

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MKUYE J.A., KIHWELO, J.A., And MGEYEKWA, J.A.)

CIVIL REFERENCE NO. 01 OF 2022

MODESTUS DAUDI KANGALawe (Administrator of
the Estate of the late **DAUDI TEMAUNGI KANGALawe**) **APPLICANT**

VERSUS

DOMINICUS UTENGA **RESPONDENT**

**(Application for Reference from decision of the Court of Appeal of
Tanzania at Iringa)**

(Mwampashi, J.A)

dated the 1st day of October, 2021

in

Civil Application No. 139 of 2020

RULING OF THE COURT

5th & 11th December, 2023

MGEYEKWA, J.A.

This is an application for reference predicated under rule 62 (1) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) in which the applicant seeks this Court to vary and reverse an order of a Single Justice in Civil Application No.139 of 2020 dated 1st October, 2021. The single Justice denied the extension of time within which the applicant could lodge a notice of appeal and apply for leave to appeal against the decision of the High Court of Tanzania dated 30th September, 2016 in Land Appeal No. 15 of 2016.

Aggrieved, the applicant, through a letter written by Mr. Modestus Daudi Kangalawe dated 6th October, 2021 sought to move the Court as hinted above.

Before we proceed any further, we find it apposite to narrate, albeit briefly, the essential facts of the matter as obtained from the record. They are as follows: Modestus Daudi Kangalawe (Administrator of the Estate of the late Daudi Temaungi Kangalawe), the applicant, filed a suit at the District Land and Housing Tribunal (the DLHT) at Iringa in Land Application No. 86 of 2015 against Dominicus Utenga, the respondent, praying for recovery of land, permanent injunction restraining the respondent from interfering with his land measuring 20 acres and costs of the suit. The matter before the DLHT proceeded *ex parte* against the respondent. As a result, on 28th December, 2015 the suit was dismissed with costs.

The applicant was not happy with the DLHT's decision and therefore appealed to the High Court vide Land Appeal No. 15 of 2016. On 30th September, 2016 that appeal was dismissed. The applicant was aggrieved by the decision of the High Court (Sameji, J.), and resolved to file an application for leave before the High Court (Feleshi, J) in Miscellaneous Application No. 61 of 2016, and on 30th April, 2018, the application was granted. Subsequently, the applicant successfully filed an application for

leave before the High Court (Banzi, J) in Miscellaneous Application No. 17 of 2018.

Still desirous to pursue an appeal before this Court, he realized that he was late to exercise that right, therefore, he lodged Civil Application No. 139 of 2020 seeking the indulgence of the Court to extend time to lodge a notice of appeal and apply for leave to appeal out of the prescribed time. The application was supported by an affidavit taken by the applicant. On his part, the respondent resisted the application through an affidavit in reply deposed by himself. In his ruling, the learned single Justice, declined to grant an extension on account that the applicant's grounds for extension of time cannot amount to technical delay as was expounded in the case of **Fortunatus Masha v. William Shija and Another**, [1997] T.L.R 213.

Regarding the ground of illegality, the learned single Justice observed that the applicant's complaint that the proceedings of the DLHT were tainted with illegalities cannot hold water, since the said proceedings were not included in the record. Therefore, there was no way that the Court could state that there was illegality apparent on the face of the record.

As intimated above, the learned single Justice, declined to grant an extension of time as the applicant did not advance good cause to trigger the Court to exercise its discretion under rule 10 of the Rules.

Having examined the notice of motion and affidavits on record in the light of the contending submissions of the parties, the learned single Justice was satisfied that, the application had no merit and, hence, dismissed it with costs. Undeterred, the applicant has knocked the Court's door to challenge it in this reference fronting three grounds in the letter initiating the reference as follows:

- i) *The Honourable single Justice of Appeal found that there were no reasons disclosed in the affidavit of the applicant for him to exercise discretion to grant an order of extension of time while at the outset the applicant was sick and that reason was not disputed by cogent evidence.*
- ii) *The Honourable single Justice of Appeal found that the ground of illegality of proceedings complained of must fail while the same can be raised at any stage and proved, and on that day of hearing of Civil Application No. 139 of 2020 the applicant tried to tender the said proceedings under the umbrella of Judicial Notice but it was not considered.*
- iii) *The Honourable single Justice of Appeal found that the act of the applicant's filing different applications to condone him as technical delay is of no value based on the decision of*

Fortunatus Masha v. William Shija and Another [1997]
TLR 213.

At the hearing of the application before us, the applicant was represented by Mr. Marco Kisakali, learned counsel; whereas the respondent appeared in person, unrepresented.

When Mr. Kisakali was given the floor to elaborate on the application, he adopted the written submission and list of authorities filed earlier on and submitted that one of the grounds in the notice of motion was that the single Justice observed that there was no good cause stated by the applicant that he was unwell. He clarified that after the delivery of the High Court decision, the applicant fell sick, hence, he could not file the notice of appeal within time. He contended further that, the applicant in paragraph 5 attached the document which was marked as annexure MDK2. He urged us to consider the said annexure and allow the applicant to file the notice of appeal and apply for leave out of time.

Regarding the issue of the single Justice failing to take into consideration the ground of illegality which was raised by the applicant in paragraph 4 of the affidavit, he argued that the single Justice declined to consider the ground of illegality within which the assessors cross-examined the witnesses and they did not give their opinions, for a mere reason that, the applicant did not attach the DLHT proceedings.

Reinforcing his submission, he referred us to the DLHT proceedings. The learned counsel's further contention is that the single Justice had to consider the said proceedings because the same was pleaded at paragraph 5 of the applicant's affidavit. He clarified further that, there is no specific provision that list the documents to be tendered during the hearing of the application. He buttressed his argument by relying on the case of **G.A. B Swale v Tanzania Zambia Railway Authority**, Civil Reference No. 5 of 2011 [2016] TZCA 863 (7 September 2016, TanzLII).

On the third ground, Mr. Kisakali while relying on the case of **Fortunatus Masha v William Shija and Another** (supra) argued that, the single Justice declined to grant an extension of time based on technical delay without considering the circumstances of each case. He continued to argue that the applicant successfully lodged the application for extension of time for leave to appeal, unfortunately, he did not comply with rule 47 (1) of the Rules because he did not lodge the notice of appeal.

On the strength of the above submission, Mr. Kisakali urged us to grant the application and vary the decision of a single Justice.

On the adversary side, the respondent had not much to say. He contended that litigation must come to an end. On alleged illegality of the decision desired to be impugned, the respondent declined to make any

comment on account of his being a lay person and left the matter for the determination by the Court in the interests of justice.

Before dealing with the matter before us, we have deemed it crucial to point out that subsection (1) of section 5 of the Appellate Jurisdiction Act, Cap. 141 has been amended vide Written Laws (Miscellaneous Amendment) Act No.11 of 2023. Currently, the application for leave to appeal is no longer a legal requirement. For that reason, we will only determine the applicant's prayer for extension of time to lodge a notice of appeal against the decision of the High Court of Tanzania dated 30th September, 2016 in Land Appeal No. 15 of 2016.

We have scrutinized the material on record and considered the submissions for and against the reference and we think, the issue for our determination is whether the applicant in Civil Application No. 139 of 2020 managed to give good cause warranting an extension of time in terms of Rule 10 of the Rules.

At the outset, we would reiterate that extension of time under rule 10 of the Rules is a matter of discretion on the part of the Court, exercisable judiciously and flexibly by considering the relevant facts of the case, and the said jurisdiction can rarely be interfered with. The Court can only interfere with such exercise where there is a good cause such as

where the single Justice has taken into account irrelevant factors and matters. The guiding principles when determining whether or not to interfere with the decision of the single Justice was clearly articulated in the case of **G.A.B Swale v. Tanzania Zambia Railways Authority** (supra). The Court having revisited its previous decisions on reference, summarized the principles that govern applications for reference which are that: **one**, the Court looks at the facts and submissions the basis of which the single Justice made the decision; **two**, no new facts or evidence would be given by any party without the prior leave of the Court; and **three**, the single Justice's discretion is wide, unfettered and flexible, that it can only be interfered with if there is a misinterpretation of the law. In the case of **Philip Chumbuka v. Masudi Ally Kasele**, Civil Reference No. 14 of 2005 (unreported), the Court stated as follows:

"It is an accepted principle that in reference, the full Court considers what was presented and argued before the Single Justice and see whether the learned judge was right or wrong. The full Court will not interfere with the decision of the Single Justice on the basis of fresh facts or submissions which were not available to the Single Justice."

See also **Amada Batenga v. Francis Kataya**, Civil Reference No. 1 of 2006 (unreported).

Coming to the application before us, we find that there are three issues to guide us on how to determine the instant application. First, whether the applicant's ill health was a good cause for extension of time. Mr. Kisakali contended that the applicant was unable to lodge the notice of appeal within time because he was sick. Having examined the annexure MDK2 and affidavital information from the applicant as was extracted by the single Justice at page 11 of the impugned ruling, we noted that none of the paragraphs in the supporting affidavit provides any justification on the whole duration of the illness of the applicant. For ease of reference, we find it apposite to reproduce part of the single Justice's holding hereunder:

"...the applicant's delay to lodge a notice of appeal was due to his ignorance of law and negligence, the ground and argument that the delay was caused by sickness cannot be accepted. As it has been amply demonstrated above, the impugned decision was delivered on 30th September, 2016. According to the applicant he got sick soon thereafter up to 10th November, 2016 when he recovered. After recovering from 10th November, 2016 up to 2019 he took no efforts in regard to the notice of appeal, rather he wasted time seeking leave to appeal..."

Going by the above excerpt, we think the single Justice reasons for declining the ground of sickness are fully justified. Consequently, we find no reason to vary it.

Second, whether the ground of technical delay was a good ground for an extension of time. Upon our reading of the single Justice's decision, specifically at pages 9, 10 and 11 of the impugned ruling, from the outset, we find and hold that the raised technical delay did not amount to a good cause for an extension of time. The single Justice could not have been in a position to grant the applicant's application based on the ground of technical delay since this ground can only stand when the original appeal was lodged in time but for one reason or another has been found to be incompetent. In the instant application, the notice of appeal to which extension of time is sought had not been lodged. Consequently, the period of delay cannot conveniently be termed as a technical delay. Thus, the facts in **Fortunatus Masha** (supra) does not fall in all fours with the present case.

The third issue is whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged. We are mindful of the fact that it is settled that in applications of extension of time, once an issue of illegality in the impugned decision is raised, that

amounts to good cause and the Court, even if every day of delay is not accounted for, would grant an extension sought to rectify the illegality on appeal. This position has been stated by the Court in a string of decisions, see: **The Principal Secretary, Ministry of Defence and National Service v. D P Valambhia** [1992] TLR 185, **The Principal Secretary, Ministry of Defence and National Service v. D P Valambhia** [1992] TLR 387 and **Said Nassor Zahor & 3 Others v. 7 Nassor Zahor Abdallah EI Nabahany**, Civil Application No. 278/15 of 2016. In **The Principal Secretary, Ministry of Defence and National Service v. D P Valambhia** (supra), the Court held:

"Where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute "sufficient reason within the meaning of rule 8 of the Rules for extending time".

The Court, went on to state that:

*"... 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 right".*
[Emphasis added].

It transpired that in this reference the single Justice rejected the ground of illegality for not constituting good cause for the delay, however, we are of the considered view that, after a perusal of the proceedings of the DLHT in Application No. 86 of 2015 that was brought forward to us, it does. By merely looking at the DLHT proceedings, we note that the applicant had pegged the illegality on the decision of the DLHT that, the Chairman did not invite the assessors to give their opinions. In **Citibank (Tanzania) Ltd v. TICI & Others**, Civil Application No. 97 of 2003 [2006] TZCA 89; (04 May 2006, TanzLII), the Court observed that enlargement of time can be done if there exist exceptional circumstances such as:

"A claim of illegality or otherwise of the challenged decision or order or in the proceedings leading to the decision."

In the above cited authority, the full Court reversed the decision of the single Justice and granted the applicant the extension of time sought. The same stance applies in the instant application. Therefore, we are in accord with the submission advanced by Mr. Kisakali that the allegation of an illegality of the decision sought to be challenged amounts to good cause for the delay warranting the reverse of the previous order of the single Justice.

In the upshot, we find this reference meritorious. We, therefore allow the application for reference and reverse the order by the single Justice. Consequently, we grant an extension of time to lodge the notice of appeal against the judgment of the High Court of Tanzania in Land Appeal No. 15 of 2016. The applicant is given thirty (30) days reckoned from the date of delivery of this ruling. Each party to bear own costs.

It is so ordered.

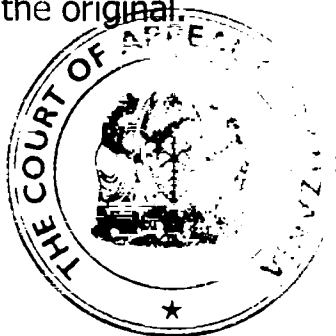
DATED at IRINGA this 11th day of December, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 12th day of December, 2023 in the presence of Mr. Marco Kisakali, learned counsel for the Applicant and Mr. Dominicus Utenga present in person, is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL