

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR-ES-SALAAM

MISCELLANEOUS APPLICATION NO.155 OF 2022

(Arising from Taxation Cause No.21 of 2021)

FIROZ HAIDERALI JESSA.....1ST APPLICANT

SALIM HAIDERALI JESSA2ND APPLICANT

NASIRI HAIDERALI JESSA.....3RD APPLICANT

VERSUS

DIAMOND TRUST BANK (KENYA) LTD.....RESPONDENT

RULING

Date of the Last order: 03/04/2023

Delivering this Ruling: 12/05/2023

NANGELA, J.:

This is an application for extension of time within which to file a reference application. It has been brought by way of a chamber summons filed under Order 8(1) and (2) of the Advocate Remuneration Order, 2015, GN No.264 of 2015 and section 95 of the Civil Procedure Code, Cap.33 R.E 2019 and any other enabling provision of the law.

The application is supported by an affidavit of Mr. Reuben Robert, the Applicant's advocate and, the applicants seek for the following orders:

1. That, this honourable Court be pleased to extend time within which the Applicants herein can make an application for the reference to the High Court Judge against the order of this Court, Hon. H.S. Mushi, the Deputy Registrar, dated 01/07/2021 in Taxation Cause No.21 of 2021.
2. Costs of this Application be provided for.
3. Any other relief and further order as the Court may deem fit to grant.

When this application was called on for its hearing, the Applicants enjoyed the legal services of Mr. Reuben Robert, learned advocate while Mr. Laurent Leonard, learned advocate as well, appeared for the Respondent. The parties agreed and prayed to have this application disposed of by way of written submissions, a prayer which this Court accepted and issued a

schedule of filing such submissions. The parties having filed their submissions as instructed by this Court, I will therefore go through such submissions before I render my verdict on the prayers.

Submitting in support of the application, Mr. Reuben, submitted that, the parties herein were initially parties in Commercial case No. 62 of 2017 which was struck out with costs at the preliminary stages of the case, on 16th February 2021.

Following the striking out of the suit, the Applicants lodged Taxation Cause No.21 of 2021 which was set for hearing on the 1st July 2021 and got dismissed for want of prosecution owing to the absence of the Applicants' advocate, hence this application for extension of time within which to challenge the dismissal order by way of reference.

Adopting the contents of the supporting affidavit, Mr. Reuben submitted that, the delay to file the reference resulted from technical-delay as amplified in paragraphs 1,2,7,8,9,10,11 and 12 of the applicants' affidavit in support of this application. In support of this point reliance was placed on the cases of

Fortunatus Masha vs. William Shija and Another [1997] TLR 154; **Yara Tanzania Limited vs. DB Shapriya and Co. Ltd**, Civil Application No.498/16 of 2016 (unreported) and **Elly Peter Sanya vs. Ester Nelson**, Civil Appeal No.151 of 2018 (unreported).

Mr Reuben contended further that; the impugned decision of the Taxing Officer is tainted with illegality warranting the intervention of this Court as disclosed in paragraph 13 of the Applicants' affidavit in support. He argued that, such illegality is apparent since, in light of the current position of the law, the Taxing officer ought not dismiss the bill of costs due to non-appearance of the advocate and that constituted an illegality.

To support his submission on that point, he relied on the decisions of **Juma Mganga Lukobora and Others vs. Tanzania Medicine and Medical Devices Authority (TMDA) and Another**, Misc. Civil Appl. No. 642 of 2020; **Salum Suleiman Ally vs. DTB Tanzania Ltd**, Reference No.7 of 2021 (unreported); **Principal Secretary, Ministry of Defence and National Service vs. Devram Valambia** [1992] TLR 185; **Vodacom Tanzania vs. Innocent Daniel**

Njau, Civil Appeal No.60 of 2019 (unreported) and **Arunaben Chaggan Mistry vs. Nausha Mohamed Hussein and 30Others**, Civil Application No.6 Of 2016.

Mr. Reuben contended as well that, the Applicants have been diligent and prompt in filing and prosecuting several applications, including this application for extension of time. He relied on facts disclosed in paragraph 14 of the affidavit filed in support of this application and he surmised that, the Respondent will not be prejudiced. As such, he urged this Court to grant the application.

In response to the Applicants' submission, Mr. Leonard, the learned counsel for the Respondent commenced his submissions by adopting the affidavit filed in opposition to the application. He submitted that; the **Taxation Cause No.21 of 2021** was dismissed for want of prosecution following a non-appearance.

He admitted, however, that, subsequent to the dismissal orders, the Applicant filed further applications, i.e., **Misc. Commercial Cause No.96 of 2022** seeking for restoration of the **Taxation Cause No.21 of 2021** and **Reference No.01**

of 2022 which was struck out for being time barred. He contended that; this current attempt amounts to an attempt to take a second bite of the cherry.

He contended that; the alleged technical delay is not but a result of negligence on the part of the Applicants who failed to approach an appropriate forum. He contended that, the previous applications were found to be incompetent and that cannot be regarded as a technical delay.

He submitted further that, the Applicants lacked diligence as well, looking at the previous applications as the Taxation Cause was dismissed for want of prosecution, and the **Misc. Commercial Cause No.96 of 2022** was dismissed for being premised on a wrong provision and in a wrong forum while the **Reference No.1 of 2022** was struck out for being time barred.

He concluded that, there can be no technical delay and no good cause to warrant extension of time. He placed reliance on the decision of this Court in **Rosemary Katunzi vs. Oscar Mhagama and Another**, Misc. Land Application No. 230 of 2021 (unreported).

Mr. Leonard submitted as well that, negligence or fault of an advocate is not an acceptable ground for granting extension of time. He relied on the decision of the Court of Appeal in the case of **Jubilee Insurance Company (T) Ltd vs. Mohamed Sameer Khan**, Civil Application No.439/01 of 2020 (unreported), **Exim Bank (T) Ltd vs. Jacqueline A. Kweka**, Civil Appl. No.348 of 2020 (unreported) and **Omar Ibrahim vs. Ndege Commercial Services Ltd**, Civil Application No.83 of 2020 (unreported).

Referring to Order 7(1) and (2) of the Advocates Remuneration Order, 2015, he submitted that, reference to the High Court must be within 21 days from the date of the decision of the Taxing Officer.

He contended that, from the time when the Taxation Cause No. 21 of 2021 was dismissed on the 1st of July 2021 to the time of filing of the present application on the 14th of September 2022 is about 15 months. Citing the cases of **Karibu Textile Mills Ltd vs. Commissioner General of TRA**, Civil Appl. No.192/20 of 2016, (unreported), and **Bushiri Hassan vs. Latifa Lukio Mashayo**, Civil Appl. No.3 of 2007,

(unreported), he submitted that, as a matter of principle, each day of delay must be accounted for.

As regards the alleged issue of illegality, it was Mr. Leonard's submission that, such ground is non-existent because the Taxing Officer acted within his mandate and dismissed the Taxation Cause No.21 of 2021. Citing Order 68 of the Advocates Remuneration Order, 2015, he submitted that, the Taxing Officer was justified to proceed *ex-parte* in default of appearance of either or both parties or their advocates.

He argued that, much as the Taxing Officer can determine a taxation cause so can he equally order its dismissal. He relied on the case of **TOL Gases Limited vs. Chang Qing Int. Investment Ltd**, Misc. Commercial Application No.215 of 2018 (unreported). He contended that, there was nothing like an illegality since the matter which the Applicant seeks to re-open was conclusively dealt with by this Court in Reference No.1 of 2022 which was dismissed for being time barred.

To support his contention, he relied on section 3(1) of the Law of Limitation Act, Cap.89 R.E 2019. I think I need to state here that, the issue at hand is not **Reference No.1 of 2022**

but **Taxation Cause No. 21 of 2021**. As such, I do not find how the discussion regarding section 3(1) of Cap.89 R.E 2022 comes in or the relevance of the case of **Jubilee Insurance Company (T) Ltd vs. Sofia Mlay & 14 Others**, Civil App. No.31 of 2008 (unreported).

As regards the issue of being prejudiced, the counsel for the Respondent submitted that, by continuing to incur costs, the Respondent is, as well, being prejudiced. He urged this Court to dismiss this application.

By way of rejoinder submission, the Applicants' counsel re-joined by refuting the Respondent's submissions that, the applicants were negligent. He asserted that, there is a misconception on the part of the Respondents' counsel regarding what technical delay means. He reasserted reliance on the case of **Fortunatus Masha** (supra) and **Yara Tanzania** (supra).

Mr. Reuben distinguished **the Jubilee Insurance Company (T) Limited vs. Mohamed Sameer** (supra) arguing that, the case is inapplicable since the advocates involved had wasted considerable time which was unaccounted

for while in this present application the gist of it is the dismissal order of the Taxing Officer contrary to what the law provides. Likewise, he argued that, the other cited cases by the Respondent were also inapplicable and irrelevant.

Mr. Reuben was of the view that, the **TOL Case** (supra) was distinguishable because the Court was not invited to discuss about the jurisdiction of the Taxing Officer to dismiss a bill of costs for want of prosecution. He reasserted his reliance on the **Juma Maganga Lukobora's case** (supra) and urged this Court to grant the application.

Having carefully gone through the rival submissions, the issue to respond to is whether the application before me has any merit in it. As I pointed out earlier, this application is one for extension of time within which the Applicant, if granted, will file a reference application to challenge the decision of the Taxing Officer dated 01st of July 2021.

It is trite law that in granting an application like the one before me, the applicant must disclose sufficient good cause which will convince the Court to grant the prayers sought. Besides, any delay, even for a day, must be sufficiently

accounted for. There is a number of cases which have cemented the requirement of accounting for every day of delay.

Examples of such decisions of the Court include the cases of **Bushiri Hassan vs. Latifa Lukio, Mashayo**, Civil Application No. 3 of 2007 (unreported), **Karibu Textile Mills vs. Commissioner General (TRA)**, Civil Application No. 192/20 of 2016 (unreported), and **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) and the cited case of **Zuberi Nassor Moh'med** (supra).

In addition, illegality is as well a sufficient ground for allowing an application for extension of time, and such illegality, however, must be on the face of the record. See the cases of **Lyamuya Construction Ltd** (supra) and **Principal Secretary Ministry of Defence and National Service** (supra). In this application the alleged illegality is tied to the exercise of jurisdiction of the Taxing Master which the applicant seeks that it be examined to see as to whether it was properly exercised or not. That is not the task of this Court for now but in my view, it does carry sufficient weight to allow this application.

That being said, I see no need to waste more energy in dealing with the rest of issues raised in the submissions filed before me, since that single point is sufficient because, in the case of the **Principal Secretary, Ministry of Defence and National Service** (supra), the Court of Appeal was of the firm view that:

"[W]hen 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."

The same was reiterated in **Valambhia's case** (supra) where the Court of appeal stated on page 188F that:

" We think that, where ...the point of law at issue is the illegality of or otherwise of the decision being challenged, that is

of sufficient importance to
constitute a reason ...for
extending time.”

For that sole ground, I find it pertinent to grant the
prayers sought in this application and this Court proceeds to
order as follows:

1. That, the prayer for extension of
time within which the Applicant is
to file an application to for
Reference to the Court against
the Order of this Court, (Hon.
Mushi DR dated 01/07/2021 in
Taxation Cause No.21 of 2021 is
hereby granted with costs.
2. That, the same be filed within
21 days from the date of this
ruling.

It is so ordered.

**DATED AT DAR-ES-SALAAM ON THIS 12TH DAY OF MAY
2023**



.....
DEO JOHN NANGELA
JUDGE