

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA DISTRICT REGISTRY**

**AT MBEYA**

**MISC. LAND APPLICATION NO. 32 OF 2023**

(Arising from Taxation Cause No. 35 of 2021, and Original Land Case No. 8 of 2021 in the High Court of Tanzania at Mbeya)

**SHIMALANGWADA ESTATE COMPANY.....APPLICANT**

**VERSUS**

**NMB BANK PLC.....RESPONDENT**

**R U L I N G**

***Date of last order: 20/06/2023***

***Date of Ruling: 11/07/2023***

**NDUNGURU, J.**

This is an application by way of chamber summons for extension of time within which to file reference out of time against the decision of the Taxing Master in Taxation Cause No. 35 of 2021. The application is

predicated upon Order 8 (1) and (2) of the Advocates Remuneration Order, 2015 G.N No. 264 of 2015 and it is supported by an affidavit duly sworn by one, George Herman Nzunda, the applicant's Principal Officer. In other side, the respondent vehemently opposed the applicant's application through the counter affidavit duly sworn by one, Heri Nyambo, the respondent's Principal Officer.

For better understanding of the essence of this application, I find it pertinent to briefly narrate the background of the matter before me, as discerned from the affidavits filed for and against the application together with the documents attached thereto is as follow: The applicant was the judgment debtor in Taxation Cause No. 35 of 2021 before this Court and the ruling was delivered on 17<sup>th</sup> day of February 2023 and the taxed amount in respect of the stated Taxation Cause was Tshs. 21,550,000/= out of the claimed amount of Tshs. 233,255,585.9/=. Also, the record reveal that, the applicant failed to lodge her reference timely due to the reason that, one of her directors named Suzy George Nzunda was very serious sick and she attends for medication examination at Muhimbili Hospital. As the result, the applicant failed to make any decision in respect

of the said ruling in the Taxation Cause in her absence hence the instant application for extension of time.

When the application came up for hearing before me, the applicant was represented by Ms. Mary Gatuna, learned advocate, whereas the respondent enjoyed the services of Mr. Baraka Mbwilo, learned advocate. The matter was disposed of by way of oral submissions.

In her submission, Ms. Gatuna commenced her submission by adopting the affidavit to form part of her submission. She went on to submit that, they challenge the content of affidavit in reply filed on 20<sup>th</sup> day of June 2023, save for the paragraphs which did not dispute the affidavit. She also elaborated that, it is the position of law that the party who is seeking for extension of time has to advance good cause for the Court to exercise its discretion. To buttress her submission, she referred this Court to the case of **Murtaza Mohamed Raza Virani & another v Mehboob Hassanali Versi**, Civil Application No. 448/01 of 2020, CAT at Dar es Salaam (unreported).

She continued to submit that, the applicant failed to lodge an application for reference within 21 days as required by the law due to the

sickness of one of the directors one, Suzy George Nzunda and the admission sheet for sickness is attached to the affidavit. She cited the case of **Murtaza Mohamed Raza Virani & another** (supra) to the effect that, sickness is the sufficient cause for the Court to grant extension of time. She added that, Suzy George Nzunda is one of the directors her presence was very important in decision making against the intended to be challenged ruling.

It was also submitted by Ms. Gatuna that; it is the position of the law that the company cannot file the case without the board resolution. To cement her contention, she cited the case of **Simba Papers Convertes Limited v Packaging and Stationery Manufactures Limited & another**, Civil Appeal No. 280 of 2017, CAT at Dar es Salaam (unreported). Again, she argued that, since the applicant is a company, it spends sometimes to communicate with members so as to see the convenience and set a date for the meeting, that why it spent the time from 17<sup>th</sup> day of May 2023 up to 19<sup>th</sup> day May 2023 only three days.

She further demonstrated that, the applicant spent few days to study the case and prepare the required documents. To reinforce her

submission, she referred this Court to the case of **Murtaza Mohamed Raza Virani & another** (supra) to the effect that, the time spent for drawing documents are excluded in counting each day of delay. She added that, the applicant neither negligently or deliberately failed to file the application on time. Finally, she prayed the Court that, the application be granted.

In opposing the application, Mr. Mbwilo began by adopting the affidavit to form part of his submission. He then responded to the arguments advanced by Ms. Gatuna by submitting that, this application has no merit because of the following reasons:

One, the applicant in this application was not the part in the Taxation Cause No.35 of 2021. He added that, the record shows that, the judgment debtor was SHIMILANGWADA ESTATE COMPANY LTD while the applicant in this application is SHIMILANGWADA ESTATE COMPANY. It was also argued by Mr. Mbwilo that; the company is identified in its registered name. He cited the case **Mustapha Lyapanga Msovela v Tanzania Electric Supply Co. Ltd Iringa Regional Manager & another**, Civil Appeal No. 16 of 2020, HC at Iringa (unreported) to bolster his argument.

Second, the main reasons advanced by the applicant are two. Regarding, the ground of sickness of Suzy George Nzunda, Mr. Mbwilo contended that, there is no affidavit of the said Suzy George Nzunda to confirm that it is true that she was sick. He added that, sickness is condition experience by sick person it is not a shared experience. To reinforce his contention, he referred this Court to the case of **Murtaza Mohamed Raza Virani & another** (supra). It was also argued by Mr. Mbwilo that, the law requires the deponent who mentioned the other person in the affidavit must as well swear affidavit to the fact which he is referred to. He also cited the case of **Elihaki Giliad Mbwambo v Mary Mchome Mbwambo & another**, Misc. Civil Application No. 449 of 2019, HC at Dar es Salaam (unreported). He further argued that, since there is no affidavit of Mary Gatuna and Suzy George Nzunda, what is stated in the filed affidavit remains to be hearsay which cannot be acted upon.

He continued to submit that, the deponent in the verification clause, has failed to disclose the source of information found on paragraph 5, 6, 7, and 8. He went on to submit that, there was no need for resolution since this application is not filed on behalf of the company and is between the

director and the company. He added that, the Advocates Remuneration Order of 2015 does not require the applicant to seek resolution to file such an application. This is not a fresh suit. Mr. Mbwilo also stated that, the case of **Simba Papers Convertes Limited** (supra) is distinguishable to the fact of this case. Again, he demonstrated that, there is no evidence to prove that the content of paragraph 9 like an advertisement or notice of the meeting. More so, he submitted that, the hard copies were presented on 25<sup>th</sup> day of May 2023 while the verification clause is said to have done on 25<sup>th</sup> day of May, 2023. In conclusion, he prayed the Court that, the application be dismissed with costs.

In her rejoinder, Ms. Gatuna reiterated his submission in chief. She went on to submit that, as regards the submission that the applicant was not a party in Taxation Cause No. 35 of 2021, that issue is very minor the missing of the word "*Ltd*" is just a slip of pen but the parties are the same. She added that, the error of omission of the word "*Ltd*" can be cured under section 3A of the Civil Procedure Code (Cap 33 R.E. 2019) together with Article 13A of the Constitution. In respect of the fact that, Suzy George Nzunda was required to swear the affidavit; it was submitted by Ms.

Gatuna that, the applicant is a company, medical report of Suzy George Nzunda is part of their submission so it was not necessary for her to swear the affidavit and the affidavit of George Herman Nzunda was enough to justify the sickness of Suzy George Nzunda.

She continued to submit that, it is true that sickness is experience by the sick person, but they insist that Suzy George Nzunda was seriously that is why she failed to appear or make decision for resolution. She also contended that, counsel for the respondent did not state why Mary Gatuna had to swear affidavit. She added that, there is no need for her to swear affidavit because deponent in para 12 of the affidavit states that he got information from the advocate which he believed to be true. She referred this Court to the case of **Mustapha Lyapanga Msovela** (supra) at page 9 para 2, to the effect that, each case must be determined on its own pecuria facts.

As regards to the need of board resolution, she maintained her submission in chief. She also referred this Court to the case of **Murtaza Mohamed Raza Virani & another** (supra) at page 20-21 to support her submission. About notice/advertisement of meeting, she submitted that,



the board resolution is enough to prove that the meeting was conducted and the resolution was passed.

In relation to when the drafting and filing that is not at issue the record is very clear if the Court clerk made a mistake is not the applicant's fault. She added that, the date of receipt is the date of filing, the receipt of the application is dated 26<sup>th</sup> day of May 2023.

Having scanned the oral submissions made by the parties, pleadings and the Court's record, the central issue for determination is whether the applicant has established a good cause for extension of time.

In the first place, I wish to state that, it is a well-established rule of practice that, in order for the Court to exercise its discretionary power in extending time, good cause for the delay must be shown by the applicant. However good cause has not been defined. It is therefore up to the applicant to sufficiently convince the Court that good cause exists. That, this is well emphasized in the case of **Caritas Kigoma vs. Kg Dewsi Ltd.** (2003) T.L.R 420 at page 421 where the Court of Appeal of Tanzania held that:

*"In an application for extension of time, the question to be considered is whether sufficient cause has been shown by the applicant for the delay in applying to set aside the ex-parte judgment."*

At this point of determination, it is very important to reproduce Order 8 (1) of the Advocates Remuneration Order, 2015 which provides that:

*"The High Court may, subject to order 7 extend the time for filing a reference upon sufficient cause."*

It is apparent from the wording of provision of the law cited above that, the Court may extend time upon the good cause advanced by the applicant. Also, I am aware of the current law that, the applicant has a duty to the Court account for each day of delay. See **Bushiri Hassan Versus Latifa Lukio Mashayo**, Civil Application No. 3 of 2007, Court of Appeal of Tanzania (unreported) where the Court held 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."*

Before I proceed any further, I feel profoundly to address the three issues raised by the counsel for the respondent when opposing this application. In his reply submission, counsel for the respondent raised the three issues namely; first, none disclosure of the source of information in the verification clause, second, filing date and verifying date, and third, misspelt of the name of the applicant.

In fact, counsel for the respondent was required to raise a preliminary objection and not through the back door. Indeed, I agree with Ms. Gatuna that, the issue of misspelt of the name of the applicant is not fatal and curable under the overriding objective principle. On the same foot, even the issue of none disclosure of the source of information in the verification clause as well as filing date and verifying date are curable under the same principle. I therefore overrule the issues.

Now, turning to the merit of this application, I will start with the issue of sickness as ground of extension of time. It must be noted that, it is settled law that sickness is a sufficient ground of extension of time, it is also trite law that a person alleging existence of certain fact is duty bound to prove that fact exists. It must also be noted that, the ground of sickness

is proved by medical evidence and the applicant has to show how sickness barred him from filing either appeal or application on time. See the case of **Willium Odemba Ater v Magreth Jonah**, Misc. Land Application No. 60 of 2020, HC at Musoma (unreported).

Again, I concur with counsel for the parties that, sickness is condition experience by sick person, it is not a shared experience. That was the observation in the case of **John David Kashekya v The Attorney General**, Civil Application No. 1 of 2012, CAT (unreported) where the Court observed that:

*".....Sickness is a condition which is experience by the person who is sick. It is not shared experience. Except for children who are not yet in a position to express their feelings, it is the sick person who can express his/her condition whether he/she has strength to move, work and do whatever kind of work he is required to do".*

In the instant case, the affidavit in support of the application sworn by George Herman Nzunda and not by Suzy George Nzunda who was allegedly sick. On that regard, I agree with Mr. Mbwilo that, there was a

need for the said Suzy George Nzunda to swear affidavit to prove her sickness and not otherwise. Indeed, in number of times this Court and Court of Appeal held that an affidavit of a material person had to be filed to explain the delay. See the case of **Phares Wambura & 15 others v Tanzania Electric Supply Company Limited**, Civil Application No. 186 of 2016, CAT (unreported).

As the Civil Procedure Code require that, an affidavit to be depone by person who having knowledge of the facts, the affidavit of Suzy George Nzunda could have been useful to substantiate her sickness. I hold so because sickness is condition experience by sick person, it is not a shared experience. Apart from that, the applicant company have directors, shareholders, the company secretary and other principal officers who can act and file reference for the applicant company. In the premises, I find out this ground has no merit.

In relation to the issue of board resolution, it is my finding that, there was no need for board resolution in order the applicant to file the present application. I hold so because now it is settled law that, the board resolution would be necessary where the suit involves a dispute between a

company and one of its shareholders or directors, which is not the case in the instant application. See the case of **Simba Papers Convertes**

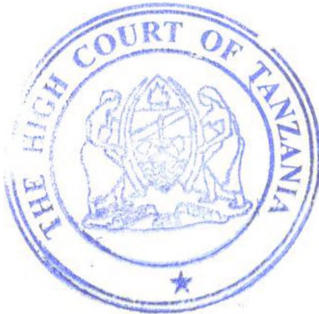
**Limited v Packaging and Stationery Manufactures Limited & another** (supra). Therefore, I finding this reason of no merit.

Regarding the issue of time spent for drawing documents, in her submission the counsel for the applicant demonstrated that, from 22<sup>nd</sup> day of May 2023 up to 25<sup>th</sup> day of May 2023 the applicant spent such time for drawing the necessary documents to file this application. It is my finding that, this issue also cannot detain me much because even if the time spent for drawing documents by the applicant would be excluded still the applicant failed to account almost 92 days for the delay from the date of delivery of decision i.e. on 12<sup>th</sup> day of February 2023, to the date alleged spent for drawing documents. On that regard, also this ground has no merit.

In the upshot, it is my well-considered view that the applicant has not shown good cause for the delay to warrant this Court exercise its discretion to grant the extension of time sought. Consequently, I find this

application wanting in merit. No order as to costs on the reason that the instant case emanate from the taxation cause.

It is so ordered.



  
**D. B. NDUNGURU**

**JUDGE**

**11/07/2023**