IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL REFERENCE NO. 30 OF 2019

MASHAKA JUMA SHABANI.....1ST APPLICANT
JOSEPH MSUMBUKO KISIMA.....2ND APPLICANT
KASSIAN MAPUNDA.....3RD APPLICANT
SHABANI H. KATANGA..... 4TH APPLICANT
CHACHA MARWA.....5TH APPLICANT
HATIBU HUSSEIN.....6TH APPLICANT
FLORENCE AMBAKISYE.....7TH APPLICANT
AFRICAN M. KOBERO.....8TH APPLICANT
MWAJUMA JUMA CHARUNGU.....9TH APPLICANT
EMMANUEL SAMWEL.....10TH APPLICANT
RASHIDI KIPASANGE.....11TH APPLICANT
IDD ABDUL SHEMBARUKU.....12TH APPLICANT
KIPIPI BARUANI.....13TH APPLICANT
IBRAHIM B. SHEDAFFER.....14TH APPLICANT
ZUBERI MAHIZA.....15TH APPLICANT
BERNARD ADAM LUVANGA.....16TH APPLICANT
AMINA SAIDI.....17TH APPLICANT
RAJABU YUSUFU WAIMANI.....18TH APPLICANT
ALOIS PAUL SOMA .....19TH APPLICANT
ABDALLAH ATHUMANI.....20TH APPLICANT
LAZARO P. CHINOLO.....21ST APPLICANT
KAZUMALI SAMULI.....22ND APPLICANT
TATU H. RAMADHANI.....23RD APPLICANT
WILSON K. KAJULA.....24TH APPLICANT
ALLY ATHUMANI.....25TH APPLICANT
SELEMANI KIWIGU.....26TH APPLICANT
KURTHUM J. KATABE.....27TH APPLICANT
ARBOGAST MARTIN.....28TH APPLICANT
AMINA YUSUPH MARIJANI.....29TH APPLICANT
KASIRANI MTINDI.....30TH APPLICANT

CYPRIAN DUNDULI.....31ST APPLICANT
SIXMUD MLOTE.....32ND APPLICANT
CHRISTOPHER J. MLUGE.....33RD APPLICANT
SALEHE PAZI.....34TH APPLICANT
JOSEPA NDAZI.....35TH APPLICANT
DANIEL KIHOGO.....36TH APPLICANT
AIDAN NGONYANI.....37TH APPLICANT
GEORGE LUPATA.....38TH APPLICANT
JOHN BISEKO KASIKA.....39TH APPLICANT
LEAH Y. MASASI.....40TH APPLICANT
YONA JALANE.....41TH APPLICANT
EUSEBIO PETER KASSULWI.....42TH APPLICANT
FRANCIS MANEGE.....43RD APPLICANT

VERSUS

THE ATTORNEY GENERAL ..... RESPONDENT

(Application for reference from the ruling of the Single Justice of the Court of Appeal)

(Mkuye, JA.)

dated the 11th day of September, 2019

in

Civil Application No. 279/01 of 2016

.....

RULING OF THE COURT

21st March & 12th September, 2023

MWARIJA, J.A.:

This application for reference arises from the decision of a single Justice (Mkuye, JA.) in Civil Application No. 279/01 of 2016 delivered on 11/09/2019. In that matter, the applicants, Mashaka Juma Shabani and 42 Others, had unsuccessfully applied for extension of time to lodge an

application for reference against the ruling of the Court (Bwana, JA.) dated 12/8/2010 handed down in Civil Application No. 141 of 2010 (hereinafter "*the first application*"). By that application, the applicants sought an order granting them extension of time to appeal against the decision of the High Court (Wambura, J.) in Civil Case No. 79 of 2003. They were unsuccessful hence the application giving rise to the decision which is now being challenged by the applicants in this reference (hereinafter "*the second application*").

In the second application, the applicants applied for extension of time to file an application for reference against the decision which arose from the first application. Their main reason for the delay as per the notice of motion is as follows:

> "*1. That the applicants learnt of the existence of the ruling and order in January 2014 to which they are aggrieved and seek this court's order of review (sic).*

In his affidavit, the first applicant, Mashaka Juma Shabani expounded that reason in paragraphs 7, 8, 9 and 15 as follows:

> "*7. That, the said application No. 141 of 2010 for extension of time to lodge the record of appeal was*

dismissed by this Court for failure to file written submissions. The copy of the ruling and order is annexed hereto and the same is marked as Annexture "C".

8. *That, we were not aware of the ruling and order in Civil Application No.141 of 2010 in this Court, dismissing our application on 12th August, 2011. The dismissal by this Court was not communicated to me or other applicants.*
9. *That, I became aware of the dismissal order on 16th January 2014 when I visited our former Advocate Mkongwa's office to follow up the status of the application. I then instructed Mr. Mkongwa to challenge the order dated 12th August 2011, but he turned down the instruction.*

10. – 14....N/A.

15. *That, I am advised by my Advocate, Tazan K. Mwaiteleke that in Civil Application No. 141 of 2010 one of the grounds for seeking extension of time is to quash an illegality in Civil Case No. 79 of 2003. That Civil Case No. 79 of 2003 was dismissed on grounds of expiry of speed track".*

The application was resisted by the respondent, the Attorney General through an affidavit in reply sworn by Angela Kokuhumbya Lushagara,

learned Principal State Attorney. Apart from noting, among others, the averments made in paragraphs 2, 3, 4, 5, 6 and 7 of the affidavit, she disputed the contents of paragraphs 8 and 9 of the first applicant's affidavit reproduced above, stating as follows:

> *"4. That the contents of paragraphs 8 and 9 are disputed and the respondent avers that the applicants had the services of an advocate who was in charge of the matter, hence lack of information about the matter is not an excuse. It is averred further that the application is with no sufficient ground for extension of time to challenge the ruling by Honourable Bwana, JA. in Civil Application No. 141 of 2010".*

In her decision, the learned single Justice was of the view that, since the applicants were represented by an advocate, their contention that they did not become aware timely about the dismissal of the first application, is not tenable. She observed further that, in any case, the applicants should not have stayed for a period of about three and a half years from the date of the decision without making a follow up on the outcome of the said application. With regard to the ground that the decision of the High Court

sought to be appealed against is tainted with illegality, the learned single Justice was of the view that, for the alleged illegality to constitute a good cause, it ought to have been shown to be apparent on the face of the record. But that was not the case. For those reasons, the application was dismissed hence this application for reference which was brought under rule 62 (1) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The application is predicated on the following ground:

> *"The learned Justice of Appeal erred in law in ruling that the applicants had not shown good cause to warrant an extension of time to file reference from the decision of the Court of Appeal of Tanzania at Dar es Salaam in Civil Application No. 141 of 2010 dated 12th August, 2011...."*

After institution of the application, the advocate for the applicants, Mr. Tazan Mwaiteleke, filed his written submissions in support of the application in compliance with rule 106 (1) of the Rules. On its part, in compliance with rule 106 (7) of the Rules, the respondent also filed its written submissions in reply.

At the hearing, the applicants were represented by Mr. Tazan Mwaiteleke, learned counsel while the respondent was represented by Ms. Subira Mwandambo, learned Senior State Attorney assisted by Mr. Evelius Mwendwa, learned State Attorney. Mr. Mwaiteleke started by adopting his written submissions. After stating the background facts leading to the application at hand, he proceeded to reiterate, in essence, the submissions made at the hearing of the application before the single Justice that, the applicants were not aware of the date on which the first application before Bwana, JA. was dismissed. The learned counsel pointed out also that, prior to the filing of the first application, the applicants had lodged several applications for extension of time, all of which were later withdrawn with leave to refile them.

Submitting in support of the ground of the reference, Mr. Mwaiteleke reiterated the reasons relied upon by the applicants for the delay in filing the intended application, **first**, that the applicants were not aware of the date on which their first application was dismissed. According to him, that factor constituted a good cause, stressing that in such a situation, the second application should have been granted. To bolster his argument, he cited the cases of **Marcky Mhango (on behalf of 684 Others) v.**

Tanzania Shoe Co. Limited, Tanzania Leather Associated Industries, Civil Application No. 37 of 2003 and **Diamond Fields Automobiles Hardware, Jayantilal Pregji Rajani and Sunil Amrantlal Rajani v. Loans and Advances Realization Trust**, Civil Application No. 139 of 2002 (both unreported). He also cited two persuasive decisions of the Court of Appeal of Kenya in the cases of **Machakos District Cooperative Union Limited v. Philip Nzuki**, Civil Application No. 17 of 1997 (www.kenyalaw.org) and **Joyce Muthoni Njagi v. Elizabeth M. Nyagi, Solomon K. Nyagi**, Civil Application No. 168 of 1997 (www.kenyalaw.org.).

Secondly, apart from reiterating that the decision of the High Court sought to be appealed against is tainted with illegality, he contended that the position applies also to the decision in the first application because the same was dismissed for the applicants' failure to file written submissions. In support of his argument that, the decision in the first application is tainted with illegality, he cited the case of **Khalid Mwisongo v. M/s Unitrans (T) Ltd.**, Civil Appeal No. 56 of 2011 (unreported). In that case, the Court held that, the failure to file written submissions did not have the effect leading to the dismissal of the appeal. It was Mr. Mwaiteleke's

submission therefore that, the second application for extension of time ought to have been granted so that the alleged illegalities could be addressed. He urged us to allow this application for reference on the basis of the two grounds which he had relied upon.

Mr. Abubakar Mrisha, learned Senior State Attorney had also filed his written submissions in reply to the submissions made in support of the application. He argued that, the grounds relied upon by the applicants are devoid of merit. He disputed the contention that the applicants were not aware of the date on which the first application was dismissed. According to the learned Senior State Attorney, the ruling on that application was delivered in the presence of Mr. Felix Mkongwa, advocate who appeared for the applicants.

Mr. Mrisha submitted further that, notwithstanding the fact that the applicants were represented by the said advocate, they ought to have made a follow-up to find out about the outcome of their application but they did not do so until after a period of over three years from the date of delivery of the ruling. He added that, their laxity for all that period and by filing several applications for extension of time which were, at their

instance, withdrawn with leave to refile, exhibited negligence on their part and as a principle, negligence of an advocate does not constitute a good cause for grant of extension of time. In that respect, Mr. Mrisha argued, the applicants did not account for the delay and therefore, their application was rightly dismissed.

As to the ground that the decisions in the first application and that of the High Court, which was intended to be challenged on appeal, are tainted with illegalities, Mr. Mrisha argued that, this ground is equally devoid of merit. Citing the case of **Lyamuya Constructin Company Ltd. v. Board of Registered Trustees of Young Womens Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), he argued that the alleged illegalities are supposed to be apparent on the face of the record and not those that would be discovered by a long drawn arguments as is the position in the two decisions.

With regard to the contention by the learned counsel for the applicants that the intended application for reference against the decision in the first application stands greater chances of success, Mr. Mrisha countered that arguments. He stated that, the decision in which the said

application was dismissed, was based on the mandatory provisions of rule 106 (1) of the Rules. He argued further that, the case of **Khalid Mwisongo** (supra) and the two Kenyan cases cited by the learned counsel for the applicants, copies of which were not attached to his written submissions, are not in the context stated by him and are not therefore, applicable to the case at hand.

On the contention that the applicants were not to blame because their advocate did not inform them of the ruling of the first application, in his oral submissions, Mr. Mrisha argued that, the omission, which was due to negligence on the part of their advocate, does not constitute a good cause for grant of extension of time and therefore, the learned single Justice did not err in holding that, the applicants did not establish a good cause for the delay.

Having duly considered the submissions of the learned counsel for the parties, the only issue for our determination is whether or not the learned single Justice erred in holding that the applicants had failed to establish a good cause for grant of their application as required by rule 10 of the Rules under which the application was made. That rule states 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 so extended".

Starting with the ground that the applicants were not aware of the date on which their first application was dismissed but came to be aware of it on 16/1/2014, we agree with the learned single Justice that, the same is devoid of merit. It is not disputed that, in that application, the applicants were being represented by an advocate, Mr. Mkongwa. From the record, he was the advocate who argued the application on 13/7/2011 when the same was reserved for ruling. In her ruling at page 9, the learned single Justice observed as follows:

"Up to the time of dismissal, the applicants were represented by advocate Mkongwa who is a seasoned advocate... the counsel for the applicants ought to have informed the applicants immediately

after such dismissal. That he did not do. Strictly speaking, an advocate's negligence or lack of diligence is not sufficient cause for extension of time. See ***Yusuf Same and Another v. Hadija Yusuf,*** *Civil Appeal No. 1 of 2002 (unreported)".*

According to Mr. Mrisha, the learned advocate for the applicants was present in court on 12/8/2011 when the ruling was delivered. Mr. Mwaiteleke did not dispute that fact. The failure by the applicant's previous advocate to inform his clients about the ruling constituted negligence on his part and as observed by the learned single Justice, negligence of an advocate does not constitute a good cause for grant of extension of time. Apart from the case of **Yusuf Same** (supra) relied upon by the learned single Justice, the position was also stated in *inter alia,* the cases of **Tanzania Rent A Car v. Peter Kimuhu**, Civil Application No. 226/01 of 2017 and **Exim Bank (Tanzania) Limited v. Jacquiline A. Kweka**, Civil Application No. 348/18 of 2020 (both unreported). In the case of **Peter Kimuhu** (supra), the Court reiterated the position as stated in the case of **Metal Product Ltd. v. Minister for Lands** [1989] T.L.R. 5, that:

"...categories of explicable inadvertence causing delay to make an application do not include ignorance of procedure or ***blunder by counsel****". [Emphasis added]*

We also agree with the holding to the effect that, on their part, the applicants were not enthusiastic. They acted in a lackadaisical manner in pursuing their application because, as shown above, the application was heard on 13/7/2011 but according to them, they became aware of the ruling on 16/1/2014.

On the ground that, both the decisions in the first application and that of the High Court are tainted with illegalities, we also agree with the learned single Justice that, from the nature of the alleged illegalities, the same do not constitute a good cause for grant of extension of time. In the first place, the alleged illegality in the decision of the High Court would not constitute a good cause for granting the second application. It could be so in the first application for extension of time to appeal against the decision of the High Court. In the circumstances, we hasten to state that, this is not an appropriate forum to determine whether or not the second

application ought to have been granted on the ground of existence of illegality in the decision of the High Court.

It is trite that, where the decision sought to be challenged is tainted with an illegality, extension of time may be granted so that such illegality may be addressed. See for instance, the case of **The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] T. L. R. 185. In that case, the Court held that:

> *"where ... the point of law at issue is the illegality or otherwise of the decision challenged, that is of sufficient importance to constitute 'sufficient reason' within the meaning of rule 8 [now rule 10] of the Rules for extending time".*

However, as observed by the learned single Justice, it is not sufficient to allege that the decision sought to be challenged is tainted with illegality. The illegality must be apparent on the face of the record. In the case of **Lyamuya Construction Company Ltd. (supra)** cited by Mr. Mrisha, the Court had this to say:

> *"... it cannot ... be said that in VALAMBHIA'S case, the Court meant to draw a general rule that every applicant who demonstrates that his intended*

appeal raises points of law should as of right be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that of sufficient importance and I would add that ***it must be apparent on the face of the record, such as the question of jurisdiction; not that which would be discovered by long drawn argument or process."***
[Emphasis added].

Although in the reproduced passage above, the stated principle is shown to be applicable to an intended appeal, in our considered view, the same also applies to any decision in which a point of law at issue is illegality, like in the application at hand.

The nature of the illegality in the decision of the first application, as argued by the learned counsel for the applicants, is that the dismissal was based on the applicants' failure to file written submissions. In her decision on that point at page 12 of the impugned ruling, the learned single Justice states as follows:

"It is now settled that, where an illegality is raised in an application for extension of time, it may be taken as good cause for extending the time. This

was stated in the case of ***Quality Group Limited v. Tanzania Building Agency,*** *Civil Application No. 102 of 2015 (unreported). See also* ***Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia*** *[1992] T.L.R. 185, Also, in the case of* ***Lyamuya Construction Company*** *(supra) which was rightly cited by Mr. Mrisha, the Court added that, such point of law/illegality must be apparent on the face of the record and not one which can be discovered by a long drawn argument or process."*

As pointed out above, the learned single Justice held that the alleged illegality in the ruling of the first application is not apparent on the face of the record. That is indeed a correct position. The dismissal was based on non-compliance with the provisions of rule 106 (1) of the Rules. By that rule, the applicants were required to file written submissions after they had lodged their application. Since therefore, the dismissal was based on the interpretation of the said rule, that is, on the effect of its non-compliance, the complained of illegality is, with respect, not apparent on the face of the record. The decision in the case of **Khalid Mwisongo** (supra) gave an interpretation which is different to the one made in the first application. If

anything therefore, it may be said that the two decisions are conflicting and to resolve that conflict, a long drawn procedure and reasoning would be required. For that reason, we do not find merit in the contention that, extension of time should have been granted on the ground of existence of illegality in the ruling of the first application.

In the event, we find that, on the basis of the foregoing reasons, this application lacks merit. It is hereby dismissed with costs.

DATED at **DAR ES SALAAM** this 6th day of September, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 12th day of September, 2023 in the presence of 1st, 13th 17th and 29th applicants in person and Ms. Doreen Mhina, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL