IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KWARIKO, J.A., LEVIRA, J.A. And NGWEMBE, J.A.)

CIVIL REFERENCE NO. 8 OF 2023

DOMINIC ISHENGOMA ..... APPLICANT

VERSUS

GEITA GOLD MINING LTD ..... RESPONDENT

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

(Rumanyika, J.A.)

dated the 8th day of December, 2022

in

Civil Application No. 146/8 of 2020

.....

RULING OF THE COURT

19th & 23rd February, 2024

LEVIRA, J.A.:

The applicant, Dominick Ishengoma was dissatisfied with the decision of the single Justice of the Court in Civil Application No. 146/8 of 2020 which refused his second bite application for extension of time within which to lodge a notice of appeal and application for leave to appeal to the Court. He is now moving the Court to reverse that decision by this reference which is brought by way of a notice of motion made under Rule 62 (1) (b) of Tanzania Court of Appeal Rules, 2009 (the Rules) and supported by the applicant's affidavit. The application is opposed by the respondent.

A very brief background of this matter as it can be gleaned from the record of application is as follows: The applicant was employed by the respondent prior to the year 2006. On 29th June, 2006, he was terminated from employment. Aggrieved by the termination, he referred the labour dispute to the Labour Conciliation Board which ordered his reinstatement to his place of work and payment of all his entitlements. The respondent was not amused by the decision of the Conciliation Board and thus, she appealed to the Minister for Labour who reversed the decision of the Conciliation Board and confirmed the termination of the applicant's employment and ordered that he be paid all his terminal benefits. Following that order of the Minister for Labour, the applicant initiated execution process, which was partly successful.

Discontented, the applicant went through various court processes seeking to be paid repatriation costs for his family under the pretext that, he was recruited from Newala Mtwara and brought to Geita by the respondent, a claim which was denied by the respondent. The decision of the court regarding his entitlements which the applicant intends to challenge, if will get the opportunity to appeal to the Court, is that of the High Court in Civil Revision No. 5 of 2010 of 18th February, 2014. In that Revision, the applicant sought the High Court to call for the record of the Resident Magistrate's Court of Mwanza at Mwanza (the executing court) in

Miscellaneous Civil Applications No. 13 and 17, both of 2009, examine them and make necessary orders as could deem fit. Having done so, the High Court upheld the decision of the executing court and ordered the applicant to be paid terminal benefits in accordance with the calculations made by the Labour Officer following the order that was given by the executing court on 9th July, 2010. Eventually, on 4th March, 2014 the applicant was paid a sum of TZS. 50,730,000.00. However, he was not satisfied. Therefore, he continued to make several futile applications seeking to challenge that decision.

Since long time had lapsed from when the decision of the High Court was delivered, the applicant could not come straight to the Court to appeal against it. Therefore, he made his first attempt to apply for extension of time to lodge a notice of appeal to the Court before the High Court vide Miscellaneous Civil Application No. 141 of 2019, in vain. Determinedly, he lodged a second bite application for extension of time (subject of the present reference). Just like the first one, the second application was, as well, found unmerited and thus, it was dismissed.

In the present application, the applicant has advanced ten (10) grounds as follows:

"1. *That, the learned single Justice erred in law when he omitted to consider and effectively deal with the applicant's Written Submissions.*

2. *That, the learned single Justice erred in law when he misconceived and distorted the background of the matter.*

3. *That, the learned single Justice erred in law when he omitted to consider and effectively deal with all the authorities relied upon by the applicant.*

4. *That, the learned single Justice erred in law when he arbitrarily exercised the judicial discretion against the rules of reason and justice.*

5. *That, the learned single Justice erred in law when he omitted to uphold the applicant's first ground indicated in the notice of motion.*

6. *That, the learned single Justice erred in law when he held that the applicant went to improper forums and wrong remedies, and that he cannot rely on technical delay for extension of time.*

7. *That, the learned single Justice erred in law when he omitted to uphold the applicant's*

second ground indicated in the notice of motion.

8. *That, the learned single Justice erred in law when he omitted to consider and effectively deal with the allegations of illegalities in the 6 grounds of the intended appeal.*

9. *That, the learned single Justice erred in law when he omitted to uphold the applicant's additional ground of causing injustice in case of shutting the door for the intended appeal.*

10. *That, the learned single Justice erred in law when he dismissed the application for being unmerited."*

At the hearing of the application, the applicant appeared in person, unrepresented whereas, the respondent had the services of Ms. Marina Mashimba, learned advocate.

The applicant adopted his affidavit and written submissions as part of his oral submission before the Court. In addition, he urged us to consider the above quoted ten (10) grounds opposing the decision of the single Justice of the Court. He went on to state that, the decision of the High Court, subject of the intended appeal, is tainted with illegalities. He referred us to pages 45 and 103 of the record of application arguing that, on page 45 of the record, the Resident Magistrate in Civil Application No. 17 of 2009

ordered the applicant to be paid TZS. 30,000.00 from the date of termination to the date of his repatriation together with his family. But, he said, on page 103 of the record, the High Court (Mwangesi, J.- as he then was), ordered execution to be carried out as per the attachment warrant that was issued on 12th July 2010.

According to the applicant, the High Court ought to have said that the execution be carried out as per the order of the Court of Resident Magistrate. He insisted that, the failure of the High Court to order so was an illegality which was supposed to be considered in his application for extension of time by the single Justice of the Court. He supported his averments with the decision of the Court in **Principal Secretary Ministry of Defence and National Service v. Devran P. Valambhia** [1992] T.L.R. 387 and **Modestus Daudi Kangalawe (Administrator of the Estate of the late Daudi Temaungi Kangalawe) v. Dominicus Utenga,** Civil Reference No. 01 of 2022 (unreported).

Finally, the applicant argued that, since the respondent did not respond to his grounds as presented in the notice of motion, we should consider that she agrees with the applicant and grant the application.

In response, Ms. Mashimba opposed the application. She adopted the respondent's affidavit in reply and reply to the applicant's written

submissions as part of her oral submission. She went on to submit that all the grounds advanced by the applicant in this Reference look like grounds of appeal against the decision of the single Justice rather than reference. According to her, it is not proper for the applicant to raise such grounds because in reference, the Court is required to satisfy itself whether there were grounds raised before the single Justice to enable him grant extension of time and not otherwise.

Ms. Mashimba argued further that, the applicant while before the single Justice failed to show good cause which would have moved him to grant extension of time sought. He only advanced two grounds, to wit, **one,** that there were sufficient reasons to justify the delay; and **two,** that the impugned ruling and order are tainted with illegalities, irregularities and improprieties, but he failed to substantiate his claims. Therefore, she submitted that the single Justice was justified to hold that the application was unmerited and dismissed it. In the circumstances, she firmly stated that the single Justice committed no wrong because there was no technical delay as the applicant chose improper forums for wrong remedies in persuing his rights.

Regarding the ground of illegality raised before the single Justice, Ms. Mashimba supported the observation made by the single Justice to the

effect that, the raised ground was not worth the name. Rather, it was a grievance that deserved to be a ground of appeal. She thus, concluded that the application before us is meritless because the applicant failed to advance good cause for extension of time in his second bite application before the single Justice of the Court. For the reasons stated, Ms. Mashimba prayed for this application to be dismissed.

The applicant, with respect, made a rejoinder out of context, he said, the counsel for the respondent failed to talk about 85% of payment which the applicant was supposed to be paid as per the Labour Minister's order. Therefore, if this application will not be granted, it will amount into injustice. He pressed for the application to be granted in order for the applicant to get an opportunity to appeal and be heard by the Court.

Having heard the parties' submissions and thoroughly gone through the record in this application, the issue for our determination is whether this application for reference has merits. We wish to state at the outset that in in this reference, the applicant is beseeching the Court to reverse the decision of the single Justice of the Court which dismissed his application for extension of time to lodge notice of appeal and application for leave to appeal. For the Court to grant such an application, there are some principles to be considered taking into consideration that, whether or

not to grant extension of time is within the Court's discretion in terms of Rule 10 of the Rules. In **G.A.B Swale v. Tanzania Zambia Railway Authority,** Civil Reference No. 5 of 2011 (unreported), the Court stated:

> *"The principles upon which a decision of a single Justice can be upset under Rule 62 (1) (b) of the Rules, are 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:*
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> *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 a misapprehension or improper appreciation of the law or facts applicable to that issue or;*
> *v. If, looked at in relation to the available evidence and law, the decision is plainly wrong. (see **KENYA CANNERS LTD v. TITUS MURIRI DOCTS** (1996), LLR 5434*

a decision of the Court of Appeal of Kenya, which we find persuasive) (see also ***MBOGO AND ANOTHER V SHAH*** *(1996), EA 93)".*

Being guided by the above established principles, we find it appropriate to make an observation, as we have already indicated, that the impugned decision of the single Justice in the present matter involved the exercise of judicial discretion. Therefore, we shall confine our deliberations only on those issues which were raised and considered by the single Justice, notwithstanding the voluminous submissions / materials presented before us by the applicant.

Before we go any further, we think, it is not insignificant to restate that, before the single Justice of the Court the applicant had applied for extension of time to lodge notice of appeal and application for leave to appeal out of time. However, following the amendment of section 5 of the Appellate Jurisdiction Act, Cap 141 vide The Legal Sector Laws (Miscellaneous Amendment) Act No. 11 of 2023, leave to appeal to the Court is no longer a requirement.

In determining whether the applicant had advanced reason(s) for the delay to lodge notice of appeal constituting good cause to warrant extension of time, the single Justice of the Court found none. It was his

observation that, the applicant spent his considerable time to narrate a series of matters he constantly had in courts of different levels, including the Court without success. However, when the single Justice considered the nature of those matters which kept the applicant busy for the whole period of time in court corridors, did not find, as we so hold, the delay to be technical to warrant extension of time sought. We shall explain.

The applicant was aggrieved by the decision of the High Court (subject of the intended appeal) which was delivered on 18th February, 2024. However, although that decision is appealable, the applicant took no initiatives to challenge it by way of appeal. He unsuccessfully, narrated to the single Justice various applications he lodged in court with intent to get his rights as a justification why he did not file the notice of appeal in time. We have keenly perused the record, but we could not find any good reason explaining why the applicant did not take the right measures to institute his intended appeal until when he made his first futile attempt before the High Court and later to the Court, as intimated above. We thus agree with the findings of the single Justice of the Court.

Another reason for delay to file notice of appeal advanced by the applicant before the single Justice was that, he fell sick from August, 2014 up to January 2017 as per paragraph 40 of the supporting affidavit.

Specifically, he indicated that his health condition became worse on 8th June, 2016 and he was admitted in hospital up to 25th June, 2016; and was excused from duty up to 25th June, 2016; (paragraph 41). At any rate, the time which the applicant indicated that he was sick could not be considered because it was over and above the time within which he was supposed to institute his appeal. While the decision of the High Court which he intends to challenge is of 2014, his sickness became serious in 2016 and if we take that he stated to be sick in 2014, no specific date is indicated. Hence, sickness could not stand as a good cause for extension of time. In short, we agree with the respondent that the applicant failed to account for the delay. As a result, we find no any justifiable reason to fault the decision of the single Justice in that aspect.

Another ground which the applicant complained of, is that the single Justice did not consider illegality of the impugned decision of the High Court. First and foremost, we agree with the applicant that illegality of the impugned decision constitutes a good cause for extension of time. However, for the alleged illegality to constitute good cause envisaged under Rule 10 of the Rules, it must be apparent on the face of the record and should not be the one to be discovered by a long-drawn process as stated in **The Principal Secretary Ministry of Defence and National Service** (supra), cited to us by the applicant.

In the light of the above position, we scrutinized the record of application. We have no hesitation to state that, we agree with the single Justice of the Court that the applicant's claims which he termed as points of illegalities, are not points of illegalities worth the name. As such, they do not constitute good cause warranting extension of time. To appreciate our stance, we wish to quote them here under:

> *"60. That, the complained Ruling and Order of the High Court at Mwanza (Hon. Mwangesi, J.) dated 18/02/2014 in Civil Revision No. 5 of 2010 are tainted with several* ***illegalities, irregularities and improprieties apparent on the face of the record*** *as per the following 6 grounds of the intended appeal: -*
>
> *(a) The High Court erred in law by both directing that execution of the decision of the Minister be carried out as per the attachment warrant of 12/07/2010, and ignoring the requirement of the law and the Order of the RM's Court of Mwanza dated 09/07/2010 in Misc. Civil Application No. 17 of 2009 which required the Applicant and his family to be paid Tshs. 30,000/= per diem from the date of termination till the date of repatriation.*

(b) *The High Court erred in law when it omitted to hold that, due to the respondent's application for stay of execution and Revision in the High Court, the Applicant unfairly and illegally suffered for approximately 1334 days waiting for the outcome of the same application without being repatriated.*

(c) *The High Court contradicted itself by first acknowledging that the Applicant and his family are entitled to subsistence allowance from the date of termination to the date of repatriation, and at the same time denying them those entitlements by illegally backdating the date of repatriation back to 12th July, 2010, while the actual repatriation date was already suspended or extended by the Respondent to the year 2014.*

(d) *The High Court erred in law by causing the Applicant and his family to suffer at the instance and for the benefit of the Respondent.*

(e) *The High Court wrongly omitted to make its own calculations and assess whether the amount tagged by the RM's Court to be executed was legally correct according to: -*

(i) The decision of the Minister dated 23/04/2003.

(ii) The Ruling and Order of the RM's Court dated 09/07/2010 in Misc. Civil Application No.17 of 2009, and

(iii) The Report and calculations of the Regional Labour Officer dated 12/07/2010.

(f) The Ruling of the High Court unfairly and illegally prevented the Applicant from claiming the unpaid balance.

61. That, when I cross-checked the calculations of the Regional Labour Officer dated 04/03/2014 in Annexure "DM5" below, I noted that there is also an apparent error therein regarding the number of days which the Respondent delayed to repatriate me and my family. In those calculations, the said delay is erroneously reckoned as 2,796 days instead of the proper figure which is 2,806 days."

The above excerpt speaks for itself. As intimated above and correctly submitted by the counsel for the respondent, issues regarding calculations and establishing figures cannot be taken to be apparent errors. This is because, whether wrongly calculated or omitted cannot be rectified without long process, calculations and reasoning. As for us, just as it was found by

the single Justice, the claims fit as grounds of appeal rather than points of illegality.

Generally, we are of the firm view that, the single Justice neither misapprehended the facts nor the law applicable to the extension of time in exercising his discretion in determining the issue before him. Therefore, we find no justifiable reason to fault him. This reference is unmerited, it stands dismissed.

DATED at **MWANZA** this 22nd day of February, 2024.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

Judgment delivered this 23rd day of February, 2024 in the presence of the Applicant in person and Ms. Marina Mashimba, learned counsel for the Respondent, is hereby certified as a true copy of the original.

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL