

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

CIVIL REFERENCE NO. 3 OF 2020

(C/f Taxation Cause No. 52 of 2019, Originating from Criminal Appeal No. 3 of 2016)

LONGISHUU MEMULUTI APPLICANT

Versus

WILLIAM MEMULUTI 1ST RESPONDENT

LOITU LEYANI 2ND RESPONDENT

MMASAI MEMULUTI 3RD RESPONDENT

SALUMU MEMULUTI 4TH RESPONDENT

LOITALE MEMULUTI 5TH RESPONDENT

RULING

27th May & 13th August, 2021

Masara, J.

The Applicant brought this Application for Reference under Order 7(1) and (2) of the Advocates Remuneration Order, 2015; GN No. 264 of 2015, moving the Court to quash and set aside the decision of the Taxing Officer, in Taxation Cause No. 52 of 2019. The Applicant faults the decision of the taxing officer for applying a wrong principle of the law in taxing off the whole bill of costs. The Application is supported by the affidavit deposed by Longishuu Memuluti, the Applicant. The Respondents did not file a counter affidavit.

There is no viable record from which the facts of the cases leading to this reference can be extracted; what is apparent is that there was a battle of cases amongst the parties herein. The Applicant having won in the dispute between them, he filed bill of costs, vide Taxation Cause No. 52 of 2019. After thorough scrutinization of the costs, the Taxing Officer was satisfied that the Applicant failed to prove the costs with requisite EFD receipts. The whole bill was taxed

off on 24/2/2020. The Applicant was dissatisfied, he has preferred this reference aiming to challenge the decision of the Taxing Officer.

On 2/11/2020, the Respondents lodged notice of two points of Preliminary Objections, couched in the following terms:

- a) The Civil Reference No. 3 of 2020 filed by the Applicant against all above named Respondents in the Registry of this Hon. Court on 6th day of April, 2020 is incompetent for being time barred as per Order 7(2) of the Advocates Remuneration Order, 2015, the only remedy for it, is to have it struck out with costs; and*
- b) The Civil Reference No. 3 of 2020 filed by the Applicant against all the above named Respondents in the Registry of this Hon. Court on the 6th day of April, 2020 is incompetent for having been served to all the Respondents contrary to the mandatory provision of Order 7(3) of the Advocates Remuneration Order, 2015, the only remedy for it is to have it struck out with costs.*

At the hearing of the suit, the Applicant appeared in Court in person, unrepresented while the Respondents were represented by Dr. Ronilick E. K. Mchami, learned advocate. It was resolved that both the reference and the Preliminary Objections be argued simultaneously through filing written submissions. It was scheduled that the submissions in chief for both the application and the Preliminary Objections be filed by 8/3/2021. Reply submissions for both the application and the Preliminary Objections were to be filed by 22/3/2021, and rejoinders for both the application and the Preliminary Objections were to be filed by 29/3/2021.

It appears that the Applicant did not file the submission in chief in support of the application and also the reply submission in opposing the Preliminary Objections as ordered by the Court. His prayer to file the written submissions on 27/5/2021 was rejected due to the reason that he failed to file the same on two diverse dates when the case came for mention, therefore he was not diligent.

It has been held time and again that failure to file written submission as ordered by the Court is tantamount to failure to enter appearance in Court on the date the case is fixed for hearing. In this aspect I am guided by the Court of Appeal decision in ***National Insurance Corporation of (T) Ltd & Another Vs. Shengena Limited***, Civil Application No. 20 of 2007 (unreported) where it was observed that:

"The Applicant did not file submission on due date as ordered. Naturally, the court could not be made impotent by a party's inaction. It had to act. ... It is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case."

In the light of the reference under consideration, since the Applicant defaulted filing written submissions as ordered, he has waived his right to clarify on his side of the case. In the circumstances, I am constrained to determine the application basing on the submissions in support of the preliminary objections filed by Dr. Mchami.

Submitting in support of the first Preliminary Objection, Dr. Mchami submitted that, according Order 7(2) of the Advocates Remuneration Order, 2015, reference against the decision of the Taxing Officer has to be filed within 21 days from the date of the decision. He capitulated that the decision of the Taxing Officer subject of this reference was delivered on 24/2/2020 and the instant reference was filed on 6/4/2020. He insisted that counting the date the decision of the Taxing Officer was delivered to the date this Civil reference was filed 43 days had elapsed. Dr. Mchami concluded that this contravenes the mandatory requirements of the law and prayed that the application be dismissed.

Elaborating on the second Preliminary Objection, Dr. Mchami stated that according to Order 7(3) of the Advocates Remuneration Order, 2015, the Applicant, upon filing reference, shall serve the Respondent with copies of the

reference within seven days. According to Dr. Mchami, this reference was filed on 6/4/2020 and copies thereof were served to the Respondents on 21/10/2020 which is after 198 days. He insisted that the service contravened the law as it was done outside the prescribed time. He further urged the Court to dismiss the reference with costs.

According to Dr. Mchami, the two offended provisions that; is Order 7(2) and (3) are couched in mandatory terms as the word "shall" is used therein. In his opinion, dispensing with such mandatory provisions is a serious abrogation of the law. In concluding, the learned counsel for the Respondents implored the Court to sustain the two Preliminary Objections raised and strike out the reference with costs.

I have scrutinised the Preliminary Objection raised as well as the submission by Dr. Mchami made on behalf of the Respondents. The main issue calling for determination is whether the two raised Preliminary Objections have merits.

In dealing with the Preliminary Objections, I find it necessary to deal first the second Preliminary Objection regarding the service of copies of the reference. At the outset, I agree with Dr. Mchami that Order 7(3) of the Advocates Remuneration Order, 2015, G.N No. 264 of 2015, requires an Applicant in a civil reference to serve the Respondent with copies of the reference within seven days. As soon as the application for reference is filed, service of the reference to the other party ought to be made within seven days from the date it was filed or on the date the chamber summons was stamped by the registry officer. The relevant Order 7(3) provides:

"The Applicant shall within seven clear days of filing reference save copies all parties entitled to appear on such taxation"

According to the submissions made by Dr. Mchami, the reference under consideration was filed on 6/4/2020, while the Respondents were served with copies of the reference on 21/10/2020. However, his assertion that the Respondents were served on 21/10/2020 is a statement from the bar, without any supporting evidence. Despite the fact that the Applicant has not given his version, the learned advocate for the Respondents ought to have supported his argument with proof of the purported service.

In as much as I agree with Dr. Mchami that such is a pure point of law, it cannot be adjudicated properly in the absence of proof of the date the reference was served on the Respondents. There is nothing on record supporting the fact that the Respondents were served with copies of the reference on 21/10/2020. Consequently, the second Preliminary Objection is overruled.

I now revert to the first Preliminary Objection which relates to the competency of the reference. According to Dr. Mchami, the reference is time barred for being filed outside the prescribed time as provided under Order 7(2) of the Advocates Remuneration Order, 2015, G.N. No. 264 of 2015. That provision provides:

"A reference under Order (1), shall be by way of chamber summons supported by an affidavit and be filed within 21 days from the date of the decision."

As the record bears it, and as correctly submitted by Dr. Mchami, the decision of the Taxing Officer was delivered on 24/2/2020. The instant reference was filed on 6/4/2020. That is almost 42 days. The same is excessively out of the prescribed time. There is no record to show whether the Applicant sought and was granted extension of time. It was just filed out of time. For that reason, the first Preliminary Objection has merits and is accordingly sustained.

Based on the foregoing, the Civil Reference filed by the Applicant is time-barred. I need not deal with the merits of the same. I accordingly strike out the reference for being filed outside the prescribed time. Ordinarily, I was inclined to grant costs to the Respondents. However, I am deeply concerned that the Applicant who emerged victorious in the original dispute, was given nothing by the Taxing Master for a technical flaw. It will be against all tenets of justice to condemn him to pay costs of this Application. That will be rewarding the Respondents unfairly. I therefore direct that each of the parties bears their own costs for this Application.

Order accordingly.



Y. B. Masara
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JUDGE

13th August, 2021