**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MWARIJA, JA., KENTE, J.A. And MURUKE, J.A.:)**

**CIVIL REFERENCE NO. 12 OF 2022**

**KHALID HUSSEIN MUCCADAM ..... APPLICANT**

**VERSUS**

**NGULO MTIGA (As legal representative of the late ABUBAKAR OMAR SAID MITIGA) .....1ST RESPONDENT**

**TULIBAKO TABU KYOMA ..... 2ND RESPONDENT**

**MR. ABDALLAH MAKATTA MWINYIMTUMA T/A SENSITIVE AUCTION MART & COURT BROKER..... 3RD RESPONDENT**

**(Reference from the decision of a single Justice of the Court of Appeal of Tanzania, at Dar es Salaam**

**(Maige, JA.)**

**dated the 14th day of June, 2022**

**in**

**Civil Application No. 234/17 of 2017**

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## RULING OF THE COURT

28th August, 2023 & 17th April, 2024

**KENTE, J.A.:**

The present reference which is made in terms of Rule 62 (1) (b) of the Tanzania Court of Appeal Rules, 2009 (hereinafter the Rules), follows a refusal by a single Justice of this Court to grant the application filed by the applicant seeking extension of time within which to apply for Revision of the decision of the High Court – Land Division in Land Case No. 184 of

2016. The decision by the single Justice was handed down on 20th October, 2021.

The facts forming the background to this application are briefly as hereunder: Through Land Case No. 184 of 2018 (before the Land Division of the High Court), the first respondent was declared the lawful owner of a property known and described as Plot No. 320 Block "A" Mikocheni Area Dar es Salaam, with a certificate of title No. 21778 (hereinafter the suit property). The present applicant was not a party to the proceedings before the High Court.

Following the judgment and decree (ex-parte) of the High Court from which no appeal had been preferred, the first respondent launched execution proceedings in which he sought to demolish all the buildings erected on the suit property. The applicant who alleges to reside in one of the said buildings, on becoming aware of the notice of the intended demolition which was issued by the third respondent, M/s Sensitive Auction Mart and Court Brokers, went on and instituted objection proceedings (Miscellaneous Civil Application No. 290 of 2019) before the High Court seeking to block the said demolition. Contemporaneous with the filing of the objection proceedings, and, as a second resolve, the applicant on 22nd June, 2019 lodged in this Court a Notice of Motion in terms Rules 10 and 48 of the Rules requesting for an extension of time to

file revision proceedings against the decision of the High Court in Land Case No. 184 of 2018.

After hearing the application for extension of time in which the present first and second respondents were impleaded as the respondents, a single Justice of this Court (Maige JA) while dismissing the application, held that, since the applicant had already decided to pursue the matter by way of objection proceedings, he could not be heard to seek to ride two horses at the same time. Otherwise, the learned single Justice was of the view and he accordingly held that, what the applicant had intended to do was an abuse of the court process. Aggrieved by the decision of the single Justice, the applicant preferred the present reference.

Before us Mr. Sylivester Shayo, learned counsel appeared to represent the applicant while the first respondent was absent although duly served with a notice of hearing through his advocates AEGIS Attorneys who also, for the reasons best known to themselves, did not enter appearance. The second respondent who resides in the United State of America appeared through Mr. Yasin Mdee to whom he had given a power of attorney. The third respondent was represented by Mr. Ramadhani Makatta Mwinyimtuma, its Managing Director.

It is worthwhile to mention here that, despite non-appearance on the hearing day, the first respondent had in terms of Rule 106 (7) of the Rules, filed written submissions opposing the reference. We will get to the first respondent's arguments in his opposing submissions at the most opportune moment. In the meantime, we shall first highlight the main points raised in the written submissions filed by Mr. Shayo which he adopted and expounded on orally at the hearing before we reserved our ruling, on notice.

To begin with, Mr. Shayo enumerated the legal principles as evolved and developed in the case law upon which a decision of a single Justice of the Court can be upset by the full Court under Rules 62 (1) (b) of the Rules, thus:

*(i)* *Only those issues which were raised and considered before the single Justice may be raised in a reference; and if the decision involves the exercise of judicial discretion;*

*(ii)* *If the single Justice has taken into account irrelevant maters; or*

*(iii)* *If the single Justice has failed to take into account any relevant matter; or*

*(iv)* *If there is a misapprehension or improper appreciation of the law or fact applicable to that issue, or;*

*(v)* *If, looked at in relation to the available evidence and the law, the decision of the single Justice is plainly wrong.*

Addressing himself to the particular question as to whether, in the instant case, the decision by our brother refusing to extend time should in the circumstances, be upset under Rule 62 (1) (b) of the Rules, Mr. Shayo contended that, indeed it should be upset as it was based on misconceptions and a misapprehension of the law on extension of time and what objection proceedings entail. Elaborating, the learned counsel further contended that, the single Justice failed to appreciate that, a lower court cannot correct its own illegalities after giving judgment as thereafter, it becomes *functus officio*. Moreover, Mr. Shayo went on contending that, the learned single Justice failed to appreciate that the High Court Judge did not, in the judgment sought to be revised, make any decision regarding the property at Plot No. 320 which the applicant allegedly purchased from the second respondent through Bancorp Bank Limited.

Moving forward, Mr. Shayo complained on behalf of the applicant that, the single Justice misapprehended the issues involved in this dispute when he decided that, whether the demolition order purporting to execute the trial court's decree has any adverse effect on the applicant's plot, was an issue which related to the execution of the decree and not the decree itself. The learned counsel submitted that, the position taken by the single Justice on that aspect was erroneous because the demolition order was

clearly stated in the decree and as such, it cannot be said to be distinct from the decree itself. With considerable exactitude, Mr. Shayo referred to item number two of the High Court decree which specifically reads thus:

> *"The defendant is ordered to demolish all the structures thereon within 30 days from the date of the order".*

Apparently, in an attempt to demonstrate to us that, after the objection proceedings were terminated by the High Court in the applicant's disfavor, the whole process was blocked as to entitle the applicant to revision being the only remedy available to him under the law, Mr. Shayo referred us to MULA: The Code of Civil Procedure, Vol. 3 pages 2780 to 2781; SARKAR'S LAW OF CIVIL PROCEDURE, Vol. 2 page 1038 and SIR JOHN WOODROFFE & AMMER ALIS, LAW OF EXECUTION OF DECREE AND ORDERS, pages 664 – 670. The counsel's ultimate aim was to underscore the most important point that, in objection proceedings, the only issue that arises in terms of Order XXI Rule 58 of the Civil Procedure Code, is whether the objector was in possession of the property under attachment in his own right, and that, unlike the position obtaining in India where objection proceedings are both investigative and adjudicative, in Tanzania, objection proceedings are only investigative. Mr. Shayo submitted, rightly so in our respectful view that, in contrast to

section 38 of the Civil Procedure Code which empowers a court executing the decree to adjudicate and determine all questions related to execution and treat the proceedings as a suit, the investigation under Order XXI Rule 58 as it were in the instant dispute, is limited to possession or to some interest in the property attached and the executing court does not adjudicate ownership.

Moreover, the learned counsel faulted the single Justice for allegedly his failure to take into account the relevant facts and law and that, as a result, he failed to hold that the demolition order related to the structures which could not be owned separately from the land on which they stand. He also faulted the learned single Justice's observation that, objection proceedings is an appropriate way to deal with a situation where someone's property is alleged to have been attached in the execution of a decree to which he or she is not privy.

Regarding the position taken by the single Justice that objection proceedings could dispose of the intended Revision, and that, before initiating the application for extension of time to file Revision, the applicant ought to have either withdrawn the objection proceedings or exhausted all the remedies available under Order XXI of the CPC including the filing of a suit, Mr. Shayo charged that, the above position goes beyond the principle in Rule 10 of the Rules and that, there is no reason

to subject the appellant to such a lengthy and cumbersome procedure before he can access this Court.

According to Mr. Shayo, the above conclusion by the single Justice also means that, this Court will lose its superintendence jurisdiction given to the higher courts over the courts below them. The learned counsel was afraid that if the decision of the single Justice in this case is left to stand and continue to be good precedent such that the aggrieved parties are precluded from challenging orders given in objection proceedings, the superintendence jurisdiction vested in the higher courts over the lower courts will be lost and that would be against the constitutional principle enshrined in Article 13 (6) (a) of the Constitution the core idea of which, is the explicit right to the aggrieved party in any judicial proceedings to appeal.

By way of a comparative approach, Mr. Shayo submitted that, in Zanzibar which is one part of the United Republic of Tanzania, objection proceedings are also taken under the heading "Investigation of Claims and Objections", and that, the orders given therefrom are appealable. For instance, the learned counsel referred us to the unreported case of **Katibu Mkuu Amani Fresh Sports Club v Dodo Ubwa Mamboya And Khamis Machano Keis,** Civil Appeal No. 88 of 2002. As such, Mr. Shayo did not see the reason why in Tanzania Mainland, as in Zanzibar,

the orders given in objection proceedings should not at least be amenable to revision.

With regard to the refusal by the High Court to entertain the objection proceedings filed by the applicant on the ground that the applicant had used a wrong avenue by preferring objection proceedings against the first respondent who had already won the case against his predecessor in title, Mr. Shayo submitted that, those were special circumstances where the applicant was not heard on merit in the objection proceedings and that, on that account, the applicant ought to be treated as if he had never preferred any objection proceedings. In those circumstances, Mr. Shayo concluded, the only remedy available to the applicant is a Revision.

As stated earlier, through the professional services of Mr. Kephas Simon Mayenge and Ms. Anna Marealle of AEGIS Advocates, the first respondent had filed written submissions in terms of Rule 106 (7) of the Rules strongly opposing the reference. The first respondent's counsel supported the decision of the single Justice, because, according to them, before applying for extension of time to file application for revision of the decision of the High Court, the applicant ought to have withdrawn the objection proceedings at the High Court or exhausted the remedies available under Order XXI of the CPC.

Regarding the question as to whether or not through the objection proceedings, the High Court could determine the question of ownership of the attached property, counsel for the first respondent submitted that, that question was not considered by the single Justice. The learned counsel were emphatic that, the application for extension of time was struck out by the single Justice because it was an abuse of process in civil proceedings. Moving forward, counsel for the first respondent contended that, in terms of Order XXI of the CPC, a party who initiates objection proceedings has to exhaust all the remedies available under that Order and that, orders given in objection proceedings can only be challenged under Order XXI Rule 62 of the CPC. The first respondent's counsel further contended that, the allegations by the applicant that the single Justice refused the application for extension of time because he believed that the intended application for revision had no merit, were baseless and unfounded.

On our part, we begin by stating that, we entirely associate ourselves with Ms. Shayo with regard to the legal principles as evolved through various case law and for which a decision of a single Justice of this Court can be upset by the full Court in terms of Rule 62 (1) of the Rules.

If we may recapitulate, the argument advanced by Mr. Shayo on behalf of the applicant with respect to the question as to why in the instant case, the decision of the single Justice should be upset by the full Court is that, the said decision was based on misconceptions and a misapprehension of the law on extension of time and on what the objection proceedings entail. Essentially, that is the substantive part of the applicant's complaint against the decision by the single Justice.

Having given due consideration to the applicant's grounds of complaint as well as the elaborate submissions made by Mr. Shayo, we propose to start determining this reference with a brief overview of the current position of the law on the subject of extension of time as elucidated in various decisions of this Court.

As luck would have it, all the three cases which we have in mind were referred to by the single Justice in his impugned decision. In the first case of **Masatu Mwizarubi v. Tanzania Fish Processing Ltd,** Civil Application No. 13 of 2010 (unreported), the principle was established that, good cause is a relative phrase and it is upon the party seeking an extension of time to provide the relevant material in order to move the court to exercise its discretion in its favour.

Regarding the court's discretion, it was held in the case of **Henry Muyaga v. Tanzania Communication Company Ltd,** Civil Application No. 8 of 2014 (unreported) that;

> *"The discretion of the Court to extend time under Rule 10 is unfettered, but it has also been held that in considering an application under the rule, the Court may take into consideration, such factors as the length of the delay, the reason for the delay, the chances of success of the intended appeal and the decree of prejudice that the respondent may suffer if the application is granted."*

(See also the case of **R. v. Yona Kaponda & Others** [1985] T.L.R 84)

After dispassionately going through the arguments canvassed by the parties herein and considering the law governing the applications for extension of time under Rule 10 of the Rules, we find ourselves in full agreement with Mr. Shayo. In the first place, we entirely agree with our brother Maige, J.A. regarding his industry in locating and his exposition of the applicable law. What we do not agree with him however, and that is in the second place, is the position he seems to have taken that, the chances of success of the intended application for revision, should take precedence over the requirement for the applicant to furnish good cause to account for the delay when a court is considering an application under

Rule 10 of the Rules. For upon a careful reading of the impugned ruling by the single Justice, it becomes obvious that, he was significantly influenced by the arguments regarding the latter requirement than the former. That led him to the erroneous conclusion that the actual intent behind the applicant's actions was an abuse of the court process. Needless to say, the position we have taken resonates with the argument by Mr. Shayo, who argued that the ruling of the single Justice was based on a misconception and misapprehension of the law on extension of time.

We, of course are mindful of the notion that, in a deserving situation, courts must always resist the temptation to condone the abuse of process under the façade of doing substantial justice even in a delayed form. However, the view we take from the current jurisprudence is that, the very purpose for which Rule 10 of the Rules was meant, was to provide a certain amount of leeway to the litigants who can plausibly explain that, they were caught up in some compelling or inevitable circumstances as not to take the necessary steps in the pursuit of their rights within the prescribed period. It follows in our judgment that, to insist on the requirement for the applicant to demonstrate that his intended appeal or application for revision has overwhelming chances of success and not that on account of a good cause the applicant could not take the necessary steps within time as the learned single Justice did, would result a total

departure from the law in the light of the clear provisions of Rule 10 of the Rules the purposive interpretation of which should keep with the general tone of that law itself. Rule 10 of the Rules provides in no ambiguous terms that:

> *"10 The Court may, **upon good cause shown**, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended".*
>
> *[Emphasis added]*

It is plain from the foregoing provisions of the law that the keywords in the determination of any application for extension of time under Rule 10 of the Rules, are found in the phrase "upon good cause shown". In effect therefore, the earlier mentioned legal principles as developed through various case law, are but subsidiary.

For the foregoing reasons, we agree with Mr. Shayo that indeed in the circumstances of the instant case, it was not proper for our learned brother to reject the applicant's application and prayer for extension of

time. We thus quash and set aside the decision by the single Justice of this Court in Civil Application No. 234/17 of 2017. On the view we have taken, we grant the application with an order that if he still desirous, the applicant is given sixty days from the date of delivery of this ruling to lodge an application for revision. The costs of the present application shall be in the cause.

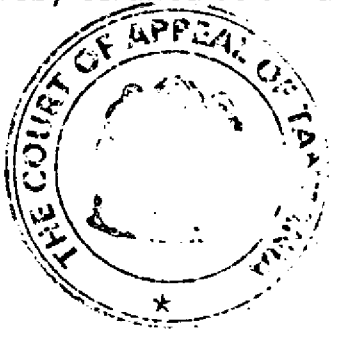
**DATED** at **DAR ES SALAAM** this 16th day of April, 2024

A. G. MWARIJA
**JUSTICE OF JUSTICE**

P. M. KENTE
**JUSTICE OF APPEAL**

Z. G. MURUKE
**JUSTICE OF APPEAL**

The Judgment delivered this 17th day of April, 2024 in the presence Ms. Apis Maibwa, learned counsel for the 1st respondent, also holding brief for Mr. Shayo, learned counsel, for the appellant and Mr. Yasin Mdee under power of Attorney of 2nd respondent, Mr. Nyamuko Makata, for the 3rd respondent is hereby certified as a true copy of the original.




J. E. FOVO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**