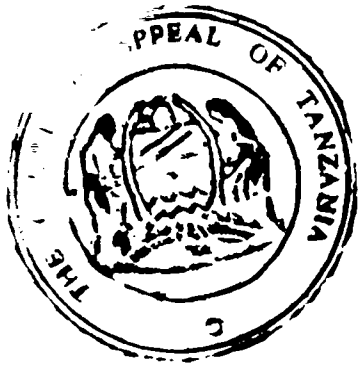
DATED at **MOSHI** this 31st day of August, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Ruling delivered this 31st day of August, 2023 in the presence of Mr. Faustin Materu, learned counsel for the Applicant and Respondent who appeared in person, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL