

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MKUYE, J.A., FIKIRINI, J.A. And MWAMPASHI, J.A.)

CIVIL REFERENCE NO. 28 OF 2019

TANZANIA RENT A CAR LIMITED.....APPLICANT
VERSUS
PETER KIMUHU.....RESPONDENT

[Application for Reference arising from the decision of a Single Justice]

(Mwambegele J.A.)

dated 7th day of May, 2019

in

Civil Application No. 226 of 2017

.....

RULING OF THE COURT

14th February & 10th March, 2023

MKUYE, J.A.:

This is an application for reference that is predicated under Rule 62 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. 226/01 of 2017 which denied the extension of time within which the applicant could lodge an application for review. Before the Single Justice the applicant had advanced the reasons for delay that after the dismissal of Civil Appeal No. 84 of 2012, she instructed Advocate Edward Lisso to re-start the appeal where upon she filed Misc. Civil Application No. 747 of 2016 for extension of time to file a notice appeal and Misc. Civil Application No. 835 of 2016 for an order for stay of execution which applications came to be withdrawn

after an engagement of another advocate who discovered some defects in the said applications.

The other reason advanced was that there was an illegality since the appeal was dismissed instead of being struck out as it was not heard on merit. Apart from that, there was an illegality on the impugned order since Civil Appeal No. 84 of 2012 sought to be impugned originated from the decision delivered on 11/5/2011 and not on 11/5/2012 as was shown in the appeal.

On the respondent's side, it was argued that the applicant had failed to account for each day of delay and thus resisted the application.

In his ruling, the Single Justice observed that, although the applicant had shown chances of success in the intended application for review under Rule 66 (1) (a) to (e) of the Rules, she had failed to account for each day of delay. As it can be gleaned from pages 13-14 of the typed Ruling, the Single Justice found that since the applicant did not provide the dates on which the applications, she was pursuing in the High Court were lodged and when the same were withdrawn, there was no better particulars in place for measuring the promptness of the filing of the application for extending time. The Court went on to find that the wrong citing of a date in the case was not an illegality but a mere error which was curable.

The grounds for this application are that the Single Justice erred in holding that:

- 1) The applicant had not brought good cause for the delay.
- 2) The time spent by the applicant in pursuing the application for extension of time to file a notice of appeal and application for stay of execution was not properly accounted for.
- 3) The negligence of the advocate is not a good cause for extension of time.
- 4) There was no illegality in the Order of the Court but there was only an error in the decision of the Court.
- 5) Although the applicant succeeded to show chances of succeeding in one of the grounds under Rule 66 (1) (a) to (e), that alone does not suffice to grant extension of time.

When the application was called on for hearing, the applicant was represented by Mr. Braysoni Shayo, learned advocate; whereas the respondent enjoyed the services of Mr. Odhiambo Kobas, learned advocate.

On being availed an opportunity to expound on the application, Mr. Shayo adopted the written submission and list of authorities filed earlier on and after having done so, had nothing to add except that he

stressed that the Court erred in dismissing the appeal instead of striking it out.

Basically, in the written submissions, Mr. Shayo submitted that it was wrong to hold that the applicant failed to show good cause and to account for each day of delay since she acted promptly after discovery that she was out of time to file a review. That, after the dismissal of the appeal, the applicant initially engaged Mr. Lisso who filed two Misc. Applications which were withdrawn on 2nd May, 2017 after having discovered that she was pursuing a wrong course in the High Court as the order was dismissal and not striking out the appeal. That, the application for extension of time was filed on 17th May, 2017 only 15 days after the withdrawal of the applications. However, we hasten to state that the dates when the said applications were withdrawn and the application for extension of time was filed were not availed before the Single Justice.

The applicant contended further that although the former advocate ought to have check the law properly, he is of the view that, he took that course of action in good faith, sincerity and diligently since he acted under the assumption that the appeal was heard on merit without forgetting that advocates are human being subject to errors. He,

therefore, urged the Court to consider that the application for extension of time was delayed while taking a wrong course in the High Court.

Besides, the learned advocate argued that there was an illegality in dismissing the appeal since it has been a practice of the Court to strike out the matter filed out of time and not dismissing it. As regards the wrongly cited dates in the title of the application, he argued that, it was a mere clerical error which could be cured under the Rules.

He ultimately prayed to Court to grant the application and vary the decision of the Single Justice.

Mr. Kobas, who did not file a reply to written submission, resisted the application. He kicked off by re-stating and, rightly so in our considered view, that for an application for extension of time to file review to be successful the applicant must show good cause for extending time and the ground under Rule 66 (1) (a) to (e) of the Rules to which the application for review would be predicated. He referred us to the case of **Laureno Mseya v. Republic**, Criminal Application No. 8 of 2013 (unreported).

He elaborated that in the application at hand, the Single Justice after scrutizing the material brought before him, he rightly reached to the conclusion that the applicant failed to show good cause but

succeeded in showing that the application would be predicated in one of the grounds under Rule 66 (1) (a) to (e) of the Rules. To bolster his argument, he referred us to the case of **Gibb Eastern African Limited v. Syscon Builders and 2 Others**, Civil Application No. 5 of 2005 (unreported).

He went on submitting that in this matter, there was no such material which could have warranted the Single Justice to exercise his discretion to grant the application. He elaborated that what was exhibited by the applicant was negligence and failure by the advocate to observe the law which did not constitute a good cause for the grant of extension of time.

To fortify his argument that the Single Justice properly exercised his discretion, he made reliance on the case of **Omari Shamba and Others v. National Housing Corporation**, Civil Application No. 49 of 2020 (unreported) where the Court while citing the case of **Calico Textile Industries Ltd v. Pyaraesmail Premji** (1983) TLR 28 stated that failure of the counsel to check the law is not sufficient ground for extending the period of appeal. He also referred us to the case of **Exim Bank (Tanzania) Limited v. Jacqueline A. Kweka**, Civil Application No. 348/18 of 2020 (unreported), where the Court held that failure by

the advocate to act within the dictates of the law did not constitute a good cause for enlargement of the time.

As regards the issue of illegality that the appeal was dismissed instead of being struck out, Mr. Kobas while relying on the case of **Hashim Madongo and 2 Others v. Minister for Industry and Trade and 2 Others**, Civil Appeal No. 27 of 2003 (unreported) argued that the Court rightly dismissed it, though, we think, the said authority is misplaced since in that case the Court dealt with the issue that was filed out of time in the High Court which was subject to the Law of Limitation Act, [Cap 89 R.E. 2002] not applicable to this Court.

As to the issue regarding wrongly cited dates, it was his view that it was curable under Rule 42 (1) and 115 of the Rules which deals with correction of errors in judgments and immaterial errors in civil matters, more so when taking into account that other documents were correctly cited.

Eventually, he beseeched the Court to find that the application for reference is devoid of merit and dismiss it.

In rejoinder, Mr. Shayo, reiterated what was submitted in the written submission and added that the authorities cited by his counterpart on negligence of advocate are distinguishable to this case

since in the case at hand the advocate acted in good faith. He also argued that, the case of **Hashimu Madongo and 2 Others** (supra) was distinguishable since it dealt with the procedure at High Court and not in this Court.

We have examined the material brought before us and considered the rival submissions by the parties and we think, the issue for our determination is whether the applicant had in Civil Application No. 226/01 of 2017 given good cause to warrant the grant of extension of time which was sought.

We wish to take off by re-restating the principles which 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 and **C.A.B. Swale v. Tanzania Zambia Railway Authority**, Civil Reference No. 5 of 2011 (both unreported)].

On top of that, it is trite law that extension of time may be granted by the Court in exercise of its discretion which is to be exercised judicially. This is as per Rule 10 of the Rules. It is also important to note that in an application for extension of time to file an application for review, two matters have to be shown. **One**, an account for each day of delay; and **two**, the ground under which the application would be predicated under any one of the circumstances stipulated under Rule 66 (1) (a)-(e) of the Rules. This position was stated in the case of **Mwita Mhere v. Republic**, Criminal Application No. 7 of 2011 (unreported) where the Court stated as follows:

“But in application of this nature, the law demands that the applicant should do more than account for the delay. To succeed in showing that he has a good cause under Rule 10 of the Rules, it must be shown further that the applicant has

an arguable case. An arguable case is one that demonstrates that the intended ground of review is at least one of those listed in Rule 66 (1) of the Rules."

In this case, the Single Justice in finding that the applicant had failed to account for each day of delay stated as follows:

"Worse still, the applicant has not accounted for every day of delay. After Civil Appeal No. 84 of 2012 was dismissed on 18.10.2016, the applicant's counsel filed two applications in the High Court which were later on withdrawn by the applicants' counsel to pave way for the present application for extension of time to file a review. However, the applicant does not state the dates on which those applications were filed in the High Court. Neither does the applicant state when they were withdrawn. That information is vital to measure the promptness when the present application was filed on 26.5.2017. The applicant has therefore failed to account for every day of delay which failure would not trigger the Court to exercise its discretion to grant the extension sought..."

Our perusal of the material that was brought forward to the Single Justice bears that indeed, there was no information as to when the two Miscellaneous Applications were lodged before the High Court following

the dismissal of Civil Appeal No. 84 of 2016 on 18th October, 2016. Neither were the dates when the alleged Miscellaneous Applications were withdrawn made known to the Court. Indeed, the Single Justice could not have been in a position to determine the promptness of the applicant in her actions.

Likewise, we do not have qualms with the settled principle of law propounded in the case of **Omari Shamba and Others** (supra) in which the case of **Calico Textile Industries Ltd** (supra) was cited to the effect that failure by the counsel to check the law is not sufficient ground for extending the period of appeal; or that failure by the advocate to act within the dictates of the law does not constitute a good cause for enlargement of the time – see also **Exim Bank (Tanzania) Limited** (supra).

However, having examined the affidavital information from the applicant as was extracted by the Single Justice at pages 11-12 of the impugned Ruling, we find that there were some efforts which were made by the applicant in pursuing her right. In particular, the Single Justice stated that:

"...The decision of the Court intended to be challenged by the intended application for review was handled down on 18.10.2016. After that the

applicant went back to the High Court where she filed two applications; one for extension of time to file a fresh notice of appeal and another one for stay of execution. At a later stage, after engaging Mr. Shayo in the place of Edward Lisso who handled the matter previously, it was learnt that no fresh appeal could be lodged as the appeal was not struck out but dismissed. It was resolved that an application for review of the dismissal order was ideal. Mr. Shayo thus withdrew the application for extension of time to file a fresh notice of appeal in the High Court and the one for execution and filed the present application as time within which the applicant could assail the Order of the Court by way of review had elapsed.”

Although it was rejected by the Single Justice for not constituting good cause, we are of the considered view that in the circumstance of this matter it does. The efforts which were made by the applicant above indicate that the applicant regardless of whether she took a right or wrong course of action or whether she was represented or not, she was busy in pursuit of her rights. In other words, she did not lie idle. In the case of **Mary Mchome Mbwambo and Another v. Mbeya Cement Company Limited**, Civil Application No 271/10 of 2016 (unreported), the Court held that where an applicant has been in court’s corridors in

pursuit of his rights and consequently delays to take appropriate steps, that pursuit may constitute good cause for the purposes of extension of time. But again, in the case of **Mrs. Rafiki Hawa Mohamed Sadick v. Ahmed Mabrouk and 2 Others**, Civil Application No. 179/01 of 2018 (unreported), where the applicant despite being represented by an advocate took a wrong course of action, the Court held that:

"In this case the applicant has not pleaded ignorance of the law, which is not an excuse as Mr Mbamba rightly put it, and it cannot be said that she was idle in seeking guidance from practicing advocates, which impresses me as being diligent. In fine I conclude that the applicant has demonstrated that she was diligent and entitled to the order of extension of time".

Applying the above principle in this case, it is our finding that the fact that the applicant, after the dismissal of the appeal, filed two Miscellaneous Applications which were withdrawn after discovery that that was not the right course, it suffices to demonstrate that she was diligent in pursuing her rights in the court – See also **Royal Tanzania Limited v. Kiwengwe Strand Hotel Limited**, Civil Application No 111 of 2009 (unreported). For that reason, we are satisfied that she has been able to show good course for the delay warranting the reverse of the previous order of the Single Justice.

On the other hand, we are aware that existence of a point of law or illegality in the impugned decision may constitute good cause - See **Tanga Cement Co Ltd. v. Jumanne Masangwa and Another**, Civil Application No. 6 of 2011, **Lyamuya Construction Co. Ltd v. Board of Trustees of the Young Woman Christian Association**, Civil Application No. 2 of 2010; (both unreported) and **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR. For instance, in the latter case, the Court emphasized that if one establishes that there is illegality the Court may grant extension of time even if the applicant has failed to account for delay but added that

"such of point of law must be that "of sufficient importance" and ..." 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."

The applicant has in ground no. 4 complained that it was wrong for the Single Justice to hold that there was no illegality on the Court's order but a mere error in the decision. However, we note that the applicant had pegged the illegality on the order of the Court that dismissed the appeal that had not been heard on merit and that the case from the High Court was wrongly cited. The applicant has also

consistently maintained that the appeal after having been found to be time barred ought to have been struck out and not dismissed.

In the first place, we think, the counsel for the applicant is right in arguing that the respondents' counsel reliance on **Hashimu Madongo and 2 Others** case (supra) was misplaced since the Law of Limitation Act which provides for a dismissal of a matter lodged in court out of time is only applicable in the High Court and courts subordinate thereto, not in this Court. Secondly, as regards the issue of wrong citation of the date when the decision of High Court in Civil Case No. 126 of 2003 was delivered on 11/5/2012 instead of 11/5/2011 or rather pegging it as an illegality for making reference to a different case, we endorse the Single Justice's finding that it was a mere error which is curable.

We also note that the applicant in building her case basing on the issue of illegality forcefully challenged the order of the Court dismissing Civil Appeal No. 84 of 2012 instead of having it struck out. However, the Single Justice did not dwell much on it, and understandably so, because he was looking at the provisions of the law which the applicant intended to predicate his application for review as required by the law and not the issue of illegality as a stand - alone requirement. In the end, after looking at the nature of averment in the affidavit and the argument by the applicants advocate, he found that by implication the applicant had

shown that there was a ground under Rule 66 (1) of the Rules as the Court ordered for a dismissal of Civil Appeal No. 84 of 2012 instead of striking it out.

On our part, we are of the considered view that the applicant had, as was found by the Single Justice, succeeded in showing the ground under Rule 66 (1) (a) to (e) to which the application for review was to be predicated. At that stage it was not required to point out the illegality but rather to show the grounds specified under Rule 66 (1) (a) to (e) which, in a way could be legal, to which contravention of the same could render whatever done illegal. At any rate, that the applicant had shown the provisions under Rule 66 of the Rules is not in controversy as the Single Justice was satisfied that the applicant had been successful in showing the ground under Rule 66 (1) (a) to (e) to which the application for review would be predicated.

In the circumstances, therefore, we think that, the applicant ought to have been granted an extension of time sought since, she not only established her diligence in pursuing her right after the Civil Appeal No. 84 Of 2016 was dismissed but she also showed that there is an error on the face of the record under the provisions of Rule 66 (1) of the Rules which calls for the attention of the Court and the only way the same can be corrected, is by way of review.

In this regard, in view of our discussion above, we allow the application for reference and reverse the decision of the Single Justice which declined extension of time to file an application for review. Instead, we grant the extension of time to file a review and order that the same be filed in Court within sixty (60) days from the date of this Ruling.

It is so ordered.

DATED at DAR ES SALAAM this 9th day of March, 2023.

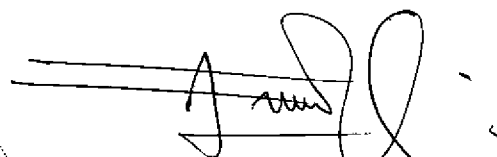
R. K. MKUYE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 10th day of March, 2023 in the presence of Ms. Belinda Batinamani, learned counsel for the Applicant and Ms. Lulu Mbinga, learned Counsel for the Respondent, is hereby certified as a true copy of the original.




E.G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL