

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION No. 246 OF 2021**

(Originating from Bill of Cost No. 83 of 2019)

JUMA RAJABU KAPUNGU.....APPLICANT

VERSUS

NOVAT DENNIS MUSHI.....1ST RESPONDENTS

JULIANA NOVAT MUSHI.....2ND RESPONDENT.

RULING

I. ARUFANI, J.

This application traces its root from the Land Case No. 128 of 2015 and Miscellaneous Civil Application No. 182 of 2017 which were struck out by the court before Mzuna, J. and Masabo, J. respectively. After the said matters being struck out the respondents in the present application were granted costs and filed the court a Bill of costs No. 83 of 2019 which was taxed on 2nd November, 2020 and the respondents granted the sum of TZS 6,235,000/= being costs of the matters which were struck out by the court.

The present application has been brought under the provision of section 14 (1) of the Law of Limitation Act, Cap 89 R.E 2019 (herein after the Limitation Act) and section 95 of the Civil Procedure Code Cap 33 R.E

2019 (Herein after the CPC), seeking for extension of time for the applicant to file in the court an application for Reference to quash the ruling of the Taxing Master delivered in the Bill of Cost 83 of 2019. During hearing of the application both parties were represented. While the applicant was represented by Advocate Dickson Matata, the Respondents were represented by Advocate Sindilo G. Lyimo. The application was argued by way of written submission and I commend both sides for abiding to the schedule given by the court.

Submitting in support of the application the counsel for the applicant prayed the court to adopt the affidavit supporting the application dated 23/02/2021 to form part of his submission. He submitted that, when the ruling in the Bill of cost was delivered neither the applicant nor his advocate entered appearance, and that they were not notified about the ruling delivered in the Bill of Cost.

He continued to submit that, on 15/12/2020 the respondents preferred an execution proceeding. He argued that, due to the fact that it is a common practice that during the stated period of time judicial officers tends to take leave the applicants were not served until early February, 2021. He stated that, after being served with the copies of the ruling and going through the said decision, the applicant discovered the Taxing Master did not totally consider the applicant's submissions and the point

of law raised therein were not considered. Therefore, the counsel for the applicant found the decision is tainted with illegalities and decided to file the present application in this court.

The counsel for the applicant continued to submit that, the main reason for the applicant's delay in filing the reference before this court is due to the delay to be supplied with copies of the ruling. He added that this application has a great chance of success as the decision of the Taxing Master in the Bill of cost has several illegalities that needs intervention of this court. He stated that, the alleged illegalities are deposed at paragraph 4 of the affidavit in support of the application.

He continued to submit that, the court in most cases has been moved to extend time when the issue in question is one alleging illegality. To support his argument, he referred the court to the case of **The Principal Secretary Ministry of State and National Service V. Devram Valambhia**, (1992) TLR 182 where it was held that, 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 purposes of ascertaining the point and if the alleging illegality is established, to take appropriate measures to put the matter and the record right.

In his reply the counsel for the respondents submitted that, grant of extension of time is discretion of the court, which must be exercised

judiciously. To support this argument, he cited the case of **Mbogo and Another V. Shah** (1968) EALR 93. He submitted that the applicant has failed to give sufficient reasons as to why he failed to file his Reference in the court within the time prescribed by the law.

He argued that, while the decision in the Bill of Cost was delivered on 02/11/2020 but the applicant filed the application at hand in the court on 26/05/2021, which is a period of more than six months from when the ruling was delivered. He went on arguing that, according to the law, reference was supposed to be filed in the court within 21 days from the date of the decision, hence, the reference was supposed to be filed in the court by 23/11/2020.

The counsel for the respondents stated that, it is well known that the court is usually on leave from 15th of December in every year but the court registry is usually open, hence anyone can file anything in the court if need arises. He submitted that the applicant has failed to explain why he waited for more than six months to file his application for extension of time in the court. To support his submission, he referred the court to the case of **Independent Power Tanzania Limited & Another V. Standard Charter Bank (Hong Kong) Limited**, Civil Revision No. 1 of 2009 (Unreported) where it was stated that, speed is good but justice is best and by justice we mean justice to both parties to a dispute.

He also referred the court to the case of **Nyanza Road Works Limited V. Giovanni Guidon**, Civil Appeal No.75 of 2020 (unreported) where it was stated that, in exercising court's discretionary power to extend time it is settled that, the court's discretion must be exercised judiciously as opposed to capriciousness on the basis of material placed before the court for consideration. He also referred the court to the case of **Magnet Construction Limited V. Bruce Wallace Jones**, Civil Appeal No.459 of 2020 (unreported) where the Court of Appeal held that, the applicant was required to place sufficient materials before the court to account for the period of delay in lodging the application in the court within the time prescribed by the law.

It was held further in the above cited case that the applicant was also required to justify existence of illegality in the impugned decision of the court to move the court to grant the sought order of extension of time. In addition to that he referred the court to the case of **Harbours Authority V. Mohamed R. Mohamed**, [2003] TLR 76 where it was stated that, though the court has held in numerous decisions that time will be extended if there is illegality to be rectified but it has not said time must be extended in every situation. In fine the counsel for the respondent prayed the application be dismissed with costs.

In his rejoinder the counsel for the applicant reiterated his submission in chief and added the cases of **Theresia Mahoza Mganga V. The Administrator General**, Civil Application No. 85 of 2015, where the Court of Appeal quoted with approval the case of **V. I. P. Engineering and Marketing Limited & Two Others V. Citibank Tanzania Limited**, Civil Reference No. 67 and 8 of 2006 (both unreported) where an allegation of existence of illegality in an impugned decision was found to be sufficient cause for granting extension of time.

He also referred the court to the case of **Ezrom Magesa Maryogo V. Kassim Mohamed Said and Another**, Civil Application No. 227 of 2015, CAT at DSM and **Ghania J. Kimambi V. Shedrack Rubben Ng'ambi**, Misc Application No. 692 of 2018 (both unreported) where the court discussed the issue of negligence or error committed by the counsel for a party and stated it should not be used to deny the applicant right of enlargement of time to appeal. At the end he prayed the prayers sought in the application be granted with costs.

Having carefully considered the rival submissions from the counsel for the parties and after going through the affidavit and counter affidavit filed in the present application the court has found its main duty in this application is to determine whether the applicant has established sufficient or reasonable cause for being granted the order is seeking from

this court. The court has framed the above issue after seeing the application is made under section 14 (1) of the Law of Limitation Act. The cited provision of the law requires that, before granting extension of time sought, the court must be satisfied there is sufficient or reasonable cause for granting extension of time sought under the cited provision of the law.

The question to ask here is what is "sufficient" or "reasonable cause". The said term is not defined under the Law of Limitation Act or any other law. The reason for not defining the mentioned terms in the statutes can be seen in the case of **Emmanuel Billinge V. Praxeda Ogweya & Another**, Misc. Civil Application No. 168 of 2012, HC at DSM (unreported) where it was stated that:-

"What constitute reasonable or sufficient cause has not been defined under the section because that being a matter for the court's discretion it cannot be laid down by any hard and fast rules but to be determined by reference to all circumstances of each particular case."

The discretionary power of the court stated in the above quoted case is supposed to be exercised judicially and not arbitrarily. The stated position of the law together with the factors to be considered while determining to grant or refuse an application for extension of time were stated by the Court of Appeal of Tanzania in the case of **Yusuf Same**

and Another V. Khadija Yusuf, Civil Appeal No. 1 of 2002 (unreported), where it was stated that:-

"It is trite law that an application for extension of time is entirely in the discretion of the Court to grant or refuse it. This discretion however has to be exercised judicially and the overriding consideration is that there must be sufficient cause for so doing. What amounts to sufficient cause has not been defined? From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly, the absence of any valid explanation for the delay; lack of diligence on the part of the applicant".

The position of the law stated in the above quoted case was restated and amplified more in the case of **Lyamuya Construction Company Ltd. Vs. Board of Registered Trustees of Young Women's' Christian Association of Tanzania**, Civil application No. 2 of 2010 (unreported) where the Court of Appeal of Tanzania gave the guidelines or factors to be considered in granting or refusing an application for extension of time to be as follows: -

- (1) the applicant must account for all the period of delay.*
- (2) The delay should not be inordinate.*
- (3) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*

(4) 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."

While being guided by the afore stated position of the law the court has found in relation to the application at hand that, the reasons given for the applicant's delay to lodge his reference in the court within the time prescribed by the law as stated in the affidavit supporting the applicant and in the submission of the counsel for the applicant is that, the applicant was not notified about the ruling of the bill of costs which was delivered on 2nd November, 2020 and he delayed to be supplied with the copies of the said ruling as it was supplied to them early February, 2021.

The court has found it is true as rightly argued by both counsel for the parties that the court is usually on vacation from 15th of December in every year which extended up to the end of January of the following year. However, the court has found it is not only that it has not been disclosed to the court as to what caused the counsel for the applicant and his client to fail to appear in the court when the ruling was delivered but also he has not disclosed what caused them to fail to make follow up of the decision of the court from when it was delivered on 2nd November, 2020 until 15th December, 2020 when the court stated its vacation.

The court has also found that, as rightly argued by the counsel for the respondent it is true that though the court is usually on vacation during the stated period of time but the court's registry is usually open, for a person wishing to collect any document he wants from the court or to file anything he want to file in the court. That shows the applicant's counsel has not managed to establish he has accounted for the period starting from 2nd November, 2020 when the ruling was delivered until the early February, 2021 when he stated he was supplied with the copy of the impugned ruling.

The court has also been of the view that, even if it will be taken the court's registry was closed until early February 2021 when is alleging the court resumed its functions, still it has not been stated anywhere by the applicant or his counsel as to why they failed to file the present application in the court from February, 2021 when he was supplied with the copies of the impugned ruling and waited until 27/05/2021 when he filed the application at hand in the court.

The court has found that, as rightly argued by the counsel for the respondents and as provided under order 7(2) of the **Advocates Remuneration Order, 2015**, if the applicant was aggrieved by the ruling of the court, he was required to file his reference in the court within 21 days after the date of delivery of the impugned ruling. That means, as

the ruling of the Bill of costs No. 83 of 2019 was delivered on 2nd November, 2020 the applicant was required to file his reference in the court by 23/11/2020.

The above stated inaction of the applicant caused the court to agree with the counsel for the respondents that, the applicant has not put before the court sufficient material facts to establish what caused them to delay to file the application for extension of time to file reference in the court from February, 2021 when he was served with the copies of the impugned ruling until 27th May, 2021 when he filed the present application in the court. The stated inaction goes contrary to what was stated by the Court of Appeal in the case of **Sebastian Ndaula V. Grace Rwamafa** (Legal Personal Representative of Joshwa Rwamafa), Civil No. 4 of 2014, CAT at BKB where it was insisted that, in an application for extension of time, the applicant has to account for every day of the delay.

The court has also found the counsel for the applicant deposed at paragraph 4 of the affidavit supporting the application and argued in his submission that, there are several illegalities in the decision of the Taxing Master which the applicant wish to use to challenge the decision of the Taxing Master by way of filing reference in the court. The court has found that, as rightly argued by the counsel for the applicant the position of the law as laid in the case of **Devram Valambia** (supra) and followed in

numerous cases decided by this court and the Court of Appeal is very clear that, claim of existence of an illegality in a decision intended to be challenged is a sufficient cause for granting extension of time sought so that if the alleged illegality is established to enable the court to put right the record of a case. The court stated in the above cited case that:-

"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 right."

The court is alive that, as stated in the case of **Tanzania Harbours Authority** (supra) cited by the counsel for the respondents it is not in every situation where a claim of illegality has been raised that time must be extended. It must be in a situation where an alleged illegality is apparent on the face of the record and is of sufficient importance for the court to be able to put the record of the case right. That position was well stated in the case of **Lyamuya Construction Community Ltd** (supra) where it was stated that:-

"Since every party intending to appeal seeks to challenge a decision either on point of law or facts, it cannot in my view, be said that in Valambia'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 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.***"

[Emphasis added].

Under the guidance of the above stated principle of the law the court has found proper to have a look on the points of illegalities alleged by the counsel for the applicant are existing in the impugned ruling. The alleged illegalities are listed at paragraph 4 of the affidavit in support of the application and they read as follows:-

- a) That the taxing master wrongly consolidated the case files on the view of oxygen principle injudiciously.*
- b) That the taxing master erroneously determined claims which were preferred out of time.*
- c) The decision is problematic in such a way that the taxing master failed to observe and determine the issue of jurisdiction of the court despite the fact that the issue was raised by the applicant therein.*
- d) That despite the fact that the taxing master taxed off more than one sixth of the bill of cost, failed to disallow taxation without availing any reason contrary to the law.*

Having carefully considered the above points of illegalities alleged are in existence in the impugned ruling the court has found that, although it is true as argued by the counsel for the respondents that some of the alleged illegalities are the points which are supposed to be raised as grounds for reference ought to be filed in the court by the applicant but some of them are challenging jurisdiction of the Taxing Master in entertaining the bill of costs. That can be seen in the second, third and fourth illegalities where the deponent is assailing jurisdiction of the Taxing Master to entertain the bill of costs.

That being the position of the matter the court has found that, as stated in the cases of **Devram Valambia** (supra) and **Lyamuya Construction Company Limited** (supra), there being allegation of illegalities relating to jurisdiction of the taxing Master to entertain the bill of costs the court has found it is a sufficient ground for granting extension of time so that if the alleged illegalities will be established the court can put right the record of the case. The above finding is also getting support from the case of the **Attorney General v. Consolidated Holding Corporation and Another**, Civil Application No. 73 of 2015, where it was stated that, contentious as to illegality or otherwise of the challenged decision has now been accepted as a sufficient cause for granting extension of time.

It is in the strength of all what I have stated hereinabove the court has found that, although the applicant has failed to account for the whole period of the delay but there are points of law of sufficient importance which can move the court to exercise its discretionary power to grant the order of extension of time the applicant is seeking from this court. The court has found that, the points of law raised by the applicant that the bill of costs was entertained out of time, the Taxing Master granted the costs which was not required to be granted in law and the argument that the points raised by the applicant were not considered by the Taxing Master are of sufficient importance to move the court to exercise its discretionary power to grant the extension of time sought so that if they will be established the record of the court can be put right.

Consequently, the application of the applicant for extension of time to file in the court a reference to challenge the ruling of the Taxing Master delivered in the Bill of Costs No. 83 of 2019 dated 2nd November, 2020 is hereby granted. The reference to be filed in the court within fourteen (14) days from the date of delivery of this ruling. After taking into consideration the nature of the application and its circumstances the court has found proper to make no order as to costs. It is so ordered.

Dated at Dar es Salaam this 14th day of March, 2022



I. ARUFANI.

JUDGE.

14/03/2022

Court:

Ruling delivered today 14th day of March, 2022 in the absence of the applicant and his counsel and in the presence of Mr. Sindilo G. Lyimo, advocate for the respondents. Right of appeal to the Court of Appeal is fully explained.



I. ARUFANI.

JUDGE.

14/03/2022