IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RAMADHANI, J.A., LUBUVA, J.A., And MSOFFE, J.A.)

CIVIL REFERENCE NO. 3 OF 2000

BETWEEN

DAUD MLENGE..... APPLICANT
AND
TITUS N. MAKOMBE..... RESPONDENT

(Reference from the decision of the single Judge of the Court of Appeal Tanzania at Dar es Salaam)

(Makame, J.A.)

dated the 16th day of March, 2000
in
Civil Application No. 93 of 1998

R U L I N G

LUBUVA, J.A.:

In Civil Application No. 93 of 1998, the applicant, Daud Mlenge, applied before a single judge of this Court (Makame, J.A.) for leave to appeal to this Court against the decision of the High Court (Kileo, J.) of 12.12.1997 in Civil Appeal No. 61 of 1996.

When the application was called on for hearing, a preliminary objection was raised on behalf of the respondent, Titus Makombe, that the application for leave to appeal to this Court against the decision of the High Court was filed out of time. Sustaining the

preliminary objection, the learned Single Judge dismissed the application. Dissatisfied, the applicant has come to the Court on reference in terms of the provisions of rule 57 (1) (b) of the Court Rules, 1979.

For easy appreciation of the sequence of events leading to this matter, we think it is desirable to outline briefly the historical background of the case. The case involving a plot of land originated from Magomeni Primary Court, Kinondoni District in Dar-es-Salaam. The respondent successfully instituted a suit against the applicant claiming ownership over the suit plot. On appeal to the District Court, the decision of the Primary Court was overturned in favour of the applicant. The respondent appealed to the High Court where on 12.12.1997 the appeal was allowed with the result that the decision of the District Court was set aside and the Primary Court decision restored. Dissatisfied with the decision of the Single Judge, this reference as already indicated, has been preferred.

As already indicated, since the matter originated from the primary court, the respondent sought from the High Court extension of time within which to apply for leave to appeal and for leave to

appeal to this Court. On 14.12.1998, the application was dismissed by the High Court (Bubeshi, J.). After the dismissal of the application, the application before the learned Single Judge was filed on 31.12.1998. A preliminary objection was raised that the application before the Single Judge was out of time. Sustaining the preliminary objection, the learned Single Judge was live to the fact that G.N. 307 of 1964 provides to the effect that 15th December to 31st January inclusive, is one of the Court vacations, that is the Christmas vacation. The learned Single Judge however, took the view that the G.N. No. 307 only refers to the High Court and not the Court of Appeal. Furthermore, the learned Single Judge's endeavour to resort to the application of rule 6 (e) which provides that Christmas vacation shall not be taken into account in computing time was not fruitful either. This was so, the learned judge further held, because the rules do not define Christmas vacation. For this reason, it was the view of the learned Single Judge that the practice of applying Christmas vacation in such a situation in the Court of Appeal was a "borrowing" from the High Court which had no legal basis. In the event, the learned Single Judge also considered the application of rule 6 (b) which provides for dies non. Even then, the learned Single Judge came to the conclusion that in the circumstances of the case,

the rule was also inapplicable. Consequently, the application was dismissed.

Before us in this application, the applicant was represented by Mr. Taslima, who had also appeared for the applicant before the Single Judge and the High Court as well. The thrust of his submission in support of the reference was that the decision of the learned Single Judge was per incuriam because the provisions of G.N. 114 of 2.11.1979 were not considered. Had the learned Single Judge considered the provision of G.N. 114 of 2.11.1979, he would have found that the application was timeous and that it was unnecessary to seek extension of time in which to apply for leave, Mr. Taslima urged.

For the respondent, Mr. Mkongwa, learned counsel, who had also represented the respondent in the High Court appeared. While conceding that the decision of the learned Single Judge was per incuriam, he maintained that the outcome of the case would still be the same. In his view, the application would still be out of time even after invoking the provisions of rule 6 (e) of the Court Rules, 1979 with regard to the Christmas vacation. At any rate, he further

submitted, if the submissions by Mr. Taslima were accepted, the matter, subject of the application would have to be taken back to a Single Judge to be dealt with on merit.

This matter, we think, can be disposed of within a narrow compass. This is so because as correctly submitted by Mr. Taslima, learned counsel for the applicant, and conceded by Mr. Mkongwa, learned counsel for the respondent, the decision of the learned Single Judge was per incuriam. In coming to the conclusion that the application was out of time the learned Single Judge relied on the provisions of Government Notice No. 114 of 1979 which provides for the Christmas vacation. According to the provisions of this Government Notice, no reference is made to the Court of Appeal and so, the learned Single Judge correctly in our view, held that it (G.N. 114 of 1979) did not apply to the Court of Appeal with regard to the Christmas vacation. As observed earlier, the Government Notice No. 114 of 1979 which was published on 2.11.1979 under rule 24 (1) was not taken into account. It provides for the Court vacations. Among others, it provides that the vacations of the Court of Appeal in every calendar year shall be from 15th December to 31st January, inclusively. It is to be observed that without excluding the time

covered during the Christmas vacation as the learned Single Judge did when computing time in which the application was filed, the application was filed 17 days after the High Court decision (Bubeshi, J.) was given on 14.12.1998. This was about three (3) days out of time. However, if the provisions of Government Notice No. 114 of 2.11.1979 were invoked, it is patently clear that the period from 15th December, 1998 to 31st January, 1999 should have been excluded in computing the time in which to institute the application. With such exclusion, we think it goes without saying that the application before the learned Single Judge was well within time.

With great respect, we think had the provisions of the Government Notice No. 114 of 2.11.1979 been brought to the attention of the learned Single Judge for consideration, we have no doubt in our minds that he would have found that the application was timeous and that the application for extension of time in which to apply for leave was thus unnecessary.

In the event, we are constrained to allow the reference.

The matter is to be placed before the Honourable Chief Justice for assigning the matter to a Single Judge of the Court to deal with the application on merit regarding leave to appeal to the Court which was not dealt with after the preliminary objection was sustained.

DATED at DAR ES SALAAM this 4th day of November, 2004.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR