

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., LEVIRA, J.A., And MASHAKA, J.A.)

CIVIL REFERENCE NO. 5 OF 2020

JOSEPH PAUL KYAUKA NJAU1ST APPLICANT

CATHERINE PAUL KYAUKA NJAU 2ND APPLICANT

VERSUS

EMMANUEL PAUL KYAUKA NJAU..... 1ST RESPONDENT

HIACINTA PAUL KYAUKA NJAU 2ND RESPONDENT

**(Application for Reference arising from the decision of the single Justice
of the Court at Dar es salaam)**

(Mwangesi, JA.)

**dated the 22nd day of May, 2017
in**

Civil Application No. 7/05 of 2016

.....

RULING OF THE COURT

29th May & 4th July, 2023

LILA, J.A.:

This reference emanated from the decision of a single Justice in Civil Application No.7/05 of 2016 and has been predicated under Rule 62(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). In that application which was a *second bite* following the applicant's former application in Miscellaneous Civil Application No. 26 of 2016 being refused by the High Court (Moshi District Registry), the learned single Justice of the Court denied the applicant extension of time within which to file in the Court an application for revision against the decision of the High Court in

Consolidated Probate and Administration Applications Nos. 34 of 2010 and 14 of 2014 (henceforth the Consolidated Applications). In his letter to the Registrar of the Court dated 16/12/2019 which initiated the reference, the applicant claimed that the decision by the single Justice was erroneously arrived at on the ground that the consolidated applications suffered from the following illegalities which constituted good reason for granting extension of time: -

- "(a) That Hon. Mwingwa J. erred in law to bless the distribution of the estate of the late Paul Kyauka which did not adhere to the laws of inheritance applicable in Tanzania.*
- (b) That Hon. Mwingwa J. erred in law to issue a judgment instead of a ruling after determining the consolidated applications.*
- (c) That Hon. Mwingwa J. acted ultra vires in discharging the administrators while Probate and Administration Cause No. 5 of 2002 is still pending in the High Court at Moshi.*
- (d) That Hon. Mwingwa J. acted ultra vires in discharging administrators while they have not transferred the estates to the beneficiaries."*

In the light of the above grounds, it is clear that the reference does not concern the decision of the single Justice that the applicant failed to account for the days of delay but failure to consider that there were

allegations of illegalities which would have warranted the single Justice exercise his discretion and grant extension of time to lodge a revision. Since our discussion on that sole complaint is decisive, we are compelled to narrate the only relevant part of the background of the matter before the Court as discerned from the available record.

The record bears out that the applicant was aggrieved by the High Court decision in the Consolidated applications and was inclined to apply for revision of the decision before the Court but was late. He was unsuccessful in his application for enlargement of time before the High Court holding that the applicant failed to account for the days of delay and, as for existence of an illegality which the learned judge acknowledged it to be a good ground for enlargement of time, it was held that it could not justify grant of extension of time where someone "*opted to sleep on his/her rights and without any reasonable cause*". It is worth noting that the applicant had filed, together with the application, a copy of the memorandum of appeal to which Mr. Lawena, learned counsel who represented the applicant, argued that it showed that there were overwhelming chances of the appeal being successful. Still vying to challenge the High Court decision on the consolidated applications, the applicant preferred a *second bite* before the single Justice.

In his decision, the learned single Justice prefaced his ruling by reproducing paragraphs 3 to 10 of the affidavit supporting the application which was deposed by the applicant so as to appreciate the background of the matter before him. Given their relevance here, we also take the pain to do the same as under: -

- "3. *That judgment in the said High Court of Tanzania at Moshi Probate and Administration Application No. 34/2010 and 14/2014 consolidated, was delivered on the 09th March 2016 before Honorable B. B. Mwingwa Judge.*
4. *That on 14th March 2016 we applied to the Deputy Registrar, High Court of Tanzania at Moshi for supply of the copy of proceedings, judgment and decree.*
5. *That on the same date, that is 14th March 2016 we issued a notice of appeal against the decision of the High Court of Tanzania at Moshi Probate and Administration Application No. 34/2010 and No. 14/2014.*
6. *That as from 22nd March 2016 we started following up for the copy of the judgment and decree in the High Court of Tanzania at Moshi Registry.*
7. *That we were supplied with a copy of the decree on the 22nd March 2016.*
8. *That having obtained the said copies we approached our Advocate with the said documents and he told us that the time within which to apply for leave to appeal had long*

expired and that the only way is to apply for extension of time.

9. *That on the 19th March 2016, we filed before this Honorable High Court of Tanzania at Moshi Miscellaneous Civil Application No. 26 of 2016 applying for extension of time within which to file our application for leave to appeal to the Court of Appeal of Tanzania.*
10. *That the said application was heard and, on the 18th October 2016, Honorable P. S. Fikirini, Judge, dismissed the application with costs."*

Plain as they are, neither of the quoted paragraphs advanced any claim of existence of illegalities in the consolidated applications. After consideration of the first three conditions set forth in **Lyamuya Construction Company limited Vs Board of Trustees of Young Woman's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) and being satisfied that no good cause for delay was advanced, the learned single Justice turned to consider whether illegality as a ground for extending time had any merit. In doing so, he stated: -

"...The only principle for their rescue is, as to whether there were matters of illegality in the decision intended to be impugned that call for the involvement of this Court. The learned counsel for the applicants has invited this Court to have a glance to the grounds of the intended

memorandum of appeal which has been annexed to the affidavit of the applicants which reveal that there were some illegalities in the decision of the trial court that call for deliberation by this Court."

It is apparent that, like it was before the High Court, the allegation of illegalities was not raised before the single Justice as a ground for grant of extension of time either in the notice of motion or in the supporting affidavit. Reliance of the applicant was, again, on grounds of appeal as contained in the intended memorandum of appeal which was annexed to the affidavit supporting the application for extension of time. The learned single Justice took the liberty to quote them thus: -

- "1. *That the Honorable Judge having admitted that, the estates of the late Paul Kyauka Njau were unevenly distributed, erred in law and in fact in holding that, Crescentia, the first wife of the deceased, deserved a lion's share simply because of living with the deceased for a long time **without considering the fact** that, all wives of the deceased had equal rights to the said properties.*
2. *That the Honorable trial Judge erred in law and in fact in holding that, the Administrators performed their duty, **while there is evidence** that some beneficiaries tempered with the said estates and they failed to take necessary action especially when they knew the said properties tempered with by the said beneficiaries.*

3. *That the trial Judge erred in law and in fact when he held that, the first respondent duly performed his duty while **in fact** he was out of the country and that duty was conducted solely by Febronia Paul Kyauka Njau in the absence of the first respondent as a joint Administrator.”*
(Emphasis added)

Nevertheless, upon consideration of the grounds of appeal, the learned single Justice agreed with Mr. Daniel Haule Ngudungi, learned counsel for the respondent, that the grounds of appeal related to evaluation of evidence hence raised factual issues. The application was accordingly dismissed.

For the hearing of the application before us, Ms. Stella Simkoko, learned counsel, appeared for the applicant and, as it was before the High Court, Mr. Ngudungi, also learned counsel, appeared for the respondent.

Ms. Simkoko, as an addition but different to the grounds of this reference reflected above, expanded the playground as she fronted three arguments to move this Court to vary the decision by the single Justice. **One**; she was not happy with the manner a delay of 20 days was treated to be inordinate quite opposed to the Court’s finding **in Attorney General Vs Oysterbay Villas Limited and Another**, Civil Application No. 448/01 of 2020 (unreported) where a delay was taken to be not inordinate. **Two**; the Court should not only consider the delay but also

the weight of the substance which is the subject matter of the application citing the cases of **Reuben Lubanga Vs Moza Gilbert Mushi and 2 Others**, Civil Application No. 533/01 of 2021 and **Doto Isoda and 8 Others Vs Ambogo Elly Ambogo**, Civil Appeal No. 318 of 2012 (both unreported) to bolster her argument. She argued that the weight of issues as could be deduced from the grounds which involved distribution of estate were crucial and sufficed the single Justice apply his discretionary power and grant extension of time. **Three**; there were illegalities in the decision sought to be challenged by way of revision and to prove so, Korosso, JA considered them in Civil Application No. 143/05 of 2018 and granted the applicant extension of time to lodge the present reference. She further submitted that even if the Court is to find the grounds of appeal did not raise any illegality, the Court should take it that there are irregularities in the Consolidated Applications sought to be revised in the event time is enlarged to lodge a revision application.

In rebuttal, Mr. Ngudungi prefaced his submission by giving the background of the matter as reflected above and was not hesitant to agree with the single Justice's findings. His first assault to Ms. Simkoko's arguments was directed on the manner the alleged illegalities were raised. Legally speaking, he insisted, grounds for an application ought to be reflected either in the notice of motion or in the affidavit in support of the

application. Referring to the present case, he argued that existence of illegalities as a ground for granting extension of time were neither raised in the notice of motion nor on the supporting affidavit. He discounted the grounds of appeal as revealing no any illegality and argued that the learned single Justice was right to hold that they touched on factual issues. Addressing the Court in respect of the afore listed illegalities raised in this reference, Mr. Ngudungi stated that they are new and the learned single Justice cannot be blamed for not having a glance on them. They were supposed to be raised in the application before the single justice, he stressed.

Regarding the arguments that the grounds of appeal raise crucial issues, Mr. Ngudungi was of the firm view that the law as it stands now is that the allegation must be of law not factual as contained in the grounds of appeal.

Mr. Ngudungi insisted that the delay of 28 days in the present case was not accounted for and distinguished the facts of this case and the case of **Attorney General Vs Oysterbay Villas Limited and Another** (supra) arguing that each case has to be decided according to its circumstances. He argued further that in the present case the applicant was served with a copy of proceedings before expiry of the stipulated time for lodging an application for revision but the applicant stayed for 28 days

without doing the needful which inaction he attributed to negligence on the part of the learned applicant's counsel. He finally, notwithstanding the fact that the parties herein are relatives, urged the Court to dismiss the application with costs.

Rejoining, Ms. Simkoko urged the Court to consider the circumstances of this case in the light of the circumstances in the case of **Attorney General Vs Oysterbay Villas Limited and Another** (supra) and proceed to not only reverse the decision of the single Justice but also grant the applicant extension of time to lodge a revision application. She was insistent that costs should not be awarded so as to maintain the parties' relationship.

As alluded to above, the present application has been preferred under Rule 62(1) of the Rules which empowers the Court in fit circumstances to vary, discharge or reverse the decision of a single Justice. The Court gave guidance on the circumstances under which such power may be exercised in **G.A.B Swale Vs Tanzania Zambia Railway Authority**, Civil Reference No. 05 of 2011 cited in the case of **Farida F. Mbarak and Another Vs Domina Kagaruki and 4 Others**, Civil Reference no. 14 of 2019 (both unreported) to be that: -

- (i) Only those issues which were raised and considered before the single Justice may be raised in a reference. (See **Gem and Rock**

Ventures Co Ltd Vs Yona Hamis Mvutah, Civil Reference No. 1 of 2010 (unreported).

And if the decision involves the exercise of judicial 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 fact applicable to that issue, or;
- (v) If looked at in relation to the available evidence and law, the decision is plainly wrong (see **Kenya Cannery Ltd Vs Titus Muriri Doct**s (1996) LLR 5434 a decision of the Court of Appeal of Kenya, which we find persuasive) (see also **Mbogo and Another Vs Shah** (1996) 1 EA 93 at page 3-4)". See also **Daudi Haga Vs Jenitha Abdon Machafu**, Civil Reference No. 01 of 2000 and **Amada Balenga Vs Francis Kataya**, Civil Reference No. 01 of 2006 (both unreported)."

On the authority above, our serious examination of the grounds raised in this application against those raised in the application before the single Justice as recited above, has revealed that the grounds placed before us

are completely new. The above listed alleged illegalities did not feature neither in the notice of motion or in the affidavit supporting the application that was before the single Justice as is expected in terms of Rule 48(1) of the Rules which mandatorily directs every application to the Court to be made by way of a notice of motion supported by affidavit and that it shall state the grounds for the relief sought. In terms of that Rule grounds for the application should be reflected in the notice of motion but this Court relaxed the stance by permitting, as a way of curing the omission, grounds of the application be deduced from the averments in the affidavit in support of the notice of motion (see **Masumbuko R. M. Lamwai vs Venance Ngula & The Attorney General**, Civil Application No. 60 of 1998 (unreported) cited in **Eliya Anderson vs The Republic**, Criminal Application No. 2 of 2013 (unreported)). The present reference, like any other applications, ought to have had reflected the grounds for the relief sought. By the applicant preferring new grounds in violation of the law on reference it is tantamount to preferring a reference without grounds for the relief sought. We therefore entirely agree with Mr. Ngudungi that the grounds of this reference were not part of the grounds placed before the single Justice for consideration and, on the authority above, this Court is precluded from considering them.

Just as a reminder to the learned counsel for the applicant, this is a reference and not a second bite application. In the later application a party is permitted to raise new grounds for consideration by the Court as the Court lucidly stated in **Bishop Roman Catholic of Tanga Vs Casmir Richard Shemkai**, Civil Application No. 507/12 of 2017 (unreported) cited in **Benedict M. Kezirahabi Vs Loveness Mary D. Kezirahabi**, Civil Application No. 572/01 of 2019 (unreported) that: -

*"Our careful reading of Rule 47 of the Rules, we think that **a party who is refused the application in the High Court, in making the same application to the Court in the second bite, not bound to front the same grounds advanced at the high Court. He can as well raise new ones in the fresh application and the Court is enjoined to consider them.**"*

(Emphasis added)

Ordinarily we would have stopped there and dismissed the application, but we find ourselves compelled to state, albeit briefly, that we have had opportunity to digress on the cited cases by Ms. Simkoko. Admittedly and as was with requisite vigor argued by Mr. Ngudungi, grant of extension of time is a matter for the Court's discretion and the reasons for exercising such power are not closed but depends on the circumstances of each particular case. That position was cemented in

Osward Masatu Mwizarubi Vs Tanzania Fish Processing Ltd, Civil

Application No.13 of 2010 (unreported), where the Court stated that;

*"What constitute good cause cannot be laid down by any hard and fast rules. The term **"good cause"** is a relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion."*

A crucial thing to be noted is the fact that, in this reference the Court is being invited to consider the propriety of the exercise of such discretion by the single Justice. We are not dealing with an application for extension of time for the first time. As stated above, in view of the grounds raised, the applicant had no issue with the single Justice's finding on the failure to account for the days of delay. We need not overemphasize that the letter to the Registrar by the applicant initiating the reference constituted a notice of motion and the grounds thereon carry equal weight as those reflected in a notice of motion. Arguing any ground beyond those contained in the letter is therefore unacceptable. We shall not therefore address the complaint on the single Justice's findings on failure to account for the days of delay that was raised by Ms. Simkoko before us and we take it to be an afterthought.

Existence of illegalities in the impugned decision had been the major point of contention between the learned counsel of the parties. As demonstrated above, existence of illegalities did not feature in the notice of motion or affidavit supporting it which are the acceptable ways of advancing grounds in an application for the relief sought. Before the single Justice, Mr. Lawena relied on the copy of the memorandum of appeal which comprised of three grounds of appeal to have placed before the Single Justice illegalities as a ground for seeking extension of time. Ms. Simkoko has taken the same view with an addition that if they fall short of that, they should be treated to have raised issues of crucial importance warranting grant of extension of time in line with the Court's decision in **Reuben Lubanga Vs Moza Gilbert Mushi and 2 Others** (supra). Mr. Ngudungi disagreed with her supporting the learned single Justice's position that the grounds of appeal do not raise any issue of illegality.

We have given due consideration to the contending arguments by the learned counsel for the parties and seriously examined the grounds of appeal. As a matter of principle, both learned counsel are in agreement that an allegation of illegality is itself a ground which must warrant exercise of discretion to grant extension of time. The often-cited case of **Lyamuya Construction Company limited Vs Board of Trustees of Young Woman's Christian Association of Tanzania** (supra) lays

down that stance. We however do not agree with Ms. Simkoko that the grounds of appeal raise an allegation of illegality. Apart from not deserving to be considered having not been raised before the single Justice in either the notice of motion or affidavit supporting it, without hesitation, we hold, like the single Justice, that they clearly show that they are intended to challenge the decision of the High Court in the consolidated applications on factual findings. They do not suggest contravention of any law.

Besides, we have traversed the cited case of **Doto Isoda and 8 Others Vs Ambogo** (supra) and that of **Reuben Lubanga Vs Moza Gilbert Mushi and 2 Others** (supra) and satisfied ourselves that they are of no assistance to Ms. Simkoko. The former case was an appeal and had nothing to do with the subject matter of this application, hence it is irrelevant. In the later case, the applicant expressly alleged existence of an illegality in his application that he was denied a right to be heard. Such is not the case herein rendering it distinguishable.

Lastly, Mr. Ngudungi had pressed for payment of costs of the case to the respondents which was stoutly opposed by Ms. Simkoko. We have considered the rival arguments. Award of costs to a successful party is a matter of right unless there are good reasons to justify an order to the contrary. Being relatives alone constitutes no good reason not to award

costs in cases like the present one where one of them unnecessarily drags another relative in Court thereby subjecting him to costs of litigation.

For the reasons stated, the application is hereby dismissed and we hereby order the respondents to be paid costs of this application.

The above said, we see no justifiable grounds to interfere with the decision of the Single Justice and hereby dismiss this application with costs.

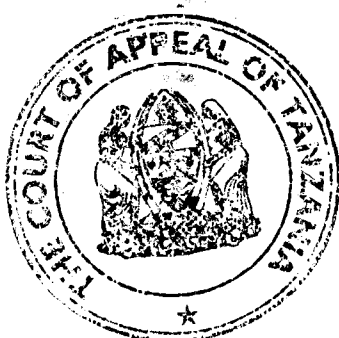
DATED at DAR ES SALAAM this 28th day of June, 2023.


S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The ruling delivered this 4th day of July, 2023 in the presence of Mr. Damian Ngudungi learned advocate for the respondents also holding brief for Ms. Stella Semkoko, learned counsel for the applicants is hereby certified as a true copy of the original.




F.A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL