

**IN THE HIGH COURT OF TANZANIA
(IN THE SUBREGISTRY OF MWANZA)**

AT MWANZA

MISCELLANEOUS CIVIL APPLICATION NO.122 OF 2022

DOMINITA KAIHURA.....APPLICANT

VERSUS

NICKSON PATRICK.....RESPONDENT

RULING

Date of Last Order: 24/02/2023

Date of Ruling: 03/03/2023

Kamana, J:

This is an application for extension of time to file a reference out of time to this Court against the Ruling of Nyamagana District Court in the Bill of Cost No. 7 of 2022. In the said matter, the Applicant Dominita Kaihura was not pleased with the decision of taxing Tshs. 2,140,000/- as costs in favour of Nickson Patrick, the Respondent.

Briefly, the Respondent sued the Applicant in Civil Case No. 492 of 2020 at Mwanza Urban Primary Court whereby the former claimed from the latter a total of Tshs. 12,000,000/- for a breach of contract. After hearing the parties, the trial Court concluded that the Respondent had proved his claims against the Applicant to the tune of Tshs. 2,804,500/-.

Dissatisfied by such decision, the Applicant preferred an appeal at Nyamagana District Court. Thereat, the District Court upheld the decision of the trial Court and proceeded to dismiss the appeal with costs.

Following the decision of the District Court, the Respondent filed an application for Bill of Cost at the same Court. On 21st September, 2022, the Court ordered that the Respondent should be paid Tshs.2, 140,000/- as costs. Such decision did not amuse the Applicant, hence this application for extension of time to file a reference out of time to this Court with a view to challenging the decision.

During the hearing of this application, both parties were unrepresented. At their instance and with a leave of this Court, the application was argued by way of written submission.

Submitting in support of the application, the Applicant prefaced by recognizing the discretionary powers of this Court to extend time judiciously. The Applicant insisted that the discretionary powers of this Court in relation to extension of time are exercised upon demonstration of sufficient and reasonable causes which depend on the circumstances of the case. To buttress her position, the Applicant invited this Court to

consider the case of **Kiriisa v. Attorney General and Another** [1990-1994] EA 258.

With regard to the application, the Applicant contended that the underlying reason behind the application is illegality of the impugned Ruling. She averred that since the subject matter of the appeal at the District Court was Tshs.2,804,500/-, the said Court did not have any justification to tax the bill of cost from Tshs.12,000,000/- which was subject matter at the trial Court. The Applicant argued that according to 9th Schedule of the Advocates Remuneration Order, 2015 (GN No. 263 of 2015), the taxing officer was supposed to tax the bill of costs from Tshs. 2,804,500/- and not from Tshs. 12,000,000.

The Applicant summed up her submission in chief by contending that illegality in itself is a sufficient ground for extension of time. To bolster her position, she referred this Court to the cases of **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015, **Principal Secretary, Ministry of Defence and National Service v. Devram Valambia**, [1991] TLR 387, **VIP Engineering and Marketing Limited and Three Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No.6,7 and 8 of 2006 and **Sabena Technics Dar Limited v. Michael J. Luwunzu**, Civil

Application N0.451/18 of 2021. In view of that, the Applicant beseeched this Court to grant her application taking into consideration that the illegality complained of is on the face of the record.

Responding, the Respondent submitted that what constitutes instruction fee is the value of the subject matter which he termed it to be the value of the original claim and not the value of the money awarded by the Court after original claim being litigated. In that case, he was of the view that the Court was right in taxing the bill of cost as per item 3 of the 9th Schedule of the Advocates Remuneration Order, 2015.

The Respondent argued further that taxing of costs is the domain of taxing officer exercised at his discretion. He averred that courts may interfere into that discretion if the same is exercised injudiciously. In substantiating his position, the Respondent cited the cases of **The Attorney General v. Amos Shavu**, Taxation Reference No. 2 of 2000 and **Preimchand Raichand Ltd and Another v. Quarry Services of East Africa Ltd and Other (No.3)** [1972] 1 EA 162.

On the issue of illegality, the Respondent contended that the same must be on the face of the record. It was his submission that there was no illegality in the decision of the taxing officer as reasons for awarding

Tshs, 2,140,000/- were furnished as the same includes instruction and appearance fees.

In summing up, the Respondent implored this Court to consider that the Applicant has failed to account for each day of delay. In that case, he was of the opinion that the Applicant is short of sufficient reasons for his delay. In buttressing his position, the Respondent invited this Court to consider the cases of **Morris Shepea v. Rafael Lenesira Mollel**, Misc. Land Application No.45 of 2021, **Wambele Mtumwa Shahame v. Mohamed Hamis**, Civil Reference No.8 of 2016 and **Ngao Godwin Losero (Supra)**.

In his rejoinder, the Applicant reiterated her position in submission in chief.

Having heard the rival arguments, the issue for my determination is whether the application is meritorious or otherwise. According to Order 7(2) of the Advocates Remuneration Order, 2015 (GN No. 263 of 2015), a person who is not pleased by the decision of the taxing officer is at the discretion of referring the matter to the High Court within 21 days from the date of the impugned decision. The said Order stipulates:

'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 order (1), shall be instituted by way of chamber summons supported by an affidavit and be filed within 21 days of from the date of the decision.

(3)

(4)'

From the records, the impugned decision was delivered on 21st September, 2022. This means that the reference to the High Court was supposed to be filed not later than 12th October, 2022. However, that was not the case hence this application which was filed on 25th October, 2022 almost 13 days from the deadline.

Both parties were in agreement that this Court is clothed with the discretionary powers to judiciously extend the time to make a reference out of time to this Court. This position has been enunciated in multitudinous decisions-**see: In Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010; **Metro Petroleum Tanzania Limited and 3 Others v. United Bank of Africa**, Civil Appeal No. 147 of 2019; and **EPDB Construction**

Company Limited and 2 Others v. CRDB Bank PLC, Civil Reference No. 3 of 2016.

For such powers to be exercised in favour of the Applicant, he is required to advance “good cause” as to his delay in taking the action in relation to the application for extension of time. As rightly contended by the Respondent, there is no a clear cut definition of what constitutes “good cause”. In that case, determination of what amounts to “good cause” is the prerogative of the Court after taking into consideration various factors. These factors include the reasons for the delay, lengthy of delay, diligence of the Applicant and so on. The Court of Appeal had this to say when determining whether the Applicant furnishes good cause to warrant extension of time in 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:

‘As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private

opinion or arbitrarily. On the authorities however, the following guidelines may be formulated: -

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

(b) The delay should not be inordinate;

(c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take;

(d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.

From the affidavit deposed by the Applicant, it is crystal clear that the only reason advanced by the Applicant is the illegality of the Ruling. The affidavit avers nothing with regard to reasons for delay. In that case, I had to delve on whether there was illegality in the said Ruling and if the answer is in affirmative, whether such illegality warrants extension of time.

As a matter of general principle, illegality constitutes a good cause for extending time. This position was taken by the Court of Appeal in the

case of **Principal Secretary, Ministry of Defence and National Service v. Devram Valambia (Supra)** where it was asserted:

'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.'

While one may celebrate this liberal approach, the highest Court of the land was and is mindful of the danger of leaving the flood gate open as it may lead to endless litigation. In the cited case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, the Court of Appeal stated:

'Since every party intending to appeal seeks to challenge a decision either on points of law or fact, it cannot in my view, be said that in VALAMBHIA's case, the Court meant to draw a general rule that every applicant who demonstrate that his intended appeal raises points of law should as of right, be granted extension of time if he

applies for one. The Court there emphasized that such point of law, must be that "of sufficient importance" and I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process.'

According to paragraphs 5, 6 and 7 of the Applicant's affidavit, the taxing officer exercised his powers by taxing the Bill of Costs basing on the Respondent's claim in the Primary Court which was Tshs.12,000,000/- and not Tshs.2,804,500/- which was awarded by the Primary Court and challenged by the Applicant in the District Court. In her averments, the Applicant was of the view that such taxing was tainted with illegality. On the other hand, the Respondent conceded that the trial Court awarded him Tshs.2,804,500/- and he defended such decision of Primary Court in the District Court. However, he is of the firm view that the Taxing Officer was right in taxing the Bill of Costs.

In my opinion and without prejudging, the Applicant has managed to establish the existence of illegality in the impugned Ruling which does not require long arguments to prove. Being alive with the principle that illegality in itself when is on the face of record may constitute a

sufficient cause for extension of time, I grant the application. The Applicant may file her reference within 10 days from the date of this Ruling. I order the costs of this application to follow event in the reference. Order accordingly.

DATED at MWANZA this 3rd day of March, 2023.



KS KAMANA

JUDGE