IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANDAMBO, J.A., ISSA, J.A. And ISMAIL, J.A.)

REFERENCE NO. 02 OF 2023

FRADY TAJIRI CHAWE (As Administrator of the estate of the late Donatus Chawe Sanga) **& 443 OTHERS.....APPLICANTS**

VERSUS

TANESCO.....RESPONDENT

(Reference from the decision of a single Justice of Appeal)
(Mwampashi, JA)

dated 6th day of March 2023)

in

Civil Application No. 505/ 18 of 2019

.....

RULING OF THE COURT

7th & 23rd November, 2023

MWANDAMBO, J.A.:

In Civil Application No. 505/18 of 2019, the applicants lost their quest before a single Justice of the Court for extension of time to institute an appeal to this Court from the decision of the High Court in Consolidated Revision Application No. 78A of 2008 made on 9 February 2016. Believing that the learned single Justice wrongly exercised his discretion in dismissing their application, they have preferred a Reference to the Court by way of a letter dated 13 March 2023 in pursuance of rule 62(1) of the

Tanzania Court of Appeal Rules, 2009 (the Rules) seeking to reverse the decision of the learned single Justice.

The facts from which the application has emanated are common ground except on specific issues of contention. The applicants were aggrieved by the decision of the High Court (Labour Division) made on 9 February 2016 in Consolidated Revision No. 78A of 2008. They accordingly lodged their notice of appeal on 22 February, 2016 against that decision. Initially, the applicants had filed an application for leave to appeal before the High Court but that application was withdrawn on 31 August 2017 as leave to appeal was no longer a requirement. Naturally, time to institute the intended appeal had already lapsed.

In compliance with rule 90(1) of the Rules, the applicants had already applied for certified copies of proceedings, judgment and decree for the purpose of their appeal from the Registrar of the High Court (the Registrar). All things being equal, they were entitled to the exclusion of the days to be certified by the Registrar as necessary for preparation and delivery of the requisite documents to the applicants for the purpose of the intended appeal. This had to be done through a certificate of delay issued by the Registrar upon the applicants' request.

Despite compliance with rule 90(1) of the Rules, the applicants lodged Civil Application No. 500/18 of 2017 before the Court for extension of time to institute the appeal instead of requesting the Registrar to issue them with a certificate of delay. However, that application was marked withdrawn on 6 November, 2018 after realising that they should have approached the Registrar for a certificate of delay. Subsequently, the Registrar issued the applicants' advocate with a certificate of delay on 31 July 2019, excluding 107 days from 22 February 2016 to 8 July 2016 when the applicants were notified that the documents requested were ready for collection.

It is glaring that; the certificate of delay was issued after protracted correspondence between the applicants' counsel and the Registrar. Needless to say, the certificate of delay was, for all intents and purposes worthless to the applicants. This is due to the fact that, sixty days within which to institute their appeal had long expired. That triggered the unsuccessful application for extension of time before the Justice of the Court lodged on 25 November 2019 whose ruling is impugned in this reference.

It is remarkable that, before the learned single Justice, counsel for the parties were agreeable that the applicants were caught up by technical

delay up to 31 July 2019 when the Registrar issued a certificate of delay. The contention related to the period from that date to 25 November 2019 when the applicants lodged their application whose decision is challenged in the reference. In his ruling, the learned single Justice agreed that the delay up to 31 July 2019 was, but excusable technical delay since the applicants had been in court corridors pursuing their rights. The learned single Justice's determination focused on the period between 31 July to 25 November 2019 which he agreed with the respondent's counsel that it was not accounted for.

Before us, the applicants are represented by Mr. Peter Kibatala, learned advocate. They have preferred six grounds faulting the single Justice for dismissing their application. Admittedly, the grounds are mouthful but upon our close examination, they can be conveniently truncated into three main complaints namely; **one**, failure to hold that the applicants had shown good cause for the delay which was in reality a technical delay considering that they had at all material times been in court corridors; **two,** error in holding that the applicants had not accounted for a period of four months from 31 July 2019 when the certificate of delay was issued to 25 November, 2019 on which they lodged the application for extension of time and; **three**, failure to take into account the time taken in joining the legal representative of the late

Donatus Chawe Sanga and the Court's order (Mugasha, J.A.) directing the issuance of a certificate of delay by the Registrar.

At the hearing of the application, Mr. Kibatala addressed the Court generally on the grounds of the reference. His first attack was against the alleged strict approach on the lack of an affidavit from the Registrar explaining the efforts the applicants' advocate made towards obtaining a proper certificate of delay following the Court's order made on November 2018. Counsel contended that, considering that it was a tall order on the applicants to procure an affidavit from the Registrar, he took out an affidavit explaining the efforts he made which were sufficiently set out in the founding affidavit accounting for the delay in lodging the application. Submitting further, Mr. Kibatala was up in arms about the learned single Justice's failure to take into account the applicants' earlier application for extension of time which was subsequently withdrawn to pave way for obtaining a certificate of delay. Nonetheless, the certificate was not issued until 31 July 2018 after protracted follow-ups with clarifications for its issuance.

On the other hand, the learned advocate took issue with the learned single Justice on the delayed collection of the certificate of delay which, according to him, was not one of the matters before him hence an

erroneous exercise of his discretion resulting in the dismissal of the application. Regarding the failure to account for the four months' delay in lodging the application, the learned advocate faulted the single Justice for failure to appreciate that the founding affidavit sufficiently explained the delay of four months. That concluded his address urging the Court to reverse the impugned decision which will result in an order extending the time sought in Civil Application No. 505/18 of 2019.

The respondent was represented by Ms. Jenipher Kaaya, learned Principal State Attorney assisted by Ms. Narindwa Sekimanga, learned State Attorney who addressed the Court in reply, resisting the application. To begin with, she argued that, the learned single Justice rightly dismissed the application upon being satisfied that the applicants failed to account for the delay of four months and the nature of the illegality complained of. Secondly, it was the learned State Attorney's submission that, the attack against the single Justice's finding on the failure to obtain an affidavit from the Registrar was misplaced because the applicants' affidavit fell short of any explanation behind such failure. Ms. Sekimanga downplayed Mr. Kibataia's argument on the import of Mugasha, J.A.'s order made on 6 November 2018 and argued that, that order did not compel the Registrar to issue a certificate of delay disregarding the conditions for its issuance. To bolster her submission, Ms. Sekimanga

relied on the Court's decision in **Athuman Mtundunya v. The District Crime Officer Ruangwa & 2 Others**, Civil Reference No. 15/20 of 2018 (unreported) and urged the Court to dismiss the application.

Mr. Kibatala's rejoinder focused on, one, that in response to the Registrar's letter dated 17 December 2018 (TAL 10), he met the Registrar on 21/02/2019 and wrote a letter the following day which was not responded to followed by a reminder on 24/04/2019; two, he made efforts to make follow-ups with the Registrar as evident in paras 20, 21, 22,23 and 24 of the founding affidavit; three, the learned single Justice misconstrued Mugasha J.A.'s order and, four, illegality sufficiently explained warranting exercise of discretion in the applicants' favour.

Having heard opposing arguments from the learned counsel and examined the grounds in the reference, we are of the view that a lot of energy has been wasted on grounds two, five and six which are irrelevant for the determination of the application. Those grounds relate to the complaint on technical delay, the passing on of Donatus Chawe Sanga and the subsequent substitution of Frady Tajiri Chawe; his legal representative in his place and alleged misapprehension by the learned single Justice in relation to the order withdrawing the initial application for extension of time. These grounds are irrelevant since the decision sought to be

reversed was not based on any of them. Firstly, as remarked earlier on, the complaint on failure to appreciate the delay as technical is misplaced because the learned single Justice determined it in favour of the applicants excluding the period up to 31 July 2019. That should be clear from our reading of the impugned ruling at page 13 whereby the learned single Justice stated:

> *".....I agree with Mr. Kamihanda that the period from when the application for leave to appeal was pending before the High Court till when it was withdrawn, up to 31.07. 2019, when the applicants were issued with a certificate of delay which they claim [that it] was defective and not in accordance with the Court order, is excusable. The delay was technical...."*

With such a clear finding in the applicants' favour, we are surprised that it could have been a ground for any complaint. Directly connected to the above is the complaint against the alleged misinterpretation of the order dated 6 November 2018. Whether or not that order was misconstrued was irrelevant for the purpose of determining the real issue on the failure to account for the delay of four months on which the impugned decision was based. Lastly, the application for joining the legal representative of the late Donatus Chawe Sanga to the application before

the learned single Justice could not have been a factor in the four months' delay in filing the application for extension reckoned from 31 July 2019.

Next we turn our attention to the remaining grounds. We shall begin our discussion with the legal position in applications as this one. The crucial issue that always features for consideration and determination is whether the single Justice exercised his discretion properly. In **G.A.B Swale v. Tanzania Zambia Railway Authority**, Civil Reference No. 5 of 2011 referred subsequently in **Athuman Mtundunya** (supra) cited to us by Ms. Sekimanga, it was aptly stated that, a decision of a single justice to the extent it involves exercise of judicial discretion can be interfered with where; (1) it takes into account irrelevant factors; (2) fails to take into account relevant matters; (3) there is a misapprehension or improper apprehension of the law or facts applicable to the issue under consideration; and, (4) the decision is plainly wrong looked at in relation to available evidence.

The notice of motion before the single Justice was predicated upon, essentially, two grounds, one; errors and illegalities in the decision of the High Court subject of the intended appeal and the Registrar's non-compliance with the Court's order in Civil Application No. 500/18 of 2017

in relation to the issuance of a certificate of delay to enable the applicants institute their appeal.

Since we have declined the application in ground one, three and four as irrelevant, our discussion will focus on whether the single Justice took into account irrelevant matters in his decision. The applicants moved the single Justice to extend time to institute an appeal to the Court under rule 10 of the Rules. As alluded to earlier, there were essentially two grounds in the notice of motion. It was submitted by Ms. Sekimanga that, to succeed in such application, the applicants were bound to explain the reason or cause for the delay, its length and accounting for each day of delay and whether there was any illegality in the decision sought to be appealed against. There was no dispute as to the cause of the delay as well as its length. The dispute was on the explanation accounting for each day of delay. To achieve this, the applicants' advocate took out an affidavit containing 26 paragraphs which were largely a narration of the background of the labour dispute, the decision of the defunct Industrial Court of Tanzania (the ICT) and the Labour Court. It also contained averments on the steps the applicants took following the delivery of the decision sought to be appealed against and the efforts to secure a certificate of delay after the Court's order made on 6 November 2018.

It will be recalled that, counsel for the applicants criticised the learned single Justice for failing to hold that the applicants had sufficiently accounted for the delay of four months through paras 20, 21, 23 and 24 of the founding affidavit. Despite this, he applied a strict approach in demanding an affidavit from the Registrar after the withdrawal of the initial application. It was argued further that, in doing so, the single Justice failed to appreciate not only the daunting task in securing the affidavit from a judicial officer but also the fact that the averments made in the founding affidavit were explanatory enough to require another affidavit from a third party.

It is glaring from the impugned ruling that the single Justice agreed that the applicants' delay up to 31 July 2019 was a technical delay which was excusable. The contention related to the period from 31 July 2019 when the applicants' advocate obtained the certificate of delay to 25 November, 2019 the date on which they filed the second application for extension of time from which the impugned decision has emanated. Alive to the duty of a litigant to account for each day of delay expressed from an unbroken wall of authorities, the learned single Justice found the affidavit wanting in accounting for each day of delay from 31 July to 25 November 2019 in the absence of an affidavit from the Registrar backing up the applicants' version on what efforts they took.

It is trite that he who alleges has a burden proving what he says. As submitted by Ms. Sekimanga, the applicants were bound to explain away each day of delay from 31 July to 25 November 2019 when they lodged their application. Ground five in the notice of motion was essentially predicated upon technical delay and the claim that the certificate of delay issued by the Registrar on 31 July 2019 was worthless. The learned single Justice was not satisfied that the applicants accounted for the delay regarding the efforts the follow- ups with the Registrar for as long as four months. Put it differently, the learned single Justice did not believe the applicants' story because it was not plausible unless there was an affidavit from the Registrar with whom the applicants claimed through their advocate's affidavit that they made follow-ups.

It is trite law that where a deponent to an affidavit mentions another person on a material aspect in an application, an affidavit from such person must be obtained to lend support to the deponent's averments. See for instance: **Unyangala Enterprises Limited & Others v. Stanbic Bank (T) Ltd,** Civil Application No. 56 of 2004 and **Gibb Eastern Africa v. Syscon Builders Ltd and Two Others**, Civil Application No. 5 of 2005 (both unreported). It is significant that, the dates on which the deponent claims to have contacted the Registrar were central to the application to explain away the delay in filing the application.

The affidavit of the Registrar became necessary if one examines para 20 of the founding affidavit. In that affidavit, the deponent who happens to be the applicants' advocate avers that on several occasions, including 25 September and 22 October 2019 he contacted Mr. Mrangu, Registrar of the Labour Court for issuance of a certificate of delay but to no avail despite his promises to that effect. There was nothing unusual for the learned single Justice demanding an affidavit from the Registrar to back up the applicants' story which he considered to be implausible. The so-called contacts and promises were not even documented to lend support to the deponent's averments. But even if that was the case, there is no explanation why the learned advocate had to sit by and contact the Registrar two months later after receipt of a worthless certificate on 31 July 2019 and still wait for a month to remind the Registrar followed by yet another month to file the application for extension of time.

It may not be completely irrelevant to point out that, unlike the period prior to 31 July 2019, there is not a single correspondence to the Registrar challenging the efficacy of the certificate of delay. Under the circumstances, the attack against the learned single Justice that he applied the law on the need to have an affidavit from the Registrar strictly is, with respect unjustified. The learned single Justice correctly applied the law to the facts neither did he misapprehend the evidence before him.

Mr. Kibatala's argument that paras 20, 21, 22,23 and 24 of his affidavit explained away the delay without the need for an affidavit from the Registrar sounds attractive but untenable. Those paragraphs say nothing more than lamenting on the difficulties in obtaining a correct certificate of delay and an affidavit from the Registrar and hence the filing of the application. Again, we have found no reason to fault the single Justice for holding as he did that the applicants failed to account for each day of delay for a period close to four months.

Lastly on the illegalities which Mr. Kibatala was adamant that they were sufficiently explained. The learned single Justice, again alive to what kind of illegality would suffice to extend time, took the view, rightly so, that the so-called illegalities were nothing more than complaints against the decision sought to be appealed against which could only fit as grounds of appeal. It is significant that, in **Lyamuya Construction Co. Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** (Civil Application 2 of 2010) [2011] TZCA 4 (3 October 2011 TanzLII), the Court made a distinction between a complaint against a decision sought to be challenged on appeal and existence of an illegality or point of law of sufficient importance apparent on the face of the record or decision as against one that would be discovered by long drawn argument or process. With respect, none of the

grounds in paras 1, 2, 3 and 4 in the notice of motion met the threshold and the single Justice cannot be faulted for rejecting that contention.

The upshot of the foregoing is that the applicants have not succeeded in moving the Court to vary, reverse or rescind the decision of the single Justice. The application is devoid of merit and we dismiss it. Owing to the nature of the dispute giving rise to the application, we make no order as to costs. It is so ordered.

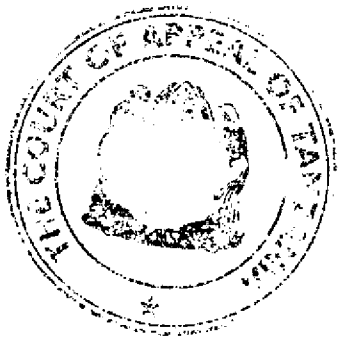
DATED at **DAR ES SALAAM** this 21st day of November, 2023.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of November, 2023 in the presence of Ms. Faith Mwakikoti, learned counsel for the applicants and Mr. Salehe Manoro, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL