

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: MBAROUK, J.A., BWANA, J.A., And MASSATI, J.A.)

CIVIL REFERENCE NO. 3 OF 2012

**OSWALD MASATU MWIZARUBIAPPLICANT
VERSUS
TANZANIA FISH PROCESSORS Ltd.RESPONDENT**

**(Reference from the decision of a single Justice
of Appeal at Mwanza)**

(Mjasiri, JA.)

**dated the 2nd day of March, 2012
in
Civil Application No. 13 of 2010**

RULING OF THE COURT

21st & 25th March 2013.

BWANA, J.A:

On 13th day of December 2010, the applicant, Oswald Masatu Mwizarubi, filed an application seeking an extension of time within which to file an application for leave to appeal to this Court. His earlier application before the High Court had been refused. On 1st day of March 2012, a single Justice of this Court (Mjasiri, J.A.) dismissed the application for reasons

clearly stated in her Ruling. Aggrieved, the applicant preferred this reference.

Filed under a certificate of urgency, the applicant has since then and on three consecutive occasions when the reference came up for hearing, asked for adjournment at the insistence of his counsel. The reasons given are always the same namely that his counsel is engaged in another national assignment (i.e. The activities of the Constitutional Reform Commission). At each date of the hearing the following two features become apparent namely, first, the applicant's counsel promises to be present at the next hearing date, a promise he never keeps. Second, he seeks adjournment by writing an administrative letter to the Hon. Chief Justice, asking for the said adjournment.

At today's hearing, it was the same thing. Before the application was called on for hearing, we received copies of a letter dated 20th day of March 2013, that is, written a day

before, addressed to the Hon. Chief Justice, requesting for yet another adjournment. The applicant was present in Court but could not proceed with the hearing at such short notice. Until the day before the hearing he was assured of his counsel's attendance he asserted. Therefore he asked for another adjournment.

Mr. Costantine Mutalemwa, learned counsel for the respondent, objected to further adjournment. He urged the Court to dismiss the application, if the applicant was not ready to argue the application. According to Mr. Mutalemwa, it is the applicant who filed the reference under certificate of urgency but since then, he is the very person who has been seeking leave of the Court for adjournment. Hearing has been fixed either at Dar es Salaam or Mwanza to fit the applicant's convenience but even then, it could not take off.

Notice of this latest hearing had been received by counsel for the applicant on 18th day of February 2013, that is

over a month ago, thus giving him enough time to programme himself accordingly. As to the manner adjournment was being sought, it was Mr. Mutalemwa's averment that a sitting of a court of law is not moved or adjourned by administrative correspondence. In so far as this Court is concerned, adjournment may be asked for in accordance with Rule 59 of the Court of Appeal Rules, 2009 (the Rules). Practice has it that counsel requesting for adjournment may either enter appearance before the Court and pray for the same or ask a learned brother/sister to hold his brief. A hearing cannot be adjourned by way of an administrative correspondence addressed to the Chief Justice in his administrative capacity as head of the Court of Appeal cum Judiciary, asserted Mr. Mutalemwa. He therefore asked the Court to dismiss the application, with costs pursuant to Rule 63(3) of the Rules, or as the Court deems fit. As stated above, the applicant could not proceed with the hearing.

We have given due consideration of the matter. We are mindful of the cardinal principle of *debet esse finis litium*, that is, there should be an end to litigation; there ought to be an end of suits. In the instant application filed under a certificate of urgency, the applicant's side should have shown seriousness in pursuing their case. This is not so as the following pertinent points would have it.

- The reasons given are always the same: counsel who has the conduct of the case is busy with other national assignments. We do not hesitate to remark here that given the said national duties, counsel should have excused himself and assigned another counsel. His law firm, The South Law Chambers Advocates, as the name on the headed paper connotes, has more than one advocate. As officers of the Court and carrying the banner of justice must be seen to be done, they should have given due priority to this application. That would have guaranteed substantive justice.

- We consider the reasons raised by the applicant when the matter was called on for hearing as being flimsy. His failure to prosecute his application leaves no room other than for the Court to either heed to his application for adjournment or to dismiss it as prayed for by counsel for the respondent. It is our judgment that given the prevailing circumstances of this application, a further adjournment amounts to doing injustice to the adverse party who has always been attending Court be it here in Mwanza or in Dar es Salaam. We are convinced that the applicant has not shown seriousness in the prosecution of his application. The granting of further adjournment is to condone an abuse of process of the Court.

All the above considered, and by invoking the provisions of Rule 4 (2) (a) (b) and (c) of the Rules, we dismiss this application with costs.

DATED at **MWANZA** this 22nd day of March 2013

M.S. MBAROUK
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL