

IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA
(CORAM: NDIKA, J.A., RUMANYIKA, J.A. And MURUKE, J.A.)

CIVIL REFERENCE NO. 1004/06 OF 2023

HENRY JALISON MWAMLIMA APPLICANT

VERSUS

**ROBERT JALISON MWAMLIMA AND
CHRISTIAN JALISON MWAMLIMA**

(As an administrators of the Estate
of the Late **JALISON MWAMLIMA**) **1ST RESPONDENT**

NBC BANK **2ND RESPONDENT**

VITUS MGAYA **3RD RESPONDENT**

(From the Court of Appeal of Tanzania at Mbeya)

(Kairo, J.A)

dated the 12th day of December, 2023

in

Civil Application No. 652/06 of 2022

.....

RULING OF THE COURT

21st & 23rd February, 2024

MURUKE, J.A.:

This is an application for Reference against the Ruling of a single Justice, Kairo, J.A. dated 13th December, 2023 in Civil Application No. 652/06 of 2022 in which she declined the applicant's application seeking for extension of time to serve notice of appeal, memorandum of appeal, letter to the registrar requesting to be supplied with proceedings,

judgment and decree on the second and third respondents in respect of the judgment of the High Court of Tanzania at Mbeya (Mongella, J.) dated the 19th day of August, 2021 in Land Case No. 20 of 2017.

The background of this application was very well narrated by single justice in her ruling. The applicant was dissatisfied with the judgment and decree of the High Court in Land Case No 20 of 2017. He timely lodged the notice of appeal on 20th August, 2021. He further requested to be supplied with the proceedings, judgement and decree well within time on 23rd August, 2021 and timely served the documents on the first respondent only. The second and third respondents were not served because applicant's counsel was convinced that his client had no cause of action against them. On second thoughts, on 1st November, 2021, he wrote to the Deputy Registrar of the High Court, Mbeya registry, requesting for leave to serve the second and third respondents with the said documents. The Registrar on 22nd November, 2021 responded by refusing to handle the issue administratively. Following the said response, the applicant decided to lodge a formal application for extension of time to serve the second and third respondents through Misc. Land Application No. 99 of 2021. Unfortunately, the same was struck out following the notice of preliminary objection raised by the 2nd

respondent. The applicant then filed an application for extension of time to be able to serve necessary documents on the 2nd and 3rd respondents. In the impugned decision, the Single Justice of the Court dismissed the application as she found that the applicant had failed to account for 75 days of delay.

Having heard both parties, the issue for consideration is whether, the applicant has in Civil Application No. 652/06 of 2022, adhered to the principle of accounting for each day of delay. It is worth noting that the following facts are not in dispute to both applicant and respondents.

One, the applicant was supplied with copy of proceedings, judgment and decree within time on 23rd August, 2021 and timely served the first respondent with the relevant documents.

Two, the second and third respondents were not served on the reason that the applicant believed that he had no cause of action against them.

Three, on 1st November, 2021 applicant wrote to the Deputy Registrar at Mbeya requesting for leave to serve the second and third respondents with the said documents but the Deputy Registrar refused to handle the request administratively.

Four, following the response by the Deputy Registrar, the applicant filed formal application for extension of time to serve second and third

respondents vide Misc. Land Application No. 99 of 2021, which then, was struck out following preliminary objection raised by the second respondent.

Five, the applicant then filed Civil Application No. 652/06 of 2020 whose ruling by the single justice is subject of the present reference on 25th November, 2021.

At the hearing of the application for reference, Mr. Boniface Mwabukusi, learned counsel represented applicant. Mr. James Kyando and Mr. John Laswai, represented first and second respondents respectively, while the third respondent was present in person, unrepresented.

Mr. Mwabukusi, submitted in support of the reference that, the Court should go through the single Justice's ruling and reverse it on the following reasons: **One**, the applicant's communication to the Deputy Registrar and reply thereto were not considered. **Two**, the second and the third respondents did not object to the application. **Three**, the first respondent has not shown how is he going to be affected if the Court grants extension to serve 2nd and 3rd respondents. **Four**, delay is not for 75 days but rather it is for 60 days technically.

In response to the applicant's counsel, Mr. Kyando vigorously resisted the prayer sought, adducing the following reasons, **one**, the applicant's counsel deliberately elected not to serve the second and third respondents as he thought that his client had no cause of action against them but that he later changed his mind and started to take the step to serve them. **Two**, the applicant has failed to account for each day of delay for all the period of almost 75 days. Mr. Laswai for the 2nd respondent and 3rd respondent who was in person not represented, did not resist the application. In fact, they urged us to grant it.

In rejoinder, Mr. Mwabukusi insisted that, the reason for the reference is for the parties to be heard, and that is for interest of justice.

From the above undisputed facts, the omission by Mr. Mwabukusi is glaring and he cannot benefit from his own wrongs. He elected not to serve the second and third respondents believing his client had no cause of action, and later, on reflection he decided to take steps. This is a sheer lack of diligence by the counsel for the applicant. The Court in a number of its decisions has held that, lack of diligence by an advocate does not amount to sufficient cause. For instance, in the case of **Tauka**

Theodory Ferdinand vs Eva Zakayo Mwita & Others (Civil

Reference 16 of 2017) [2022] TZCA 113 (14 March 2022, TANZLII)

" Since the only cause for the delay relied upon by the applicant is lack of diligence on the part of the previous counsel for the applicant and because as observed above, such lack of diligence or laxity does not constitute a good cause, we agree with the learned single Justice that the applicant did not establish a good cause for grant of extension of time."

Similarly in the case of **Wankira Benteel v. Kaiku Foya**, Civil Reference No.4 of 2000, the Court held that;

"... if at all there is any mistake then the blame was upon the applicants' counsel, and such mistakes do not constitute sufficient reason for extending time..."

Therefore, the applicant's counsel own mistake of not serving the second and third respondents deliberately, is a bar for an extension of time. Assuming it is a reason which is not the case, yet in an application for extension of time, each day passed beyond the prescribed time counts and it has to be accounted for. Otherwise, the court will have no material facts to act on it. Despite the second and third respondents not

opposing the application, the applicant has failed to account for the days of his delay as rightly found by single justice at page 11 of the ruling.

In the famous case of **Bushiri Hassan v. Latifa Lukio Mashao**, Civil Application No. 3 of 2007 (unreported) the Court emphasized the need of accounting for each day of delay within which certain steps could be taken. It stated:

"Delay of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which steps have to be taken."

Refusing extension of time to the applicant who has delayed for 12 days, in the case of **Gabriel Mathius Michael v. Halima Feruzi & 2 Others**, Civil Application No. 204/17 of 2020 [2022] TZCA (24 May, 2022, TanzLII), a single justice of the Court held that;

"... it is my considered view that the applicant has failed to account for lapse of 12 days before filing this application, the omission which shows lack of diligence in pursuing this matter on the part of the applicant. This ground is therefore without merit."

Having scrutinized the application and the submissions in their totality, we are settled in our mind that the applicant has not been able

to convince the Court on what went wrong in the impugned ruling. In our view, the learned single justice properly invoked the principles guiding the extension of time. In that application the applicant had basically failed to advance good cause for delay including accounting each day of the delay.

In view of the foregoing, we find the application for reference devoid of merit. It is accordingly dismissed with costs.

DATED at **MBEYA** this 23rd day of February, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

Z. G. MURUKE.
JUSTICE OF APPEAL

Ruling delivered this 23rd day of February, 2024 in the presence of Mr. Kelvin Kuboja, learned counsel for the Applicant, Ms. Marry Gatuna, holding brief for Mr. James Kyando for the 1st Respondent and Mr. Kelvin Kuboja, holding brief for Mr. John Laswai, learned counsel for the 2nd Respondent and in the absence of the 3rd Respondent, is hereby certified as a true copy of the original.




E. G. MRANGU

SENIOR DEPUTY REGISTRAR
COURT OF APPEAL