

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(IRINGA DISTRICT REGISTRY)**

AT IRINGA

MISCELLANEOUS APPLICATION NO.4 OF 2020

FOREST SERVICES AGENCY SAO HILL 1ST APPLICANT

MINISTRY OF RESOURCES 2ND APPLICANT

THE ATTORNEY GENERAL 3RD APPLICANT

VERSUS

ELIAS PICKSEN LUNYUNGU RESPONDENT

27/8 & 22/9/2020

RULING

MATOGOLO, J.

This is an application by the applicants Forest Services Agency Sao Hill, Ministry of Resources and The Attorney General, 1st, 2nd and 3rd applicant respectively for an order that this Court be pleased to enlarge time to allow the applicants to file reference out of time.

The application was made under Order 8 (1) and (2) of the Advocate Remuneration Order 2015 and is supported by an affidavit of Selina Kapange State Attorney. They lodged the present application seeking for the following orders:-

- a) That, this honorable court extends time within which the applicants may lodge the reference against the ruling in*

*Taxation Cause no 15 of 2018 by Honourable Chugulu
Deputy Registrar, delivered on 25th February 2020.*

b) That, this honorable court may deem fit and just to grant.

This application was made by way of chamber summons under Order 8 (1) and (2) of the **Advocate Remuneration Order 2015, G.N 264** Published on 17th July 2015 and is supported by an affidavit sworn by Selina Kapange.

At the hearing parties were represented, the applicants were represented by Ms. Selina Kapange Learned State Attorney while the respondent was represented by Barnabas Nyalusi Learned Advocate.

The application was argued by way of written submissions.

In support of her application Ms. Selina Kapange submitted that in the present application the applicants pray that this honourable Court be pleased to enlarge the period of time to comply with the requirement of law and Court's order dated 25th February, 2020 in Taxation Cause No.15 of 2018 within which the application for reference was required to be filed within 21 days from the date of decision.

She contended that, the citation of Order 8 of the Advocate Remuneration Order, 2015, the Applicants application is meant to prove to this Court that, the time fixed for compliance of Orders of Law has already lapsed, and that it is in the interest of justice that the applicants wish for the same to be enlarged on ground that, copy of Ruling was availed to

them on 17th of March, 2020. Where as one day has passed from the prescribed period required to file the reference. She contended that, the applicant acted promptly after the receipt of the ruling by filing this application for extension of time.

She contended further that, the applicant nevertheless cited the citation of Order 8 (1) of the Advocate Remuneration Order, 2015 Code which enables this Court to exercise its inherent powers to extend time upon establishment of sufficient cause expressly quoted hereunder.

"8 (1) The High Court may, subject to 7 extend the time for filing a reference upon sufficient cause"

She contended further that, without prejudice to the foregoing enabling provisions of Law the Applicant's application for extension of time is preferred on several grounds including the alleged illegality among others as set out and itemized under paragraph 8 of the applicant's affidavit.

She submitted further that, the applicants intend to challenge the illegality on the ground of excessive claim contrary to the requirement of the law. She argued that, on the issue whether the taxing Master's finding on the analysis of the bill of costs taxed to a tune of 3,600,000/= is whether the said amount is verifiable or equated under Order 48 of the Advocate Remuneration Order, 2015.

She went on submitting that, when the Court failed to consider the facts and evidences put before it from the parties of the dispute and as a result, arriving at current decision intended to be challenged by the Applicants to the Judge of the High Court.

He contended that, it is therefore intended that, the judge of High Court to determine the above issue of illegality raised, hence thus application for the extension of time to file reference to a judge and to put records of this dispute correct thus of paramount it is important to allow this application.

She went on submitting that, it is settled principle as established in many cases that in any application for extension of time the Court has to consider if there is sufficient or good cause for delay, to support her argument she referred the case of ***Chawe Transport Import and Export Co. Ltd versus Pan Construction Co Ltd and 3 Others***, Civil Application No. 146 of 2005 (unreported).

She argued that, the application herein meet the criteria stated in the case above on the account that there is a good cause to grant extension of time. She argued that, they have promptly filed the present application to be allowed to challenge the illegality in the principal sum and illegality is the sufficient ground for extension to challenge the same. To support her argument she referred this court to the case of ***The Principal Secretary Ministry of Defence and National Service Versus Devram P. Valambhia [1992] T.L.R 387***, she contended that, in no way the respondent will be prejudiced in case this application is granted.

She said, the law relating to application for extension of time within which to take any step in legal proceeding is well settled in our jurisdiction, grant or refusal of the application is entirely in the discretion of the court in the case of ***Kalunga and Company Advocates versus NBC Ltd [2006] T.L.R 235*** it was held that;

“ the Court has a wide discretion to extend time where the time has already expired, but where there is inaction or delay on the part of the applicant, there ought to be some kind of explanation or material upon which the Court may exercise the discretion given”

She submitted that, the facts contained in the applicant's Affidavit depicts the truth as whether the applicants actions that resulted in delay to file for reference were inordinate or else.

And that, from the applicant affidavit, this Court will find that, while the decision intended to be challenged was issued on 25th February, 2020 the letter requesting for the copy of ruling was filed on 5th March, 2020. The ruling on the decision requested by the Applicants was delivered to the Applicants on 17th March, 2020 that is one day from elapse of time to file reference.

She contended that, it is trite law that in calculating delay, the delays that the Court delayed to release a copy of decision, must be excluded. To support her argument she referred this court by the case of ***Tanzania***

China Friendship Textile Co. Ltd versus Charles Kabwe and Others,
Civil Revision No. 52 of 2008 CAT (Unreported) the Court of Appeal of
Tanzania took the view that;

*"The Applicants should not be condemned for
delay by the court to supply him with a copy
of ruling"*

She submitted that, as regards to the applicant's promptness to obtain the copies of ruling versus the delivering of the same from this honorable Court, there was no delay hence they cannot be blamed of being inordinate.

She prayed to this court to grant the application for extension of time.

In reply Mr. Nyalusi submitted that, upon being served with the applicant's submission in support of their application, they came to realize that the applicants essentially contends they delayed to file reference because the court delayed to supply them with the copy of ruling and the said ruling is tainted with illegality on the ground of excessive claim contrary to the law especially under Order 48 of the Advocates Remuneration Order, 2015.

He submitted that, they are aware that, according to order 8(1) of the Advocate Remuneration Order, 2015 this court may exercise its discretion for extension of time which are to be considered by the court before it exercises its discretion in extension of time those factors include

but not limited to accounting for each day of delay and whether or not the delay was caused by negligence of the applicant.

He contended that, it is the duty of the applicant to account for each day of delay. The applicant must be able to give explanation of each day of delay. He supported his argument by referring the case of ***Bharya Engineering and Contracting Co. Ltd. versus Hamoud Ahmed Nassor***, Civil Application No. 342/01 of 2017 at page 13 where the court held that;

"Having said as above, I would have granted the application and rested in peace if it were not for the applicant's failure to explain away the delay that followed thereafter. No scintilla of explanation has been brought to the fore in respect of the delay regarding the period between 19/07/2017 when the court struck out Civil Application no 70/11 of 2017 and the lodgment of the present application on 03/08/2017. This period of about fifteen days has not been accounted for. There is no iota of explanation in the notice of motion, in the Affidavit supporting it, in the written submissions filed in support of the application, not even in the oral arguments before me. As rightly submitted by the learned counsel for respondent in applications of

this nature, each and every day of delay must be accounted for”

He also referred the case of ***Hassan Bushiri versus Latifa Lukiko Mashayo***, Civil Application No. 03 of 2007 (unreported), The court had an occasion to underline the dire need for litigants who seek to extend time in taking actions which certain steps could be taken, to account for each and every day of delay in the following terms;

"Delay, of even a single day, has to be accounted for otherwise there would there be no point of having rules prescribing periods within which certain steps have to be taken”

He submitted further that, there are several delays, which were not accounted for by the applicants, the ruling subject to this appeal was delivered on 25th February, 2020 but the applicants lodged the letter to be supplied with the copy of ruling on 5th March, 2020 therefore by simple calculation the letter was lodged to the court after the lapse of eight (8) days which was within the time but the applicant after being supplied with that copy on 17th day of March, 2020 the applicant was still within time but failed to file the said reference and instead filed this application for the first time on the 23rd day of March 2020 that is 6 days after the lapse of the twenty one (21) days as required by the law and after being supplied with the copy of the ruling which was supplied on the 17th day of March 2020. He submitted that, looking at the applicants’ affidavit indicates that the applicants’ counsel himself admits that they are late to file the said

reference within the time so the court should extend time and justify the delay because it is only one day, which has been passed without any explanation nor reasonable grounds to the delay, and as a result they failed to account even that single day of delay hence they are deemed to have no any reason for delay whereas in turn they pray the mercy of this court to be done in order to extend time to file reference out of time. He submitted further that, however looking at the records, the applicant requested for a copy of the ruling 9 days after the ruling was rendered because their letter was received on the 6th day of March 2020, and according to them they received it on the 17th day of March 2020, a simple computation indicates that if what they are asserting is true then they were supplied with the ruling on the last day when the 21 days were to lapse. They should have filed the application for review as they had that plan from the day they requested for the ruling, instead they filed the application for extension of time on 23rd March, 2020 which is 8 days after the lapse of the required time limit and not 1 day as the applicant asserts. He contended that, assuming that they delayed for a single day, still to be granted extension should have accounted for it, to bolster his argument he cited the case of ***Tanzania Fish Processors Limited versus K. Ntagaiinda***, Civil Application No. 41/08 of 2018 at page 9 to 10 and the case of ***Hassan Bushir versus Latifa Lukio Mashayo***, Civil Application No. 03 of 2007 the Court held:-

"Delay of even a single day has to be accounted for, otherwise there should be no

point of having rules prescribing periods within which certain steps have to be taken”

With regard to the issue of illegality the applicants at paragraph 8 of their affidavit and page 3 to 4 of their submission in chief contended that the said ruling is tainted with illegality on the ground of excessive claim which is contrary to the law as the taxing master's finding on analysis of the bill of costs taxed to a tune of 3,600,000/= is whether the said amount is verified or equated under Order 48 of the Advocate remuneration Order, 2015. He contended that, this is not illegality and the applicant fails to point out how that excessive claim amounts to illegality due to the fact that the law provides the room for applicant to file the reference before this court in order to challenge the said decision of the taxing master. He was of the considered opinion that this reason is baseless and it should not be used as the shield for the applicant to deceive this court of law because the issue is whether the amount which was taxed by the Registrar will be discussed in the main application which is reference and that issue being raised at this stage will be premature as to whether or not the taxing master was exercising its discretionary power judiciously this issue will be the main debate at the main application for reference and the applicant contention that intending reference is excessive that does not amount to illegality.

To support his argument he cited the case of ***Hassan Abdulhamid versus Erasto Eliphase*** Civil Application No. 42 of 2019 at page 7 where the Court of Appeal of Tanzania referred the case of ***Lyamuya***

Construction Company Limited versus Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2020 (unreported) it was insisted that;

"The alleged illegality must be apparent on the face of record, such the question of jurisdiction, not one that would be discovered by long drawn argument or process"

Mr. Nyalusi prayed for this court to find that the applicants have failed to account days of delay and they also acted negligently also the said ruling has no any illegality, thus there are no sufficient cause advanced by the applicants to warrant this court to exercise its discretion and extend time. Thus prayed for this application be dismissed with costs.

Having read the respective submissions by the learned Counsel from both sides and the court records, the issue to be determined here is whether the applicants have advanced sufficient reason for their failure to file reference in time.

It is a settled law that in order for a court to grant extension of time, sufficient cause of delay must be given, also it is within the court discretion to grant or refuse it.

The Court of Appeal of Tanzania in the case of ***Benedict Mumelo vs. Bank of Tanzania [2006] 1 EA 227***, held:-

"It is trite law that an application for extension of time is entirely in the discretion of the court"

to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause”.

In the case of ***Lyamuya Construction Company Ltd versus Board of Registered Trustees of Young Women’s Christian Association of Tanzania***, Civil Application No.2 of 2010, the court formulated factors to be considered before the Court grant an extension of time as follows;

- (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 existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.*

In the instant application the decree sought to be challenged was delivered on 25th of February, 2020, the applicants applied to be supplied with copies of ruling on 5th of March, 2020 and it was availed to them on 17th of March, 2020. The present application was filed on 23rd of March, 2020. It means 28 days lapsed from the date of ruling.

The applicants in their affidavit averred that they failed to lodge their application on time as they were delayed to be supplied with a copy of ruling and the second reason is the said ruling by the taxing master is tainted with illegalities

Starting with the first cause of delay to be supplied with a copy of ruling, the applicants were supplied with a copy of ruling on 17th March, 2020. On the date the ruling was delivered the counsel from both sides, that is Selina Kapange for the applicants as well as Mr. Nyalusi for the respondent were present. The applicants counsel did not take any action to apply for a copy of ruling immediately until on 5th March, 2020 when she wrote a letter applying for a said copy of ruling 8 days after the date of ruling. The ruling was supplied to them on 17th March, 2020. This shows that the applicants have not been diligent in pursuing the matter. If the ruling was delivered on 25th, of February 2020, why waiting until 5th of March 2020 to apply for the necessary copy of ruling. The copies were availed to them on 17th of March 2020 and the instant application was filed on 23rd of March, 2020. The applicants were sloppiness in pursuing their matter, because if they intended to challenge the said ruling of the taxing officer, they were supposed to do it immediately after the ruling than waiting until the time has lapsed. There are 8 days unaccounted for from the date of ruling to the date applicants lodged their letter requesting for a copy of ruling.

In the case of ***Loswaki Village Council and Paresoi Ole Shuaka vs. Shibeshi Abebe***, Civil Application No. 23 of 1997 (unreported) the court held thus;

"Those who seek the aid of the law by instituting proceedings in a court of justice must file such proceedings within the period prescribed by law, or where no such period is prescribed within a reasonable time."

In the instant application the applicants were represented by the learned State Attorney who knows the time limitation for one to file an application for reference to the High court, she was supposed to lodge the application within the time prescribed by the law.

Thus the first reason for delay as advanced by the applicants is baseless as they failed even to account for each day of delay. The applicants failed to explain as to what were they doing from 25th of February, 2020 when the ruling was delivered until on 5th March when they applied for the copy of ruling.

With regard to the second reason that, the ruling of the taxing officer is tainted with illegalities, the applicants complain that the taxing officer failed to consider the facts and evidences put before her from the parties on the dispute and as a result, arriving at the current decision intended to be challenged by the applicants to the judge of the High Court.

In the case of ***Principle Secretary, Ministry of Defence and National Service vs. Devram Valambia***, (supra), the Court of Appeal held:-

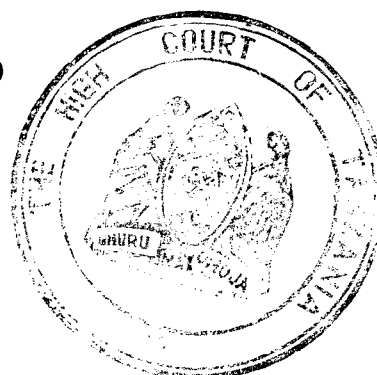
"In our view, when the point at issue is one alleging illegality of the decision being challenged, the court has a duty, even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record straight".

It is my considered opinion that, the said ruling is not tainted with illegality as the amount to tune of T.shs. 3,600,000/= taxed by the Taxing officer based on the receipt tendered before the court, applicants' counsel did not say anything in respect of that receipt. The taxing officer has discretionary powers and she exercised her powers judiciously. In his bill of costs the respondent was claiming T.shs. 5,000,000/= as instruction fees to defend the preliminary objection. T.shs 2,000,000/= was taxed off. The taxed amount of T.shs. 3,000,000/= is reasonable in the circumstances. The rest T.shs. 600,000/= is for attendance in court vide items 2, 3, 4, and 5, which were taxed at T.shs. 50,000/= per day, items 6, 7, 8, and 9 were taxed at T.shs. 100,000/= per day. That cannot be said to be with illegality. Allegation of illegality cannot be by mere mentioning it. The one who alleges illegality must point out and established such illegality. It was

correctly pointed out by Mr. Nyalusi, and as it was held in ***Lyamuya Construction Company Limited*** (supra), that the illegality alleged must be apparent on the face of record such as jurisdiction but not one that would be discovered by long drawn argument or process. The applicants have failed to so establish existence of illegality alleged, a mere fact that the taxing officer taxed the bill to the amount that applicants were displeased that alone cannot be said illegality as the same could be challenged in normal appeal or reference process. This ground also lack merit. This application has no merit as the applicants have failed to demonstrate sufficient cause for this court to exercise its discretion to grant extension of time so as to file a reference. This application fails the same is dismissed.

It is so ordered.


F.N. MATOGOLO
JUDGE
22/9/2020.



Date: 24/09/2020
Coram: Hon. F. N. Matogolo – Judge
L/A: B. Mwenda
Applicants: Absent
Respondent: Mr. Alfred Stephano, Advocate
C/C: Grace

Mr. Alfred Stephano – Advocate:

My Lord I am appearing for the Respondent. I am also holding brief for Ms. Selina Kapange State Attorney for the applicants. The matter is for ruling we are ready.

COURT:

Ruling delivered.


F. N. MATOGOLO

JUDGE

24/09/2020

