IN THE HIGH COURT OF TANZANIA

AT IRINGA

MISCELLANEOUS CIVIL APPLICATION NO 17 OF 2018
(Arising from Taxation Cause No. 1 of 2017)

TOTAL TANZANIA LIMITED..... APPLICANT

VERSUS

MEXON SANGA..... RESPONDENT

RULING

KENTE, J:

In this application, the applicants herein above being aggrieved by the decision of the Taxing Officer in the Taxation Cause No. 1 of 2017, and being out of time to lodge an application for reference in this court, they lodged the present application seeking for the enlargement of time within which to lodge the delayed application.

The application was made by way of a chamber summons under Rule 7 (1) & 8 (1) (2) of the **Advocate Remuneration Order 2015, G.N 264** (Published on 17th July 2015) and is supported by an affidavit sworn by one Isaya Gibson Matambo who was then the applicants counsel in the District Land and Housing Tribunal.

During the hearing the applicant enjoyed the legal services of Mr. George Joseph Sang'udi learned advocate while the respondent was represented by Mr. Erick Gebehard Mhimba learned advocate.

Both parties were agreed and consequently it was ordered by this court that, this application be argued by way of written submissions.

While arguing the application, the applicant's counsel advanced the following reasons with a view to persuading this court to decide in his client's favor.

In the first ground, the applicant's counsel submitted that, the decision in the Taxation Cause (No. 1 of 2017) was tainted with serious illegalities which in their opinion, need the attention of this court. The applicant's counsel claimed that the Taxing Master had in a whimsical manner, awarded the respondent herein the claimed amount in the bill of costs without any documentary proof such as invoices and payment receipts. In order to support his argument Mr. Sang'udi referred to the case of **Prof. A. Mjema v. The Managing Editor of Dira ya Mtanzania & 2 Others, Reference No. 7 of 2017**, in which my brother Mgeta, J elaborated on the duty of the service providers who receive payments in

respect of goods supplied or services rendered to issue fiscal receipts or fiscal invoices by using electronic fiscal devices.

He insisted that, in all cases of taxation, the Taxing Master is expected to demand for the presentation of the receipts or invoices before awarding the claimed amount in the bill of costs. He cited the case of **Thinamy Entertainment & Others v. Dino Katsopas, Misc Commercial Case 86 of 2018, High Court of Tanzania at Dar es Salaam** to underscore the point that cash awards to a party in any taxation matter must be in accordance with the law.

Moreover, Mr. Sang'udi submitted that illegality of the impugned decision in this case is a good cause for extension of time as it was held by the Court of Appeal of Tanzania in the case of **Tanzania Portland Cement Company Limited v. Khadija Kuziwa, Civil Application No. 437/1 of 2017, Court of Appeal of Tanzania at Dar es Salaam** (unreported).

As for diligence, advocate for the applicant submitted that, they acted diligently in handling this matter. He said that, they applied to be served with the copy of ruling on the same day when the impugned ruling

was delivered i.e on 8th June 2018 but the said copy was not availed to the applicant until 29th June 2019 when the time prescribed within which to apply for reference had already elapsed. Furthermore, he said that, they prepared the documents for the application until 4th July 2018 and presented it for filling on 10th July 2018 which was beyond the days prescribed within which to apply for reference. He also said that the applicant is based in Dar es Salaam while the court is at Iringa. He insisted that all in all, they acted diligently in the circumstances but only to fall short of beating the deadline.

To support his argument, the applicant's counsel remind us that, it is the tradition of the Court of Appeal of Tanzania to grant extension of time where diligence on the part of the applicant is proved as it was held in the cases of **Robert Schellens v. Mr. Said en Noroloron Varma & 2 Others, Civil Application No. 112 of 2016** (unreported) and **Mwantumu Ndugumbi as the administratrix of the estates of Noti Ndugumbi v. Venance Shirima Misc. Civil Application No. 346/01 of 2017.**

Moreover, the applicant's counsel argued that even if there is any delay, it was not their fault but rather the fault of the registry of this court

which could not supply them with copies of ruling as early as practicable. He also blamed what he called bureaucracy in the admission process. He drew our attention to the case of **Hans Poul Automects Limited v. RSA Limited, Civil Application No. 126 of 2018** (unreported) at Arusha in which it was held that:-

> *"the applicant should not be condemned for the delay by the court to supply him with the copy of ruling. Similarly in this case I am satisfied that the applicant is not to blame since he has shown that the High Court Registry contributed to the delay".*

On the balance of convenience, counsel for the applicant submitted that, if the extension of time will not be granted the interests and rights of the applicant will be prejudiced. This he said, is due to the fact that, the applicant will be condemned to satisfy the order from the bill of cost that was tainted with serious illegalities as explained above. However, on the other hand, Mr. Sang'udi submitted that if the extension of time will be granted, the respondent will not suffer any loss. Furthermore, he insisted that, the balance of convenience was taken to be a good cause for granting extension of time by the Court of Appeal of Tanzania in the case

of **Samwel Kobelo Muhulo v. National Housing Corporation, Civil Application No. 302/17/2017** (unreported).

The applicant's counsel submitted further that, the applicant was essentially not the cause of delay. This according to him, is due to the fact that ,the applicant has accounted for the delay of each single day from 29th June 2019 to 10th July 2019, thus the delay was not inordinate. Mr. Sang'udi cited the case of **Lyamuya Construction Company Limited v. Registered Board of Trustees of the Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010** as quoted in **Mwantumu Ndugumbi case (supra)** in which it was held that, the applicant must show that the delay was not inordinate so that the court can grant his application for extension of time.

In reply, the respondent maintained that the applicant had failed to account for each day of the delay as required by law.

On this reason, the respondent's counsel submitted that, the applicant's counsel had stated that the period of six days from 29th June 2018 to 4th July 3018 was used for reading the ruling and preparing the application and the delay for the remaining six days was contributed to by

this court in the admission process. The respondent submitted that there was no good reason to account for each day of delay and that this is due to the following reasons:-

a) The impugned ruling was delivered on the 8th June 2018 in the presence of the applicant's counsel and therefore, he was aware of the contents of the whole ruling, so it was rather strange for him to use six days to read the same.

b) That, the ruling was ready for collection on the 22nd June 2018 but due to the applicant's negligence, the said ruling was collected on the 29th June 2018 which was the last date for making reference.

Moreover, with regard to the allegation of this court to have contributed to the delay, the respondent argued that there is no any evidence to support the fact that, the court registry had spent six days in the process of admission of the application. Counsel for the respondent challenged the applicant for not stating this fact in his affidavit and also for the failure to obtain the affidavit of the Registry Officer in support of his averments. This he said, was very important because such an affidavit would have helped the applicant in accounting for the days lost as it was

observed in the case of **Christopher Mtikila v. Jacobo Nkomola & 3 Others, Civil Case No. 278 of 1997**(unreported).

Furthermore, the respondent's counsel argued that even if the applicant forgot to include these important facts in his affidavit, he should have done so in the reply to the counter affidavit after they were raised by the respondent. Counsel for the respondent submitted that there are 8 clear days which have not been accounted for, that is from 22nd to 29th June 2018 and even those from 29th June 2018 to 10th July 2018 have not been accounted for by the applicant in his affidavit. Lastly on this point, it was submitted that, with regard to the period of six days which was said to have been spent by the court in the process of admission as both the applicant and their counsel are based in Dar es Salaam, the affidavital evidence should have been led showing and proving their travelling and staying at Iringa so as to initiate the process of admission. The respondent's counsel implored, this court not to be moved by this averment saying it had no basis. He cited the case of **A-One Products & Brothers v. Abdallah Almas & 25 others, Civil Application No. 566/28 of 2017** in support of his prayer.

As to negligence, the respondent's counsel submitted that, the applicant was not diligent enough to make regular follow ups to the trial court in order to obtain the copy of ruling in time and file their intended reference application in time. This failure of the applicant according to the respondent's counsel, is coupled with negligence as it was contended in the counter-affidavit sworn and filed by the respondent.

Therefore, the respondent's counsel went on arguing that the negligence of the counsel cannot amount to good cause for the extension of time. That is what was held in the unreported case of **Hashimu Madongo & 2 Others v. The Registrar for Trades and Industries & Another, Civil Application No. 13 of 1999.** In that case Lubuva, J (as he then was) held that:-

> *"It is settled principle that, negligence or inaction on the part of counsel does not constitute sufficient reason for extending time".*

On the point of illegality of the impugned decision, the respondent's counsel argued that, the decision of the Taxing Officer in Taxation Cause No. 1/2017 was correct because the Taxing Officer had complied with the

standard requirement set out in the **Advocates' Remuneration Order No. 264 of 2015**. The said order (under order 12 (1) and 46) is clear that the Taxing Officer is required to tax any amount in the bill of cost in accordance with the scale and allow any other charges or expenses as it appears to him necessary or proper to act upon. The respondent's counsel maintained that, there is nothing for this court to fault the decision in the Taxation Cause No. 1/2017.

Moreover, he contended that, in the said order, there is no requirement to present any receipts to back up a bill of costs as it was stated in the case of **M/S Buckreef Gold company Ltd v. M/S Tax Plan Associates & Another, Misc. Commercial Reference No. 3 of 2007** where my brother Mruma, J insisted that as a matter of law, EFD receipts are not required in taxation of bill of cost.

Counsel for the respondent further submitted that, the decision of Mugeta J in the cited case is distinguishable from the present case since the applicant in the cited case had not failed to account for each day of the delay.

He further submitted that, the allegation of illegality does not confer a blanket guarantee that once raised, an applicant should be granted the extension of time. He said that, the applicant is required to show that such an illegality or a point of law is of sufficient importance and it must be also apparent on the face of the record. He referred this court to the case of **Ngao Godwin Lusero v. Julius Mwarabu, Civil Application No. 10 of 2015 (unreported).**

The applicant in rejoinder insisted that, the Taxing Master had awarded over and above the charged amount of instruction fees in the bill of costs that is Tshs. 8,000,000/= contrary to what is provided for under the II Schedule, (item one) of the **Advocate Remunerations Order of 2015** which clearly provides that for the contended application, the instruction fee is Tshs. 1,000,000/= only.

Moreover the applicant's counsel insisted that, issuing receipts is still a good law and mandatory in taxation proceedings, since advocates are service providers, and they are obliged to issue receipts to their clients. He said that, the case of **M/s Buckreef Gold Company Ltd** is distinguishable from the present case, as in the above cited case, it was held that the issuing of EFD receipts is not a mandatory requirement under

the **Advocates Remuneration Order of 2015** but it can only be issued if so required.

Therefore, the applicant's counsel insisted that issuing of receipt by the Advocate rendering service is still a mandatory requirement as it was held in the case of **M/s Tax Plan Associates Limited v. Tan Can Mining Limited, Misc Commercial Reference no 2/2019** (unreported).

The applicant submitted that, the reason is obvious that, one cannot come to this court challenging the decision of the lower court without annexing a copy of the impugned decision and the supporting exhibits. This is simply because this court is not in possession of the said record to be conversant with what might have transpired in the lower court. The court has to be furnished with the relevant proceedings, exhibits and the impugned decision of the lower court.

On the question of diligence, the applicant's counsel submitted in rejoinder that, the applicants were not idle after receiving the copy of ruling on 29th June 2018 but they were busy seeking to challenge the said decision. He further submitted that, under normal circumstances, a prudent

advocate needs time to read the decision so as to give proper advice on the way forward. He argued that, upon presenting the documents to the registry of this court, they had to be admitted and that, this process took some time to be completed.

Mr. Sang'udi submitted that, there is no legal requirement for attaching an affidavit from the Registry Officer if one is alleging the delay to have been caused by the registry. However, he submitted that, the law of this land provides for such a requirement only if one is willing to appeal to the Court of Appeal of Tanzania where one has to be issued with a certificate of delay.

Moreover he submitted that, **Mtikila's** case which was cited by the respondent is distinguishable from the present case as in the cited case, the applicant had made some averments which amounted to hearsay evidence hence the need for the court clerk to swear an affidavit with a view to supporting the said hearsay evidence.

Therefore, the applicant's counsel further argued that, in the case under consideration, the applicants had named the registry office as a whole to have caused the delay through the admission the process.

Counsel for the applicants maintained that, the applicants in the present case are not alleging that delay was caused by a single individual in which case the affidavit of such a person would be required.

Having gone through the submissions made by both parties herein, I will in the first place make the following observations which shall cater for the premise in deciding this matter. The first observation to make is that to grant or to refuse an application for extension of time is in the discretion of the court, which however must be exercised in a judicious manner. To that end, it was held by the now defunct Court of Appeal for Eastern Africa in the case of **Mbongo V. Shah [1968] EA** that:-

> *"All relevant factors must be taken into account in deciding how to exercise the discretion to extend the time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended".*

Secondly is on the requirements to be met by the applicant and the guidelines to be followed before a court can exercise the said discretion in his favour.

According to the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010**;

a) The applicant must account for all the period of delay.

b) The delay should not be inordinate.

c) The applicant must show that he acted with diligence and not apathy, negligence or sloppiness is pursuing his rights.

d) Whether, there was any illegality or existence of a point of law of importance in the decision sought to be challenged.

With regard to the question as to whether the applicants in the present case have accounted for each day of delay, I am of the respectful that they have not. As correctly submitted by the respondent's counsel, there is no evidence such as bus tickets or hotel receipts showing that the applicant's counsel or officials had travelled all the way from Dar es Salaam and stayed in Iringa as they allegedly made a follow up of some matters at the registry of this court. When this fact is combined with the generalized complaint by the applicants who sought to shift blameworthiness onto the registry office for allegedly being bureaucratic, it becomes clear that, the applicants are in the mission of embellishing themselves and at the same

time blemishing others. In the absence of evidence showing that either the applicant's official or their learned counsel had travelled to Iringa, and in the absence of an affidavit from the Deputy Registrar or Registry Officer of this court, I am not in the least persuaded that the applicants were for any sufficient or reasonable cause precluded from filing an application for reference within the prescribed period. I therefore find and hold that the applicant have not accounted for the whole period of the delay.

Needless to say, by extension, the above finding and holding goes to answer the question as to whether the applicants had acted with diligence in the pursuit of their rights. As can be gleaned from the court record and the arguments advanced by both parties herein, there is no plausible explanation to explain away the applicants' inaction immediately after delivery of the impugned court ruling by the Taxing Officer.

On the question of illegality of the decision of the Taxing Officer, I wish to state that I am live and indeed aware of the case of the **Principal Secretary, Ministry of Defence and National Service V. Derram Valambia [1991] TLR 387** in which the court held that:-

"In our view, when the point at issue is one alleging illegality of the decision being challenged, the court has a duty, even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record straight".

In the present case Mr. Sang'udi learned advocate made some efforts to convince this court to find, that the decision by the Taxing Officer was tainted with some illegality saying that the Taxing officer had taxed the advocate's fees at Tshs. 8,000,000/= instead of Tshs. 1,000,000/= which is the maximum amount prescribed by the law. Without hesitation, I tend to agree with Mr. Sang'udi. As it see it, his complaint is based on a correct understanding of what was really decided by the Taxing Officer. It is evident from the impugned ruling that item No. one in the bill of costs which was categorized as advocate's instruction fees was taxed at Tshs. 8,000,000/= as correctly submitted by the applicant's counsel. In view of the clear provisions of paragraph 1 (m) (ii) of the 11th Schedule to the **Advocates Remuneration Order 2015, (G.N No. 264 of 2015**), it appears to me that there could be some illegalities in the impugned

decision of the Taxing Officer which may have to be addressed by this Court during the hearing of the intended application for reference.

In my view, what I have said so far is enough for me to dispose of this matter. Otherwise it would be a wastage of time and resources to consider the remaining question as to whether the delay by the applicant to take necessary action in the pursuit of his rights was not inordinate.

In the result and for the above-stated reasons, I allow this application and order for the costs of the present application to be in the cause. The applicants are given thirty days time from the date of this ruling to lodge their application for reference if they are still so desirous.

It is so ordered.

Dated at Iringa this 13th day of August, 2020.

P. M. KENTE

JUDGE