

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

**IN THE DISTRICT REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 687 OF 2020**

**(Arising from Taxation Cause No. 77 of 2018)**

**VODACOM TANZANIA LIMITED.....APPLICANT**

**VERSUS**

**CATS NET LIMITED.....RESPONDENT**

**RULING (EX – PARTE)**

**MRUMA,J.**

This is a ruling on an application for extension of time within which the Applicant Vodacom (T) Limited can file reference to challenge the dismissal order passed by the taxing officer hon. Fovo, Deputy Registrar. The application is brought under Order 8(1) and Order 8(2) of the Advocate Remuneration Order GN No. 264 of 2015 and section 14(1) of the Law of Limitation Act [cap 89 RE2019]. The application is taken out at the instance of IMMMA Advocates and is supported by affidavits sworn by Mr Gasper Nyika and Frida Mtunzi annexed to the chamber summons.

The application is not opposed by the Respondent CATS NET Limited who although they were duly served they didn't enter appearance or file any counter – affidavit to oppose the application.

Despite the fact that the application is not opposed, the court has to determine whether the Applicant has been able to establish sufficient or good cause for the delay in bringing the intended reference in time.

It has been submitted by the counsel for the Applicant that they delay in filing the application was due to the time spent by the advocate in prosecuting an application to set aside the dismissal order only to be advised (in the ruling) that the Applicant ought to have filed an application for reference challenging the dismissal order.

Order 8(1) of the Advocates Remuneration Order, 2015 provide that;

*"The High Court may, subject to order 7 extend the time for filing reference upon sufficient cause."*

Order 7 (1) to which order 8(1) is subjected provides:

*"Any part aggrieved by a decision of the Taxing officer may file reference to a Judge of the High Court."*

Under Order 7(2) of the Orders, reference under Order7(1) is by way of chamber summons supported by an affidavit and has to be filed within 21 from the date of the decision impugned

It was deposed by Mr. Nyika that the Applicant filed a bill of costs on 7<sup>th</sup> May 2018. That on 7<sup>th</sup> September 2018, he was informed by their office clerk responsible with the following up of court summons for taxation of bill of costs that the matter had been dismissed for want of appearance on the same day (i.e. 17<sup>th</sup> September 2018). Eight days later that is on 25<sup>th</sup> September Mr. Nyika went to the court and perused the court file and discovered that before it was dismissed, the matter was called three(3) times namely on 1<sup>st</sup> August, 2018, 28<sup>th</sup> August 2018 and 17<sup>th</sup> September, 2018. This application was presented for filing on 24<sup>th</sup> December 2021. The Application to set aside the dismissal order was filed on 23<sup>rd</sup> October 2018, which is over 36 days after the dismissal order of 17<sup>th</sup> September 2018.

I have considered the application, the supporting affidavits and the submissions filed as well as the authorities cited. As stated herein before, under Order 7(1) of the Advocates Remuneration Order any part aggrieved by a decision of the Taxing office may file reference to a judge.

The law is so clear that any practising advocate would not need any research to know that taxation proceedings are governed by the Advocate Remuneration Order of 2015 and that under that law, any decision of the Taxing Officer can only be challenged by way of reference to a judge of the High. Challenging the dismissal order of the Taxing officer by way of application to set it aside was, to say the least professional negligent on the part of the Applicant's counsel.


Secondly and still on the issue of negligence it is deposed both by Mr. Gasper Nyika an advocate and partner in Immma advocates and Ms Frida Mtunzi an office clerk in the same office that Frida Mtunzi was responsible with the following up of summons in the matter. Frida deposed further that she made a follow up for summons for three weeks after filing the application for bill of costs but she was informed by various court clerks (which she didn't disclose their names) that the drawn order striking out the plaint in civil case No. 72 of 2012 was in the process of being typed and signed by the Registrar and therefore summons could not be processed. No affidavit was procured from any of the said "various court clerks" to support this assertion. If we take her assertions under paragraph 5 of her affidavit which is to the effect that she was informed by a court clerk one Raymond that the matter was set for mention on 28<sup>th</sup>

September, 2018 and her assertion in paragraph 8 of the same affidavit in which she asserts that she was informed by another court clerk one Yasinta that the matter was actually called on 17<sup>th</sup> September 2018 (instead of 28<sup>th</sup> September 2018 as she was informed earlier) and that it was dismissed for want of prosecution then it was pertinent for the Applicant to procure affidavit of the two court clerks to supplement her assertions. In absence of those affidavits, the assertions of Frida Mtunzi in paragraph 5, 6 ,7,8 and 9 of her affidavit contain hearsay evidence which is not admissible in terms of section 62 (1) of the Evidence Act.

Finally as regarding the principle governing extension of time, it is trite law that whether or not to grant extension of time to file a reference out of time is an exercise of discretion and just like any other discretion it must be exercised judiciously and on fixed principles and not private opinions, sentiments, sympathy or benevolence. It must be deservedly and not arbitrary. The court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles with the burden of disclosing the material fact falling squarely on the Applicant. The judicial principle established by the law is that the Applicant must satisfy the court that he had a good cause for delay. This good cause must go deep to the root cause of the delay. In the present case no good

cause has been established. Accordingly the application is dismissed. As the Respondent did not enter appearance, I make no orders as to the costs.



  
A. R. Mruma

**Judge**

**14/7/2022**

**14/7/2022**

Coram : Hon. A.R. Mruma,J

For the Applicant: Ms. Faidha Salah for

For the Respondent: Absent

Cc: Delphina

**Court:** Ruling delivered



A handwritten signature in black ink, appearing to read "A. R. Mruma".

A. R. Mruma

**Judge**

**14/7/2022**