

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**MISC CRIMINAL APPLICATION NO. 92 OF 2021**

*(C/f Criminal Appeal No 14 of 2019 at Arumeru District Court, originating from  
Criminal Case No.57 of 2018 at the Primary Court of Maji ya Chai,)*

**GRACE MATURO.....APPLICANT**

**Vs**

**ITIKISAELE LEBAYO.....RESPONDENT**

**RULING**

*Date of last order:10-12-2021*

*Date of ruling:16-2-2021*

**B.K. PHILLIP, J**

This ruling is in respect of an application for extension of time for lodging a reference in this Court against the ruling of the District Court of Arusha at Arusha in Taxation Cause No. 7 of 2020. It is made under the provisions of Order 8 (1) and (2) of the Advocate Remuneration Order G.N. No. 263 of 2015, supported by an affidavit sworn by the applicant. The application is contested. The respondent swore a counter affidavit in opposition to the application. The learned advocate Ombeni Kimaro appeared for the applicant and the respondent was

unrepresented. He appeared in person . I ordered the application to be disposed of by way of written submissions.

Let me give a brief background to this application before going into its merit. In the year 2018, the respondent instituted a criminal case against the applicant at the Primary Court of Maji ya Chai . The applicant was charged of the offence of destruction of property contrary to section 326 (1) of the Penal Code. The trial Court convicted the applicant as charged and sentenced her to six (6) months imprisonment, and ordered the applicant to pay to the respondent Tshs 539,200/= being compensation. The applicant was imprisoned as ordered by the Court and after being released from prison, he lodged an appeal to challenge the aforesaid judgment , vide Criminal appeal No.14 of 2019, which was dismissed with costs on the ground that it was time barred. Thereafter , the applicant lodged an application for extension of time for lodging his appeal in this Court vide Misc Criminal Application No.5 of 2020, which she prayed to withdraw it and the same was marked as withdrawn on 5<sup>th</sup> March 2020, with no order as to costs.

The respondent herein filed an application at the District Court of Arumeru claiming for costs in respect of Criminal Appeal No. 14 of 2018

at Arumeru District Court, Criminal application No.5 of 2020 at the District Court of Arumeru and Criminal Application No. 5 of 2020 at the High Court of Tanzania vide Taxation Cause No. 7 of 2020. The aforesaid Taxation cause was decided in favour of the respondent and the applicant was ordered to pay the respondent a sum of Tshs 740,000/= being costs incurred by the respondent in defending Criminal Appeal No.14 of 2019.

Back to the application at hand, Mr Kimaro's submission was to the effect that the applicant's affidavit in support of this application has revealed good cause for the delay as she has been diligently prosecuting her case trying to challenge the ruling of the District Court of Arusha the subject of this application. He pointed out that on 24<sup>th</sup> April 2019 the applicant was imprisoned. On 7<sup>th</sup> June 2019 while in prison, she filed Criminal Appeal No.14 of 2019 which was dismissed with costs for being time barred. She failed to institute her appeal against the judgment of the Primary Court of Maji Chai in Criminal Case No.57 of 2018 in time because she was imprisoned. She did not despair, thereafter she filed an application for extension of time for lodging her appeal vide Criminal Application No. 8 of 2020 which she withdrew it. Mr. Kimario contended that the applicant has never rested, she has

been moving in Court corridors pursuing her rights, thus she deserves to be granted the order sought in this application. To cement his arguments he cited a number of cases. I cannot reproduce all of them in this ruling as doing so will make this ruling unnecessarily long. One of the cases cited by Mr. Kimario is **Royal Insurance Tanzania Limited Vs Kiwenga Strand Hotel Limited, Civil Application No. 111 of 2009** (unreported), in which the Court of Appeal while making deliberations on application for extension of time to lodge an appeal had this say;

*"...We also of the view that in the absence of malafides, we are satisfied that the applicant has diligently and persistently been in and out of the Court Corridors in search of justice particularly after discovering the defects himself and attempting to cure it before anybody else.*

*It is for the foregoing reasons that we think the applicant has shown sufficient reasons for the delay in instituting the appeal".*

In addition to the above, Mr Kimario contended that the ruling of the District Court of Arusha, the subject of this application is tainted with illegality, on the following grounds; first, the taxing matter awarded the costs based on the Advocate Remuneration Order, GN. No. 263 of 2015 (henceforth "GN. No.263") which is not applicable in Criminal cases. To cement his argument he referred this Court to the provisions of section 2 of GN.No .263 of 2015. He went on arguing that in Criminal

cases parties are the Republic and the accused person, therefore costs cannot be awarded. Secondly, the taxing master wrongly entertained the application for taxation in respect of Criminal Application No.5 of 2020, which was determined by the High Court of Tanzania and Misc Criminal Application No. 14 of 2019 which was determined by District Court of Arusha at Arumeru. Furthermore, Mr. Kimaro submitted that the taxing master had no powers to entertain taxation claims for a matter determined by the High Court of Tanzania. That is clear illegality which is a sufficient reason to move this Court to grant this application, contended, Mr. Kimario. To cement his arguments he cited a number of cases including the case of **Principal Secretary , Minister of Defence and National Service Vrs Devram Valambhia ( 1992) T.L.R 185** in which the Court of Appeal held as follows;

*" 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"*

Mr Kimaro insisted that the applicant has adduced sufficient cause for the delay. He implored this Court to grant the order for extension of time to file reference.

In rebuttal, the learned Advocate , Francisca Gaspar, who prepared the submissions for the respondent started her submission by giving a brief background to this matter which I have already narrated at the

beginning of this ruling thus , I do not need to repeat it here. She went on submitting that the District Court correctly granted costs to the respondent in Criminal Appeal No. 14 of 2019 upon the applicant's appeal being dismissed for being time barred. The bill of costs was properly entertained by the District Court of Arusha at Arumeru and the application of GN.No 264 of 2015 in the determination of the bill of costs was correct as the same is applicable in determination of advocates' remunerations in both contentious and non- contentious matters between a party and another party. Expounding on this point, he submitted that in the aforesaid Criminal Appeal No. 14 of 2019, the respondent herein was represented by an advocate, thus he incurred costs and the court dismissed that appeal with costs. Upon the dismissal of the appeal , the applicant did not appeal against the dismissal order instead he opted to lodge an application for extension of time to lodged her appeal at the High Court of Tanzania vide Criminal Application No . 5 of 2020 which she later on withdrew it. The respondent herein filed taxation cause No.7 of 2020 whose ruling was delivered on 23<sup>rd</sup> February 2021. The applicant did not take any necessary step to challenge the ruling instead she started writing complaints letters to the Resident Magistrate in charge of the District Court of Arusha. This application has been filed in Court six months

from the date of the ruling of the taxation cause, the subject of this application.

Ms. Gaspar, maintained that the applicant's ignorance of the law and legal procedures does not constitute a good cause for delay to move this Court to grant the extension of time sought by the applicant. Like, Mr. Kimaro, he cited a number of case to buttress his position. Among the cases cited by Ms. Gaspar are; **Ngao Godwin Losero Vs Julius Mwarabu, Civil Application No. 10 of 2015**, (unreported) and **Metal Products Ltd Vs Minister for Landsand Director of Land services ( 1989) TLR 5**. Furthermore, citing the case of **Athuman Rashid Vs Boko Omar ( 1997 ) TLR 146** and **Salum Sururu Nabahani Vs Zahor Abdulla Zahor, ( 1988) TLR 41**, and went on submitting that negligence on part of the applicant's counsel does not constitute a good cause for the delay. She maintained that all cases cited by Mr. Kamario are distinguishable from the facts of the application in hand, since, in the instant application there were malafides acts, negligence and lack of diligence on part of the applicant. She insisted that this application has been filed in court to frustrate the respondent's efforts to recover his costs and the applicant has failed to account for the days of delay.

In addition to the above, it was Ms. Gaspar's contention that the ruling of the District Court, the subject of this application is not tainted with any illegality and the applicant has failed to establish before this court that there is an issue of illegality on the face of record of the ruling in question. To cement her argument she cited the case of **Lyamuya Construction Company Ltd Vs Board of Registered Trustee of Young Women's Christian Association of Tanzania, No.2 of 2010, (unreported )** In which the Court of Appeal said the following;

*" 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 tat if suffcieint importance and I would add that it must also be apparent on the face of the record, such as the question of jurisdiction, not one that would be discovered by a long drawn argument of process"*

Having carefully considered the competing arguments raised by both sides, I am of the opinion that the issue for determination by this Court is whether or not the applicant has adduce sufficient cause for the delay in filing her reference.



It is a common ground that in order for this court to grant an order for extension of time the applicant has to adduce sufficient / good cause for the delay. The law does not stipulate the good/sufficient causes. However, our Courts have established some factors which need to be considered in determination of an application of this nature. For instance, in the case of **Lyamuya Construction Company Ltd Vs Board of Registered Trsutee of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010**, (unreported ) His Lordship Massati J.A as he then was said the following;

*".. As a matter of general principle , it is in the discretion of the Court to grant extension of time .But that discretion is judicial , and so it must be exercised according to the rules of reason and justice ; and not according to private opinion or arbitrarily. On the authorities, however, the following guidelines may be formulated;*

- a) The applicant must account for all period of delay*
- b) 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 the existence of a point of law of sufficient importance , such as the illegality of the decision to be challenged.. "*

Guided by the factors stipulated in the case of **Lyamuya Construction Company Ltd**, (supra), I found myself in agreement with the Ms. Gaspar that the applicant herein has not managed to account for each day of delay and the delay in this matter is inordinate. The court's record reveals that the ruling in question, the subject of this application was delivered on 23<sup>rd</sup> of February 2021 and the applicant was aware of the same, but did not take any step to challenge it. In June 2021, the respondent herein applied at the District Court of Arumeru for attachment of the applicant's Land, for recovery of the money he was awarded in Taxation Cause No.7 of 2020, that is when the applicant wrote a complaint letter to the Resident Magistrate incharge of the District Court of Arumeru. This application was filed in this Court in September, 2021.No reasons have been given on why the applicant did not apply for reference immediately after delivery of the ruling in Taxation cause No. 7 of 2021.Honestly, the applicant's acts, depicts clear laxity.However, guided by the same case of **Lyamuya Construction Company Ltd**, ( supra) as regards the existence of a point of law of sufficient importance, I am in agreement with Mr. Kimario that the ruling of the District Court in question raises a point of law sufficient of sufficient importance to be considered by this Court. Upon perusing

the ruling in question I noted that the same is in respect of costs claimed to have been incurred by the respondent in Misc Criminal Application No. 5 of 2020 which was before this Court among others. For easy of understanding the coming discussion let me reproduce the relevant part of the ruling hereunder;

*" Total of Tshs 870,000/= ( Tanzania Shillings Eight Hundred Seventy Thousand only ) is claimed by the applicant herein ITIKISAELEBAYO against the respondent GRACE MATURO as costs to defend ;*

*-Criminal Appeal No. 14 of 2019, at Arumeru District Court ( Originating from criminal case No. 57 of 2018 at Maji ya Chai Primary Court.*

*- Criminal Application No.5 /2020 at the High Court of Tanzania, Arusha Registry.*

*- Misc Criminal Application No.5 of 2020 at Arumeru District Court..."*

*(Emphasis is added)*

The part of the ruling quoted hereinabove shows on the face of the ruling in question that there is an element of illegality since the District Court of Arusha at Arumeru has no jurisdiction to entertain a bill of costs in respect of a matter determined by the High Court. Not Only that I have perused the ruling of the High Court in respect of

the said Criminal Application No. 5 of 2020 and noted that there was no order as to costs. The said Court order, reads as follows;

*"COURT: Prayer to withdraw the application is granted. The applicant should apply, if he so wishes, for extension of time before the District Court that dismissed the Appeal on technical ground. No order as to costs"*

From the foregoing and on the strength of the case **Principal Secretary , Minister of Defence and National Service** (Supra), I hereby grant the extension of time sought to give a room for the above mentioned important point of law to be dealt with by the High Court accordingly. The applicant is granted thirty (30) days within which she has to lodge her reference to the High Court. I give no order as to costs.

Dated this 16<sup>th</sup> day of February 2022



  
**B.K PHILLIP**

**JUDGE**