IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., SEHEL, J.A. And KHAMIS, J.A)

CIVIL REFERENCE NO. 13 OF 2022

VICENT LUCAS..... 1ST APPLICANT

TUNZO SEFU.....2ND APPLICANT

MISANGA MUMBEE.....3RD APPLICANT

HASSAN TINDWA.....4TH APPLICANT

SALEHE BILING.....5TH APPLICANT

NATHANIEL MNEGA.....6TH APPLICANT

HASSAN JUMA as administrator

of the estate of JUMA RAJABU.....7TH APPLICANT

VERSUS

TANZANIA ZAMBIA RAILWAY AUTHORITY.....RESPONDENT

(Reference from the decision of the Single Justice of the Court of Appeal at Dar es Salaam)

(Makungu, J.A)

dated 1st September, 2022

in

Civil Application No. 190/01 of 2021)

RULING OF THE COURT

4th July & 11th August 2023

KHAMIS, J.A.:

This application for reference seeks to challenge, vary and reverse the orders and decision of a single Justice of this Court (Makungu, J.A) in

in an application for extension of time to lodge an appeal out of time. The extension of time was in respect of the High Court, Dar es Salaam District Registry's decision in Miscellaneous Civil Application No. 244 of 2013 dated 7th November, 2014.

Before the single Justice the applicants had presented a Notice of Motion supported by two affidavits of Vicent Lucas and Tunzo Sefu, the first and second applicants herein, alleging lack of legal assistance following death of their advocate and presence of illegalities as grounds for extension of time.

The Tanzania Zambia Railways Authority, known by its acronym TAZARA, the respondent herein, challenged the application through an affidavit in reply sworn by its principal officer, one Lameck Kagombora, who deposed that the alleged illegalities were an afterthought and that the application did not disclose sufficient reasons for extension of time.

The respondent argued that the applicants failed to prove that their advocate, Charles Kibaja Semgalawe, passed away in October, 2019 as no death certificate was produced. It was also contended that the applicants' financial difficulties which allegedly incapacitated them to engage a new advocate, were not backed up with evidence.

Upon analysis of the parties' rival arguments, the learned single Justice was of the view that there were no cogent reasons on the applicants' failure to file an application for extension of time, an act which amounted to negligence or sloppiness.

The single Justice found that instead of filing the application for extension of time within fourteen (14) days from 28th November, 2019, the applicants lodged their application on 28th April, 2021, more than one year later. For those reasons, he concluded that the applicants failed to show good cause for the delay and thus dismissed the application.

Before us, the applicants advanced two grounds to fault the decision of the single Justice, to wit:

1. That the single Justice of Appeal erred in law by not considering the issue of illegality of the ruling of the High Court dated 7th November, 2014 (F.W Mgaya, J) as sufficient ground of extension and proceeded to dismiss the application for extension of time.
2. That the single Justice of Appeal erred in law to dismiss the application for extension of time on the ground that no good reasons were given by the applicants while in fact reasons were given to justify the delay.

When the matter was placed before us for hearing, Mr. Yudathadei Paul, learned advocate, appeared and argued the application for and on behalf of the applicants. Mr. George Kalenda assisted by Mr. Siyumwe Mubanga, both learned State Attorneys, dutifully represented the respondent.

To begin with, the learned counsel for the applicants consolidated the two grounds of reference and submitted it as one. He contended that the learned single Justice of Appeal failed to consider an illegality in the impugned High Court decision.

Mr. Paul asserted that whereas Civil Appeal No. 4 of 2010 was heard ex-parte by the High Court and an ex-parte Judgment delivered against TAZARA on 16th December 2011, it was wrong for the presiding judge to entertain an application for review unprocedurally filed by TAZARA through a Chamber Summons supported by an affidavit thereby introducing fresh evidence relied by the High Court to overturn its own decision.

Mr. Paul advanced that procedurally, an application for review should be made through a Memorandum of Review whose format is more or less similar to the Memorandum of Appeal and not using a Chamber Summons supported by an affidavit.

Cementing his arguments, Mr. Paul relied on the decision of this Court in **AMOUR HABIB SALIM v HUSSEIN BAFAGI,** Civil Application No. 52 of 2009 (unreported) wherein our previous decision in **VIP ENGINEERING AND MARKETING LIMITED & OTHERS v CITIBANK TANZANIA LIMITED, CONSOLIDATED** Civil Reference No. 6, 7 and 8 of 2006 (unreported) was cited with approval particularly on a holding that:

> *"We have accepted it as established law in this Country that where the point of law at issue is the illegality or otherwise of the decision being challenged that by itself constitutes sufficient reasons within the meaning of Rule 8 of the Rules for extending time."*

The learned counsel for the applicant was of the view that the High Court decision is tainted with an illegality on the face of its record of which the single Justice of Appeal failed to take it on board.

In response thereof, Mr. Kalenda submitted that on the face of record, there is no illegality whatsoever in the challenged decision of a single Justice. Relying on the Judgment of this Court in **DOTO ISODA & 8 OTHERS v AMBOGO ELLY AMBOGO,** Civil Appeal No. 318 of 2021

(unreported), the learned State Attorney contended that the applicants failed to show alleged illegality(ies) in the questioned decision.

He asserted that an alleged illegality and reasons advanced by the applicants for extension of time before a single Justice of Appeal did not meet the legal threshold for extension of time and to that end, implored this Court to follow its unreported decisions in **LYAMUYA CONSTRUCTION COMPANY LIMITED v BOARD OF REGISTERED TRUSTEES OF YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF TANZANIA**, Civil Application No. 2 of 2010, **JUBILEE INSURANCE COMPANY (T) LIMITED v MOHAMED SAMEER KHAN,** Civil Application No. 439/01 of 2020, **WAMBELE MTUMWA SHAHAME v MOHAMED HAMIS,** Civil Reference No. 8 of 2016, **ATHUMAN MTUNDUNYA v THE DISTRICT CRIME OFFICER RUANGWA & 2 OTHERS,** Civil Reference No. 15/20 of 2018 **and NOBLE MOTORS LIMITED v UMOJA WA WAKULIMA WA BONDE LA KISERE (UWABOKI),** Civil Reference No. 29 of 2019.

Further relying on the above listed cases, Mr. Kalenda proffered that not every error in a Court decision should be taken to amount to an illegality and adjoined that the challenged decision of a single Justice

correctly found that financial constraint is not a good ground for extension of time.

As regards to the impugned High Court decision, Mr. Kalenda submitted that the learned appellate Judge properly exercised her powers on review as provided for under Section 78 of the Civil Procedure Code, Cap 33 R.E 2002.

The learned State Attorney propounded that extension of time is a discretionary power that was judiciously exercised by the learned single Justice and spurred this Court to uphold it.

The main question for determination before us is whether the impugned decision of the single Justice is faulty for failure to consider an illegality raised by the applicants.

Before considering the merits or otherwise of the application, it is important to outline the legal framework on applications for reference under Rule 62 of the Court of Appeal Rules, 2009 as amended vide G.N No. 344 of 2019.

The above provision was translated in various decisions of the Court wherein principles governing exercise of discretionary powers of this Court on reference against decision of a single Justice of Appeal were developed

and parties addressed us on some of them to support their respective positions.

In **ATHUMAN MTUNDUNYA v THE DISTRICT CRIME OFFICER RUANGWA, THE REGIONAL OFFICER LINDI AND THE ATTORNEY GENERAL,** Civil Reference No. 15/20 of 2018 (unreported), we ruled that a letter that was neither mentioned in the notice of motion nor attached to the affidavit in support of the application before a single Justice could not be considered in an application for reference.

In **G.A.B SWALE v TANZANIA ZAMBIA RAILWAY AUTHORITY,** Civil Reference No. 5 of 2011 (unreported), we held that:

> *"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 v YONA HAMIS MVUTAH,** Civil Reference No. 1 of 2010 *(unreported). And if the decision involves the exercise of judicial discretion.*

(ii) If the single Justice has taken into account irrelevant factors

(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) 1 E.A 93** (At pages 3 – 4)."

In **FELIX H. MOSHA & ANNA FELIX MOSHA V EXIM BANK TANZANIA LIMITED,** Civil Reference No. 12 of 2017 (unreported) we took note of the string of cases on the point and summarized the legal principles obtained therefrom, thus:

"To begin with, we wish to restate principles governing references under Rule 62 of the Rules as

have been enunciated in the various decisions of the Court. They are as follows: One, on reference, the full Court looks at the facts and submissions the basis of which the singie Justice made the decision; two, no new facts or evidence can be given by any party without prior leave of the Court; and three, the single Judge's discretion is wide, unfettered and flexible: it can only be interfered with if there is a misinterpretation of the law...."

It should also be noted that in a strand of cases this Court has ruled that illegality per se is not a ground for extension of time but rather in some cases a point of law may be of sufficient importance to warrant extension of time, while in others it may not (See **PRINCIPAL SECRETARY MINISTRY OF DEFENCE AND NATIONAL SERVICE v D. VALAMBIA, [1992] T.L.R 185** and **THA v MOHAMED R. MOHAMED,** Civil Appeal No. 80 of 1999 (unreported).

In **CHARLES RICHARD KOMBE v KINONDONI MUNICIPAL COUNCIL,** Civil Reference No. 13 of 2019 (unreported) a decision of the Supreme Court of India in **CHUNILA DAHYABHAI v DHARAMSHI**

NANJI AND OTHERS, AIR 1969 GUJ 213 (1969) GLR 734 was green lighted thus:

> *"....the words "illegally" and "material irregularity" do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not errors of either law or fact after the formalities which the law prescribes have been complied with."*

The Court decision in **CHARLES RICHARD KOMBE** was followed in **KABULA AZARIA NG'ONDI, ADIEL KUNDASANY MUSHI & NEEMA ADIEL MUSHI v MARIA FRANCIS ZUMBA & IGALULA AUCTION MART,** Civil Appeal No. 174 of 2020 (unreported) wherein at page 12 it was held that:

> *"At first, we would acknowledge that the learned judge slipped into error by not considering and pronouncing herself on the appellant's allegation of illegality. As the point was fully*

canvassed by the appellants in their written submissions and since it is settled that in appropriate circumstances such an allegation could constitute sufficient ground for enlargement of time, the learned judge should have considered and determined the claim. That said, we feel that it is now our solemn duty to step into the shoes of the learned judge to consider and determine the claim. The pivotal issue is clearly whether the said allegation constitutes an illegality."

In the present case, records show that before the single Justice, the applicants through their affidavits and counsel submissions, advanced illegalities and lack of legal assistance as grounds for enlargement of time.

The learned single Justice summarized parties' arguments on the two aspects of the application and largely addressed the applicants' failure to account for the delayed days. Admittedly, he hastily dismissed the claim of illegality of the impugned decision without any thorough or detailed consideration of the matter.

As rightly observed in **KABULA AZARIA NG'ONDI** (supra), the learned single Justice ought to have pronounced himself on the aspect of illegality as submitted by the applicants and that an omission to do so was a slip in the process.

Appeased that at this stage of proceedings we are empowered to step into the shoes of the learned single Justice and do what he ought to have done, we do exactly that and approach the issue of illegality in the best possible way.

Before the single Justice, parties contradicted each other on the correct procedure to be adopted by a party who is aggrieved by an ex-parte Judgment. Whereas counsel for the appellant faulted a review process applied by the respondent, the respondent's counsel contended that remedies for challenging merits of the judgment and decree passed ex-parte are wide and include a review and or appeal.

Upon thorough examination of the record, we are persuaded, that an illegality alleged by the applicants was not sufficiently brought to the attention of the learned single Justice of Appeal because submissions made before us materially differed from those availed to him.

As earlier stated, parties were at loggerheads on how the High Court entertained an application for review and differed as to how an ex-parte

Judgment against TAZARA was to be vacated. Whereas Order IX Rule 13(1) and (2) of the Civil Procedure Code was cited as a base, it was equally mentioned that the impugned decision of the High Court was not made on its original jurisdiction but rather, resulted from Employment Cause No. 18 of 1998 of the Resident Magistrate Court of Dar es Salaam at Kisutu and thus suggesting applicability of Order XXXIX Rule 21 of the Civil Procedure Code.

In our respectful view, parties' rival submissions on the disputed point, on the face of it, requires a detailed examination of the lower Courts' records.

We are convinced that, it would take a long drawn process including a detailed review of the pleadings and other documents filed in the lower courts to get to the conclusion as to who is right and why.

By so doing, we will be disregarding our own stance expressed in **LYAMUYA CONSTRUCTION COMPANY LTD** (supra) wherein we interposed that in order to amount to an illegality, an alleged point of law must be of sufficient importance and apparent on the face of the record such as the question of jurisdiction and or limitation of time.

Further to that, it was neither alleged nor exhibited that the alleged point of law for consideration touched on the jurisdiction of the High Court

or related to the time limitation. If anything, it was a decisional error that could be attended to as a ground of appeal in an appeal competently filed by an aggrieved party.

In the upshot, we hold that the applicants failed to exemplify existence of a good cause for extension of time such that the learned single Justice was justified in dismissing the application as he did.

In the same manner, this application is hereby dismissed for want of merits with no order for costs.

It is so ordered.

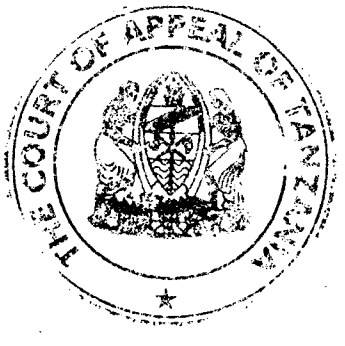
DATED at **DAR ES SALAAM** this 10th day of August, 2023.

G. A. M NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The ruling delivered this 11th day of August, 2023 in the presence of Mr. Yudathade Paul, learned counsel for the Applicants and Ms. Caroline Lyimo, State Attorney for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL