

IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

CIVIL APPLICATION NO. 545/11 OF 2018

BHARYA ENGINEERING & CONTRACTORS CO. LTD.....APPLICANT

VERSUS

HAMOUD AHMED NASSOR.....RESPONDENT

(Application for extension of time within which to apply for Reference from
the decision of the single Justice of the Court of Appeal of Tanzania
at Tabora)

(Mwambegele, J.A.)

Dated the 10th day of September, 2018
in
Civil Application No. 342/01 of 2017

RULING

26th November & 3rd December, 2019

WAMBALI, J.A.:

The applicant Bharya Engineering & Contractors Co. Ltd and the respondent Hamoud Ahmed Nassor were parties in Civil Case No. 4 of 2013 in which the High Court of Tanzania at Tabora decided in favour of the respondent.

Dissatisfied, the applicant lodged Civil Appeal No. 148 of 2015 before the Court, which according to the record of the application, was struck out

for being incompetent. That was not the end of the dispute between the parties as subsequently, the applicant lodged before the High Court Civil Application No. 20 of 2016 seeking enlargement of time within which to lodge a fresh notice of appeal against the judgment and decree in Civil Case No. 4 of 2013. Unfortunately, that application was dismissed for lacking merit.

As the applicant was still discontented, in accordance with the law she lodged Civil Application No. 342/01 of 2017 as a second bite seeking extension of time before the Court. The said application was heard by a single Justice of the Court on 24th August, 2018 and thereafter the ruling was reserved to a date to be notified to the parties. As it turned out, the ruling dismissing the application with costs was delivered on 10th September, 2018 by the Deputy Registrar of the Court at Tabora sub registry in the presence of Mr. Mugaya Kaitila Mtaki, learned advocate for the respondent and in the absence of the applicant and her advocate.

According to the record of the application, after the applicant's Managing Director on 24th September, 2019 discovered that the said ruling had been delivered in the applicant's absence, he informed his advocate

one Michael Yudas Mwambeta concerning the matter. Upon reflection, the learned advocate advised him to contest the decision of the single Justice. As the advice was accepted, the learned advocate lodged the present application for Reference on 27th September, 2018.

Initially, the application which has been preferred through a notice of motion was supported by the affidavits of Sarbjit Singh Bharya, the Managing Director of the Applicant and Michael Yudas Mwambeta, the learned advocate. On the other hand, the respondent similarly lodged two affidavits in reply in opposition to the applicant's affidavits.

However, I wish to point out at the outset that, before the hearing of the application, it was noted, and the counsel for the parties acknowledged that, the affidavit of Michael Yudas Mwambeta in support of the application was defective. In the event, upon that concession, I accordingly struck out that respective affidavit.

In the circumstances, for purpose of the record of the Court, this application is supported by the affidavit of Sarbjit Singh Bharya only and contested by the affidavit in reply of Revocatus Mugaya Kaitila Mtaki the counsel for the respondent.

It is also not out of place to state that counsel for the parties lodged their respective written submissions for and against the application. At the hearing they briefly explained the substance of their respective written submissions.

At the hearing of the application, Mr. Michael Yudas Mwambeta, learned advocate appeared for the applicant, while Mr. Mugaya Kaitila Mtaki and Mr. Fadhili Kingu entered appearance for the respondent.

It is noted that the major ground in support of the application as outlined in the notice of motion is that;

"(a). The decision of his Lordship J.C.M. Mwambegele, J.A. dated 10th September, 2018 dismissing Civil Application No. 342/01 of 2017 was read without neither notifying the Applicant nor its Advocate."

The said ground is supported by paragraphs 3, 4, 5 and 6 of the affidavit of Sarbjit Singh Bharya, the Managing Director of the applicant which are reproduced hereunder:

"3. That, I was informed by my advocate that his Lordship Justice of Appeal notified the

Advocate that, they would be notified of the date of the Ruling hence my Advocate had to fly back to Dar es Salaam thereafter as he is based there.

4. *That, neither my Advocate nor I received any Court's summons to appear for the Ruling thereafter however, out of curiosity I sent someone based in Tabora on 24th September, 2018 to the Court of Appeal's Tabora Registry to inquire if the date of Ruling has been put in the causelist but I was surprised to be told that the ruling has already been read.*
5. *That, it appeared only the Advocate for Respondent appeared on that very date when Applicant's Civil Application No. 342/01 of 2017 was dismissed without any color of light he decided to stay mute. A copy of the Ruling dated 10th September, 2018 is herewith attached and I crave leave of the Court for it to be part of this Affidavit and marked as Annexure R-1.*
6. *That, I promptly informed my advocate and asked if he had any notice of the date of the*

Ruling but he said that he was not put on notice by anyone."

It is noteworthy that in connection of what the deponent states in the reproduced paragraphs of his affidavit, he emphasizes in paragraphs 7 and 8 that, as by the time he knew about the delivery of the ruling the period of limitation for lodging reference had expired, he was advised to apply for extension of time immediately. In this regard, the deponent attributes the cause of delay in lodging the application for reference on the failure of the Court's sub registry to notify the applicant on the date of delivery of the ruling and not due to the negligence on her part.

On the other hand, the contention of the deponent on behalf of the applicant is strongly disputed by the respondent as reflected in paragraph 3 of the affidavit in reply of Revocatus Mugaya Kaitila Mtaki to the following effect:

"3. That, as to paragraphs 4, 5 & 6 of the affidavit by the Applicant the Respondent states that after conclusion of the hearing of the application before his Lordship J.C.M. Mwambegele, J.A. and upon the Court informing the parties that the ruling would be

delivered on notice, Counsel for the Applicant one Michael Yudas Mwambeta requested Counsel for the Respondent Mr. Mugaya Kaitila Mtaki to hold his brief when ruling would be delivered, which request was accepted by Mr. Mugaya Kaitila Mtaki. Thereafter counsel for the Applicant gave to Mr. Mugaya Kaitila Mtaki, Advocate a business card containing the following telephone numbers +255 784210345, +255 715452218 and + 255 756317160 for future contact.

(i) That it was on the basis of the mutual understanding as stated in paragraph 3 above that counsel for the Respondent acknowledged receipt of Court Summons on behalf of the Applicant's Counsel informing parties of the delivery of the ruling by the honourable Court; A copy of the relevant Court Summons is herewith attached and marked P1 for reference.

(ii) That I appeared in Court on 10th September, 2018 when the ruling of the Court was being delivered and informed

the Court that I was holding brief for counsel for the Applicant.

(iii) That immediately after delivery of the ruling, I tried to telephone the Applicant's Advocate, the said Mr. Mwambete (sic) but his telephone was unreachable. On the following day I also tried to telephone him but I was equally unsuccessful."

During the hearing, Mr. Mwambeta, in response to the avarment contained in the above reproduced paragraph 3, emphasized that, although he remember to have talked with Mr. Mtaki on his desire and intention to direct him to hold his brief in case he would not be able to travel to Tabora to receive the ruling once he is notified by the Court, until when the applicant's Managing Director was made aware of the delivery of the ruling through the said person, he never received any notification from either Mr. Mtaki or the Court's Deputy Registrar on the exact date of delivery of the said ruling. In this regard, he argued that he could not have attended or instructed someone to hold his brief on the date of delivery of the ruling as he eagerly waited to be notified of the same as ordered by the single Justice on 24th August, 2018.

Moreover, Mr. Mwambeta submitted that he did not remember to have given Mr. Mtaki the business card containing his said telephone numbers. Nevertheless, he stated that the said information on the business card could have been provided to Mr. Mtaki, but it might have escaped his mind in view of the time which has lapsed since they last met with him on 24th August, 2018 at Tabora. However, Mr. Mwambeta emphasized that the fact remain that, as indicated in paragraph 3 of Mr. Mtaki's affidavit in reply, until when the present application was lodged in Court on 27th September, 2018, he did not receive any notice of the date of delivery of the ruling on 10th September, 2018. He therefore argued that, the delay in lodging an application for reference against the decision of the single Justice of the Court was not caused by negligence of the applicant or the advocate, but on the lack of notice on the date of delivery of the ruling from either Mr. Mtaki or the Court's Deputy Registrar at Tabora sub registry.

In the circumstances, he prayed that the application be granted with costs as the applicant has demonstrated good cause.

In response, Mr. Kingu attributed the delay in lodging the application on the negligence of the applicant and her counsel. He argued that the applicant's Managing Director in his affidavit in support of the application did not mention the name of the person who he sent to the Court's sub registry at Tabora on 24th September, 2018 to inquire if the ruling had been delivered. He submitted, in this connection that, the applicant could have lodged an affidavit of that person to show that, the information as to the delivery of the ruling came to his knowledge on that date and not before as alleged in his affidavit. He thus argued that the affidavit of the said person could have assisted the Court to be satisfied that, the particular period of delay has been fully accounted for by the applicant. He therefore urged me to disregard the assertion. To support his contention he referred me to the decisions of the Court in **John Chuwa v. Anthony Ciza** [1992] TLR 233 and **Workers Development Corp. Ltd v. Vocal Networks Ltd**, Civil Appeal No. 28 of 2008 (unreported).

Moreover, Mr. Kingu stated that the applicant's counsel was negligent for not making efforts to follow up with the Court's Registry in Dar es Salaam where he is based to inquire whether the ruling had been set for delivery or delivered at the sub registry at Tabora.

In the circumstances, the learned advocate for the respondent urged me to find that the application has no merit as the applicant has not accounted for the ten days of delay in lodging the application from 10th - 17th September, 2018. He also prayed for costs.

From the pleadings and the submissions of the counsel for the parties, the issue for determination is whether the application has merit.

Firstly, I have no hesitation to state that there is no doubt that since the application was lodged on 27th September, 2018, the applicant has to account for the ten days of delay. This is in view of the fact that, as the ruling against which an application for reference is sought was delivered on 10th September, 2018, the applicant had to lodge the requisite application within seven days, that is, on or by 17th September, 2018.

Secondly, it is my considered view that the assertion of the applicant's Managing Director that he became aware of the delivery of the ruling on 24th September, 2018 has not been fully substantiated. There is no sufficient evidence to prove that, the said person, whose name is not mentioned by the deponent, received that information from the sub registry of the Court at Tabora or from somewhere else on that date. It

was expected that the name of that person and the registry officer who attended him could have been mentioned to ascertain the said information. I therefore agree with the counsel for the respondent that failure renders the assertion to be unsupported as stated in **John Chuwa v. Anthony Ciza and Workers Development Corp. Ltd v. Vocal Networks Ltd** (supra).

Thirdly, in view of the affidavit in support of the application and the affidavit in reply, there is no doubt that until 27th September, 2018 when the applicant lodged the current application, there is no evidence that either the Court's sub registry at Tabora or Mr. Mtaki, learned advocate for the respondent notified the applicant or her advocate Mr. Mwambeta that, the ruling had to be delivered on 10th September, 2018 or that it had already been delivered on that date.

According to the notice of delivery of the ruling, the Deputy Registrar issued the same to the applicant through Mr. Mtaki, learned advocate on 7th September, 2018. However, as indicated in the said notice, and as correctly pointed out by Mr. Mtaki, the same was received by him on 10th September, 2018 during the delivery of the ruling. It is unfortunate that,

in his affidavit in reply Mr. Mtaki did not indicate when he received the said notice on behalf of the respondent which enabled him to appear before the Deputy Registrar to receive the ruling of the single Justice on 10th September, 2018. Moreover, as per paragraph 3(iii) of Mr. Mtaki's affidavit in reply, as he had undertaken to hold brief of Mr. Mwambeta counsel for the applicant, immediately after the delivery of the ruling he tried in vain for two days to contact him through his telephone number. It therefore means that after 11th September, 2018, until when the applicant lodged the present application, Mr. Mtaki did not make any further effort to contact Mr. Mwambeta to inform him concerning the date of delivery of the ruling on 10th September, 2018 and the resulting order of the single Justice.

In the circumstances, I do not think that the sub registry of the Court at Tabora was bound to inform the applicant of the date of delivery of the ruling through Mr. Mwambeta as Mr. Mtaki had undertaken to perform that task after he duly accepted to hold his brief. It is noteworthy to emphasize that holding brief entails a situation in a court of law where a fellow advocate instructs another to take his place during the proceedings due to his inability to be present in court. Certainly, the said arrangement is in most cases temporary.

However, it must be noted that, once an advocate accepts to hold brief of his fellow advocate, he has the duty to act fairly and courteously in accordance with the terms of the agreement. Indeed, that duty entails giving feedback of what transpired in court and the direction thereof.

In the circumstances of this application, in view of what is deposed by Mr. Mtaki in paragraph 3 of his affidavit in reply concerning his undertaking to hold brief of Mr. Mwambeta at the delivery of the ruling, he cannot deny the fact that he was duty bound to ensure that, he made every effort to notify the applicant's counsel concerning the date of the delivery of the ruling and the outcome or the direction of the Court. This was important so that if his fellow advocate on behalf of the applicant wished to take any action, he would have done so within the prescribed time. In this regard, I do not think, with respect, that it was sufficient for Mr. Mtaki to try to contact Mr. Mwambeta twice and upon failure remain quite. In the event, I am of the considered opinion that the learned counsel for the respondent cannot validly argue that, the applicant's Managing Director and Mr. Mwambeta were negligent for not following up the information concerning the delivery of the ruling at the Registry of the Court at Dar es Salaam where they are based. It follows that since Mr.

Mtaki, the respondent's counsel had undertaken to hold brief of Mr. Mwambeta, he was expected to perform that task to its finality, that is, to inform his fellow advocate concerning the date of delivery of the ruling and the outcome.

As stated by the Court in **Mwigulu Doto v. Republic**, Criminal Appeal No. 92 of 2008 (unreported), the delay of the applicant may relate to the applicant himself or may be attributable to other institution or some concerned persons. In this connection, the court emphasized that in determining applications for extension of time, courts should primarily concern themselves with probing the causes or reasons for the delay. The Court went further and shared the view expressed in the decision of the erstwhile East African Court of Appeal in **Shanti v. Hindoche and Others** (1973) E.A. 201 which held that:

"The position of the applicant for extension of time is entirely different from that of an application for leave to appeal. He is concerned with showing sufficient reason why he should be given more time and the more persuasive reason he can show... is that the delay has not been caused or attributed by dilatory conduct in his part."

In the present application, I am of the considered view that, the delay of ten days by the applicant in lodging the application for reference was not caused by or attributed to dilatory conduct or negligence on her part.

In the circumstances, being an officer of the Court in the administration of justice, once Mr. Mtaki, learned advocate for the respondent accepted to hold the brief of the applicant's advocate as stated in paragraph 3 of the affidavit in reply, he was, with due respect, expected to do his best to carry out the obvious legitimate promise to inform him of the delivery of the ruling and the resulting order.

From the foregoing, I have to find that the applicant has sufficiently demonstrated good cause that she was not notified of the date of delivery of the ruling either by the Deputy Registrar or Mr. Mtaki, and therefore she could not lodge the requisite application for reference within the prescribed period of seven days.

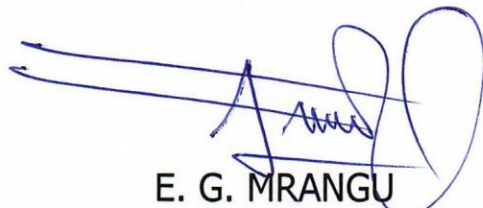
In the result, the application is granted. In the event, I grant the applicant seven days from the date of delivery of this ruling to lodge the application for reference against the decision of the single Justice of the

Court. However, considering the circumstances of this application, parties shall bear their own costs.

DATED at **TABORA** this 3rd day of December, 2019.

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Ruling delivered on this 3rd day of December, 2019 in the presence of Mr. Michael Yudas Mwambeta, learned counsel for the applicant, Mr. Mugaya Kaitila Mtaki and Mr. Fadhili Kingu, learned counsels appeared for the respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL

