IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J. A., SEHEL, J.A. And FIKIRINI, J.A.)

CIVIL REFERENCE NO. 16 OF 2017

TAUKA THEODORY FERDINAND ..... APPLICANT

VERSUS

1. **EVA ZAKAYO MWITA (As administrator of the estate of the late ALBANUS MWITA (DECEASED)**
2. **DENIS MOSES KAPELA**
3. **ADELINE MIGISHAGWE KAPELA**
4. **THE REGISTERED TRUSTEES OF BETHEL CHAPEL INTERNATIONAL**

..... RESPONDENTS

(Application for reference from the decision of the Court of Appeal of Tanzania, at Dar es Salaam)

(Mwambegele, J.A.)

dated the 16th day of June, 2017
in
Civil Application No. 300/17 of 2016

.....

RULING OF THE COURT

16th August, 2021 & 14th March, 2022

MWARIJA, J.A.:

The applicant, Tauka Theodory Ferdinand was the plaintiff in Land Case No. 28 of 2011. He instituted that case in the High Court of Tanzania (Dar es Salaam District Registry), at Dar es Salaam against the respondents; Eva Zakayo Mwita (the admininistratrix of the estate of the late Albanus Mwita), Denis Moses Kapella and the Registered Trustees of Bethel Chapel International Church (the 1st -4th respondents respectively).

He claimed for *inter alia,* a declaration that he was the lawful owner of a piece of land, Plot. No. 365, Regent Estate within the City of Dar es Salaam (the suit property). On the other hand, through their joint written statement of defence, the respondents denied the claim and in addition, they raised a counterclaim seeking an order declaring the 1st respondent the lawful owner of the suit property.

The dispute between the parties arose after the area on which the suit property is situated was surveyed. After the survey, the applicant was issued with a certificate of occupancy over the said property. However, when he wanted to develop the area by carrying out construction works, he encountered strong resistance from the late Albanus Mwita who had been in occupation of the suit property since 1975, before the area had been surveyed. The applicant complained to the police and consequently, the late Albanus Mwita was charged in the Resident Magistrate's Court of Dar es Salaam at Kisutu with the offence of criminal trespass, in Criminal Case No. 919 of 1990 (hereinafter "the criminal case"). He was found guilty, convicted and sentenced to a conditional discharge of six months.

During the pendency of the criminal case, the late Albanus Mwita complained before the responsible authorities for land matters, both at

the municipal and ministerial levels seeking their intervention in resolving the ownership dispute between him and the applicant. Having found that the late Albanus Mwita had previously been in occupation of the suit property and because he had never been compensated after the survey, he was issued with a certificate of occupancy and the one granted to the applicant was revoked. Later on, however, following the decision in the criminal case in which the late Albanus Mwita was found guilty of having trespassed into the suit property, the certificate of occupancy which was subsequently granted to him was revoked and a new one was re-issued to the applicant. That dramatic turn of events was opposed by the late Albanus Mwita who resisted to give vacant possession of the suit property hence the filing by the applicant, of the High Court Land Case No. 28 of 2011.

Having heard the evidence adduced by the witnesses for the applicant and the respondents, the High Court (Munisi, J.) found that the applicant did not have any right over the suit property. His claim was thus dismissed. On the other hand, the learned Judge was satisfied that, despite the revocation of Albanus Mwita's right of occupancy following the decision of the criminal case, the suit property was lawfully owned by the late Albanus Mwita. The respondents' counterclaim was thus granted and

consequently, the 1st respondent was declared the lawful owner of the suit property.

The applicant was aggrieved by the decision of the High Court and thus on 22/4/2015, he lodged a notice of appeal under Rule 83 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) intending to appeal to this Court. He did not however, serve the respondents with a copy of that notice as required by Rule 89 (1) of the Rules and therefore, decided to file in this Court, Civil Application No. 104 of 2015 seeking extension of time to comply with that requirement. The application was however, unsuccessful. It was dismissed by Kileo, J.A. on 10/12/2015.

With that setback on his intention to appeal, but still determined to challenge the decision of the High Court, on 22/2/2016 the applicant applied and obtained leave to withdraw the notice of appeal. Thereafter, on 27/2/2016, he filed a twofold application in the High Court; Misc. Civil Application No. 111 of 2016 seeking extension of time to institute a notice of appeal afresh and leave to appeal against the impugned decision of the High Court.

The application was again, unsuccessful. It was dismissed on 15/9/2016 for want of good cause. The High Court was of the view that the application was intended to circumvent the decision of this Court in

Civil Application No. 104 of 2015 which refused to grant the applicant extension of time to serve a copy of the notice of appeal upon the respondents.

Dissatisfied further with the decision of the High Court, on 30/9/2016 the applicant filed an application before this Court, Civil Application No. 300/17 of 2016 seeking the same reliefs sought before the High Court, that is; extension of time to lodge a notice of appeal and leave to appeal. The application which was brought under Rules 10 and 47 of the Rules was supported by an affidavit sworn by the applicant. The grounds upon which the same was based are mainly that:

> *"(a) The delay [was] caused by good cause.*
>
> *(b) The decision of the High Court intended to be chalienged contains illegalities."*

During the hearing before the single Justice (Mwambegele, J.A.), the learned counsel for the applicant submitted that the application for extension of time, which was in the first instance, filed in the High Court, resulted from the omission by the applicant's previous advocates, (Msemwa & Co. Advocates) to serve upon the respondent, a copy of the notice of appeal which had been filed within time. As a result, the applicant had to terminate the services of the said advocates and engage the present firm of advocates, Auda & Co. Advocates. It was stated

further that the omission to serve a copy of the notice of appeal upon the respondents necessitated the withdrawal of that notice with a view of starting the appeal process afresh.

In his submission, the applicant's counsel attributed the delay in instituting the notice of appeal to lack of diligence on the part of the previous counsel for the applicant. Relying on case of **Felix Tumbo Kisima v. Tanzania Telecommunication Co. Ltd and Another** [1997] T.L.R 57, the learned counsel argued that, lack of diligence on the part of a counsel for a party constitutes a good cause for grant of extension of time. He argued further that, the applicant acted diligently after his application, Civil Application No. 104 of 2015 had been dismissed. According to his counsel, this is because, immediately thereafter, the applicant dismissed his previous counsel and engaged another advocate who promptly withdrew the notice of appeal and filed an application for extension of time to lodge such notice afresh.

With regard to the delay for the period between 15/9/2016 and 30/9/2016, it was the explanation by the applicant's counsel that the period was spent in obtaining copies of proceedings and the ruling, the documents which were necessary for filing in Court, the application for extension of time to institute the notice of appeal.

It was argued further that, after having realized that there was no-compliance with Rule 89 (1) of the Rules, the more sensible course which the applicant took was to withdraw the notice of appeal instead of waiting for the same to be struck out under Rule 89 (2) of the Rules. In the circumstances, because the applicant was content with the decision of the Court in Civil Application No. 104 of 2015, he decided to withdraw the notice of appeal instead of preferring a reference against that decision as doing so would have amounted to an abuse of the court process.

On the ground that the impugned decision of the High Court is tainted with illegalities, it was argued that the learned High Court Judge erred in holding that the revocation by the Commissioner for Lands, of the late Albanus Mwita's right of occupancy over the suit property was in effectual because the applicant's ownership right would not have been determined in a criminal case. In support of his argument that the allegation of illegality constitutes a good cause for grant of extension of time, the learned counsel cited the case of **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R 387.

The arguments made in support of the application were countered by the respondents. Their learned counsel, Mr. Mbuya submitted in reply

before the single Justice that the applicant had failed to establish that the delay to institute a notice of appeal afresh was due to a good cause. According to the learned counsel, by withdrawing the notice of appeal after the Court's decision in Civil Application No. 104 of 2015 with a view of starting afresh the appeal process, the applicant had the intention of circumventing that decision of the Court which refused him extension of time to serve upon the respondents, a copy of the notice of appeal. It was argued further that, the act was an abuse of the court process. The following cases were cited in support of that argument; **Heykel Berete v. Dero Investiment Ltd**, Civil Reference No. 1 of 2016, **East Africa Development Bank v. Blueline Enterprises Ltd**, Civil Appeal No. 101 of 2009 (both unreported) and **Mayers & Another v. Akira Ranch** (No. 2) [1972] E.A. 347.

As for the allegation of illegality in the impugned decision, it was argued for the respondents that, since the High Court is superior to the Resident Magistrate's Courts, it was entitled to address the apparent errors in the decision of the Kisutu Resident Magistrate's Court, the same having adversely affected the right of the respondents; that is, an error by the said subordinate court of determining the parties' right of ownership of the suit property in a criminal case.

In his ruling, the learned single Justice found that the act of withdrawing the notice of appeal with a view of starting the appeal process afresh after realizing that the notice was incompetent, was an abuse of the court process. He was of the view that the act amounted to circumvention of the Court's decision in Civil Application No. 104 of 2015.

On the ground that the decision of the High Court which is intended to be challenged contains illegality, the learned single Justice observed that, not every allegation of illegality in a decision constitutes good cause for grant of extension of time. He relied on the case of **Lyamuya Construction Co. Ltd v. The Board of Trustees of Young Women's Children Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). He observed that, whereas in the **Valambhia case** (supra) relied upon by the applicant, the errors were clear on the face of the record, in the case at hand, the illegality complained of by the applicant is not one which can be discerned without a long-drawn arguments or process.

On the basis of the above stated reasons, the learned single Justice dismissed the application with costs for failure by the applicant to show good cause upon which the Court could exercise its discretion to grant the extension of time sought by the applicant.

Aggrieved by the decision of the Single Justice, the applicant has brought this reference challenging that decision on the following grounds:

1. *That the Applicant was unsatisfied with the decision of a single Justice of Appeal (Hon. Mwambegele, J.A.) dated 16th June, 2017 in Civil Application No. 300/17 of 2016 dismissing his application for extension of time within which to lodge a notice of appeal and apply for leave to appeal with costs (copies of the ruling and order).*
2. *That the Applicant had made up a decision to challenge that decision by reference to the Court and he hereby applies that the decision of the single Justice of Appeal (Hon. Mwambegele, J.A.) dated 16TH June, 2016 in Civil Application No. 300/17 of 2016 dismissing that Application for extension of time be reversed, and the decision granting that application with costs be made in that place on the following grounds:*
    (a) That the Honourable single Justice of Appeal erred in law in equating dismissal of an application for extension of time to serve the Notice of Appeal with dismissal of an appeal;
    (b) That, having not faulted the Applicant's contention that after dismissal of the application for extension of time to serve the Notice of Appeal, the Applicant who still wanted to pursue the appeal remained with two options: either to wait indefinitely until when the notice of appeal would be struck out or to withdraw it immediately in order to restart the appellate process, the Honourable single Justice of Appeal erred in law to hold that the Applicant abused the Court process by choosing the latter;

(c) *That the Honourable single Justice of Appeal erred in law and in fact in misconstruing the law of extension of time such that it condemns rather than encouraging the doing of all acts within one's control to avoid wasting more time which such acts would have saved from being wasted;*

(d) *That the Honourable single Justice of Appeal erred in law and in fact to accept the Respondent's contention that the Applicant's decision to withdraw the Notice of appeal rather than challenging the decision of the single Justice on reference (even when the Applicant is satisfied that the single judge was right) meant to circumvent rather than upholding the decision of the Single of Justice of Appeal in Civil Application No. 104 of 2015;*

(e) *That the Honourable single Justice of Appeal erred in law and in fact by conceiving the appellate process involving the case at hand as a process that had failed in a way that the law closes up doors for a restart;*

(f) *That the Honourable single Justice of Appeal erred in law and in fact in holding that the present case did not plead any ground of illegality warranting extension time;*

(g) *That the Honourable single Justice of Appeal erred in iaw and in fact in holding that the illegality warranting extension of time must be one appearing on the face of the record.*

(h) *That the Honourable single Justice of Appeal erred in law and in fact in holding that the present case does not disclose any illegality on the face of the record.*

(i) *That the Honourable single Justice of Appeal erred in law and in fact in holding to the effect that leaving on record in the notice of appeal which was not served within time would have served anything better than withdrawing the same.*

Having lodged the reference, the learned counsel for the applicant filed his written submission in compliance with Rule 106 (1) of the Rules. On their part, through their learned counsel, the respondents filed their reply submission in terms of Rule 106 (7) of the Rules. The respective written submissions were later on highlighted by the counsel for the parties at the hearing of the application whereby, the applicant was represented by Mr. Audax Kahendaguza Vedasto, learned counsel, and respondents had the services of Dr. Fredrick Ringo, also learned counsel.

When he was called upon to argue his grounds of reference, Mr. Vedasto adopted his written submission and as shown above, proceeded to make oral submission highlighting the arguments contained in his written submission. On items (a) and (e) of ground 2 of his grounds of reference, the learned counsel argued that the learned single Justice erred in failing to find that the applicant had acted diligently in withdrawing the notice of appeal after Civil Application No. 104 of 2015 had been dismissed by the Court. According to the learned counsel, by withdrawing the notice with a view of filing the same afresh, the applicant acted diligently

because after he had unsuccessfully applied for extension of time to serve a copy thereof upon the respondents, that notice became invalid and thus deserved to be struck out. In the circumstances, the learned counsel argued, the move taken by the applicant, of not awaiting for the notice to be struck out by the Court and instead deciding to withdraw it and file an application for extension of time to lodge it afresh, did neither amount to abuse of the Court process nor the filing by him, of frivolous or vexatious proceedings leading to endless litigation.

He distinguished the case of **Blue Star v. Jackson Msetti** [1999] T.L.R 80 relied upon by the learned single Justice in his ruling contending that, while in that case the dismissed application for execution was sought to be filed afresh, in the present case, the notice of appeal which was the subject of the application for extension of time, was not dismissed but rather, the same was withdrawn by the applicant. Citing the cases of **Francis Itengeja v. Kampuni ya Kusindika Mbegu za Mafuta Ltd** [1997] T.L.R 148 and **Tina & Co. Ltd and 2 Others v. Eurafrican Bank Ltd**, Civil Application No. 86 of 2015 (unreported), Mr. Vedasto went on to argue that the effect of a failure to serve a copy of the notice of appeal to a respondent warrants striking out of such a notice and therefore, it was proper for the applicant to withdraw that notice instead of awaiting

for the obvious legal remedy of being struck out by the Court. It was the learned counsel's further argument that, since in law, an order striking out a matter does not bar the affected party from going back to court, even if the notice of appeal would have been struck out, that would not have prevented the applicant from filing an application for extension of time to file that notice afresh. He relied to that effect on the case of **Mount Meru Flowers Tanzania Limited v. Box Board Tanzania Limited**, Civil Appeal No. 260 of 2018 (unreported).

On items (b), (c) and (d) of ground 2 of the grounds of reference, the learned counsel faulted the learned single Justice for having found that the applicant's act of withdrawing the notice of appeal with a view of filing an application for extension of time to institute it afresh was frivolous, vexations and an abuse of the court process while he had at same time, agreed with the applicant that, since a copy of the notice of appeal was not served upon the respondents, the decision of Kileo, J.A. could not be challenged by way of a reference because to do so would amount to an abuse of the court process. According to the learned counsel, the only appropriate route to be taken after the applicant had discovered the omission was to withdraw the notice of appeal and file an application for extension of time to lodge it afresh. In doing so, he said,

the applicant acted diligently. In support of his argument, Mr. Vedasto cited the case of **Salvand Rwegasira v. China Henan International Group Co. Ltd**, Civil Reference No. 18 of 2006 (unreported).

With regard to items (f), (g), (h) and (i) of ground 2 of the grounds of reference, the applicant's counsel faults the learned single Justice for having failed to find that the decision of the High Court which is intended to be challenged is tainted with illegalities warranting a grant of the application for extension of time. The learned counsel argued at length on this point citing the relevant passages in the decision where the learned High Court Judge observed that the Commissioner for Lands acted wrongly in re-granting to the applicant, the revoked title over the suit property by acting on the decision of the Kisutu Resident Magistrate's Court made in the criminal case.

It was Mr. Vedasto's argument that, since the decision of the Kisutu Resident Magistrates Court had not be varied or reversed, it remained to be binding and therefore, the single Justice should have found that, because the High Court was not sitting on appeal against that decision the fact that the High Court determined the rights of the parties over the suit property on the basis of the said decision raises a point on illegality or otherwise of the High Court decision.

Responding to the submission made by the counsel for the applicant, Dr. Ringo opposed the contention that the learned singe Justice erred in dismissing the application in which the applicant had sought extension of time to lodge the notice of appeal afresh. He argued that the Court had discretion to grant or refuse to extend time, only that in the exercise of its discretion, it must act judicially and in accordance with the rules of reason and justice, the main factor being establishment by the applicant, of a good cause. He cited the cases of **MZA RTC Ltd. v. Export Trading Co. Ltd,** Civil Application No. 12 of 2015 and **Keloi Madore v. Mepukori Mbelekeni and Mti Mmoja Village Council,** Civil Application No. 13 of 2016 (both unreported) in which that position of the law was reiterated by the Court.

As to what amounts to a good cause, the learned counsel cited the cases of **Elfazi Nyatega and Three Others v. Caspian Mining,** Civil Application No. 44/08 of 2017 and **Lyamuya Construction Co. Ltd. v. Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (both unreported). It was the learned counsel's argument that, in this matter, apart from the failure by the applicant to account for the delay of nine months, he could not establish any other good cause and therefore, in terms of the Court's

decision in the case of **Finca (T) Ltd v. Kipondogoro Auction Mart**, Civil Application No. 589/12 of 2018 (unreported), the learned single Justice correctly dismissed the application.

Dr. Ringo went on to counter the arguments made in support of the reference by arguing that, the applicant acted improperly by withdrawing the notice of appeal with a view of instituting it afresh after his application for extension of time to serve a copy thereof to the respondents had been dismissed. This, he said, is because it was due to lack of diligence on the part of the applicant that the notice of appeal was rendered incompetent. On that proposition, the learned counsel relied on the case of **Arunaben Chaggan Mistry v. Naushad Mohamed Hussein**, Civil Appeal No. 6 of 2016 (unreported). He stressed that, the laxity exhibited by the previous counsel for the applicant is not excusable because the omission by him was not based on misconduct and for that reason, the position as stated in the case of **Felix Tumbo Kisima** (supra) is not applicable. According to the learned counsel, the previous counsel for the applicant adopted a lackadaisical attitude which is not excusable, particularly so because the applicant has not complained of any misdeeds on the part of his previous advocate. In support of his argument, the respondents' counsel cited the persuasive decision of the High Court of Uganda in the

case of **Bishop Jacinto Kibuuka v. The Uganda Catholic Lawyers and Two Others**, Misc. Civil Application No. 696 of 2018 (unreported).

On the existence or otherwise of illegalities in the decision of the High Court which is sought to be challenged, the learned counsel opposed that ground as well. He argued that, not every allegation of illegality amounts to sufficient cause. According to the learned counsel, it is only when an allegation of illegality raises a point of law of sufficient importance and when such as illegality is apparent on the face of the record, that the same would warrant consideration by the Court. He cited to that effect, the cases of **East African Development Bank v. Blueline Enterprises (T) Ltd**, Civil Application No. 47 of 2010 (unreported) and **Chandrakant Joshibhai Patel v. Republic** [2004] T.L.R 218.

On the basis of his reply submission, the learned counsel for the respondents prayed that the application be dismissed with costs.

Having considered the submissions of the learned counsel for the parties on the grounds of the reference, we think that the issue which arises for determination is whether or not the learned single Justice erred in holding that the applicant had failed to establish a good cause for grant of extension of time as sought.

To answer the issue, we wish to start by reiterating on what a good cause entails. As submitted by Dr. Ringo, the Court has in a number of its decisions, including the case of **Lyamuya Construction Co. Ltd** (supra) specified what need to be established by the applicant who seeks to be granted extension of time. They are that; **one**, the applicant must account for all the period of the delay, **two**, the delay must not be inordinate and **three**, the applicant must show diligence not apathy, negligence or sloppiness in the prosecution of the action that is intended to be taken. A good cause may also be established when it is shown that there are other sufficient reasons such as existence of a point of law of sufficient importance like illegality in the decision sought to be challenged.

It is also instructive to point out that in the application which gave rise to this reference, although the same was brought by way of a second bite, the learned single Justice heard and determined it as a fresh application because it was not filed to challenge the decision of the High Court arising from a similar application which was in the first instance, filed in that court.

We also find it apposite to reiterate the position of the law as regards the effect of lack of diligence or inaction on the part of an advocate in handling his client's case such that it results into a delay. The

position was stated in the case of **Yusuf Same and Another v. Hadija Yusuf**, Civil Appeal No. 45 of 1998 (unreported), that:

> *"Generally speaking, an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time. This has been held in numerous decisions of the Court and other similar jurisdiction... But there are times, depending on the overall circumstances surrounding the case, where extension of time may be granted even where there is some elements of negligence by the applicant's advocate as was held by a single Justice of the Court (Mfalila, J.A. as then was) in* ***Felix Tumbo Kisima v. TTCL Limited and Another – CAT,*** *Civil Application No. 1 of 1997 (unreported)."*

In the above cited case, the respondent did all that he could and left the matter in the hands of the advocate who had been assigned to her on legal aid. Despite the negligence on the part of the advocate resulting into the delay in filing an application for leave to appeal, the Court considered the fact that the respondent, a widow, did all that was necessary on her part, shuttling between Dar es Salaam where the Court records were and Moshi where the counsel assigned to her on legal aid was based and found that the advocate's negligence should not be visited upon her.

Similarly, in the **Felix Tumbo Kisima case** (supra) the Court granted the applicant extension of time to lodge an application for leave to appeal notwithstanding the fact that, through negligence, the counsel for the applicant delayed to institute an appeal. The advocate who had been fully paid by the applicant misled his client that he was dealing with the matter while in fact he was not. In the circumstances, the Court was of the view that the delay by the applicant was due to sufficient cause, that although he was actively making a follow-up on the matter, his advocate told lies in writing that he was pursuing the matter.

That having been said, we now turn to consider the arising issue. From the grounds of the reference and the submission made in support of the reference, the only factor relied upon by the applicant is that he had acted diligently by withdrawing the notice of appeal with a view of filing it afresh. That move was however, taken after he had realized that the omission to serve a copy thereof to the respondents had rendered the notice incompetent. That became obvious after his application for extension of time to serve a copy of the notice had been dismissed by the Court. In his ruling, the learned single Justice declined the proposition that the move taken by the applicant constituted a good cause for grant of extension of time.

As shown above, in items (a) and (e) of ground 2 of the grounds of the reference, Mr. Vedasto challenged the finding of the learned single Justice arguing that he had equated dismissal of the application for extension of time with dismissal of an appeal, the effect of which the applicant could not start the appeal process afresh. With due respect to the learned counsel, we could not discern from the ruling, any such finding by the learned single Justice. The relevant part of the ruling, starting at pages 10-11 thereof reads as follows:

> *"... it is apparent from the record and the affidavits supporting the application that the applicant withdrew the notice of appeal which he now seeks leave of this Court, by a second bite, to have it filed out of time. In the High Court and this Court, the applicant did not and has not brought to the fore good reasons why that course of action was taken. However, reading the record in context as well as the oral submission at the hearing of the application, it has become clear enough that the applicant saw no prospect in succeeding to challenge by reference the ruling of a single Judge of this Court dated 10.12.2015 in Civil Application No. 104 of 2015 between the parties. The learned counsel for the applicant conceded at the hearing that challenging that decision while he was aware*

that it was legally correct would be tantamount to abuse of the court process. He is right..."

On the move taken by the applicant, of withdrawing the notice of appeal with a view of filing it afresh after having been advised by his counsel, the learned single Justice went on to state as follows at pages 11-12 of the ruling:

> *"By this advise, in my view, the learned counsel was not legally correct. With due respect to Mr. Vedasto,* ***this course of action cannot amount to good cause to grant the extensions sought*** *... The course of action taken by the applicant had the effect of circumventing the verdict of Civil Application No. 104 of 2015 which refused the applicant extension of time to serve the respondents with the notice of appeal. If anything, the course of action adopted by the learned counsel for the applicant was but an abuse of the Court process ....."* [Emphasis added].

He observed further at page 13 of the ruling that:

> *"The applicant's course of action of filing the present application after the previous one [Civil Application No. 104 of 2015] was heard on the merits and dismissed is, in my considered view, not only frivolous, vexations and an abuse of the*

Court process but also a recipe for endless litigation."

Going by the above excerpts, we are unable to agree with Mr. Vedasto that the learned single Justice had equated the dismissal of the application for extension of time to serve a notice of appeal with dismissal of an appeal. The learned single Justice expressed clearly that, from the cause which was relied upon by the applicant, his application for extension of time lacked merit because the factor which was relied upon does not constitute a good cause. He found instead, that the course of action taken by the applicant was an abuse of the Court process, the finding which is also being challenged in items (b), (c) and (d) of ground 2 of the grounds of reference. In our considered view, the essence of the finding is that the dismissal of the application for extension of time to serve a copy of the notice of appeal precluded the applicant from starting the appeal process afresh. That cannot be equated with a dismissal of an appeal.

Again, after having considered the submissions on the above stated three items of ground 2 of the grounds of reference, we find the same to be lacking in merit. We agree with Dr. Ringo that, because the course of action taken by the applicant came after dismissal of Civil Application No. 104 of 2015, the move by the applicant was indeed an abuse of the Court process. The fact that the applicant had acted immediately after the ruling

in Civil Application No. 104 of 2015 by withdrawing the notice of appeal and shortly thereafter filed an application for extension of time to lodge it afresh instead of waiting until the notice is struck out by the Court, did not in our view, exempt him from the consequences of the dismissal of that application. So, although we agree with Mr. Vedasto that a withdrawal order does not bar a party from going back to court to seek its re-institution in accordance with the law, in the present case, the applicant did so after he had failed to validate his notice of appeal by serving a copy thereof to the respondents.

In the circumstances, even though an order marking a notice of appeal withdrawn does not bar the affected party from filing an application for extension of time to reinstitute it, in the particular circumstances of this case, we agree with the learned single Justice that by filing such an application while the appeal process had already been blocked following dismissal of Civil Application No. 104 of 2015, was intended to circumvent the decision arising from that application.

With regard to the submission by the counsel for the applicant that the delay was caused by the previous counsel for the applicant and thus his negligence should not be visited on the applicant, we find, as argued by the respondents' counsel, that the case of **Felix Tumbo Kisima** is

distinguishable. As shown above, it is only under exceptional circumstances that negligence on the part of the counsel may constitute a good cause for extension of time. Unlike in the cases of **Yusuf Same** and **Felix Tumbo Kisima**, in the case at hand, no such special circumstances exist. There is nothing on record showing that the applicant had made efforts in pursuing the matter or that there was any act of his previous advocate indicating that he went against his professional ethics. The negligence on the part of the applicant's previous advocate is therefore, of the nature that could be visited on his client. For these reasons, we are with respect, unable to agree with Mr. Vedasto that the delay, which resulted into the withdrawal of the notice of appeal, was due to good cause.

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.

Next for our consideration is the issue whether or not the learned single Justice erred in failing to find that the decision sought to be challenged is tainted with illegalities as raised by the counsel for the

applicant on items (f), (g), (h) and (i) of ground 2 of the grounds of reference. We need not be detained much in determining the issue which arises from the above stated items of ground 2 of the reference. It is clear from the judgment sought to be challenged that the question of legality of the decision of the Kisutu Resident Magistrate's Court in the criminal case was made by way of an *obiter dictum*. In her judgment at page 80 of the record of appeal, the learned High Court Judge states as follows:

> *"Before concluding this judgment, there is also one serious flaw that has featured substantially during the hearing, i.e. the criminal proceedings in which Mr. Albanus Mwita was arrested tried and convicted for the offence of Criminal Trespass as shown in exhibit P.5 which* ***I wish to touch on****."*
> [Emphasis added].

The learned High Court Judge observed that it was improper for the Commissioner for Lands to use the decision of the criminal case to revoke the 1st respondent's right of occupancy. As stated above however, that was an observation in passing, not forming the basis of the decision sought to be challenged. In essence therefore, the suit was not determined on the basis of the remarks made by the learned High Court Judge on the decision of the criminal case. It was determined on the

basis of the evidence tendered by the parties' witnesses. That being the position we do not find it important to determine the issue arising from items (f), (g), (h) and (i) of ground 2 of the grounds of reference. We find, with respect that the items have been raised out of misconception.

On the basis of the foregoing reasons, we are of the settled mind that this application for reference has been brought without sufficient reasons. We find it to be devoid of merit and hereby dismiss it with costs.

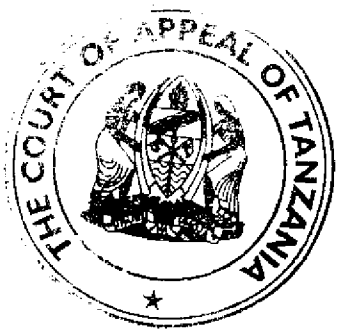
DATED at **DAR ES SALAAM** this 9th day of March, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The ruling delivered this 14th day of March, 2022 in the presence of Mr. Paschal Mshanga, learned counsel for the applicant and Dr. Fredrick Ringo, learned counsel for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL