IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO.93 OF 2020

MARIA IHONDE ..... APPLICANT

VERSUS

JUMANNE RIKOHE ..... RESPONDENT

RULING

4th May, & 12th July, 2021

ISMAIL, J.

This Court is called upon to grant an extension of time within which to file an extension of time to institute an application for reference. The impending reference is against the decision of the Taxing Master in the Bill of Costs No. 34 of 2019. The applicant feels hard done by the Taxing Master's decision that taxed the costs at the aggregate sum of TZS. 1,150,000/-. The taxation of costs arose from an application for leave to appeal to the Court of Appeal against the decisions in Land Case Revision No. 13 of 2013 and Misc. Land Application No. 245 of 2017.

The application is supported by the applicant's own affidavit in which grounds on the application is based. Illness and illegality have been cited as the basis for the application. The averment is that the dilatoriness of the applicant's action was caused by her ailment which saw her admitted to hospital before she was advised to take days off her schedule. It is also contended that the decision of the Taxing Master is tainted with illegalities which require attention of the Court of Appeal.

The respondent is opposed to the application. Through his own counter-affidavit, the respondent has played down illness of the applicant as there is no proof that the applicant was admitted during the time, arguing further that the fact that she travelled to Mwanza means that she could still file the intended reference. He also contended that the applicant has not accounted for the days of delay. The respondent refuted the contention that there was an illegality.

Hearing of the application took the form of written submissions. Mr. Paul Makang'a, learned counsel for the applicant, submitted with respect to illness that the applicant was admitted to Nyasho Health Centre in Musoma, on 8th May, 2021. He contended that the hospitalization came a few days before the ruling on the taxation matter and that the severity of her ailment necessitated that she be put under close medical examination and

medication which would not allow her to perform any strenous duties, until 11th August, 2020 when she was given an okay to resume her normal schedule. The learned counsel argued that, since the application was filed on 12th August, 2020, then such filing was prompt and without any delay. On accounting for each day of delay, the learned counsel argued that good reasons had been adduced to warrant grant of extension of time, and that the delay was not inordinate or occasioned by negligence.

With respect to illegality, the applicant's argument is that the taxing master failed to take into account mandatory requirements of the law and applicable procedures governing taxation of costs, one of such failures being taxation of the instruction fees without production (by the respondent) of a receipt. This, the counsel argued, offended the requirement for proof of the said claims. To buttress his argument, the learned counsel cited the Court's decision in ***Thinamy Entertainment Limited & 2 Others v. Dino Katsapas***, HC-Misc. Commercial Case No. 86 of 2018 (unreported), in which it was emphasized that a party who alleges has the duty to prove his allegation. He prayed that the application be granted to allow her exercise her right to challenge the Taxing Master's decision.

In his reply submission, Mr. Alhaj Majogoro, learned advocate for the respondent, disputed the contentions put forward by the applicant. With

respect to ailment, the argued that if the applicant was able to travel 420 kilometres from Musoma to Mwanza and back to Musoma, it is clear that she had enough energy that would also enable her to draft and file the application for reference. The learned counsel further contended that the medical chit attached to the application does not state that the applicant was admitted for all that time. It only states that he was under supervision and that that would not prevent her from consulting an advocate and take necessary steps. He wondered what would have prevented the applicant from taking such steps whilst she managed to travel to Mwanza while she was still under supervision.

On illegality, Mr. Majogoro's take is that, while the applicant discovered an illegality the moment she was served with the ruling, it took her three months to enlist the assistance of an advocate and prefer the instant application. The respondent's counsel argued that what is alleged to be an illegality was not deponed in the supporting affidavit, contrary to the settled principle underscored in ***Yara Tanzania Limited v. Charles Aloyce Msemwa t/a Msemwa Junior Agrovet & Others***, HC-Commercial Case No. 5 of 2013 (unreported). The counsel further argued that, since the contention on illegality which are premised on production of a receipt were raised in the submissions, the same ought not to be considered since those

are mere narrations and not evidence, consistent with the holding in ***The Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman Bunju Village Government & Others***, CAT-Civil Appeal No. 147 of 2006 (unreported). He urged the Court to expunge the argument.

Mr. Majogoro further contended that, even in the case of illegality, the settled position is that such illegality must be apparent on the face of the record. On this, he cited the Court of Appeal's decisions in ***Zitto Zuberi Kabwe & Others v. The Honourable Attorney General***, CAT-Civil Application No. 365/01 of 2019; ***Moto Matiko Mabanga v. Ophir Energy PLC & Others***, CAT-Civil Application No. 463/01 of 2017 and ***Mega Builders Ltd v. D.P.I Simba Limited***, CAT-Civil Application No. 319 of 2020 (all unreported). The learned counsel argued that, pursuant to Order 58 (1) of the Advocates Remuneration Order, 2015, production of receipts in an application for bill of costs is not a mandatory prerequisite unless the directed by the Registrar. He argued that this was emphasized in ***Edna Chambiri v. Tanzania Electric Supply Co. Ltd***, HC-Civil Reference No. 4 of 2018 (unreported). It was the Counsel's contention that the award of TZS. 1,000,000/- was consistent with 11th Schedule of the Advocates Remuneration Order, 2015. He prayed that the application be dismissed with costs.

The applicant's rejoinder submission was, by and large, a reiteration of what was argued in the submission in chief, a rebuttal of the respondent's submission, and an extensive discussion on the illegality, a subject whose time has not come. On illegality, the applicant's contention is that the fact that the respondent has identified it implies that the said illegality is apparent on the face of the record, and that whenever that is raised, the same has to be taken as a ground for granting extension of time. He maintained that the decision sought to be impugned is tainted with illegalities that arise from the taxing master's application of wrong principles.

From these long draw arguments, the question for settlement is whether the application has met the threshold for granting an extension of time.

The law is settled in this country. It is to the effect that extension of time can only be granted upon the party's presentation of a credible case sufficient to convince the Court to grant it. Grant of extension of time is, therefore, in the discretion of the Court, and the process leading up to such grant requires the party in whose favour the order is made acts equitably. Thus, the Supreme Court of Kenya made the following remarks in ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014:

"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants have to lay a basis [for], where they seek [grant of it]."

Back home, the Court of Appeal of Tanzania outlined key conditions upon which grant of extension of time should be based. This was in the famous case of ***Lyamuya Construction Company Limited v. Board of Trustees of YWCA***, CAT-Civil Application No. 2 of 2010 (unreported). These conditions are:

"(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 he intends to take.

(d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged."

The applicant has cited two grounds on which the prayer for extension of time is premised. The first of the two is that she had taken ill, admitted

to hospital, before she was placed under a close supervision and medication. This is backed up by a letter from the hospital giving the detail of what is contended to be the applicant's ailment. The settled law in our jurisdiction, is that illness may serve as a good reason for extending time. (See: ***Christina Alphonce Tomas (as Administratrix of the late Didas Kasele v. Saamoja Masinjiga***, CAT-Civil Application No. 1 of 2004 and ***Richard Mlagala & 9 Others v. Aikael Minja & 3 Others***, CAT-Civil Application No. 160 of 2015 (both unreported). In both of the cited decisions the emphasis is that ill health will only amount to sufficient cause if the same is sufficiently evidenced. In this case, what is relied upon as evidence is the letter from Nyasho Health Centre, providing some narration of what happened prior to the applicant's alleged hospitalization and subsequent thereto. A review of the said communication raises a few pertinent issues. One, the letter does not provide the date on which the applicant was discharged from hospital. Two, with respect to the time that she was under supervision, it has not been stated that duties that she was excused from included those that relate to pursuit of her case. Lastly, the applicant has not come out clean on how her doctor allowed her to travel to Mwanza but failed to attend to her case which merely required filing the application for reference. On this, I subscribe to the counsel for the respondent that it was

illogical that the applicant would hit the road to Mwanza, getting to see what her case was all about but failed to do what I consider to be the easiest of the decisions *i.e.* pursuing a challenge of the decision of the taxing master. I find that illness cited as a cause was, in the circumstances of this case, not good enough to be considered as the basis for extension of time.

The applicant's counsel has argued that circumstances of the delay differ from one case to another, and that in our case the delay was not so inordinate. While I agree that each case has to be decided based on their own unique circumstances, I am mindful of the settled principle that each day of delay has to be accounted for, consistent with the reasoning in ***Bushiri Hassan v. Latina Lucia Masaya,*** CAT-Civil Application No. 3 of 2007 – unreported), in which it was held:

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

In this case, the delay that is said to be not inordinate has not been accounted for and find no plausible reason to allow it.

In the applicant's second limb of arguments, illegality has been cited as a reason, and the contention is that the taxing master flouted the imperative requirements of having to let the respondent prove the claim of

instruction fees by producing a receipt. This contention has been contested by the respondent, arguing that the law does not demand that production of receipt should constitute a condition precedent. It is generally accepted that illegality, once pleaded as a reason, can justify granting of an extension of time. Such illegality must, however, be in the mould of the infraction stated in the ***Lyamuya Construction case*** (supra), in which it was guided:

> *"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* ***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 record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process.****"*[Emphasis supplied]

In the instant matter, the alleged illegality substantially resides in what is argued as failure to conform to the provisions of the Advocates Remuneration Order, 2015, primarily on the production of the receipt for payment of instruction fees. Whilst the veracity of such contention is the remit of the appellate court, there is a narrow issue that calls for

determination. This is as to whether such failure is an act of illegality and, if so, whether the same has passed the threshold of illegalities for which extension of time may be granted. My hastened reaction to this question is an emphatic NO! Going by the current legal holdings, including the ***Edna Chambiri case*** (supra), these are issues which rest in the discretion of the taxing master. Failure to demand production of a receipt would not and cannot be considered to be an illegality, let alone the fact that it would not be of any sufficient importance as to meet the requisite threshold for consideration as the basis for enlargement of time. I choose to disregard it.

Overall, I am of the considered view this is not a fit case for which the prayer of enlargement of time may be granted, lest I drift from the splendid holding in ***KIG Bar Grocery & Restaurant Ltd v. Gabaraki & Another*** (1972) E.A. 503, wherein it was held that ***"... no court will aid a man to drive from his own wrong."*** Consequently, I dismiss the application with costs.

It is so ordered.

DATED at **MWANZA** this 12th day of July, 2021.

M.K. ISMAIL

JUDGE

Date: 12/07/2021

Coram: Hon. C. Tengwa, DR

Applicant: Present

Respondent: Absent

B/C: J. Mhina

Court:

Ruling delivered today in the presence of the applicant and in the absence of the respondent.

C. Tengwa

DR

At Mwanza

12th July, 2021