IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWANDAMBO, J.A., MAIGE, J.A. And MGEYEKWA, J.A.)

CIVIL REFERENCE NO. 27 OF 2023

BENJAMINI H. NDESARIO T/A HARAMBEE BUS SERVICES/ UB40BUS SERVICES .....APPLICANT

VERSUS

M/S RAHISI GENERAL MERCHANT LTD.....1ST RESPONDENT

M/S UHURU PEAK SERVICE STATION.....2ND RESPONDENT

(Reference from the decision of a single Justice of the Court of Appeal of Tanzania at Arusha)

(Mdemu, J.A.)

dated the 20th day of July, 2020

in

Civil Application No. 265/05 of 20120

.....

RULING OF THE COURT

11th & 18th March, 2024.

MAIGE, J.A.:

The applicant lodged a motion before the Court for enlargement of time to serve a notice of appeal and a letter to the Deputy Registrar of the Court requesting for a copy of the proceedings in which was entertained by a single Justice of the Court. Under rule 84 (1) of the Tanzania Court of Appeal Rules, 2009 otherwise referred to as "the Rules", the intended appellant is obliged to, before or within 14 days of lodging the notice of appeal, serve copies of it on all persons who seem to him to

be directly affected by the appeal. In accordance with rule 90(1) of the Rules, the intended appeal has to be instituted within 60 days from the date of the lodging of the notice of appeal. However, if, for the reason of the delay to procure a copy of proceedings, the intended appellant is unable to institute the appeal within the period as afore stated, the period he or she was awaiting to be availed with such documents is excluded by the Registrar by way of a certificate of delay in terms of rule 90(2) provided that such letter was served on the respondent within thirty days from the date of decision.

In the instant matter, the applicant, after having his appeal dismissed by the High Court (Twaib, J), he lodged, on 24th December, 2019, a notice of appeal and applied, at the same time, for a certified copy of the proceedings. Neither of the documents had, at the time of lodging the application before the Court on 1st April, 2020, been served on the respondents despite the fact that the time limit so to do had already expired.

Before the single Justice, the applicant justified the delay to serve the notice of appeal on account that, although he lodged it on 24th December, 2019, it was not until on 8th March, 2020 when he was called by a staff of the High Court one Noel Shida Mgeta to collect the same,

which he did, on 9th March, 2020. Nothing was said about the delay to serve the request letter. The single Justice found the application wanting and dismissed it accordingly.

Being aggrieved, the applicant has, in terms of rule 62(1) of the Rules lodged the instant application faulting the decision in question on four grounds which can conveniently be reduced into two complaints: **one**, the Single Justice of the Court was wrong in holding that the period between filing and collection of the notice could not be accounted for in the absence of an affidavit of the said Noel; **two**, the Single Justice of the Court was wrong in holding that the period between collection of the documents and lodging of the application before the single Justice was not justified in that it was not pleaded in the affidavit in support of the motion.

At the hearing of the application, the applicant was represented by Mr. Yusuf Mwangazambili, learned advocate whereas the respondents were represented by Mr. Gwakisa Sambo, also learned advocate.

In his submission in support of the first ground, Mr. Mwangazambili submitted, making reference to the affidavit that, the notice of appeal was timely presented for filing and was received by Noel Shida, the High Court's registry officer who in turn, informed the applicant to wait until

when he would be notified of the readiness of the documents for collection. He submitted that, despite his constant follows up, it was not until on 8th March, 2020 when the said Noel informed him by phone that, the documents were due for collection and, on the next day, he collected the same. In his contention therefore, the period between 24th December, 2019 to 8th March, 2020 was justified on account that the applicant was awaiting for copies of the notice of appeal and request letter. The applicant, the counsel further submitted, could not procure a supplementary affidavit from the said Noel for the reason that him being the cause for the delay, he would not accept to depose such an affidavit. To substantiate his argument, the counsel cited the case of **Benjamini H. Ndesario T/A Harambee Bus Services v. M/S Rahisi General Merchant Ltd and Another**, Civil Application No. 9/5/2021 (unreported) where it was observed that an advocate who wrongly advised his client would logically not depose an affidavit to that effect on behalf of the respective client as that would be injurious to his professional carrier.

On the second ground, it was submitted that, though the delay from the date of collection of the documents to the date of lodging the application was not express in the affidavit, the single Justice would have implied the said delay as reasonable time for preparation and filing of the

application. Reference was made to the case of **Murtaza Mohamed Raza Virani and Another v. Mehboob Hassanali Versi,** Civil Application No. 448/01 of 2020 [2023] TZCA 442 (TANZLII), where there was a delay of about 9 days between the period of the established sickness of the applicant and the filing of the application, the single Justice of the Court treated the said delay as reasonable for preparation and filing of the application.

In rebuttal, Mr. Sambo submitted, in respect of the first ground that, since the applicant's justification of the delay from 24th December, 2019 to 8th March, 2020 in the affidavit was based on hearsay from the registry officer of the High Court, the single Justice was right in holding that an affidavit of the said registry officer was necessary. The decision in **Benjamini H. Ndesario** (supra), he submitted, is distinguishable in so far as the hearsay deposition therein pertained to a wrong advice from an advocate. This is materially difference, in his contention, with the current case wherein the hearsay involved is from a court registry officer who had no personal interest in the applicant's case.

On the second ground, Mr. Sambo, submitted that, the single Justice cannot be faulted because the respective issue being purely factual, was to be proved by an affidavit and not mere submissions from the bar. In

his contention, the case of **Murtaza Mohamed Raza** (supra) cannot assist the applicant because the delay therein was for just a period of 9 days while in here it was 24 days.

We have very carefully followed the rival submissions and we are prepared to determine it. Before doing so, however, we find it important to state that, in an application for extension of time, a single Justice enjoys wide discretion and such discretion cannot easily be interfered on reference. It can only be interfered if any or all of the following circumstances are established. **first**, misapprehension of law or facts; **two**, non-consideration of relevant factors; **three**, consideration of irrelevant factors; and **four**, if on the face of the evidence available and the law, the decision was plainly erroneous. See for instance, **Rosemary Stella Chambejairo v. David Kitundu Jairo**, Civil Reference No. 6 of 2018 [2021] TZCA 442 (TANZLII) and **Mbogo and Another v. Shah** [1996] 1 E.A. 93. It is also the law that the full Court will not disturb the decision of a single Justice basing on facts or submissions which were not available to him.

As we have said above, the single Justice refused the applicant's explanations of the delay between 24th December, 2019 to 8th March, 2020 on account that it was based on hearsay evidence which was not,

as the principle in **Guardian Limited and Another v. Justin Nyari,** Civil Application No. 87 of 2011 (unreported) requires, substantiated by a supplementary affidavit of the alleged registry officer. Mr. Mwangazambili submits that because the respective registry officer was the cause of the delay, he would not have accepted to depose an affidavit on the applicant's behalf. In his contention, the single Justice ought to have followed the position in the case of **Benjamini H. Ndesario** (supra), where the Court dispensed with the affidavit requirement for the reason that as a matter of common sense, an advocate who wrongly advised his client would not accept to depose an affidavit to that effect. For the reasons which shall be apparent as we go along, we cannot accept such a submission.

As we have said above, the determination of the issue under discussion by the single Justice was based on the well-established principle of the law as stated in the case of **Guardian Limited** (supra) that, where a factual deposition is based on hearsay, it cannot be relied upon unless there is an affidavit of the maker of the statement. In this case, it is common ground that, the applicant's justification of the period between filing and collection of the notice of appeal was based on the alleged advice from the said registry officer. The single Justice of the Court

cannot, therefore, be faulted for deciding differently from another single Justice. It is trite law that every case has to be decided according to its own merit.

On top of that, we agree with Mr. Sambo that, the facts in the two cases are different in material respects. We note that in **Benjamin H. Ndesario** (supra) the fact at issue was that the applicant was misled by his previous advocate that his appeal did not require leave. The Court, it would appear to us, made an inference that in a situation like that, it was a matter of common sense that no advocate would dare depose an affidavit as the alleged advice would possibly amount to professional misconduct. Conversely, in the instant case, the fact at issue was that, the applicant delayed to serve the document because he was advised by the registry officer to stay and wait until he was informed that the documents were due for collection. The issue of the applicant being misled by the said registry officer was not raised in the affidavit. Nor in the submissions before the single Justice. In such a situation, why should the decision of the single Justice be faulted? It is for those reasons that, we find the first complaint without merit and thus dismiss it.

We proceed with the second complaint as to the justification of the 24 days from the date of collection of the documents to the date of serving

them on the respondent. It was justified on account that it was a reasonable time for preparation and filing of the application. The Single Justice, relying on the principle in among others, **Ultimate Security (T) Ltd. v. Chande Ally Lubugile & Three Others**, Civil Application No. 428/01 of 2021 [2023] TZA 17332 (TANZLII), rejected the assertion in so far as for it was not founded in the affidavit.

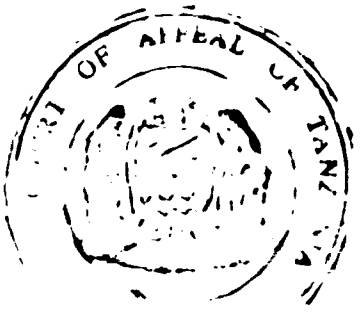
Mr. Mwangazambili while conceding that such fact was not in the affidavit, is of the contention that the single Justice should have treated the said period as reasonable time for preparation and filing of the application. In that regard, our attention was drawn to the case of **Murtaza Mohamed Raza Viran** (supra) where though not in the affidavit, the single Justice treated the delay for 9 days from the date of the established sickness of the applicant and of the filing of the application as reasonable time for preparation and filing of the application. With all respects to the counsel, that cannot be a ground for faulting the discretion of the single Justice. We have two reasons to justify our decision. **First**, it is a well settled principle of law, as we said in relation to the first complaint that, each case is decided according to its own facts. **Second** and more importantly, while the time available for serving the notice of appeal is only 14 days, the time allegedly to have been used by the

applicant and his counsel to conduct a research, is 24 days which appears to be twice longer than the time available for the intended action. In our view, treating such a period of time reasonable, would defeat the purpose behind limiting time for pursuing the intended action. That is not expected from this Court.

For the foregoing reasons, therefore, we find the application devoid of any merit and, it is accordingly dismissed with costs.

DATED at **MOSHI** this 16th day of March, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL



I. J. MAIGE
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 18th day of March, 2024 in the presence of Mr. Emmanuel Anthony, holdings brief for Mr. Yusuph Mwangazambili, learned advocate for the appellant and Ms. Beatrice Chami, holdings brief for Mr. Gwakisa Sambo, learned advocate for the respondent is hereby certified as a true copy of the original.

W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL