

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
MOSHI DISTRICT REGISRTY
AT MOSHI
CIVIL REFERENCE NO. 6 OF 2019**

CHARLES MARKO LUKUMAY

(as an administrator of the Estate
if the late Marko Naibala)

}**APPLICANT**

Versus

LILIAN MARKO NAIBALA.....RESPONDENT

Last Order: 17th March, 2020
Date of Ruling: 20th March, 2020

RULING

MKAPA, J.

The applicant, Charles Marko Lukumay, discontent with the dismissal order for want of prosecution dated 19th April, 2018 before Honourable Mpepo DR; in Bill of Cost No. 34 of 2017 preferred this application to set aside the order and for the court to hear the matter on merit. This application is brought under

order 7(1) and (2) of the Advocates Remuneration Order GN. No. 264 of 2015. The application was by way of Chamber Summons supported by the applicant's affidavit. The respondent did not file a counter affidavit and so the matter was scheduled for hearing. By consent of parties the court ordered the matter to be disposed of by way of written submissions.

In his brief submission the applicant explained that on the 19th day of April 2018 he failed to appear in court on time because his motor vehicle got a mechanical problem while on his way to Moshi. When he appeared before the honourable Deputy Registrar court he was informed that the case was dismissed for want of prosecution. The applicant further submitted that it is trite law under the provisions of Order XXV Rule 2 (2) of the Civil Procedure Code that where the suit is dismissed the plaintiff may apply for an order to set aside and if is proven to the satisfaction of court that he was prevented by any sufficient cause, the court shall set aside the dismissal order and appoint a day for proceeding with a suit. He as well cited the case of **Pimak Profesyonel Muftak Sirket Vs Pimak Tanzania Ltd and Farha Abdulah Noor (Misc. Commercial Application No. 55 of 2018)**. Basing on that case the applicant submitted that his

reason for non-appearance was sufficient as he had no alternative after his motor vehicle broke down.

Opposing the application the respondent submitted this reference was incompetent before this court because for there to be a reference there should have been taxation that is determination on the cost followed by a decision thereof.

The respondent further submitted that the only reason by the applicant was that his motor vehicle had a mechanical problem however he did not provide any proof to substantiate his allegation. He explained that the applicant should have submitted an affidavit of the mechanic who repaired the car as well as the affidavit of the court clerk.

He further argued that the cited Order XXV Rule 2(2) of the Civil Procedure Code is irrelevant to the present matter because the same relates to suits and not application as the one at hand. He added that even the cited case of Pimak is not relevant as the case is about setting aside dismissal order against suits and not application for bill of cost. He then prayed for the application to be dismissed.

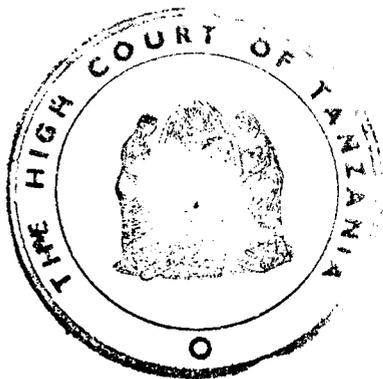
Having gone through the submissions by both parties the issue for determination is whether the application is meritorious. The law which the application is brought under is Order 7(1) and (2) of the **Advocates Remuneration Order GN. No. 264 of 2015**. The order provides that a party aggrieved by a decision of the taxing officer may file a reference to a judge of the High Court within 21 days. In this application the applicant was aggrieved by a decision of a taxing officer who dismissed the Taxation cause for want of prosecution. The applicant has explained in his affidavit that his nonappearance on the material date was caused by a mechanical problem of his motor vehicle. The respondent has challenged the genuineness of this fact because the applicant did not provide any proof to substantiate the same. I do agree with the respondent that the applicant should have submitted proof of his allegation so as to satisfy the court on the truthfulness of the reason for his absence.

It is undisputed that the suit for Bill of Cost No. 34 of 2017 which is the subject of this application was not heard on merit. It seems to me justice demands this court to invoke its discretionary powers by applying the overriding objective rule as provided for in the **Written Laws (Miscellaneous**

Amendment) (No. 3) Act, 2018 [Act No. 8 of 2018 in which section 3B, imposes the duty for courts to uphold the overriding objective with a view to attaining just determination of suits.

Having observed so, in conclusion I find the application with merit and therefore proceed to set aside the dismissal order so that the application can be heard on merit.

Dated and delivered at Moshi this 20th day of March 2020.




S.B MKAPA
JUDGE
20/3/2020