

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 696 OF 2022

*(Arising from the Ruling in Bill of Costs No. 216 of 2021 High Court of Tanzania Land Division at Dar es Salaam, Hon. Kisongo C M Taxing Master dated 18<sup>th</sup> July, 2022)*

WILLA ISHENGOMA ..... 1<sup>ST</sup> APPLICANT

ALBERT ISHENGOMA ..... 2<sup>ND</sup> APPLICANT

WILMOT INSHENGOMA ..... 3<sup>RD</sup> APPLICANT

VERSUS

MAHENDA NYALIKA ..... 1<sup>ST</sup> RESPONDENT

FAUSTINE KAZINZA ..... 2<sup>ND</sup> RESPONDENT

RULING

*Date of the last order 21.11.2022*

*Date of Ruling 22.11.2022*

A.Z.MGEYEKWA

This is an Application for an extension of time to file a reference against the decision delivered by Hon. Kisongo C. M in Bill of Costs No. 216 of 2021 dated 18<sup>th</sup> July, 2022. The Application was made under Order 8 (1) and (2) of the Advocates Remuneration Order, 2015. The application is

accompanied by the Chamber Summons supported by the affidavit of Will Ishengoma, Albert Ishengoma, and WilmaT Ishengoma, the applicants. The application has encountered an impediment, the respondent has demonstrated his resistance by filing a counter affidavit deposed by Mahenda Nyalika and Faustine Kasinza, the respondents.

When the matter was called for hearing on 21<sup>st</sup> November, 2022 the applicants enlisted the legal service of Mr. Charles and the respondent enlisted the legal service of Ms. Batilda Mally, learned counsel.

In their oral submission, the applicants' counsel urged this Court to adopt the applicants' affidavit to form part of his submission. Mr. Charles stated that the application is based on two limbs; good cause and illegality. He stated that the applicant's delay to file a reference is one month and few weeks because the applicants are relatives and scattered. He added that the applicants were taking care of their mother who is seriously sick and suffering from breast cancer, as a result, they were not aware of the matter. The learned counsel for the applicants went on to submit that the applicants filed an application before this Court on 15<sup>th</sup> September, 2022, however, the same was struck out. The added that the applicants have spent their time in court.

Regarding the limb of illegality, Mr. Charles submitted that he went through the Ruling with respect to the Bill of Costs and noted that there is

an issue of illegality. The counsel for the applicants asserted that the applicants filed a Bill of Tshs. 13, 151, 120/=, and the Taxing Master taxed off Tshs. 8,081, 720 the remained balance was Tshs. 5, 070, 000/= which is against the procedure. To fortify their submission, they cited the cases of **Brazafric Enterprises Ltd v Kaderes Peasants Development (PLC), Civil Application No. 421/08 of 2021**. The Court of Appeal of Tanzania cited with approval the Case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young women Christians Association of Tanzania, Civil Appeal No. 2 of 2010** (unreported). Mr. Charles stated that the Court of Appeal of Tanzania found that the issue of illegality is a good cause for an extension of time.

On the strength of the above submission, the applicants' counsel urged this Court to grant their application.

In reply, Ms. Batilda's confutation was strenuous. The respondents' counsel came out forcefully and argued that the applicant's application is devoid of merit. The learned counsel contended that the law requires a party aggrieved by the decision of the Taxing Master to file an application within 21 days. She urged this Court to adopt the respondent's counter-affidavit and form part of her submission. The counsel submitted that the Court has set principle in allowing this kind of application whereas the Court of Appeal of Tanzania stated that an extension of time can be

granted upon shown good cause. To buttress her position he cited the cases of **Bernard Mumello v BOT**, Civil Appeal No. 12 of 2002, and **Jehangir Aziz Abdulrasul & Others v Balozi Ibrahim Abubakar & Another**, Civil Application 265 of 2016. Ms. Batilda went on to submit that in the case of **Lyamuya Construction** (supra) the Court of Appeal of Tanzania established the grounds for extension of time whereas, the applicant must account for every day of delay whereby the applicant was required to account from 18<sup>th</sup> July, 2022 up to the date of filing the instant application on 18<sup>th</sup> September, 2022. She stressed that in the case of **Jehangir** (supra) the Court insisted that a delay of even a single day must be accounted for otherwise there has been no need of establishing the rules.

The learned counsel for the respondent continued to argue that the delay be inordinate but it is inordinate; more than five months in which the applicant was relaxing. She added that the applicant is required to act diligently and not showing sloppiness or negligence. Ms. Batilda argued that in the matter at hand the applicant's act shows that there are some sloppiness and negligence in the highest order. The learned counsel for the respondent went on to submit that it is a legal requirement that the Court has discretionary power in the application extension of time to an extent time, however, the same must be exercised judiciously. To bolster

her submission she cited the case of **Fatma Rashid v Pendo Stephene**, Misc. Land Application No. 15 of 2021. She valiantly argued that the applicant has not given any sufficient reasons to move this Court to grant his application. She stated that litigations must come to an end, she referred this Court to the case of **Barclays Bank of Tanzania v Phylisiah Hussein Mcheni**, Civil Appeal No. 19 of 2016.

Regarding the ground of illegality, Ms. Batilida contended that there is nowhere in the applicant's affidavit where the applicant mentioned the ground of illegality. Stressing on the point of illegality, the counsel argued that the counsel for the applicant in his submission stated a point of illegality that does not move this Court to grant the applicant's application. She argued that the point of illegality must be on the face of the records and appear on the court records. She strongly argued that Mr. Charles in his submission submitted the application of reference instead of the application at hand.

On the strength of the above submission, the learned counsel for the respondents beckoned upon this Court to dismiss the application with costs.

In his rejoinder, Mr. Charles reiterated his submission in chief.

Having carefully considered the submissions made by the learned counsels in their oral submission and examined the affidavits and counter-

affidavits, the issue for our determination is *whether the applicants have adduced sufficient cause to warrant this Court to grant their application.*

I have keenly followed the grounds contained in the applicants' affidavit and the respondent's counter-affidavit with relevant authorities. As rightly submitted by Ms. Batilda, the position of the law is settled and clear that an application for an extension of time is entirely the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice as was observed in the case of **Mbogo and Another v Shah** [1968] EALR 93.

Additionally, the Court will exercise its discretion in favour of an applicant only upon showing good cause for the delay. The term "good cause" having not been defined by the Rules, cannot be laid by any hard and fast rules but is dependent upon the facts obtained in each particular case. This stance has been taken by the Court of Appeal in the case of **Tanga Cement Company Ltd v Jumanne D. Massanga and another**, Civil Application No. 6 of 2001, **Vodacom Foundation v Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 (all unreported).

The applicants' Advocate has raised two main limbs for his delay, accounting for days of delay and illegality. I have opted to address the first limb. As amply submitted by the applicants, they submitted to the effect that they were taking care of their sick mother who is suffering from breast

cancer. To support his submission he referred this court to he attached Cytology report. The applicants in paragraph 4 stated on 17<sup>th</sup> August, 2022, they received a demand notice demanding the Tshs. 5,070,000/= and at that time they were in a position to file a reference but they did not do so. Instead, they file their application on 15<sup>th</sup> September, 2022. Counting the days of delay as provided under Order 7 (1) any person aggrieved by a decision of the Taxing Officer, may file a reference to the High Court within 21 days ended on 7<sup>th</sup> September, 2022, and the applicants filed their previous application on 15<sup>th</sup> September, 2022, a delay of 8 days.

The main reason for the applicants' lateness is taking care of their mother's sickness, they claimed that they were taking care of their seriously ill mother. I understand that sickness is a good ground for an extension of time only if the said sickness is explicable. However, as stated by Ms. Batilda, the applicants were not sick.

The applicants in their affidavit specifically paragraph 3 gave stated that their mother's health was unwell, seriously sick from high blood pressure and effects of the amputated breast. To support their submission, they attached a hospital chic that shows that their mother is attending medical treatments since 2016. The counsel stated that the condition of their mother was vulnerable and unpredictable and the alleged medical chits at

issue only showed that the applicant's mother was sick. Nonetheless, both medical chits did not indicate that the applicants were attending their mother thus, were unable to handle their case. In my considered view, the alleged delay of taking care of their ill mother is not a *prima facie* panacea for a case of delay whenever it is pleaded. I am saying so because a ground of sickness must relate to a party to the case.

It is trite law that in application for extension of time the applicant must account for each day of delay, consistent with the position of the Court of Appeal in the cases of **FINCA (T) Ltd and Another v Boniface Mwalukisa**, Civil Application No. 589/12 of 2018 (unreported) which was delivered in May, 2019 and the case of **Bushiri Hassan v Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported), the Court held that:-

*"Dismissal of an application is the consequence befalling an applicant seeking an extension of time who fails to account for every day of delay."*

Applying, the above authority, in the instant application, the applicants in their affidavit did not account for each day of delay. The records reveal that the decision of the Taxing Master was delivered on 18<sup>th</sup> July, 2021 and after a lapse of 19 days, the applicants on 17<sup>th</sup> August, 2022 received a demand notice to pay the outstanding amount. Unfortunately, they did not take any action until 15<sup>th</sup> September, 2022. From 7<sup>th</sup> September, 2022



when the 21 statutory days to file reference ended to 15<sup>th</sup> September, 2022 when they lodged the previous application, is a lapse of 8 days, the same not accounted for. Again, the applicants did not account each day of delay from 6<sup>th</sup> October, 2022 when their application was struck out to 1<sup>st</sup> November, 2022 when they filed the instant application. The affidavit does not state anything instead the counsel in his submission submitted in length that the applicants were scattered therefore it was not easy to finalize the documents within time, the same is an afterthought.

Regarding the issue of illegality, the position in our jurisprudence is settled on the matter. It is to the effect that, in determining whether the application has met the required conditions for its grant, a conclusion is drawn from the affidavit that supports the application. The rationale for this is not hard to find. It stems from the fact that an affidavit is a piece of evidence, unlike submissions which are generally meant to reflect the general features of a party's case and are elaborations or explanations on evidence already tendered. This was observed by the Court of Appeal of Tanzania in the case of **The Registered Trustees of Archdiocese of Dar es Salaam v Chairman Bunju Village Government and Others**, Civil Application No. 147 of 2006 (unreported).

Thus, while the contention raised by Mr. Charles is in sync with the foregoing position, as pleaded under paragraph 10 that the Bill of costs

No. 216 of 2021 that the tax master taxed more than a sixth of the total amount. Therefore, the question of illegality in the conduct of the trial proceedings does not arise. The same cannot, as a matter of law, be termed as illegality and thus cannot be a ground for applying for an extension of time.

The legal position, as it currently obtains, is that where illegality exists and is pleaded as a ground, the same may constitute the basis for an extension of time. This principle was accentuated in the **Permanent Secretary Ministry of Defence & National Service v D.P. Valambhia** [1992] TLR 185, to be followed by a celebrated decision of **Lyamuya Construction Company Limited and Citibank (Tanzania) Limited v. T.C.C.L. & Others**, Civil Application No. 97 of 2003 (unreported). In **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** [1992] TLR 185 at page 89 thus: -

*"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.**" [Emphasis added].*

Similarly, in the cases of **Arunaben Chaggan Mistry v Naushad Mohamed Hussein & 3 Others**, CAT-Civil Application No. 6 of 2016

(unreported), and **Lyamuya Construction** (supra), the scope of illegality was taken a top-notch when the Court of Appeal of Tanzania propounded as follows:-

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in Vaiambia's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted an extension of time if he applies for one. **The Court there emphasized that such a point of law must be 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."* [Emphasis added].

Applying the above authorities, it is clear that the ground of illegality that has been cited by the applicants does not touch on a point of law that is on the face of the record. In my view, the raised illegality does not bear sufficient importance, and its discovery require a long-drawn argument or process. In my considered view, this point of illegality did not meet the requisite threshold for consideration as the basis for the enlargement of time and it does not weighty enough to constitute sufficient cause for the extension of time. In the case of **Jubilee Insurance Co, T Ltd v Mohamed**

**Sameer Khan**, Civil Application No. 439/01 of 2020 delivered on 22<sup>nd</sup> October, 2022, the Court of Appeal of Tanzania held that:-

“Basing on my observation, I am not persuaded that there is any illegality that is apparent on the face of the record and neither can it be discerned from those two orders that can be said to constitute a sufficient cause for the Court to extend time within which to serve a copy of the notice of appeal to the respondent. Given the circumstances and without prejudice, it is my considered view that even if there is any unreasonableness or error on part of the High Court in awarding interest at those rates, the same does not constitute a sufficient cause for extension of time. It **should be insisted that not every error committed by a court amount to an illegality.**” [Emphasize added].

Based on the above holding of the Court of Appeal of Tanzania it is clear that the Court is not persuaded if the alleged illegality is not apparent on the face of the record and the Court does not consider every error committed by a Court as a good ground of illegality.

For the sake of clarity, I have read the case of **Brazafric** (supra). In the issue for discussion was illegality and the Court of Appeal of Tanzania found that the illegality on issue of jurisdiction and right to be heard was as a good cause for extending time. Unlike, in the case at hand the raised

illegality is in regard to Taxing Master findings which requires long drawn argument and moves this Court to go back and scrutinize the findings of the Taxing Master.

From the foregoing, it is dear that there are no good cause for extension of time can be said to have been shown in the circumstances of this application where, the applicants have completely failed to account for the delay of each day and the ground of illegality relied upon is not a good point of law.

In the event, I find no merit in the application and I hereby dismiss it without costs.

It is so ordered.

Dated at Dar es Salaam this date 22<sup>nd</sup> November, 2022.



Ruling delivered on 22<sup>nd</sup> November, 2022 in the presence of both parties

