IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., KITUSI, J.A. And MGEYEKWA, J.A.)

CIVIL REFERENCE NO. 2/11 OF 2020

BHARYA ENGINEERING & CONTRACTING CO. LTD..... APPLICANT

VERSUS

HAMOUD AHMED NASSOR..... RESPONDENT

[Application for Extension of time to lodge an Appeal against the Decision of the Court of Appeal of Tanzania at Tabora]

(Mwambegele, JA.)

dated the 10th day of September, 2018

in

Civil Application No. 342/01 of 2017

.....

RULING OF THE COURT

29th September & 3rd October, 2023

KITUSI, J.A.:

This is a reference from Civil Application No. 342/01 of 2017 in which a single Justice of this Court (Mwambegele, JA), dismissed the applicant's application for extension of time. The learned Justice was satisfied that the applicant's delay from 17.10.2016 when Civil Appeal No. 148 of 2015 was struck out to 19.07.2017 when Civil Application No. 70/11 of 2017 was struck out constituted a period that has been dubbed as *"technical delay"* because there was evidence that the applicant had not allowed grass to grow under his feet.

If matters had stopped there, the applicant would have ended a happy side and this reference would not have been necessary. However, the learned single Justice dismissed the application because, he said, the applicant had not accounted for the delay of 15 days from when the last Application (No. 70/11 of 2017) was struck out on 19.07.2017 to 03.08.2017 when Civil Application No. 342/01 of 2017 was lodged.

The application premised on rule 62 (1) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules), attacks the decision of the learned single Justice on six grounds which are: -

1. *That the Honourable Justice of Appeal erred in law in ruling that the Applicant had failed to account for the 15 days of delay in re-filing Civil Applicant No. 342/01 of 2017.*
2. *That the Honourable Justice of Appeal erred in law and fact since his observation and finding in the Ruling are in variance with his final decision hence creating confusion.*
3. *That the Honourable Justice of Appeal erred in law for failure to point out any Rule describing the period of time within which to re-file an application after the previous application has been struck out to allow the court to rightly start reckoning days of delay.*

4. *That the Honourable Justice of Appel narrowly interpreted the phrase "sufficient/good cause" by merely confining it to only the meaning of failure to account for each day of delay.*
5. *That, the Applicant had furnished sufficient/good cause to explain delay.*
6. *Any other grounds to be adduced at the hearing of this reference.*

Mr. Michael Mwambeta learned advocate appeared before us to prosecute the application on behalf of the applicant. He had also represented him before the single Justice. The respondent was represented by Messrs. Mugaya Kaitila Mtaki and Fadhili Kingu, learned advocates.

Mr. Mwambeta did not have much in his address. After reference to settled principles governing reference, he made two points for our determination. The first is that since the single Justice had accepted the other period of delay as being technical, he did not exercise his discretion properly when he ultimately concluded that the 15 days had not been accounted for. The second point made by Mr. Mwambeta was that, it was wrong for the single Justice to pin the applicant down when there is no statutory period from which the 15 days could be reckoned.

On the other hand, Mr. Kingu argued that in order for us to interfere with the decision of the single Justice there must be good cause. He cited **BP Tanzania Limited (Now Puma Energy) Tanzania Limited v. Sanyou Service Station Limited**, Civil Reference No. 16 of 2023, and **Karibu Textile Mills Limited v. Commissioner General TRA**, Civil Reference No. 21 of 2017 (both unreported). He also cited the case of **Vodacom Foundation v. Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 (unreported), to support his argument that the applicant failed to account for each day of the delay. He prayed for dismissal of the application.

In our decision we begin by reproducing the principles underlying reference as summarized in **Amanda Batenga v. Francis Kataya,** Civil Reference No. 1 of 2006 (unreported) cited in **Karibu Textile Mills** (supra):-

> *"(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"*

As alluded to earlier, Mr. Mwambeta referred to principles governing reference some of which are part of those stated in **G. A. B Swale v. Tanzania Zambia Railway Authority**, Civil Reference No. 5 of 2011 (unreported) also cited in **Karibu Textile Mills** (supra): -

> *"(i) Only those issues which were raised and considered before the single Justice may be raised in a reference...*
>
> *(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..."*

We have considered the grounds of reference that were earlier reproduced, as well as the oral address by Mr. Mwambeta and find no basis for interfering with the finding of the learned Judge. We do not see how, for

instance, ground 4 may be rationalized because sufficient or good cause in applications for extension of time translates into the duty to account for each day of the delay.

The applicant appeared to be unhappy with the way the learned Justice seemingly changed from the initial line of reasoning where he had concluded that he was not negligent, to the latter where he concluded that he had failed to account for the delay of 15 days. In our view, the learned single Justice was entitled to that approach because the first period which constituted technical delay has its own way of sorting out.

The second period has to be considered by invoking a different principle altogether. The learned Justice observed the following: -

> *"The period of about fifteen days has not been accounted for. There is not an Iota of explanation in the notice of motion, in the affidavit supporting it, in the written submissions filed in support of the application, not even in the oral arguments before me"*

When we drew the attention of Mr. Mwambeta to this paragraph and asked him if it can be faulted, he conceded that it could not. With respect, we agree with the learned counsel. We also agree with Mr. Kingu that the applicant failed in his duty to account for each day of the delay. It does not

need a statutory provision for the court to conclude that the applicant's inaction for 15 days had not been explained. It cannot be said that the learned Justice wrongly exercised his discretion, nor can it be said that he did not take into account some relevant matters.

For those reasons, this application has no merit and we dismiss it, with costs.

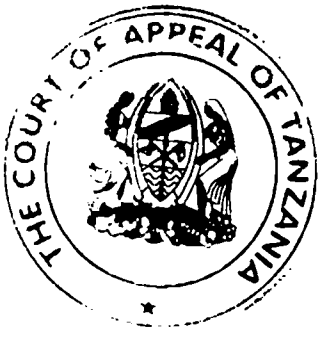
DATED at **TABORA** this 3rd day of October, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

Ruling delivered this 3rd day of October, 2023 in the presence of Mr. Mugaya Kaitila Mtaki, holding brief for Mr. Michael Mwambeta, learned Counsel for the Applicant and Mr. Mugaya Kaitila Mtaki, learned Counsel for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL