

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL REFERENCE NO. 9 OF 2020

(Arising from the Ruling of Taxation Officer in Taxation Civil Case No. 76 of 2019 before Hon. F.S. Kiswaga, **RM** dated 08th May, 2020 at the District Court of Kinondoni at Kinondoni)

JOSEPH NGEREJA MCHUNGA.....APPLICANT/JUDGMENT DEBTOR

VERSUS

EQUITY FOR TANZANIA LIMITED..RESPONDENT/DECREE HOLDER

RULING

21st April 2020 & 21st May, 2021.

E. E. KAKOLAKI J

This is a ruling in respect of the preliminary points of objections raised by the respondent against the Civil Reference No. 09 of 2020 filed by the applicant in this Court. He has raised five grounds going thus:

1. That the Civil Reference is time barred.
2. That the Affidavit in support of the Chamber Application is incurably defective for failure to disclose the place and date of the verification.

3. That the Affidavit in support of the Chamber Application is incurably defective for containing legal issues and arguments at paragraphs 5,6,7 and 8.
4. That the Chamber Application is unsupported by Affidavit of the person who supplied material information in paragraphs 1,2,3,4,5,6 and 7 to Mr. Gordian Njaala (the deponent) and thus incurably defective.
5. That Mr. Gordian Njaala (deponent) is incompetent person to swear an affidavit in support of this chamber application for lacking sufficient facts thereto.

He is therefore praying this court to dismiss the reference with costs.

Briefly before this court by way of chamber summons taken out at the instance of the applicant/judgment debtor by Gordian Law Chambers supported by affidavit of advocate Gordian Isaya Njaala for the applicant, the court is moved to examine the proceedings, ruling and drawn order of the Taxing Master in Taxation Civil Case No. 76 of 2019 for the purposes of satisfying itself as to the correctness, legality or propriety of the said proceedings, ruling and drawn order arising therefrom. Having so examined the court was invited to fault, quash and set them aside and proceed to determine the proper taxation as well as granting the applicant costs of the application and any other reliefs as it deems fit and just. Upon service of the copy of the said application the respondent/judgement holder vehemently challenged it by filing the counter affidavit. Further to that she filed a Notice of Preliminary objection challenging the competence of the reference on five grounds above stated.

As the practice of the court dictates the said preliminary points of objection were to be disposed of first and hearing proceeded orally whereby both parties were represented. The applicant/judgment debtor had the representation of Mr. Gordian Isaya Njaala while the respondent/judgment holder enjoyed the services of Mr. Heriel Munisi both learned advocates. All five grounds of objection were argued. Submitting on the first ground Mr. Munisi contended this Civil Reference is time barred. He said the ruling sought to be impugned was delivered on the 08th May, 2020 and this reference filed on the 23/06/2020, 46 days passed the date of delivery of the said ruling which is in contravention of Order 7(2) of the Advocates Remuneration Order, 2015, that requires reference to be made within 21 days of the delivery of the decision sought to be impugned. The consequences of filing the matter out of time as per section 3(1) of the Law of Limitation Act, [Cap. 89 R.E 2019] is dismissal of the matter and urged this court to so dismiss the reference with costs. To fortify his stance the court was referred to the case of **Steven Masatu Wasira Vs. Joseph Sinde Warioba & AG**, (1999) TLR 334 where the Court of Appeal said the High Court having held the application was time barred had a power to dismiss it.

On the second ground he submitted the affidavit is incurably defective for failure to disclose the place and date of the verification which act infringed the provision of Order VI rule 15(3) of the Civil Procedure Code, [Cap. 33 R.E 2019] that every verification must be signed, state the place where it is signed and dated. As for the third ground he argued the affidavit contained arguments in paragraphs 5,6,7 and 8 in contravention of Order XIX Rule 3(1) of CPC and supported it with the case of **AG Vs. National Housing**

Corporation and 5 Others, Misc. Land Case Application No. 945 of 2017 (HC-unreported) at page 2 and 3. On the last two grounds he submitted the deponent was incompetent to swear the affidavit for lack of sufficient facts as ought to have stated where he obtained the said information. According to him his submission finds support in the case of **Anatoly Peter Rwebangira Vs. The Principal Secretary Ministry of Defence and National Services**, Civil Application No. 548/04 of 2018 (CAT-unreported).

Opposing the raised objections Mr. Njaala on the first ground submitted the reference was filed in time. He reasoned that the ruling sought to be challenged was delivered on 08/05/2020 and the order extracted on 15/05/2020 therefore counting from that date 21 days lapsed on 06/06/2020. That the applicant's advocate accessed the court for filing the application on 27/05/2020 but was instructed to file it through JSDS and managed to do so on 28/05/2020. However, the same could not be admitted until 05/06/2020 and on the 12/06/2020 was issued with control number for payment of admission fees before he executed payment on 15/06/2020. He added since on 12/06/2020 it was Friday and control number was issued a bit late that is why payment was effected on 15/06/2020 and added from that date to 23/06/2020 the applicant was awaiting for the issue of summons. With such series of event Mr. Njaala submitted the reference was filed in time and urged the court to dismiss the ground.

As for the second ground of objection he argued the date for verification clause was place at the bottom of the affidavit after the jurat as it was matter of style and urged the court to order for amendment should it find it was wrongly placed as it was stated in the case of **Maneno Mengi Ltd and 3**

Others Vs. Farida Said Nyamachumbe and Another, Civil Appeal No. 45 of 2004 cited with approval in the case of **AAR Insurance Tanzania Ltd Vs. Beatus Kisusi**, Civil Appeal No. 67 of 2015 (CAT-unreported). With regard to the third ground on legal arguments and issues contained in the affidavit he responded there were none as this Court in the case of **Reagan Katunzi Vs. Emelda Mtakije**, Misc. Civil Application No. 102 of 2019 (HC-unreported) at page 3 stated ingredients of a valid affidavit. It was his submission therefore that the faulted paragraphs contained facts originating from the court record in which the advocate for the applicant was representing him thus acquitted with the facts deposed. And on the last two grounds he submitted the same were not qualifying to be objections on point of law as per **Mukisa Biscuits'** case. In view of the above submission Mr.Njaala invited the court to dismiss the objections with costs.

In his rejoinder submission Mr. Munisi reiterated his earlier submission in chief and responded, the case of **Maneno Mengi** (supra) cited by the respondent is out of context as it refers to the winding up of the company. On the first ground he submitted all what is stated by the respondent in response is nothing but evidence from the bar as the applicant having found that he was out of time ought to have filed an application for extension of time to explain on all what happened to delay him to file this reference in time. He further argued even if it is assumed both ruling and order were obtained on 15/05/2020 still the applicant was out of time as 21 days if reckoned from that date lapsed on 04/06/2020 and not 06/06/2020 as the respondent would like this court to believe. He was insistent this applicant deserves dismissal and so invited the court to order with costs.

I have taken time to consider the rival submissions from both parties in support and against the preliminary points of objection raised by the respondent. I am intending to determine each and every point raised in seriatim if need be. Starting with the first point the issue for determination before the court is whether this reference is time barred. It is undisputed fact by both parties that under Order 7(2) of the Advocates Remuneration Order, GN. No. 263 of 2005, any party aggrieved with the decision of Taxing Officer has to file to this court a reference within 21 days of the date of the ruling sought to be challenged. The ruling sought to be impugned in this matter was delivered on 08/05/2020. The contention by Mr. Munisi for the respondent is that this reference was filed on 23/06/2020, 46 days after delivery of the ruling, implying that it was outside the prescribed time for 25 days. This assertion is contested by Mr. Njaala in that it is in time as time started to run on 15/05/2020 when the drawn order was extracted and made available to the applicant thus 21 days lapsed on the 06/06/2020. He added admission of the application was delayed from 28/05/2020 when it was filed until 05/06/2020 as well as issuance of control numbers for effecting payment which were released on 12/06/2020 and payment executed on 15/06/2020 but the summons could not be issued until 23/06/2020. The law under section 19(2) and (3) of Law of Limitation Act, [Cap. 89 R.E 2019] (LLA) provides automatic exclusion of the period of time spent for obtaining a copy of judgment/ruling or decree or order sought to be impugned. This was also the position in the case of **Alex Senkoro and 3 Others Vs. Eliambuya Lyimo** (As Administrator of the Estate of Fredrick Lyimo, Deceased), Civil Appeal No. 16 of 2017 (CAT-unreported) where the Court of Appeal said:

“We entertain no doubt that the above sub-sections expressly allow automatic exclusion of the period of time requisite for obtaining a copy of the decree or judgment appealed from the computation of the prescribed limitation period. Such an exclusion need not be made upon an order of the court in a formal application for extension of time. Indeed, that stance was taken recently in **Mohamed Salimini v. Jumanne Omary Mapesa**, Civil Appeal No. 345 of 2018 (unreported) where the Court affirmed that section 19 (2) of the LLA obliges courts to exclude the period of time requisite for obtaining a copy of the decree appealed from.” (Emphasis supplied).

Applying the principle in the above cited case to the facts of this matter the days between 08/05/2020 when the impugned ruling was issued to 15/06/2020, the date of collection of the drawn order which was a necessary document for filing this reference are automatically excluded. So time started to run against the applicant on 15/05/2020. And counting 21 days of filing the reference from that date the time lapsed on 04/06/2020 as submitted by Mr. Minisi. Since this reference was filed on 23/06/2020, 19 days after lapse of 21 days, reckoned from 04/06/2020, I am in agreement with Mr. Munisi and therefore of the finding that the same was time barred. My firm finding is premised on the legal position that automatic exclusion under section 19(2) and (3) of LLA does not cover the appellant/applicant who files the appeal or reference outside the prescribed time limitation which in this case is 21 days. This proposition of the law was adumbrated in the case of **Director of Public Prosecutions Vs. Mawazo Saliboko @ Shagi &**

Fifteen Others, Criminal Appeal No. 384 of 2017 (CAT-unreported) when interpreting the provision of section 379 (1) (b) of the Criminal Procedure Act, [Cap. 20 R.E 2019] on the purpose of providing automatic exclusion of the time requisite for obtaining the judgment or order sought to be impugned which is to avoid multiplicity of applications, and delay to disposal of cases. And that it was not intending to cover the appellant who filed the appeal outside the prescribed time after obtaining the said copies of judgment/ruling or order sought to be assailed. The Court had this to say:

*"The learned Judge was of the view that, though the appellant filed the appeal within 45 days after being served with the copy of the proceedings, he ought to have applied for extension of time to do so because he was time-barred from the date of the impugned decision. **On our part, we are of the decided view that the intention of the legislature under the proviso to section 379 (1) (b) of the CPA was to avoid multiplicity of applications, and delay to disposal of cases. That is why it provided for automatic exclusion of the time requisite to obtain a copy of proceedings, judgment or order appealed from, this is different where the intending appellant finds himself out of 45 days to file an appeal after receipt of the copy of proceedings.**"* (Emphasis added)

In an attempt to rescue the situation Mr. Njaala attempted to substantiate the delay and went further to invite the court to visit his JSDS account Roll No. 4298 to satisfy itself of the reasons that caused the applicant to file the reference on the 23/06/2020 and not before or on 04/06/2020, the invitation

which was challenged by Mr. Munisi submitting that Mr. Njaala's submission was evidence from the bar unsupported by any document or affidavit. I agree with Mr. Munisi that what Mr. Njaala was trying to do is unacceptable practice in our jurisdiction. Reasons for the delay in filing the appeal or application in my respected view are assigned in the affidavit accompanying the chamber application for extension of time to file either the appeal or application. If at all the applicant wanted to justify reasons for his delay to file this reference I hold ought to have filed an application for extension of time as this reference is time barred. The first point of objection has merit and I sustain it. I further find the first ground of objection has the effect of disposing of this matter and I see no pressing issue to determine the rest of the points.

Having found the application for reference was filed out of time what is the consequence then. Mr. Munisi submitted under section 3(1) of LLA this reference is bound to be dismissed for being filed out of time while Mr. Njaala for the applicant responding that, that is not the position and the prayer should be dismissed. Section 3(1) of LLA provides thus:

3.-(1) Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence.

The law provides further under subsection (2)(c) of section 3 of LLA that for the purposes of subsection (1) of section 3 of LLA proceedings is instituted in the case of an application, when the application is made. It was held in

the case of **Steven Masatu Wasira** (supra) that the court having held this application is time barred the High Court had a power to dismiss it. Applying the same principle in this case this court having held the reference was filed out time the only remedy is to dismiss it and I so find.

In view of the fore stated reasons I would hold as I hereby do that this reference was filed out of time. It is therefore dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 21st day of May, 2021.




E. E. KAKOLAKI

JUDGE

21/05/2021

Delivered at Dar es Salaam in chambers this 21st day of May, 2021 in the presence of Mr. Gordian Isaya Njaala advocate for the appellant, Mr. Heriel Munisi advocate for the respondent and Ms. Asha Livanga, court clerk.

Right of appeal explained.




E. E. Kakolaki

JUDGE

21/05/2021