

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. 2 OF 2021

WAMBURA N. J. WARYUBA APPLICANT

VERSUS

THE PRINCIPAL SECRETARY MINISTRY OF FINANCE 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

**(Application for Reference from the decision of the Single Justice of the
Court of Appeal of Tanzania at Dar es Salaam)**

(Kwariko, J.A.)

dated the 8th day of March, 2021

in

Civil Application No. 320/01 of 2020

RULING OF THE COURT

2nd June, 2023 & 16th May, 2024

MASHAKA, J.A.:

This is a reference under rule 62 (1) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) from the ruling of a learned single Justice of the Court (Kwariko, J.A.) in Civil Application No. 320/01 of 2020. The applicant had lodged the application seeking extension of time to file an application for reference against the decision of a single Justice (Ndika, J.A.) in Civil Application No. 225/01 of 2019 dated 21st July, 2020 who had

denied him extension of time for failure to account for the days of delay from 28th July, 2020 when the impugned judgment was delivered to 5th August, 2020 when the application was filed. The issue of illegality was raised by the applicant and it was held that the applicant failed to state that the decision of the single Justice contained any illegality for consideration of the Court.

The applicant raised three grounds that:

1. *The learned single Justice found the applicant had failed to account for the days of delay for extension of time sought despite that the applicant took immediate action to apply for the extension after having been aware of the existence of the option to apply for reference and the delay to apply for it.*
2. *The learned single Justice finding that the delay of seven (7) days by the applicant was inordinate for extension of time sought is contentious.*
3. *The Hon. Justice of Appeal found that the applicant said nothing as to the illegality in the decision of the single Justice of Appeal (Ndika, J.A) despite the applicant having shown and/or argued (in the affidavit and submissions) errors and /or points of law not considered*

by the single Justice of Appeal for the purpose of granting extension of time.

During hearing, the applicant was present and unrepresented while the respondents were represented by Messrs Baraka Nyambita, Boaz Albany Msoffe and Bryson Ngulo, all learned State Attorneys.

Arguing in support of his application, the applicant submitted that, the single Justice ought to have considered his reason for the delay that he delayed to file the application for reference against the decision of the single Justice (Ndika, J.A) as he had travelled to Musoma the following day after delivery of the decision of the single Justice to attend a sick relative who died on 29th July, 2020. The next date his advocate advised him to file the application for reference which was found to be time barred. He argued that the single Justice ought to have considered and believed him that he had attended family matters. Bolstering his argument with the case of **Kalunga and Company Advocates v. NBC Ltd** [2006] T.L.R 235 that the delay of seven days was not inordinate.

On the issue of illegality, the applicant faulted the single Justice for not considering it which was apparent as it was based on jurisdiction. In conclusion, the applicant implored the Court for sympathy as he went to

attend a sick relative and burial ceremony of same relative who passed away. He reiterated that the delay of seven days is not inordinate.

In opposition, Mr. Nyambita supported the decision of the single Justice (Hon. Kwariko, J.A.) that it was correct. He referred the Court to the case of **Athuman Ntundunya v. The District Crime Officer Ruangwa and Others**, Civil Reference No. 15/20 of 2018 (unreported) which had set the principles upon which a decision of a single Justice can be upset under rule 62 (1) (b) of the Rules.

Arguing grounds one and two conjointly that the decision of learned single Justice failed to consider the applicant's account of the days of delay, that he had to account for every day of the delay and the delay should not be inordinate, supporting his argument with the cases of **Lyamuya Construction Company Ltd v. Board of Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 and **Wambele Mtumwa Shahame v. Mohamed Hamis**, Civil Reference No. 8 of 2016 (both unreported). He contended further that the applicant had averred that the decision of the single Justice (Ndika, J.A.) was delivered on 21.07.2020 and he travelled to Musoma on 22.07.2020 to attend his sick relative who ultimately died and he had to attend the burial ceremony on 29.07.2020. The applicant returned to Dar es Salaam on 02.08.2020

and upon seeking advice from his advocate, he proceeded to lodge an application for extension of time to lodge an application for reference on 05.08.2020. It was the submission of Mr. Nyambita that despite the narration of a sequence of events, the applicant failed to substantiate his averments as he did not produce bus tickets and the burial permit. He concluded that grounds one and two have no merit.

On ground three which is based on existence of an illegality in the decision, the learned State Attorney argued that, the alleged illegality concerns the decision of the High Court in which the grant of this application cannot rectify the same. He referred us the case of **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 387 that the alleged illegality ought to be in the decision of the single Justice (Ndika, J.A.).

Mr. Nyambita concluded that the decision of Hon. Kwariko, J.A. was correct and urged the Court to dismiss this application and each party to bear own costs.

On his rejoinder, the applicant reiterated his submission in chief and beseeched the Court to allow his application as the single Justice failed to consider relevant matters.

We have considered the arguments by both sides and as gathered from the record, the application before the single Justice was an application for extension of time to file an application for reference against the decision of the single Justice (Ndika, J.A.). The single Justice (Kwariko, J.A.) exercised her discretion judiciously under rule 10 of the Rules and did not grant the applicant extension of time because he failed to account for the delay by not showing proof to substantiate his averments. On the point of illegality, it was misplaced as the applicant did not aver that the decision of the single Justice (Ndika, J.A.) contains any illegality rather he dwelt on the decision of the High Court. Our question is, whether there are reasons to fault the decision of the single Justice which dismissed the application form extension of time to file the application for reference.

In an application of this nature, as correctly argued by Mr. Nyambita, the Court will rarely intervene with the decision of the single Justice who exercises her discretion under rule 10 of the Rules unless, the single Justice has, one; taken into account irrelevant facts; two, failed to take into account relevant matters or; it has failed to take into consideration matters which it should have taken into consideration, and in so doing, arrived at a wrong decision. (See: **A.B Swale v. Tanzania Railway Authority**, Civil Reference No. 5 of 2011; **Gem and Rock Ventures Co. Ltd v. Yona**

Hamis Mvutah, Civil Reference No. 1 of 2010 (both unreported) and **Athumani Mtundunya v. The District Crime Officer Ruangwa and 2 Others** (*supra*).

It is the applicant's submission that the delay was for only seven days from 29.07.2020 to 05.08.2020 which he believes is not inordinate. He has recounted the sequence of events that soon after the delivery of the decision of the single Justice (Ndika, J.A.) on 21.07.2020, he travelled to Musoma on 22.07.2020 to visit his sick relative who ultimately passed away on 29.07.2020. He returned to Dar es Salaam on 2.08.2020 and met his advocate who advised him to file the application. On 05.08.2020, the applicant lodged the application for extension of time before a single Justice. Although there was no proof to substantiate the described events as there was no bus ticket nor a burial permit as concluded by the single Justice. We are of the view that each case has to be decided according to its own peculiar circumstances as we shall demonstrate.

In the case of **Zuberi Athumani Mbuguni v. National Bank of Commerce Limited**, Civil Application No. 311/12 of 2020 (unreported), when the Court faced a similar situation held:

"In the instant case, as rightly submitted by Mr. Balomi, the applicant's application for extension of

*time to apply for leave was struck out on 6/5/2020 and when the present application was lodge only twelve (12) days lapsed. I have examined the record and satisfied myself that **the applicant has shown the steps he had been taking and days spent all along until the application was struck out and I have not noted any laxity on his part. He diligently prosecuted the cases in court and the twelve days which lapsed before lodging this application is too short a time to condemn the applicant that he did not act promptly to lodge the present application.** Mr. Ngogo's assertion, therefore misses legs to stand on and it falls apart."*
[Emphasis added]

Taking into account the above excerpt and the facts of the instant application, it is evident that even though there is no proof of tickets and burial permit, the applicant had shown his diligence to prosecute his application and the delay for seven days, is in our considered view, not inordinate given that there was no laxity on the part of the applicant who took steps to pursue his case after his travel. However, this was not considered by the single Justice. We find that the applicant had diligently shown how the seven days of delay were all along spent and the days are too short a time to condemn the applicant that he had not act promptly.

In the event, the applicant had demonstrated good cause to warrant the grant of extension of time to file reference against the decision of learned single justice. We, thus, under rule 62 (1) (b) of the Rules, reverse the decision of the learned single justice and allow applicant to lodge the application for reference within seven days from the date of delivery of this ruling. No order as to costs.

It is so ordered.

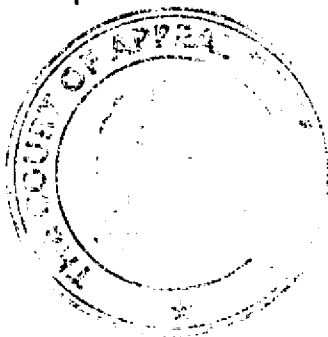
DATED at DAR ES SALAAM this 22nd day of April, 2024

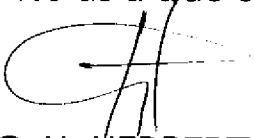
S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered on this 16th day of May, 2024 in the presence of the applicant in person and Mr. Boaz A. Msoffe, learned State Attorney for the respondent is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL