**IN THE COURT OF APPEAL OF TANZANIA**

**AT SUMBAWANGA**

**(CORAM: JUMA, C.J., KENTE, J.A. And MURUKE, J.A.)**

**CIVIL REFERENCE NO. 01 OF 2020**

**HERI MICROFINANCE LIMITED..... 1ST APPLICANT**

**CASSIANO LUCAS KAEGELE ..... 2ND APPLICANT**

**VERSUS**

**CRDB BANK PLC ..... RESPONDENT**

**(Reference from the decision of a single Justice of Appeal)**

**(Mwambegele, J.A)**

**dated the 3rd day of December, 2019**

**in**

**Civil Application No. 194/9 of 2019**

.....

## RULING OF THE COURT

20th & 22nd September, 2023

**KENTE, J.A.:**

The applicants, Heri Microfinance Limited and Cassiano Luca Kaegele made this Civil Reference from the decision of Justice Jacob Mwambegele (JA), sitting as a single Justice in Civil Application No. 194/9 of 2019 brought by the respondent CRDB Bank PLC. In that application, the respondent bank was granted an extension of time within which to file a memorandum and record of appeal outside the time prescribed by the Court Rules with the view to challenging the decision of the High Court (sitting at Sumbawanga) in Land Case No. 10 of 2015.

The grounds advanced by the applicants in support of this reference are that:

i. *The single Justice of Appeal having found that the Respondents did not apply for proceedings in Land Case No. 10 of 2015 but the same were applied in Civil Case No. 10 of 2015 and Land Case No. 10 of 2017 erred in law by ruling that the omission were merely typing error of no effect and could be glossed over.*

ii. *The single Justice of Appeal erred in law to rule that the Certificate of delay issued by the Deputy Registrar was invalid.*

iii. *The single Justice of appeal erred in law to rule that there was no proof that the respondents were served with the letter notifying them that the documents for appeal purposes were ready for collection.*

iv. *The single Justice of appeal erred to rule that the respondents did not collect the documents for appeal purposes on 18/11/2018 despite the abundant evidence in record.*

v. *The single Justice of appeal erred in law consider applicant's written submissions having ruled out that the same were filed out of time and without leave of the Court.*

At the hearing of the reference, whereas Messrs. George Mushumba, Mathias Budodi and Roman Selasini Lamwai learned advocates teamed up with one another to represent the applicants, the respondent was represented by Mr. Zakaria Daudi also a learned advocate.

Both Mr. Budodi who addressed the Court on behalf of the applicants and Mr. Daudi for the respondent adopted and relied on the written submissions filed earlier on, in terms of Rule 106 (1) and (7) respectively of the Tanzania Court of Appeal Rules, 2009 (hereinafter the Rules). The learned counsel also addressed the Court orally expounding on the first and second grounds of reference.

With regard to ground one of the reference, Mr. Budodi submitted that, the respondent's counsel having wrongly requested for his client to be supplied with a copy of the proceedings, judgment and decree in Civil Case No. 10 of 2015 for purposes of appeal instead of Land Case No. 10 of 2015, such a defect could not be said to be a result of a typing error as to be glossed over, more so, after the respondent's counsel had, not just once, but repeatedly committed the same mistake when writing reminders to the Deputy Registrar. Mr. Budodi was emphatic that in fact, what was termed by the learned single Justice as a typing error portrayed

the respondent's counsel as having been negligent. The learned counsel sought to reinforce his argument that this was a fatal defect by relying on our decision in the case of ***William Shija v. Fortunatus Masha*** [1997] TLR 213. Mr. Budodi's ultimate aim was to underscore the point that, had the single Justice taken into account the negligence exhibited by the respondent's counsel in this case, he would not have granted the respondent's application for extension of time for, negligence on the part of an advocate has never been an excuse.

Regarding the second ground of reference, which faults the learned single Justice for ruling that the certificate of delay issued by the Deputy Registrar of the High Court was invalid, it was Mr. Budodi's argument that, if the said certificate was invalid, a finding which however, the applicants dispute, then the only remedy available to the respondent was to return the defective certificate to the Deputy Registrar of the High court to have it rectified and not to apply for extension of time within which to appeal. Relying on the case of ***Athuman Amiri v Hamza Amiri*** **and Another**, Civil Application No. 133/02/2018 (unreported), the learned counsel contended that, the respondent could only apply for the extension of time within which to appeal if, on being requested, the Deputy Registrar had refused to correct the certificate for the identified errors. According to Mr. Budodi, in the absence of such a refusal by the Deputy Registrar, the

learned single Justice of this Court was not seized with the requisite jurisdiction to entertain the application for extension of time.

Regarding the third and fourth grounds of the reference which the applicants' counsel combined and argued together, it was submitted on behalf of the applicants that, it was rather erroneous on the part of the single Justice to hold that the Deputy Registrar ought to have taken an affidavit with a view to controverting the denials by Messrs Bartazar Chambi then the advocate for the respondent and Filo Msuha the respondent's Credit Officer that the documents requested for appeal purposes were collected by them on behalf of the respondent on 18th October, 2018.

The applicant's counsel surmised that, after the respondent's counsel had applied for the records requisite for appeal purposes by writing a request letter to the Deputy Registrar, a corresponding letter from the Deputy Registrar notifying him that the record was ready for collection and not an affidavit taken by the Deputy Registrar was sufficient proof that indeed the documents applied for were collected on 18th October, 2018. The thrust of the applicants' counsel's submission was, as he put it that, there was no need for the Deputy Registrar of the High Court to swear an affidavit to prove the practice of the court hence the

Latin maxim "**curcus curiae est lex cuviae"** (the practice of the court is the law of the court). Moreover, the applicants' counsel submitted that, essentially, there was no contentious matter regarding the respondent having been issued with the documents necessary for appeal purposes as counsel for the respondent had allegedly acknowledged and confirmed that fact through its letter of 10th April, 2019.

On the uncontested fact that the respondent had filed written submissions out of the timeframe prescribed by law, counsel for the applicants faulted the learned single Justice for not expunging the said submissions from the record on the grounds that, expunging them would result into the reply submissions filed by the applicants being without legs on which to stand thereby leaving the Court with no input from both parties. According to Mr. Budodi, the learned single Justice ought to have proceeded to consider the applicants' timely filed reply submissions and disregarded the respondent's belatedly filed submissions. Taking all that into account, the learned counsel entreated us to grant the application and reverse the decision of the single Justice of the Court.

Opposing the application, Mr. Daudi was relatively very brief. He submitted rightly so in our view, in respect of the first ground of reference that, it should not hold us back as the Court had already pronounced itself

on the same subject matter in its ruling of 29th March, 2022 following a preliminary objection which was raised by the applicants in Civil Appeal No. 20 of 2020 in which the applicants are the respondents.

As regards the second ground of reference wherein the learned single Justice is faulted for holding that the certificate of delay issued by the Deputy Registrar was invalid, Mr Daudi submitted that, the complaint on that aspect has no basis both in fact and in law on account of Mr. Budodi's failure or omission to address the single Justice on the said point. Regarding the case of **Athumani Amiri** (supra) to which we were referred by Mr. Budodi in his submissions on the issue as to whether or not the respondent could apply for the extension of time to lodge appeal without seeking in the first place for correction of the invalid certificate of delay, counsel for the respondent maintained rightly so in our view that, the said case did not lay down a legal foundation that there must be a refusal by the Deputy Registrar to issue a correct certificate of delay before an intending appellant can apply for extension of time within which to lodge the memorandum and record of appeal.

Regarding the argument by Mr. Budodi that it was not necessary for the Deputy Registrar of the High Court to swear an affidavit to rebut what was averred by the then respondents' counsel and Credit Officer, Mr.

Daudi stood firm that, the respondent's material averments in the supporting affidavit remained unchallenged more so after the only affidavit in reply was taken by Mr. Budodi himself who was the applicants' counsel and therefore not a competent deponent to swear on the affairs of the office of the Deputy Registrar.

As for the respondent's undisputed failure to lodge her written submissions within the prescribed period, Mr. Daudi submitted that, from the circumstances of the case before him, the learned single Justice rightly decided not to expunge the respondent's written submissions as they were meant by the parties to assist the Court to reach to a fair and just decision. Most importantly, the learned counsel contended, the late filing of the submissions did not in any way affect the validity of the application for extension of time and, as observed by the single Judge, by expunging them from the record, the applicants' reply submissions would not be spared as the two rival submissions are somewhat joined at the hip.

In determining this dispute, we begin by making a pertinent observation that, through various judicial decisions, the courts of law have laid down some guiding principles to follow in considering a civil reference like the one now under review. For instance, this Court had the following to say in our recent decision in the case of **Noble Motors Limited v.**

**Umoja wa Wakulima wa Bonde la Kisere** (UWABOKI), Civil Reference No. 29 of 2019 (unreported):

> *"We must emphasize that in dealing with an application for reference under rule 62 (1) (b) of the Rules, there are principles to be taken into account. In* ***Amada Batenga v. Francis Kitaya,*** *Civil Reference No. 1 of 2006 (unreported), the Court revisited its previous decisions on reference and summarized the following principles upon which a decision of Single Justice can be examined as hereunder:*
>
> > *"(a) On a reference, that full Court looks at the fact and submissions the basis of which the Single Justice 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".*

Still on the same point, we went on observing thus:

> *"Moreover, in* ***G.A.B. Swale v. Tanzania Zambia Railway Authority,*** *Civil Reference No. 5 of 2011 (unreported), the Court restated the principles to be*

*considered in determining an application for reference in the following terms:*

> *"(i) Only these issues which were raised and considered before the Single Justice may be raised in a reference (see* ***GEM AND ROCK VENTURES CO. LTD VS. YOMA HAMIS MVUTAH,*** *Civil Reference No. 1 of 2001(unreported. And if the decision involves the exercise of 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"*

It will be recalled that faced with a similar question, we held earlier on in the case of **Karibu Textile Mills Limited v. Commissioner**

**General Tanzania Revenue Authority**, Civil Reference No. 21 of 2017 (unreported) that:

> *"Bearing in mind that the grant of extension of time is discretionary, this Court would normally refrain from interfering with the exercise by a single Justice of his discretion under Rule 10 of the Rules".*

Reverting to the present case, without demur, we entirely agree with Mr. Daudi that since the Court had already pronounced itself on the question regarding the respondent's citation of Civil Case No. 10 of 2015 instead of Land Case No. 10 of 2015, we find the first ground of the reference to be overtaken by events. This is apparent from the Court's decision dated 29th March, 2022 regarding a preliminary objection raised by the applicants to the effect, among others that, the notice of appeal was defective for referring to Civil case No. 10 of 2015 instead of Land case No. 10 of 2015. We will thus desist from canvassing the first ground of reference in our ensuing deliberations.

With regard to the second ground advanced in support of the reference, we have keenly gone through the material placed before the single Justice together with the impugned ruling. We take note that the learned single Justice had gone through the certificate of delay, having in

mind the submissions made by Mr. Kesaria who was the respondent's counsel. Having so done, the single Justice went on observing that, the errors referred to by Mr. Kesaria were quite apparent in the certificate as not only to justify Mr. Kesaria'a complaint but also to make the certificate invalid and unable to exclude the period it purported to.

We have considered the applicants' complaint against the above finding by the single Justice. With respect, we do not see any reason why we should reverse or otherwise depart from the position taken by the learned single Justice given his reasoning and advantage of going through the impugned certificate the advantage which we do not have. In the circumstances, we find the second ground of reference to have no merit and we accordingly dismiss it.

Moving on to the third and fourth grounds of reference which the applicants' counsel combined and argued conjointly, the question for resolution by this Court is whether, in view of the material placed by the applicants and respondents before the single Justice, together with the applicable law, the single Justice was justified to rule in the first place that, there was no proof that the respondent was served with a letter by the Deputy Registrar notifying her that the documents requisite for appeal

purposes were ready for collection and, that the respondent did not collect the said documents on 18th November, 2018.

Of paramount importance here, is the fact that, knowing that the above posed questions were the core of the application before him, the learned single Justice after a thorough analysis of the evidence on record and full consideration of the submissions of both parties, came to the conclusion that it was doubtful if the letter notifying the applicant (now the respondent) of the readiness of the documents for appeal purposes was ever served on the respondent or her advocate. It is important here to state that on our part, we could not find anything convincing in the applicants' written arguments or in Mr. Budodi's oral submissions to fault the above finding by the learned single Justice. It can therefore safely be concluded that there was no material upon which the single Justice could have resolved the above-posed questions in the applicants' favour. In the circumstances, the third and fourth grounds advanced in support of the reference are found to have no merit and consequently dismissed.

Last on the list is the fifth ground in which the learned single Justice is challenged for not expunging from the record the respondent's written submissions which were filed beyond the prescribed time frame.

As it will be noted at once, the learned single Justice took great pains to explain why it would not be in the interest of justice to expunge the respondent's belatedly filed written submissions. He also had it in mind that indeed, in terms of Rule 106 (1) of the Rules the respondent should have filed her written submissions within sixty days of lodgement of the notice of motion insisting that, the above requirement which is couched in imperative terms had been flagrantly flouted by the respondent. But then, bearing in mind that the striking out of the respondent's written submissions would not invalidate the application before him and that, above all, the applicants were not prejudiced by the written submissions filed out of time as they had already filed a reply thereto in terms of Rule 106 (7) of the Rules, the learned single Justice then took the view and he accordingly held that, expunging the respondent's written submissions from the record would not serve the best interest of justice.

It should be borne in mind that, had the single Justice taken the course suggested by Mr. Budodi and expunged the respondent's written submissions from the record, he would still have come to rely on the applicants' submissions in reply which were essentially based on the same arguments raised in the respondent's submissions. This in our view, would not have been the correct approach. We are in this regard in agreement with the single Justice that indeed, the best interest of justice required

him to do what he did. For, the principle of overriding objective gives primacy to the administration of substantive justice without being tied up with procedural technicalities. We thus agree with Mr. Daudi and hold that, after all, the judicial duty of administration of justice is not a duty to engage in procedural technicalities; rather it is a duty to assist the Legislature to achieve substantive justice that can be inferred from the statutory design of section 3A (1) of the Appellate Jurisdiction Act (Cap 141 R.E 2019).

All said and done, we find no merit in this civil reference which we accordingly dismiss with costs.

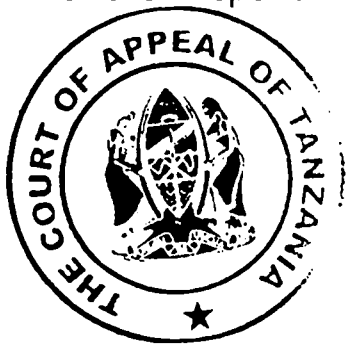
**DATED** at **SUMBAWANGA** this 22nd day of September, 2023.

I. H. JUMA
**CHIEF JUSTICE**

P. M. KENTE
**JUSTICE OF APPEAL**

Z. G. MURUKE
**JUSTICE OF APPEAL**

The Ruling delivered this 22nd day of September, 2023 via video conference from Sumbawanga High Court connecting to Dar es Salaam in the presence of the Mr. Selasini Lamwai and George Mushumba, both learned counsel for the Applicants and Mr. Zakaria Daudi, learned counsel for the Respondent is hereby certified as a true copy of the original.




E. G. MRANGU
**SENIOR DEPUTY REGISTRAR**
**COURT OF APPEAL**