

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

REFERENCE NO. 3 OF 2021

(Originating from Taxation Cause No. 01 of 2021, in the District Court of Iringa, at Iringa).

BETWEEN

NATIONAL MICROFINANCE BANK (NMB) PLC.....APPLICANT

VERSUS

LEVISON YOHANA KIULA.....RESPONDENT

RULING

12th May & 9th August, 2022

UTAMWA, J

This is an application for reference made under Order 7(1) and (2) of the Advocates Remuneration Order, 2015, GN. No. 263 of 2015. (The GN). The applicant, NATIONAL MICROFINANCE BANK (NMB) moved this court for the following orders;

1. That the Honorable court may be pleased to call, examine correctness, legality, appropriateness and reverse the decision of the taxing officer in Taxation Cause No. 01 of 2021 delivered on 30th September, 2021 by Hon. Mwankejela, RM.
2. Costs be provided for.

The application was supported by an affidavit deposed to by Mr. Baraka H. Mbwilo, the applicant's counsel.

The affidavit supporting the application basically deposed that; on 21st October 2020 the respondent filed Civil Case No. 9 of 2020 in the District Court of Iringa. The applicant then filed the Written Statement of Defence and raised preliminary objection. The said preliminary objection was dismissed with costs. The respondent then filed his bill of costs. Aggrieved by the ruling of the taxing officer on the bill of costs, the applicant preferred the present application.

The respondent, LEVISON YOHANA KIULA objected the application by filing his counter affidavit. He also lodged a notice of preliminary objection (The PO) with the following two limbs:

- i. That the application is bad in law for being time barred contrary to Order 7(2) of the GN.
- ii. That the application is bad in law for effecting improper service of the reference documents contrary to Order 7(3) of the GN.

During the hearing of the preliminary objection, the applicant was represented by Mr. Baraka H. Mbwilo, learned counsel whereas Mr.

Emmanuel Kalikenya Chengula, learned advocate represented the respondent. The preliminary objection was argued by way of written submissions.

The learned counsel for the respondent submitted in support of the first limb of the PO that, it is undisputed that the matter at hand (Reference No. 03 of 2021) was filed in this court on 22nd October, 2021. However, the ruling which gave rise to the reference was delivered on 30th September, 2021. Certified copies were delivered to the parties on the same date of the ruling. The law guides that, an application for reference should be filed in court within 21 days from the date of decision to be challenged. This is in accordance with Order 7(1) and (2) of the GN. The present application was filed out of time for almost 2 days from the date of delivering the ruling. The application was supposed to be filed on 20th October, 2021 and not on 22nd October, 2021 as the applicant did.

Respondent's counsel further submitted that, the applicant ought to have applied for extension of time even if there was a delay of a single day. This position was reiterated in the case of **Nassoro Lwila & Another v. Andrew C. Ndakidemi & Another, Land Appeal No 03 of 2021, High Court of Tanzania at Iringa** (unreported). He added that, on 26th November, 2021 he made a perusal of the record for this matter and he discovered that the court fees were not paid since the receipts were not attached to the documents for this application as required by the law.

On the second limb, the respondent's counsel submitted that he was served with the necessary documents for the reference at hand on 23rd

November, 2021. This was after the lapse of 31 days from the date the application was filed in court. This is contrary to Order 7(3) of the GN which requires the documents to be served within seven days from the date of filling the reference. This provision was not enacted to circumvent the strict rules of procedure, but rather it was aimed at securing the smooth procedures to be adhered by the litigants. He thus, urged the court to dismiss the application with costs.

In his replying submissions, the applicant's counsel submitted that, the application was timely filed through electronic filing system on 19th October, 2021. Upon that filing, the applicant was provided with an electronic payment control number for effecting the filing fees on on 21st October, 2021. She paid the said filing fees electronically on 22nd October, 2021 and he was issued with an exchequer receipt. He urged the court to take judicial notice of information from the **Judicial Statistics Dashboard System Database** (the **JSDS**) since the same cannot be attached to the pleadings filed in court. He further contended that, counting the number of days from 30th September, 2021 the period of 21 days ends on 20th October, 2021. If one starts to count the number of days from 1st October, 2021, the period of 21 days ends on 19th October, 2021. The present application was therefore, filed on 19th October hence within time.

It was also the contention by the applicant's counsel that, he filed the documents electronically upon the introduction of the electronic filing system under the Judicature and Application of Laws (Electronic Filing) Rules 2018, GN. No. 148 of 2018 (henceforth the Electronic Filing Rules).

Rule 21(1) of these rules provides that, a document is taken to have been filed if submitted before the midnight according to East African Times. He referred the court to the case of **Mohamed Hashil v. National Microfinance Bank Ltd (NMB) Revision No. 106 of 2020, High Court of Tanzania, Labour Division** (unreported) and **Kitumbo Security Company Limited v Vimajo & Sons Limited, Civil Appeal No. 12 of 2020, High Court of Tanzania at Tabora** (Unreported) to support his contention. He added that, upon filing the documents online, the applicant's counsel was requested to present hard copies to the court which he did on 22nd October, 2021 and paid the necessary fees on that date. The electronic filing system rules do not have a requirement to submit hard copies of the pleadings after filing them electronically, but this is a mere practice of this court. He distinguished the **Nassoro Lwila case** cited by the respondent since the present application was timely filed.

The applicant's counsel also faulted the argument by respondent's counsel that on 26th November, 2021 he perused the court file and discovered that court filing fees had not been paid. The absence of the receipt in his view, does not mean that the fees was not paid as the payment was done online and the exchequer receipt was generated online. He argued further that, on 20th January, 2022 he travelled from Mbeya to Iringa to attend other cases that is when he visited the registry office and requested one Grace Mfyuji (Officer of this Court) to issue a copy of exchequer receipt for records purposes. In the current *e-filing* system, if payments are not effected to the issued control number, the admission process of opening the file cannot be effective and a party will be required

to file his documents afresh. The applicant's case was therefore, processed because the filing fee was paid. The application was thus filed on time and there was no need to seek extension of time.

On the second limb of the PO, the applicant's counsel submitted that, before the introduction of e-filing system cases were manually filed. Applications for reference are governed by the GN which requires the filing of the reference to be within in 21 days from the date of the decision. Moreover, Rule 7(4) of the said GN requires the applicant to serve all parties with the said application. It should be noted that, the said GN was made before the era of *e-filing*. After the introduction of *e-filing* therefore the days are counted from when the matter is filed online. The respondent was therefore, served on 19th October, 2021 being seven days as required by the law. However, the applicant's counsel could not serve the respondent due to some misunderstanding between the parties. In his view, documents electronically filed can be served through email that is why he took the trouble to serve the respondent through email.

The applicant's counsel therefore, prayed for the court to invoke Section 3 of the Civil Procedure Code, Cap. 33 R.E 2019 and overrule the objections by considering substantive justice and overrule the PO with costs.

By way of rejoinder submissions, the respondent's counsel reiterated his submission in-chief. He also added that, there is no doubt on the provisions of Rule 21(1) of the Electronic Filing Rules. He also conceded the decision in the **Mohamed Hashil case** (supra). He nonetheless

argued that, the documents related to the matter at hand were rubber-stamped by the court officials on the 22nd October, 2021. Explanations given by the applicant's counsel in his view do not hold water. He added that, he refused to receive documents based on strange and illegal procedures as the said documents did not bear the stamp of the court. He thus, reiterated his prayer in his submissions in-chief for the dismissal of the application at hand.

I have gone through the records, the rival submissions from both parties and the law. I will decide the PO by discussing each of its limbs separately.

Regarding the first limb of the PO, I am of the view that, it is clear in this matter at hand that, the parties do not dispute on the existence of the JSDS system and the electronic filing system currently applying in our courts. They do not also dispute on the guidance under rule 21(1) of the GN and the decisions in the **Mohamed Hashil Case** (supra) and the **Kitumbo Case** (cited earlier). I therefore find that, indeed, the law as supported by these two precedents guides that, a document is deemed to have been filed in court if submitted electronically before the midnight as correctly contended by the applicant's counsel. It follows thus, that, under the circumstances of the matter at hand, to argue that the document at issue was filed on the date shown in the court's rubber-stamp (on the top of the hard copy of the chamber summons filed in court) needs evidence to disprove the allegation by the applicant's counsel that it was filed electronically before the date shown on the rubber-stamp. Evidence will also be needed to disprove the possibility that the same was filed

electronically before the date shown in the rubber-stamp. This fact alone, therefore, disqualifies the concern raised by the respondent from being a fit PO in law. This view is based on the landmark cases of **Mukisa Biscuits Manufacturing Company Limited v. West End Distributors [1969] E.A.701** and decisions by the CAT in **Karata Ernest and others v. Attorney General, TCA Civil Revision No. 10 of 2010, at Dar es Salaam**, (unreported) and **COTWU (T) OTTU Union and another v. The Hon Iddi Simba and others [2002] TLR. 88**.

In the above three precedents just cited above, it was held *inter alia* that, a PO must be based on a pure point of law arising from the pleadings and undisputed by both sides of the case. The facts on which the PO is based must also not need to be proved by evidence. In the case at hand, as I hinted before, the parties do not dispute on the guidance of law highlighted above on electronic filling of documents in courts. Furthermore, the averment that the document at issue was filed in court on the date shown in the rubber-stamp (on top of the chamber summons) is disputed by the parties.

It follows thus, that, evidence is required to prove what the respondent's counsel contends under the heading of the first limb of the PO. Besides, in my view, the date shown in the rubber-stamp of the court is not part of the pleadings of the parties. This is because, the rubber-stamp is only endorsed by the court officials to indicate the date of presentation of the document to the court in the hard-copy form. The date in the rubber-stamp however, is not a conclusive proof that the document had not been filed electronically before. Nonetheless, the undisputed

existence of the legal stance highlighted above therefore, makes it unsafe to conclusively determine that the document was actually, filed on the date shown in the rubber-stamp unless evidence is adduced to that effect.

Owing to the above reasons, I overrule the PO for not being qualified as the true PO in the eyes of the law under the circumstances of the case at hand.

The second limb of the PO also falls under the same ditch. This is because, the pleadings (the chamber summons, the affidavit and the counter affidavit) do not show the facts related to the date of service of the documents to the respondent. Besides, the date of service mentioned by the respondent's counsel as the date on which his client was served is disputed by the parties. Evidence is therefore required to establish the contentions by the respondent on the second limb of the PO. It is therefore, also disqualified as a PO due to the principles set under the precedents cited previously.

Before I wind up, and without prejudice to my above findings, I feel indebted to make two important remarks for the sake of better future practice in the process of justice dispensation. The first is that, the respondent's counsel introduced a new limb of PO in his submissions which was not part of the two limbs included in the notice of PO served to the applicant previously. This was the contention that, the filing fees for this application had not been paid by the applicant. The applicant's counsel disputed that fact and contended that he duly paid the necessary fees electronically. I also discard this contention for the same reasons I adduced in overruling the first and second limbs of the PO which had been included

in the notice of the PO. Besides, this point was introduced belatedly and without prior notice to the applicant. This course is thus, considered to be an *ambush-justice* technique which courts have to discard for purposes of promoting the parties fundamental rights to fair trials.

The second remark is that, the recent introduction of the electronic systems based on modern technology in court services through the GN and other laws of this land, must be received by all court stakeholders with both hands. This is because, they are advantageous to them and to the courts themselves in terms of convenience, time saving, costs saving, health protection (since they avoid contact between persons), expediting efforts to cope with the global modernity and many other advantages. It is therefore, my conviction that, parties who apply the systems must be encouraged in doing so instead of being demoralized. Courts must thus, strike a balance between true violations of the existing procedural laws on one hand and the promotion for the use of the electronic systems applicable in our courts currently on the other. Each case shall however, be considered under its own prevailing circumstances.

Having observed as above, I overrule the entire PO. Costs shall be in the course since the matter is currently still pending for hearing. It is so ordered.



JHK UTAMWA
JUDGE
09/08/2022

09/08/2022.

CORAM; JHK. Utamwa, J.

For Applicant; Mr. Steward Ngwale, advocate.

For Respondent; Messrs. Chengula and Muheluka, advocates.

BC; Gloria, M.

Court; Ruling delivered in the presence of Mr. Steward Ngwale, advocate for the applicant and Messrs. Chengula and Muheluka, advocates for the respondent, in court this 9th August, 2022.



JHK UTAMWA
JUDGE
09/08/2022.