

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: LILA, J.A., MASHAKA, J.A. And MGEYEKWA, J.A.)**

**CIVIL REFERENCE NO. 11 OF 2022**

**ELIAS KAHIMBA TIBENDELANA ..... APPLICANT**

**VERSUS**

**INSPECTOR GENERAL OF POLICE .....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**(Arising from the decision of a single Justice in an application for extension**

**of time to lodge a review against the Court's decision in**

**Civil Appeal No. 115 of 2008)**

**(Mwandambo, JA.)**

**Dated 9<sup>th</sup> day of August, 2022**

**in**

**Civil Application No. 388/01 of 2020)**

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**RULING OF THE COURT**

14<sup>th</sup> August & 25<sup>th</sup> September, 2023

**LILA, J.A.:**

Elias Kahimba Tibenderana, the applicant, lost before a single Justice in Civil Application No. 388/01 of 2020 in which he was seeking an order extending time to enable him apply for review of the Court's decision in Civil Appeal No. 115 of 2008. He has, in terms of Rule 62(1)(b) of the Tanzania Court of Appeal Rules, 2009 (henceforth the Rules), preferred this reference by way of a letter to the Registrar of the Court lodged in Court on 16/8/2022.

The essence of this reference traces its background, as revealed by the applicant's letter initiating this reference and the attached impugned ruling of the single Justice, from the dismissal of the aforesaid applicant's appeal to the Court (Civil appeal No. 115 of 2008) for being time barred in a ruling rendered on 17/4/2013. The dismissal order aggrieved him and was desirous to apply for review but, having realized that he was late exercised that right, he lodged Civil Application No. 388/01 of 2020 seeking indulgence of the Court to extend time to allow him prefer a review out of the statutorily prescribed time. It being a matter for a single Justice, the learned single Justice considered the grounds for the application and was satisfied that the applicant failed to account for a delay of *'40 days reckoned from the date the High Court dismissed his application'*. The learned single Justice also considered the allegation of illegality raised by the applicant as a ground for extension of time. The learned single Judge was of the view that the applicant did not point out any point of illegality but, in the course, he considered the applicant's contention that the *'order of the Court constituted an illegality in so far as it dismissed his appeal instead of striking out'* and arrived at a conclusion that it did not meet the test of being apparent on the face of the record as was expounded in the case of **The Principal Secretary, Ministry of Defence and National Service vs Devram Valambhia**, [1992] T.L.R.

387 and **Lyamuya Construction Co. Ltd vs Board of Trustees of the Young Women Christian Association**, Civil Application No. 2 of 2010 (unreported). The application was dismissed thereby denying the applicant extension of time.

The applicant still thinks that the learned single Justice's exercise of discretion to grant extension of time in his disfavour is unjustified and has knocked the Court's door to challenge it in this reference fronting Fourteen grounds in the letter initiating the reference. Relevance of some of the grounds have been taken issue by the respondent hence the need to recite them in extenso. They are: -

- "1. A single Justice of Appeal of the Court of Appeal of Tanzania, in dealing with Civil Application No.338/01 of 2020 exercised his discretion merely required to do a particular act which was precluded from entering into the merits of the matter because he was said to be acting ministerially.*
- 2. A single Justice of Appeal of the Court of Appeal of Tanzania erred in law in failing to discern by the light line of Law.*
- 3. A single Justice of Appeal of the Court of Appeal of Tanzania scope for exercising his discretion was not exercised judiciously and*

*not flexibly with regard to the relevant facts of the Applicant's case. Instead, the act has been ministerial as a result he reached a wrong decision.*

4. *whatever opinion a single Justice of Appeal of the Court of appeal delivered, there was no any **substantial reason** due to lack of investigation upon and effects the right of the Applicant.*
5. *A single Justice of Appeal of the Court of Appeal of Tanzania in failing to properly evaluate **illegalities or irregularities and the point of law in the Dismissal order worth the Court's attention.***
6. *A single Justice of Appeal of the Court of Appeal of Tanzania erred in Law in failing to have due regard to the need to achieve **substantive Justice** in the Applicant's case due to the fact that and in fact, Powers of review is invoked due to error apparent on the face of the record on the dismissal order sought to be reviewed.*
7. *A single Justice of Appeal of the Court of Appeal of Tanzania erred in law in failing to endorse or sign the Ruling so as to show his commitment that he ordered it.*

8. *A single Justice of Appeal of the Court of Appeal of Tanzania erred in law in failing to have due regards that the Court of Appeal of Tanzania in the exercise of its Jurisdiction **interferes** when there is error of law apparent on the face of the record on the dismissal order sought to be reviewed.*
9. *A single Justice of Appeal of the Court of Appeal of Tanzania erred in law in failing to have due regards that, the litigation initiated is deliberately for the purpose of merely to further the end of justice, an established Principle found in the Constitution of the United Republic of Tanzania which gives direction to the Court to pay due respect to substantial justice and the same avoid technicalities.*
10. *A single Justice of Appeal of the Court of Appeal of Tanzania erred in law in failing to properly evaluate that the Applicant's Application No. 338/01 of 2020 is raising from Civil Appeal No.115 of 2008 and not arising from the decision of the High Court of Tanzania.*
11. *A single Justice of Appeal of the Court of Appeal of Tanzania erred in law in failing to*

*properly evaluate that the delay to file application for the dismissal review in terms of a proper remedy, has not been caused or contributed by dilatory conduct on the Applicant's part.*

12. *A single Justice of Appeal of the Court of Appeal of Tanzania erred in law in failing to properly to further **Universal Respect for Justice; the Rule of Law; Human right and Fundamental freedoms.***
13. *The dismissal order and the Ruling of the Court of Appeal sought to be revised are problematic and if left to stand, Applicant's propriety right/interests over the dismissal of Appellant's Civil Appeal No.115 of 2008 will be illegally existing without affording theAppiicant's a hearing.*
14. *and for an order that Reference he allowed and costs incidental to this Reference abide the result of the revision.”(Emphasis added)*

Appearance by the applicant before us was as was case before the single Justice. He appeared in person and unrepresented. Ms. Selina Kapange, learned Senior State Attorney, entered appearance for the respondent. The appplicant had filed substantive written submission in

support of the application on 31/5/2023 followed by supplementary written submission lodged on 10/7/2023.

Save for some few paragraphs of the supporting affidavits as shall be discussed later in this ruling, the substantial part of the applicant's averrements in the supporting affidavit, written submissions and arguments before us, constituted a complaint that the denial of extension of time was a result of the learned single Justice's failure to exercise his discretion judiciously and amounted to denial of his right of appeal which is a constitutional right citing Articles 13(1),(3),(6)(a) and 117 of the Constitution of the United Republic of Tanzania of 1977 (as amended) which predominantly obligate the courts to dispense justice without unduely being tied up by procedural rules. He supported the stance by citing among others the case of **China Henan International Co-operation Group vs Salvand Rwegasira**, Civil Reference No. 22 of 2005 cited in **Bharya Engineering and Construction Co. Ltd vs Hamud Ahmed Nassor**, Civil Case No. 342/01 of 2017 (unreported). He also cited section 41(3)(a)(c) of the Judiciary Administration Act, 2011 which he later abandoned upon realising that it deals with deisciplinary actions in the event a judicial officer commits a miscinduct. These complaints are embraced in grounds number 1, 2, 3, 4, 6, 9 and 12 of the

letter initiating the reference. In ground 7, the applicant raised another complaint that the learned single Justice did not sign the ruling denying him extension of time in Civil Application No. 388/01 of 2020 which contention we outrightly find unmerited for an obvious reason that the applicant was served with a copy of the ruling which normally would not show the signature of the learned single Justice. A single Justice endorses or appends his/her signature on the original ruling only.

These complaints could not go unchallenged by the learned Senior State Attorney arguing that some of them are new grounds which were not placed before the learned single Justice in Civil Application No. 388/01 of 2020 hence should not be considered by the Court relying on the Court's decisions in **Daudi Haga vs Jenitha Abdon Machafu**, Civil Reference No. 01 of 2000; **V.I.P Engineering and Marketing Ltd and Others vs Citibank Tanzania Limited**, Consolidated Civil Reference Nos. 6, 7, and 8 of 2006 and **Amada Batenga vs Francis Kataya**, Civil Reference No. 01 of 2006 (all unreported) cited in **Praygod Mbaga vs The Government of Kenya Criminal Investigation Department and Another**, Civil Reference No. 04 of 2019 which outlined the principles governing reference.



We need not overemphasize that the rights of a party to invoke the Court's power in reference cases is limited. Rule 62(2) of the Rules expressly provides: -

*"At the hearing by the Court of an application previously decided by a single Justice, no additional evidence shall be adduced except with leave of the Court."*

The Rule makes it abundantly clear that an applicant is not permitted to raise new grounds in a reference other than those considered and determined by the single Justice unless he is so allowed by the Court upon an application to that effect. The legal position being so, the applicant herein was bound to challenge the single Justice's finding only on the grounds for extension of time he placed before the single Justice. Cognizant of the provisions of the above Rule, the Court lucidly expounded circumstances under which the learned single Justice's decision may be subjected to the Court's scrutiny in **Praygod Mbaga's** case (supra) as being: -

- 1. On a reference, the full Court looks at the facts and submissions the basis of which the single Justice made the decision;*
- 2. No new facts or evidence can be given by any party without prior leave of the Court; and*

*3. The single Judge's discretion is wide, unfettered and flexible; it can only be interfered with if there is a misinterpretation of the law."*

Alive of the above legal position, we now have to answer the question whether the above listed grounds of this reference qualify or meet the threshold of the law. As we have endeavoured to indicate above, the applicant fronted before the single Justice only two reasons for the delay; he had good reasons for the delay for the days he was late and an allegation of illegality in the Court's decision dismissing his appeal. Upon our thorough examination of the above grounds, we are of the decided view that the scales are tilted in the appellant's disfavour, as was rightly argued by the learned Senior State Attorney, that not all of them abide by the law. Plainly, grounds 1, 2, 3, 4, 7, 8, 9, 12 and 14 are new grounds to which the Court is precluded from entertaining. For this reason, these grounds stand dismissed.

There can be no doubt that the remaining grounds; 10, 11 and 13, have a bearing with the grounds that were placed by the applicant before the single Justice when seeking grant of extension of time. The crucial question now turns to be whether, on the basis of the principles set out above, there are justifications to vary or reverse the learned single

Justice's order denying the applicant extension of time. We shall first consider an allegation of illegality as a good ground for extension of time.

Before us and in his written submissions, the applicant was insistent that he fronted, as a ground, existence of an illegality in the Court's decision sought to be impugned that it dismissed the appeal instead of dismissing it after realizing that it was time barred. Conversely, the learned Senior State Attorney was opposed to the applicant's contention arguing that the learned single justice considered it and rightly held that, not only the illegality was not indicated but also it was not apparent on the face of the decision. It is trite law now that an allegation of illegality is sufficient cause for granting extension of time without need to account for the period of delay. In the case of **The Principal Secretary Ministry of Defence and Notional Service Vs. Devram Valambia** [1991] TLR 387, the Court observed thus: -

*"In our view, when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record straight"*

But, a caution was made by the Court that such an allegation of illegality should not be taken wholesome for that would lead to an abuse and the Court set a condition that such illegality should be apparent on the decision sought to be challenged in **Lyamuya Construction Company Ltd Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) where the Court stated that: -

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in **VALAMBIA'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 also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process"*

With the above caution in mind, we have examined the learned single Justice's decision and realised, indeed, that the applicant raised an allegation of illegality in his application before the learned single Justice.

That is vivid as the single Justice, at page 2 of the typed ruling, himself stated that: -

*"...Stripped of anything else, the applicant seeks to ask the Court in the intended application to review its decision **primarily because it dismissed his appeal instead of striking it out.**"*

The above comment was made before he later on, at page 9, observed that: -

*"Even though the applicant did not point out any illegality or point of law in the impugned decision to justify the order sought, I have to consider it all the same in view of the contentions in the written submissions."*

With respect, it is plain that the applicant had alleged existence of illegality and clearly stated that it was about his appeal being dismissed instead of being struck and that it could not be difficult, it being the final order, to note it. Without further ado, we find that the allegation of illegality was properly raised and it met the requirements of the law for it to constitute good cause for granting extension of time. In the circumstances, his being denied extension of time to lodge an application for review was unjustified.

As this ground is sufficient to dispose of the application, we refrain from further dealing with other complaints.

In fine, we grant the application and reverse the order by the single Justice. Consequently, we grant the application for extension of time and we order that the applicant has to lodge the intended application for review of the decision of this Court in Civil Appeal No. 115 of 2008 within sixty (60) days of the delivery of this ruling.

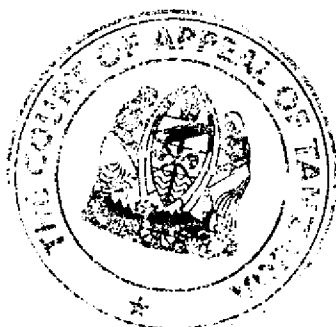
**DATED** at **DAR ES SALAAM** this 13<sup>th</sup> September, 2023.

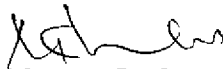
S. A. LILA  
**JUSTICE OF APPEAL**

L. L. MASHAKA  
**JUSTICE OF APPEAL**

A. Z. MGEYEKWA  
**JUSTICE OF APPEAL**

The Ruling delivered this 25<sup>th</sup> day of September, 2023 in the presence of the Applicant in person and Ms Celina Kapangyo, learned State Attorney for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, is hereby certified as a true copy of the original.



  
C. M. MAGESA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**