IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT DODOMA

MISC. CIVIL APPLICATION NO. 2 OF 2021

(Original from High Court of United Republic of Tanzania Dodoma District Registry, Taxation Cause No. 8/2020)

YASIN ATHUMAN MAFINANGA ..... APPLICANT

VERSUS

JUDITH NDABA ..... RESPONDENT

RULING

10/11/2021

KAGOMBA, J

Yasin Athuman Mfinanga, the applicant, has filed in this Court an application for extension of time to enable him file a reference, arising from the Ruling and Drawn Order of this Court in Taxation Cause No. 08 of 2020 delivered by Hon. E. J. Nyembele DR on 11/12/2020. He also applies for costs.

The Application is made under Order 8 (1) of the Advocate Remuneration Order, GN No. 264 of 2015 published on 17/07/2015 and is supported by affidavit of the applicant's Advocate, Sheck Mfinanga. In the supporting affidavit, the applicant's advocate avers that the applicant was the respondent in the aforesaid Taxation Cause No. 8 of 2020, which was decided on 11/12/2020 in favour of Judith Ndaba, the respondent herein.

The learned Advocate further avers that, on 18/12/2020, the applicant wrote to the Court to seek certified copies of the proceedings, Ruling and Drawn Order. That, the applicant followed up with further two reminders dated 24/12/2020 and 07/01/2021 and was eventually supplied with certified copies of Ruling and Proceedings on 7/1/2021 and the advocate took one (1) day to prepare and file this Application for extension of time.

The applicant 's advocate further avers in the supporting affidavit that upon perusal of the supplied copies of proceedings and Ruling, he discovered that there was an error on the face of records that the applicant was denied his right to be heard, which make the Ruling and Drawn Order to be illegal. He further avers that the time to file Reference lapsed at the time "the Applicant was waiting for and making follow ups" to be supplied with certified copies of Ruling, Drawn Order and Proceedings. He counted 31 days which had lapsed since 11/12/2020 when the Ruling was delivered. He reckoned that the delay in filing the Reference was not on applicant's fault and that considerable amount of time was spent by the applicant and his Advocates in Court, making follow ups. Copies of three letters from D'souza & Co to the Court, of diverse dates, requesting for certified copies of proceedings, Ruling and Drawn Order as well as reminders were attached to substantiate the averments made in the supporting affidavit.

The application could not go unopposed. Judith Ndaba, the respondent, filed her Counter Affidavit. She vehemently disputed the alleged fact that the applicant was supplied with certified copies of Ruling and proceedings on 7/1/2021 and that it took the applicant's counsel one (1) day to prepare and file this Application. She argued that the averment by the

applicant's Advocate lacked proof. She further stated that the application was filed on 18/1/2021 which is not one (1) day from the date of service of Ruling as alleged.

The respondent vehemently disputed the averment that the applicant was denied right to be heard. She stated that the applicant was afforded enough time to be heard, by way of written submission but chose not to. She continued arguing that the facts that, non-filing of written submissions by the applicant cannot render the Ruling and Drawn Order thereof illegal since the Taxing officer is empowered by law to proceed exparte against the defaulting party.

The respondent equally challenged the contents of paragraph 6 and 7 of the affidavit which justified the time lapse and lack of diligence on the applicant. She stated that his application is an abuse of court process and calculated as dillydallying mechanism because the applicant is aware that the time spent for procuring judgment, decree, ruling, drawn order and or proceedings is, under the law, excluded.

The above summarizes the status and contents of the Affidavit and counter affidavit. The applicant had a chance to file reply to counter affidavit as ordered by the Court, however he opted not to file the same whereby the matter proceeded to hearing stage, and with an order of this Court, the hearing proceeded by way of written submissions. Sheck Mfinanga, learned Advocate from D'souza and Co. Advocates represented the applicant while Froldius M. Mutungi of East woods Attorneys, represented the respondent.

Both parties filed their written submissions as per the schedule ordered by the Court.

In his written submission, Mr. Mfinanga for the applicant relied on the guiding criteria set by the Court of Appeal, to determine application for extension of time. He cited the case of **LYAMUYA CONSTRUCTION CO. LIMITED Vs BOARD OF REGISTERED TRUSTEES OF YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF TANZANIA**, Civil Application No. 2 of 2010. which had set out the following four tests;

(a) The degree of the lateness;

(b) The reasons for lateness

(c) Its prospects of succeeding with the dispute and obtaining the relief sough against the other party.

(d) Any prejudice to the other party.

With regard to the degree of lateness, Mr. Mfinanga reckoned that the delay is in total of 31 days from the date of Ruling, that is, 11/12/2020 to 11/01/2021 when this Application was submitted to this Court through Electronic Filing System for admission process.

Thereafter, Mr. Mfinanga expounded the reason for delay and ground for faulting the impugned decision of the Court. He said the delay to be supplied with copies of the Ruling and Drawn Order led to the delay in filing of the Reference, because, according to a number of decisions of this Court, for a Reference to be competent it must be accompanied with copies of Ruling and Drawn Order.

Mr. Mfinanga further submitted that the Ruling and Drawn Order thereof are tainted with illegalities on the face of record. He went ahead to account for all the 31 days of delay from 11/12/2020 which was the date of the Ruling to 07/01/2021 when copies of the same were availed to the applicant. He submitted that after the Ruling he requested, for the first time, copies of the Ruling and Drawn Order on 16/12/2020 and wrote reminders to the Court on 24/12/2010 (sic) and 15/01/2021. He further submitted that he was supplied with the certified copies of the Proceedings and Ruling on 07/01/2021 and spent one (1) working day (that was Friday 08/01/2021) to prepare this Application which he filed on Monday 11/01/2021. He said 09/01/2021 and 10/01/2021 were weekend days.

Following the above submission, Mr. Mfinanga prayed this Court to be bound and guided by the decision reached in **BENEDICT MUMELLO V. BANK OF TANZANIA,** Court of Appeal, Dar es Salaam, Civil Appeal No. 12 of 2002 (unreported) where Hon. Kaji, J. A (As he then was) stated:

> *"In conclusion, we are of the firm view that, the delay to be supplied with copies of proceedings and judgment, and the two copies of decrees containing different material particulars, contributed to the delay by the respondent to appeal within the prescribed period. In that respect, it is our considered view that the delay was with sufficient cause".*

Mr. Mfinanga further submitted that from 11/12/2020 when the Ruling was delivered, the applicant was not idle but was in Court corridors trying to secure necessary documents for purpose of filing his Reference. He invited this Court to the case of **PHILOMENA MANG'EHE t/a BUKINE TRADERS V. GESBO HEBRON BAJUTA,** Court of Appeal, at Arusha, Civil Application No. 8 of 2016 (unreported), where it was stated;

> *"Following the withdrawal of the Application for reference on February 12, 2016, he filed the subsequent application for extension of time on February 29, 2016, within seventeen (17) days from the date of withdrawal.* ***Taking into account the circumstance surrounding this case and the fact that applicant has not been sitting idle,*** *I am of the considered view that good cause has been established". [Emphasis added].*

Mr. Mfinanga argued that in the above cited decision, the Court of Appeal was of the view that spending time in court is a good cause for extension of time. He added that, that was a replica situation in this Application. Mr. Mfinanga further argued that since he was reminding the Court on supply of copies of Ruling, Drawn Order and proceedings but with no response from Court Registry officers, his client should not be penalized. To this end he referred to the decision in **FAMFA OIL LTD V. ATTORNEY GENERAL OF THE FEDERATION AND ANOTHER**, Supreme Court of Nigeria, SC 305/2002 and to the holding of Hon. Mwangesi, J. (as he then was) in **MBOWE HOTELS LIMITED V NATIONAL HOUSING CORPORATION AND ANOTHER,** Misc. Land Application No. 722 of 2016, High Court, Dar es Salaam. These decisions were referred to the effect that,

once a party does what is required under the law, the internal machinery of the Court is beyond his control and he cannot be punished for any shortcomings therein. As such he argued that the duty to prepare and supply to the applicant certified copies of Proceedings, Ruling and Drawn Order was not in the control of the applicant after he had applied for the same.

Regarding the criteria of prospects of succeeding with the dispute and obtaining the relief sought against the other party, Mr. Mfinanga submitted that the applicant stands a good chance of succeeding in the intended Reference due to the fact that there are serious issues of illegalities in the Ruling as per page 5 and 6 of the typed proceedings. He cited four points of the alleged illegality from the proceedings of the Court of 23/11/2020 as (i) Denial of the applicant's right to be heard in the Taxation Cause (ii) applicant was not served with Amended Taxation cause filed by respondent, despite being ordered on 15/10/2020 to do so (iii) applicant was not served with submission in chief supporting the Taxation cause as ordered on 15/10/2020 and (iv) The Court did not pronounce any Order/Ruling as to the service of Amended Taxation Cause and submission in chief after the said issues were raised by the counsel for the Judgment Debtor on 23/11/2020.

To augment his submission, Mr. Mfinanga invited this Court to draw inspiration from the cases of **SHOMARY ABDALLAH V. HUSSEIN AND ANOTHER [1997] TLR 135; NATIONAL HOUSING COPRORATION V TANZANIA SHOES AND OTHERS [1995] TLR 251** and **NDESAMBURO V ATTORNEY GENERAL [1997] TLR 137** where in the letter it was held that;

"The principle of natural justice which required that a person had to be afforded an opportunity to defend himself necessarily implied that the person determining the matter would consider the party's defence before making a decision which affect the right of the party".

He added that the legal effect of denying a party a right to be heard, is that, the decision reached will be nothing but a nullity. He picked his ammunition from the decision in the English case of **GENERAL MEDICAL COUNCIL VS SPACKMAN (1943) AC 627** (at page 644) where the court stated;

"If principles of Natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the depature from the essential principles of Natural Justice. That decision must be declared to be no decision."

Mr. Mfinanga further called to his support the decision of Court of Appeal in **PRINCIPLE SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICE VS D. P VALAMBHIA [1992] TLR 185** where it was stated;

*"....**in our view if 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***

right. *We think that where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute "sufficient reason". [Emphasis added].*

To further augument his point, Mr. Mfinanga referred this Court to the case of **VIP ENGINEERING AND MARKETING LIMITED AND 2 OTHERS v. CITIBANK TANZANIA LIMITED,** Consolidated Civil Reference No. 6,7 and 8 of 2006 (unreported) where Rutakangwa, J. A (as he then was) said the following regarding illegality as a ground for extension of time:-

"It is therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay".

He added that the illegality dealt with by the Court of Appeal in the above quoted decisions was about violation of the right and the wrong interpretation of the laws which, he argued, fits squarely with this Application. He reiterated his argument that the applicant had great chance of success in the intended Reference.

Arguing on the last of the four criteria for granting of extension of time, which is whether or not there will be prejudice to the other party, Mr. Mfinanga submitted that the respondent will not be prejudiced. He referred

to the case of **MOBRAMA GOLD CORPORATION LTD V. MINISTER FOR ENERGY AND MINERALS & 2 OTHERS [1998] TLR 425** where this Court held:-

> *"It is generally inappropriate to deny an extension of time where such denial will stifle his case; as the respondent delay does not constitute a case of procedural abuse or contemptuous default and because the applicant will not suffer any prejudice, an extension should be granted."*

He wound up his submission in chief by stating that the overall guiding principles for granting extension of time were stated by the Court of Appeal in the case of **LYAMUYA CONSTRUCTION COMPANY LTD** (supra) and that the same have been provided for, he thus prayed the application be allowed with costs.

Mr. Mutungi for the respondent, on his part, made his written submission in reply to the applicant's submission in chief. He submitted that the respondent had amended the bill of cost as ordered and served the same to the applicant on 19/10/2020 in purview of Order V. rule 30 (1) of the **Civil Procedure Code [Cap 33 R. E 2019]** as can be seen in Court's records. He argued that for the reasons best known to the applicant, he chose not to file the written submission which he requested. For that reason, he argued, it cannot at any rate be said at this point that the applicant was condemned unheard.

Mr. Mutungi referred this Court to the case of **SAID ABDALLAH KINYANTILI V. FATUMA HASSAN & ANOTHER,** Civil Appeal No. 87 of 2002 (unreported) and the case of **GABRIEL JUNIOR KAMUKARA V. MELINDER SIERRA KAMUKARA,** Misc. Civil Application No. 636 of 2019 (unreported), wherein Hon. J. A De-Mello, J addressing the issue of a party's failure to file written submission on due date, referred to the case of **GODFREY KIMBE V. PETER NGONYANI**, Civil appeal No. 41 of 2014 (unreported) in which the Court of Appeal cited with approval the case of **NATIONAL INSURANCE CORPORATION OF TANZANIA** which held that;

> *"The Applicant did not file submissions on due date as ordered. Naturally,* ***the Court could not be made impotent by a party's inaction****. It had to act. It is a trite law that* ***failure to file submissions is tantamount to failure to prosecute one's case****". [Emphasis added]*

The respondent's advocate thus submitted that, the applicant chose not to prosecute his case and therefore is estopped from demanding the right which he waived voluntarily. He added that Court orders are made to be complied with, failure of which should not be condoned if litigations were to come to an end.

The respondent's advocate reckoned that in application for extension of time, the applicant has to show a good cause to the satisfaction of the Court as per settled law, the applicant has grossly failed to show such a good cause

to warrant enlargement of time. The learned advocate gave five reasons to support his opinion as follows;

Firstly, the applicant was late to file his application for 18 days and not 31 days as submitted but must account for all the 18 days. He argued that according to rule 7 (2) of the **Advocates Remuneration Order, GN No. 264 of 2015** the time started to run upon expiry of 21 days from the date of the decision (ie 1st of January 2021 (sic), if the day of the decision is excluded as per section 19 (1) of the **Law of Limitation Act, [Cap 89 R.E 2019].** He further argued that the applicant has not substantiated, with proof, his contention that the Application was filed on line (e-filing) earlier on 11/1/2021, adding that in the absence of such proof then the date of receipt is the date of filing. To this end he referred to the statement of Hon. Nsekela, J. A (as he then was) in the case of **VJ MSASANI PENINSULA HOTELS LIMITED & 6 OTHERS V. BARCLAYS BANK TANZANIA LIMITED & 2 OTHERS,** Civil Application No. 192 of 2006 (unreported). In this case, it was stated by the learned Justice of Appeal as follows;

> *"My understanding of this sub-rule is that a document is lodged when the fee for lodging it is paid. The exchequer receipt for lodging the counter affidavit was issued on 14.2.2007 and so this is the date when the counter affidavit was lodged".*

Secondly, pursuant to section 19 (2) of the **Law of Limitation Act** (ibid), the time spent in procurement of the copies of the orders for which the Application is sought, is excluded in calculating the time lapse. He thus argued that if this is presumed to be the position of the law then the

application is an abuse of court process because it was preferred prematurely as a dilly-dallying technique. He further argued that the letter by the applicant requesting for the copies of the Ruling and Drawn Order was supposed to be served on the respondent, as a copy, for the provision of section 19 (2) of the **Law of Limitation Act** to come to the rescue of the applicant. He said the respondent was not served with such a letter and she only came to know about the existance of such request for copies of ruling upon service of this Application. He further argued that according to the purported letters, which were annexed to the Application, the respondent was neither copied nor served. To clarify his point, the respondent's advocate referred to the decision of the Court of Appeal in the case of **JACOB BUSHIRI V. MWANZA CITY COUNCIL & 2 OTHERS,** Civil appeal No. 36 of 2019 CAT -Mwanza (unreported), where it was stated that failure to serve the respondent with copy of a letter requesting for copies of Ruling and Drawn Order vitiates the right of exclusion of the period spent in procuring the same. The Advocate added that on the basis of the cited Court of Appeal decision, the applicant is therefore late for 49 days, which ought to be accounted for.

His **third** reason is that Application for Reference against the order of the Taxing Master is exclusively governed by rule 7 of the **Advocates Remuneration Order, GN No. 264 of 2015** and that in his reading of the said rule, he does not find where attachment of the copies of the Ruling and Drawn Order issued by the Taxing Master is made mandatory. He asserts that, it is not mandatory. For this reason, he argues that the applicant's application is unfounded because the applicant has misled himself and has wasted the precious time of the Court and that of the respondent for having

failed unjustifiably to apply for Reference timely. He concluded on this third reason by submitting that, the applicant's struggles if there were any to procure copies of the impugned decision was a wastage because such copies are not necessary to be filed with the application.

The **fourth** reason stated by the respondent's advocate is that the applicant, despite submitting that the Court's delay attributed to his delay to file Reference, he has failed to show, with proof, the exact date he was supplied with the same. He further argues that the proceedings and the Ruling attached to this Application show the same date when they were delivered, without having any Court endorsement, proving that the same were issued to the applicant on 7/01/2021 as alleged.

The **fifth** reason is that where blame for delay is shifted to another authority, as it has happened in this application, an affidavit of an officer of that authority must be filed to the Court to substatiate the delay so caused as per decision in the case of **ISSACK SEBEGERE V TANZANIA PARTLAND CEMENT,** Civil Application No.25 of 2002 (unreported). In this cited application, according to the respondent, the Court considered applicant's claims for delay towards a Court clerk and stated;

> *"Evidence in support of the Applicant's claim against the Court clerk was necessary. The name of the said Court's clerk should have been indicated in one of paragraphs of the affidavit of the learned counsel and that, the application should have been accompanied with the affidavit of the Court Registry Officer duly sworn to that effect".* [Emphasis supplied]

Mr. Mutungi submitted that this decision of the Court was cited and quoted with approval in a recent case of **AIRTEL TANZANIA LIMITED V MISTERLIGHT ELECTRICAL INSTALLATION CO. LIMITED AND ARNORD MULASHANI**, Civil Application No. 37/01 of 2020 (unreported). He conceded to the fact, as submitted by the applicant, that a delay caused by the court was out of the applicant's control, but hastly added, that the same must be substantiated of the Court officers, particularly a Registrar or at least a Registry Officer stating that the alleged delay was, indeed, caused by the Court.

Regarding the issue of illegality of the Taxing Master's decision, the learned advocate for the respondent wouldn't want to deliberate on it at this stage because that ought to be the ground for Reference (if any) He submits that what is required at this stage is for the applicant to show cause for his application for extension of time to be granted. He nevertheless submitted that, the Taxing master was justified in her decision because she satisfied herself that an amended bill of cost which was alleged not served by Advocate Zephania Nicodemus Manyisha (who was holding brief of advocate Sheck Mfinanga) for the applicant (then judgment debtor), was in fact served, and that is why she proceed to fix a date for ruling. For this reason, he holds the view that no illegality was committed.

Mr. Mutungi further submitted that as a matter of a long-established principle of law, the applicant must account for each of all 49 days for which he was late. He submitted that an account of delay is paramount even if it was a single day. He referred to the views of the court in **AIRTEL**

TANZANIA LIMITED V MISTERLIGHT ELECTRICAL INSTALLATION CO. LTD AND ARNORD MULASHANI (supra) where the Court cited with approval the decision in the case of **BUSHIRI HASSAN V. LATIFA LUKIO MASHAYO,** Civil application No. 03 of 2007 (unreported) to emphasize that;

> *"Delay of even a single day, has to be accounted for, otherwise there would be no point of having rules prescribing period within which certain steps have to be taken".* [Emphasis supplied].

On the assertion by the applicant's advocate that the grant of the application won't be prejudicial to the respondent, Mr. Mutungi submitted that this Application is already delaying the respondent to enjoy the fruit of the taxation order. For this reason, he argues that granting of an extension of time to the applicant will cause further delay to the respondent. He added that the costs of prosecuting this application and a Reference, if the extension is granted, all are prejudicial to the respondent. He says that this is none other than delaying technique by the applicant not to pay the respondent timely, as the Court, upon Reference may wish to use its discretion not to review the cost awarded.

In concluding his loaded reply to the applicant's submission, Mr. Mutungi humbly submitted that the applicant has not adduced a good cause to warrant extension of time. He said good cause is peculiar in every case but in this application, a delay to be supplied with copies of the Ruling and Drawn Order and alleged illegality were not substantiated. He further submitted that each day of delay is not accounted for to the required standard; the applicant chose to waive his right to be heard by not filing written submission as

ordered and he is thereby estopped; he further concluded that granting the application for extension of time will be more prejudicial to the respondent who holds more interest in the impugned decision than the applicant. He thus found the application unfounded and baseless and invited this Court to dismiss it with cost.

As was the case in the applicant's submission in chief, and the respondent's Reply submission, the rejoinder was equally loaded. In his rejoinder, Mr. Mfinanga the counsel for the applicant clarified on four main points, namely (i) Allegation that the applicant was duly served with submission in chief, (ii) Allegation as to applicant's failure to append proof for e-filing, (iii) whether attaching the Ruling and Drawn Order in reference Application is not mandatory and, (iv) allegation that the Applicant's advocate did not state when the applicant was issued with the Ruling by the Court.

Rejoining on allegation that the applicant was duly served with submission in chief, the applicant's advocate stated that the applicant was neither served with the amended bill of costs nor with the submission supporting the said bill, as it was ordered by Honourable Deputy Registrar. He rejoined that the respondent was, by law, obliged to produce such proof of service through her counter affidavit but failed to do so.

Mr. Mfinanga challenged the case law authorities submitted by the respondent's advocate. He said that since the respondent did not annex a copy of the unreported case of **SAID ABDALLAH KINYANTAL V. FATUMA HASSAN & ANOTHER** (supra), a negative inference be drawn as to its

existance and relevance. He distinguished the case of **GABRIEL JUNIOR KAMUKARA V MELINDER SIARA KAMUKARA** (supra) with the case in hand by saying that the respondent in the former case himself raised a Preliminary Objection and it was ordered the said objection be disposed by way of written submission, but the respondent failed to file such submission in support of his objection. He said in the instant case, the applicant was not served at all with the amended bill of costs as well as submission in chief hence the applicant was unable to prepare any response. He also argued that in the former case the issue of service was not featured at all, while in the case at hand, the applicant was not served and was thus unaware of the contents of the respondent's amended bill of costs.

Rejoining on the second point, regarding failure by the applicant to append proof for e-filing, he said that the applicant's advocate took only one (1) day to prepare and file the application under consideration. He further stated that once the applicant had lodged his application on-line, the duty to admit or otherwise is strictly in the domain of the Court.

On whether attaching Ruling and Drawn order in a reference application is mandatory or not, the learned advocate for the applicant rejoined that the opinion of the respondent's advocate that it is not mandatory is a mere opinion from the bar because the opinion was not supported by any authority. He reiterated his submission in chief that attaching copies of Ruling and Drawn order in a Reference is a requirement for filing a competent Reference Application.

Regarding the fourth point, on allegation that the applicant's advocate did not state when the applicant was issued with the Ruling by the court, the learned advocate for the applicant referred to paragraph 7 of the affidavit in support of the application where the date of "7th January, 2021 is mentioned. He added that the duty to supply as well as to inform the applicant that the requested documents are ready is vested in the Registrar. In this connection, he referred to the case of **THE REGISTERED TRUSTEES OF ST. ELIZABETH SISTERS AND ANOTHER V. ALIKI FALANGA**, Misc. Land Case No. 97 of 2018 at page 9 where the Court said;

> *"In the view of the above, I find the assertion by Mr. Ngalo that the decree was ready for collection earlier than the time collected by the applicant's counsel unmaintainable.* ***I hold this view because there is no evidence that the Applicant's counsel was informed in time that the copies were ready for collection."*** [Emphasis added].

He also referred to the Court of Appeal decision in **TANZANIA CHINA FRIENDSHIP TEXTILE CO. LTD V CHARLES KABWEZA AND OTHERS**, Civil Application No. 62 pf 2015 at page 8 of the typed Ruling where it was held:

> *"Despite that delay, there is no evidence that the applicant, who applied for inter alia a copy of that order for the appeal purpose, was informed that the copy was ready for collection.* ***The court had a duty of notifying the applicant that the copy was ready for collection. Since that was not done, it would be***

unjust to condemn the applicant for the delay in collecting the document". [Emphasis added].

The learned advocate for the applicant then turned to the case law authority cited by the respondent. He countered that the case of JACOB **BUSHIRI V MWANZA CITY COUNCIL AND 2 OTHERS** (supra) is distinguishable. He argued that the case does not concern application for reference as prayed in the applicant's chamber summons and secondly, it concerns Appeal to the Court of Appeal and application of Rule 90(1) and (2) of the Court of Appeal Rules with regard to criteria to be met for issuance of certificate of delay. He thus prayed the Court not to consider it for lack of relevance and applicability as to taxation reference.

The learned advocate for the applicant expressed his concern that the submission by advocate for the respondent indulged in the merits of the intended reference prematurely. He referred to the case of **THE REGIONAL MANAGER TANROADS LINDI V BD SHAPRIYA AND COMPANY LTD,** Civil application No. 29 of 2012 where the Court of Appeal cited with approval the case of **VICTORIA REAL ESTATE DEVELOPMENT LTD V TANZANIA INVESTMENT BANK AND 3 OTHERS,** Court of Appeal Dar es Salaam Civil Application No. 225 of 2014 (unreported) where at page 15 of the Ruling it was stated;

"It was now settled that a court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate court. This is so in order to avoid making decision of substantive issues before the Appeal itself is heard.

Further to prevent a single judge of the Court from hearing an application by sitting or examining issue which are not his/her purviews".

From the above authority Mr. Mfinanga rejoined that the respondent's advocate is not supposed to delve into the merits of the intended reference at length as he did. He prayed the Court to disregard the submission of the respondent's advocate in this regard. He concluded by praying, seriously, that the application for extension of time be allowed with costs.

In the outset, before determining this application, I feel obliged to commend the efforts and the industry of the learned advocates for Both parties. They have shown a rare commitment and seriousness in arguing this type of application. I have to acknowledge that the submission by both learned advocates was fairly loaded with arguments neatly presented and mostly supported by legal authorities in case law. I therefore uploud the learned counsels for this show off.

Now, having said what I have said, and despite the mighty of the submissions made, this Court has only one issue to determine. The issue is whether the applicant has shown good cause for the Court to grant his application for extension of time to file Reference in respect of the Ruling and Drawn Order of this Court in Taxation Cause no. 08 of 2020 delivered by Hon. E. J. Nyembele, D.R on 11/12/2020 with costs.

Before determining the main issue as framed, I find it imperative to address key arguments raised by the respondent's Advocate in the reply submission which in my opinion are of significant importance and interesting too. **One,** is the argument that the applicant's application could be filed in time if the time spent in procurement of the copies of the orders was excluded pursuant to the provision of section 19 (2) of **the Law of Limitation Act, [Cap 89 RE 2019],** provided that the applicant had served the respondent his letter requesting for copies of the Ruling and Drawn Order as per the cited section 19 (2) and the decision in **JACOB BUSHIRI V MWANZA CITY COUNCIL & 2OTHERS. Two,** the argument that it is not a mandatory requirement to attach copies of the Ruling and Drawn order to an application for reference against the order of taxing master which is exclusively governed by rule 7 of **the Advocates Remuneration Order, 2015**.

The above arguments if held to be true would give raise to a question whether this application needed to be filed at all. This is obviously interesting question given the delay and efforts put in preparation and arguing this application. To deal with these arguments, it is imperative to look at the provision of rule 7 of the **Advocate Remuneration Order, 2015** and section 19(1) of **the Law of Limitation Act, [Cap 89 RE 2019]**.

Rule 7 of **the Advocates Remuneration Order, 2015** provide as follows:

> *"7(1) Any party aggrieved by a decision of the Taxing officer, may file reference to a judge of the High Court.*
>
> *(2)* ***A reference under Oder (1), shall be instituted by way of chamber summons supported by an affidavit and be filed***

within 21 days from the date of the decision". [Emphasis added].

That is what the Order provides in terms of how and when the application for Reference is to be made. It is of interest to examine what section 19(2) of the **Law of Limitation Act** provides and whether it varies the provision Rule 7 of the **Advocates Remuneration Order, 2015** cited above. Section 19 (2) provides as follows:

"19-(2) In computing the period of limitation prescribed for appeal, an application for leave to appeal, or an application for review of Judgment, the day on which the judgment complained of was delivered, and ***the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded".*** [Emphasis Added].

Plainly, section 19 (2) of **the Law of Limitation Act, [Cap 89 RE 2019]** provides for computation of Limitation period for appeal, application for leave to appeal or application for review. the provision of section 19(2) above, is silent about application for revision and application for reference. It is my further view that the exclusion of period of time requisite for obtaining a copy of a decree or order, in the cited provisions is confined only to appeal and review. The exclusion is not related to the period of time requisite for obtaining a copy of decree or order sought to be revised or against which a reference is to be preferred.

With exception that might be set in other written laws, the presumption in the above cited provision of section 19(2), is that record of both decisions to be appealed from or for which a review is sought are in the custody of a court other than the court to which the appeal or application for review is to be determined. In this scenario, I would think, since the decision being sought is to be given by a different court, it becomes imperative to attach a copy of the decision being challenged, as the same may not be in the custody of the appellate court or a court to which the decision is to be reviewed. Where the decision is up for reference in the same Court, in my view, attachment of a copy of such a decision being does not become mandatory.

Again, it is clear that rule 7(2) of **the Advocate Remuneration Order, 2015** and in deed the entire Order, does not make it mandatory for an application for reference to attach a copy of Ruling, Drawn Order or proceedings. The presumption, in my view, is that the Ruling, Drawn Order and proceedings are in the custody of the same Court to which a reference is made. It would be quite unnecessary for the law to mandatorily require furnishing of documents which are in the custody of the same Court where the matter is to be determined. Such documents can be attached only for expediency and a party should not be denied a right to be heard, upon filing his application for reference, only for a reason that he did not attach a copy of the Ruling, Drawn Order or proceedings thereof.

Having said this, I should also state that where a matter is to be determined on appeal or revision by a different Court, it has been an established rule of Court practice, that copies of Judgment, or Order appealed against or sought to be reviewed must be attached.

The above deliberation points out to one conclusion; that as correctly submitted by the Advocate for the respondent, the applicant could be in a position to file his reference timely within 21 days from the date of the decision without necessarily seeking certified copies of the Ruling, or Drawn Order. Rule 7(2) of **the Advocate Remuneration Order, 2015** is clear about how the application is made. It requires a chamber summons and an affidavit to move the judge for reference. The applicant's advocate has submitted in his submission in chief about existance of a number of decisions of this Court that require attachment of the Drawn Order and Ruling for which reference has been preferred. The learned advocate could not provide a single such decision to help this Court as he had meticulously done on the other arguments raised in his submission in chief and rejoinder.

The total effect of the above deliberation is that the applicant has rendered his own application for reference out of time. Therefore, this application for extension of time is needed to be determined by this Court.

In determining this application and being guided by the issue to be determined as framed, I fully subscribe to the criteria set by the Court of Appeal in the case of **LYAMUYA CONSTRUCTION CO. LTD V. BOARD OF REGISTERED TRUSTEES OF YOUNG WOMEN CHRISTIAN ASSOCIATION OF TANZANIA** (supra). The set criteria are; the degree of lateness, the reasons for the lateness, prospects of succeeding with the dispute and obtaining the relief sought against the other party and whether there will be any prejudice to the other party.

Regarding the degree of lateness, it has been submitted that the impugned decision of the Taxation master was delivered on 11/12/2020. The applicant was allowed 21 days therefrom to file his application for reference, that would make the time limit of up to 1/1/2021. Now, from the deadline of 1/1/2021 to 11/1/2021 when this application was filed, the delay was only 10 days. These ten days needed to be justified. It is obvious that the reason for the reason adduced, which attributed to the delay in filing the reference to the delay in issuance of the certified copies of Ruling and Drawn Order does not hold any water. As we have said in the foregoing deliberation, the attachment of certified copies of the Ruling and Drawn Order was not mandatory. There was misguidance in this aspect. The reason adduced in therefore as good as pleading ignorance of law. As such while the degree of lateness of 10 days could be tolerated with proper justification the reason thereof is not acceptable. That takes care of both the degree of lateness and reasons for lateness.

Regarding the third criteria, which is the prospects of succeeding in the intended reference, the applicant has pleaded existance of serious issues of illegality in the Ruling of the Taxation officer. He has made reference to page 5 and 6 of the proceedings and mentioned four items where he alleges the Hon. Deputy Register committed such illegalities. He alleges that there is a denial of applicant's right to be heard, applicant was not served with amended Taxation cause and submission in chief supporting the Taxation cause and silence of the Court with regard to the issue of service of amended Taxation cause and submission in chief.

I have also considered the reply submission of the counsel for the respondent. He has vehemently challenged the allegation of illegalities. I would not wish to comment anything about the partie's submission on this issue. I am very alive to the caution made by the Court of Appeal in the case of **THE REGIONAL MANAGER TANROADS LINDI V. DB SHARPIYA AND COMPANY LTD** (supra) which cited with approval the case of **VICTORIA REAL ESTATE DEVELOPMENT LIMITED Vs. TANZANIA INVESTMENT BANK AND 3 OTHERS** (supra). The said decisions were submitted to this Court in the rejoinder submission to the effect that a Court hearing an application like the one before me, should restrain itself from considering substantive issues to be dealt with by a judge who will determine the application for reference.

The heated argument on the issue of illegalities as submitted by advocates of both parties reveal to me that indeed there are triable issues of illegality to be considered in the intended reference. It is for this reason I find merit in this application. In so deciding, I am guided by the decision of the Court of Appeal in the cited cases of **PRINCIPLE SECRETARY, MINISTRY OF DEFENCE & NATIONAL SERVICE V. D. P. VALAMBHIA [1992] TLR 185** where the Court of Appeal stated;

> *"...in our view if 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 right.* ***We think that where, as here, the point of law at issue is illegality or otherwise of***

the decision being challenged, that is of sufficient importance to constitute "sufficient reason" [Emphasis added].

With above cited guidance, to which I fully subscribe, I find that the applicant has adduced sufficient reason to allow this application. Having so held, I find no reason to labour on the remaining criteria regarding prejudice. I however appreciate the submission of the learned counsel for the respondent that indeed there will be prejudice to the respondent from the grant of extension of time. However, once the end of justice so requires that issues of illegalities be given space to be ascertained, the prejudice to the respondent should, in this case, be seen to be tolerated by law.

In the upshot I allow the application. The Applicant has 21 days from the date of this ruling to file his reference.

Costs to follow events.

It is so ordered.

ABDI S. KAGOMBA
JUDGE
10/11/2021