

TANZANIA / JUDGMENT

noble motors limited vs umoja wa wakulima wa bonde la kisere uwaboki 2023 tzca 17268 22 may 2023

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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM (CORAM: WAMBALI. J.A.. KEREFU. J.A. And RUMANYIKA. J.A./> CIVIL REFERENCE NO. 29 OF 2019 NOBLE MOTORS LIMITEDAPPLICANT VERSUS UMOJA WA WAKULIMA WA BONDE LA KISERE (UWABOKI)..... RESPONDENT (Application for Reference from the decision of a Single Justice of the Court of Appeal of Tanzania at Dar es Salaam) (Mwariia. J.A.^ Dated the 30th day of August, 2019 in Civil Application No. 285/01 of 2016 RULING OF THE COURT 24* April & 22nd May, 2023 WAMBALI, 3.A.: It is in the record of the application that in Civil Application No. 173 of 2016, the applicant, Noble Motors Limited initially applied for extension of time in terms of rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) within which to lodge an appeal against the decision of the High Court of Tanzania at Dar es Salaam in Civil Case No. 49 of 2011. We wish to point out at the outset that the application before the Single Justice was heard and determined before the Rules were amended by G.N. No. 362 OF 2017. It is further noted from the record of the i application that during the hearing of the said application before the Single Justice, the respondent, Umoja wa Wakulima wa Bonde la Kisere (UWABOKI), raised a preliminary objection with regard to the applicant's failure to lodge the written submission within the prescribed period of sixty days from the date of lodging the application as required by rule 106

- (1) of the Rules. At the hearing, though the applicant's counsel conceded that the written submission was filed out of time, the Single Justice was urged to exercise the Court's discretion under rule 106 (19) of the Rules and proceed to hear the application on merit instead of dismissing it. Basically, while the applicant's counsel urged the Single Justice to waive the compliance with the requirement of the Rules in filing the submission, the respondent's counsel emphasized that the application had to be dismissed with costs. The Single Justice of the Court heard the contending submissions of counsel for the parties on the prayer by the applicant and in the end, he dismissed the application in terms of rule 106
- (9) of the Rules. In reaching the conclusion to dismiss the application, the Single Justice stated and reasoned as follows: "From the wording o f the above quoted provision [Rule 106 (19)], compliance with Rule 106 (1) o f the Rules may be waived as regards an application where

existence of exceptional circumstances has been established. In his submission; Mr. Kibataia tried to give reasons for the delay in filing the submission, not existence of exceptional circumstances. In any case, his submission was based on matters of fact which cannot be proved by an advocate from the bar... the proper forum for considering these issues could have been in an application for extension of time. Apart from the arguments of the learned counsel for the applicant which relate to the cause of delay, there has been no material upon which the Court can consider to exercise its discretion under Rule 106 (19) of the Rules". The dismissal of the application prompted the applicant to lodge an application for review of the ruling of the Single Justice through Civil Application No. 285/01 of 2016 under rule 66 (1) (a), (b), (e) and (2) of the Rules premised on the following grounds: " (i) That, this honourable Court acted in a manifest error that has resulted in a miscarriage of justice having dismissed the applicant's application for extension of time to file an appeal in Civil Application No. 173 of 2016 consequently to the applicant's failure to file written submission within time as per Rule 106 (1) of the Court of Appeal Rules, 2009 based on a point of law from 3 the Bar and without there having been filed any notice of preliminary objection and without any written submission in support thereof in accordance with the very same Rules. The Court exercised its discretion in permitting the respondent to pursue the notice of objection without assigning any reasons why such discretion was being exercised while at the very time refusing to exercise its discretion to permit the applicant to proceed without written submission in support of the application. (ii) That; this Honourable Court acted in manifest error that has resulted in a miscarriage of justice having wrongly construed the meaning and import of Rule 109 (sic) (19) of the Court of Appeal Rules, 2009 to mean party has to file an application for extension of time to file written submissions and that no reasons from the bar constitute "good cause" can be submitted. (iii) That the Ruling and orders of this Court are a nullity for having conflicting dated of delivery and extraction such that there no Ruling and order in law. (iv) That, by denying the applicant the right to be heard on the application without written submissions, this Court denied itself the right to be addressed on the De-Registration of the respondent and therefore submissions on the point of law that led to the dismissal were by non- existing party" Parties to the application for review were accordingly heard by the Single Justice through their respective counsel. In the end, he delivered the decision in which he was of the opinion that, the applicant's grounds of review indicated that he was not satisfied with the reasons for the decision in Civil Application No. 173 of 2016. In the circumstances, he concluded that a review was not an appropriate avenue to challenge the outcome of that decision. He emphasized that a review was not an appeal in disguise, citing the decision of the Court in *Karim Kyara v. The Republic*, Criminal Appeal No. 4 of 2007 (unreported) and the persuasive decision of the Court of Appeal of Kenya in *Nyamongo and Nyamongo Advocates v. Kogo* [2001] EA 173. Basically, the Single Justice formed an opinion that the application for review did not meet the requirement of rule 66 (a), (b) and (e) of the Rules. The application was therefore dismissed with costs, hence the current application for reference premised under rule 62 (1) (b) and (2) of the Rules. It is thus prayed by the applicant that the Court be pleased to vary, discharge and reverse the decision of the Single Justice of Appeal. 5 In this application, both

sides lodged written submissions for and against. At the hearing of the application the applicant was represented by Mr. Ndanu Emmanuel, learned advocate whereas the respondent had the services of Mr. Melchzedek Joachim, also learned advocate. It is noteworthy that the ground for seeking reference against the Single Justice's ruling is only premised on the denial of the right to be heard. In support of the application for reference, Mr. Emmanuel essentially reiterated his submission in support of an application for review before the Single Justice with regard to the right to be heard and argued that the denial of that right rendered the proceedings a nullity. In this regard, though the argument on this matter was rejected by the Single Justice, he emphasized that since the application for extension of time was supported by the affidavit of the Principal Officer of the applicant, the Single Justice should have acted on the contents of that affidavit which constituted evidence before him. In the alternative, he argued, the Single Justice would have invited parties who appeared before him to submit orally as the failure to file a written submission did not prejudice the case of either party and therefore, the preliminary objection had no merit. Mr. Emmanuel argued further that the failure of the Single Justice to consider and appreciate the weight of the reasons adduced by the 6 applicant as to why she had to be given the opportunity to submit orally and waive the requirement of the Rules on filing written submissions, constituted miscarriage of justice on the applicant. He maintained that had the Single Justice objectively considered the decisions of the Court in Khalid Mwisongo v. M/s Unitrans (T) Ltd, Civil Appeal No. 56 of 2011 and UAP insurance Tanzania Ltd v. Noble Motors Limited, Civil Application No. 260 of 2016 (both unreported), he would not have denied the applicant the right to be heard in an application for extension of time. In the end, he prayed that the application be allowed with costs. In reply, Mr. Joachim submitted that the Single Justice properly dismissed the application for review as the applicant could not rightly assert that she was denied the right to be heard in Civil Application No. 173 of 2016 while she failed to comply with the requirements of rule 106

- (1) of the Rules as it were before the amendment introduced by the Court of Appeal (Amendment) Rules, 2017 GN No. 362 of 2017. He argued further that as properly held by the Single Justice, the applicant failed to show that there were exceptional circumstances for the waiver of the mandatory requirement of filing the written submission as provided under rule 106(19) of the Rules. In this regard, the learned counsel argued that the applicant waived the right to be heard considering 7 the position of the law as provided by the Rules before the amendment. He maintained that since the decision of the Single Justice in Civil Application No. 173 of 2016 was made when he had the discretion to exercise the right to grant the waiver or otherwise in terms of rule 106(19) of the Rules, that discretion was properly invoked. In the circumstances, Mr. Joachim submitted that the Single Justice's ruling cannot be easily upset on reference to the Court without sufficient reasons or justification. To support his argument, he made reference to the decisions of the Court in EDPB Construction Co. Ltd and Others v. CRDB Bank PLC, Civil Reference No. 3 of 2016 [2020] TZCA 188: [06 March 2020: TANZLII] in which the decision of the defunct East African Court of Appeal in Mbogo and Another v. Shah [1968] EA 93 at page 94 was made and Felix A.

Mosha and Another v. Exim Bank Tanzania Limited, Civil Reference No. 12 of 2017 [2021] TZCA 257: [14 June 2021: TANZLII]. With regard to complaint that the Single Justice failed to follow the decisions of the Court in Khalid Mwisongo and UAP Insurance Tanzania Ltd (supra) to the effect that the failure to file the written submission was not fatal, Mr. Joachim argued that the Single Justice justified his decision in relying on other decisions of the Court which held that the omission was fatal based on the facts in those cases which were 8 consistent with the facts in the application before him. In the circumstances, Mr. Joachim implored us to dismiss the application with no order as to costs as the respondent obtained waiver of Court fees and other costs pursuant to Rule 9 of GN No. 247 of 2018 of the Judicature and Application of Laws Act, Cap. 358. We note from the ruling of the Single Justice that in dealing with the applicant's complaint concerning denial of the right to be heard on the alleged failure to exercise his discretion provided under rule 106 (19) of the Rules to waive the requirement under rule 106(1) of the Rules of filing the written submissions, he made reference to the relevant part of the ruling and reproduced part of it as stated above and emphasized that: "... Instead of endeavoring to establish existence of exceptional circumstances warranting waiver of the requirements of filing written submission, the argument of Mr. Kibataia centered on establishing the cause of delay in filing the submission, stating matters which would have been relevant in an application for extension of time. The Court did not state that in order to invoke Rule 106 (19) of the Rules, a party has to file an application for extension of time to file submission." 9 In this regard, considering the circumstances of the application, the Single Justice justified his resolve to apply the decisions of the Court in Ally Suleiman v. Asuna Ally, Civil Application No. 4 of 2010, Juma Mashaka and Another v. Attorney General, Civil Application No. 141 of 2010 and Mechmar Corporation Malaysia Behard v. VIP Engineering and Marketing Ltd, Civil Application No. 9 of 2011 (all unreported) instead of the case of Khalid Mwisongo (supra). We have carefully scrutinized the record of the application and the contending submissions of the counsel for the parties amid the ruling of the Single Justice on an application for review. To this end, we are satisfied that the Single Justice properly found that the application for review had no merit as the applicant had failed to demonstrate that during the hearing of the preliminary objection raised by the respondent, there was exceptional circumstances to enable him to waive the requirement of filing the written submission as provided under rule 106 (19) of the Rules (as it then was before the amendment) instead of dismissing the application for extension of time in terms of rule 106 (9) of the Rules. Thus, considering the material on record, the applicant could not validly claim that he was denied the right to be heard as contended in this application for reference. Indeed, we are satisfied that in view of the 10 requirement of the Rules before the amendment, the Single Justice properly exercised his discretion not to waive the requirement to file written submission within the prescribed time of sixty days as there was no convincing reasons and existence of special circumstances for not doing so. In the circumstances, we do not find any justification to intervene and reverse his finding in an application for review as the requirement for asserting the denial for the right to be heard provided under rule 66 (1)(b) of the Rules has not been met. We must emphasize that in dealing with an application for reference under

rule 62 (1) (b) of the Rules, there are principles to be taken into account. In *Amada Batenga v. Francis Kitaya*, Civil Reference No. 1 of 2006 (unreported), the Court revisited its previous decisions on reference and summarized the following principles upon which a decision of a Single Justice can be examined as hereunder; "(a) On a reference, the full Court looks at the facts and submissions the basis of which the Single Justice made the decision;

- (b) No new facts or evidence can be given by any party without prior leave of the Court; and
- (c) The Single Judge's discretion is wide, unfettered and flexible; it can only be interfered with if there is a misinterpretation of the law". Moreover, in *G.A.B. Swale v. Tanzania Zambia Railway Authority*, Civil Reference No. 5 of 2011 (unreported), the Court restated the principles to be considered in determining an application for reference in the following terms: "(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 VS. YOMA HAMIS MVUTAH*, Civil Reference No. 1 of 2001 (unreported). And if the decision involves the exercise of discretion; (ii) If the Single Justice has taken into account irrelevant factors or; (iii) If the Single Justice has failed to take into account relevant matters or; (iv) If there is 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 VS TITUS MURIRIDICTS* (1996) LLR 5434, a decision of the Court of Appeal of Kenya, which we find 12 persuasive. (See also *MBOGO AND ANOTHER V. SHAH* [1968] EA 93". Applying the principles to the application at hand, we have no difficulty in concluding that the applicant has not managed to demonstrate that the Single Justice's ruling has offended any of them to lead us vary, discharge or reverse it. In the result, we dismiss the application with no order as to costs. DATED at DAR ES SALAAM this 18th day of May, 2023 F. L. K. WAMBALI JUSTICE OF APPEAL R. J. KEREFU JUSTICE OF APPEAL S. M. RUMANYIKA JUSTICE OF APPEAL The Ruling delivered this 22nd day of May, 2023 in the Absence of Applicant and Respondent, is hereby certified as a true copy of the original. IB

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