

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

MISC. CIVIL APPLICATION NO. 41 OF 2021

(Originating from Civil Application No. 1 of 2021 of the District Court of Tanga at Tanga)

HAMDUNI ALLY SHEHOZA.....APPLICANT

REHEMA ALLY SHEHOZA.....APPLICANT

ASMA ALLY SHEHOZA.....APPLICANT

-VERSUS-

RAMADHAN RUTENGWE & CO ADVOCATE.....RESPONDENT

RULING

Date of Last Order: 10/03/2022

Date of Judgment: 10/03/2022

AGATHO, J.:

This was an application for extension of time to file reference against the decision of the District Court of Tanga in Civil Application No. 01 of 2021. When the matter before the Court of law comes to an end, there are different remedies available, if one of the parties is aggrieved with the decision of the Court. Those remedy must be pursued within prescribed time as it stated in a particular law. Due to different circumstances and hardship a party may delay enjoying the remedy within prescribed time. If that happens that the party is

required to file an application for extension time. It is the discretion of the Court to grant extension of time as stated in the case of **Alliance Insurance Corporation Ltd vs Arusha Art Ltd, Civil Application No. 33 of 2015 Court of Appeal of Tanzania**, stated that, *Extension of time is a matter for discretion of the Court and that the applicant must put material before the Court which will persuade it to exercise its discretion in favor of an extension of time.*

The Applicants in the present application seek extension of time to enable them to challenge the decision of the District Court which was in favour of the Respondent. The hearing was done on 17/02/2022. The issues to be determined in this application are:

- (1) Whether there is sufficient cause to extend time?

Looking at the ruling of the District Court, there is an error on the face of the records. That the Resident Magistrate did not have jurisdiction to deal with disputes arising out of remuneration agreements between advocate and his client/s. That matter ought to be dealt with the taxing officer as per Rule 5 of the Advocates Remuneration Order of 2015. Since to exercise power that one does not have a point of law it then amounts to illegality. Such illegality is

worth to be examined by the superior Court to determine whether the proceedings and the ruling of the District Court was proper or not.

- (1) Whether the illegality claimed by the applicants is sufficient cause?

To determine whether determination of disputes of the nature of advocates remuneration by the Resident Magistrate is the illegality amounting to sufficient cause we look at the precedents. In **The Principal Secretary, Ministry of Defence and National Service V Devram Valambhia (1992) TLR 387** the CAT held illegality is sufficient cause to extend time. It should be remembered that once the matter relates to remuneration agreement of advocate and his client, then the power is vested upon the taxing officer. Ordinary magistrates and judges are excluded to exercising power over such claims. This is visible on Rule 3 of the advocates remuneration orders which defines a term "taxing officer."

"taxing officer" means the Registrar, Deputy Registrar of the High Court, Resident Magistrate in-charge of a Resident Magistrates Court or a District Court, other

officer of the Court as the Chief Justice may appoint or such other officer as the law may provide;

Moreover, Rule 5(1) provides as follows:

An application to enforce, set aside, or determine any question as to the validity or effect of a remuneration agreement may be brought to the taxing officer within sixty days from the date on which the dispute arose.

From the above there is no evidence given that the Resident Magistrate was the Hon. Majani, Resident Magistrate in charge or was anyhow appointed by the Chief Justice to perform the duties of the taxing officer. This will be determined in the reference.

(1) Whether the illegality claimed is apparent on the face of record?

On the question whether the illegality is noticeable on the face of the record, that may be answered in the affirmative because the judgment pronounced by Hon. Majani shows clearly show that she was the Resident Magistrate which was neither in charge nor the deputy registrar. Moreover, she signed the judgment as the ordinary

Resident Magistrate. That seems to offend Rule 3 and Rule 5 of the Advocate Remuneration Order of 2015.

(1) Whether this was taxation proceedings/advocates remuneration agreement? Order 5 of Advocates Remuneration Order 2015

Looking at the record of proceedings of the trial Court, the case at hand is not centered on taxation proceedings. There is no dispute that the matter at hand emanated from Civil Application No. 1 of 2021 before District Court of Tanga in which the Respondent claimed payment of the money for the services he rendered as the advocate of the applicants. It was an application emanating from advocate's remuneration agreement. This is confirmed by the respondent's counsel who argued that the application before the District Court was about advocates remuneration agreement and not bill of costs. I am of the view that, since it was a dispute relating with remuneration agreement between the advocate and his clients the Advocates Remuneration Order of 2015 applies. I am aware that there is a High Court decision in **Mawalla Advocates v. Fosunwood Tanzania Limited Misc. Commercial Application**

No. 79 of 2019 the HCT Commercial Division where the Judge entertained a matter which was about remuneration agreement. It is my settled view that this Court is not bound by that decision. Moreover, that decision seems to have been given without taking into consideration Rule 5 of the Advocates Remuneration Order of 2015.

- (1) Whether H.A. Majani RM was exercising powers of taxing officer?

From the provisions Advocates Remuneration Order of 2015, it seems that Hon. H.A. Majani, Resident Magistrate exercised the powers of the taxing officer. But whether that is correct or not it has to be determined by the Court to which such illegality will be a subject for determination. This Court cannot conclude on this issue at the moment as it is not privy to do so. However, once we are satisfied that there could be illegality in the decision of the District Court the extension of time ought to be granted as held in **The Principal Secretary, Ministry of Defence and National Service V Devram Valambhia (1992) TLR 387.**

In the application for extension of time an applicant is has duty to account for delayed days. Thus, each day of delay shall be accounted for. This is decided in the case of **Bushiri Hassan v. Latifa Lukio Mashayo, Civil Application No. 3 of 2007**, Delay of even a single day has to be accounted for otherwise there would be no proof of having rules prescribing periods within which certain steps have to be taken." In the present case the Applicants have not accounted for delayed days. They have not stated what made them fail to make an application timely. They simply claimed there is illegality. From the reason advanced by the Applicants, I find that they have not shown good cause and accounted for the delay to the standard required. However, due to a possible apparent error on the record, the extension of time may be granted. For that matter even the delay is for years, the Court may grant extension if there is illegality in the impugned decision. This view was held in **Attorney General v. Wafanyabiashara Soko Dogo Kariakoo Cooperative Society Ltd, Misc. Application No. 606 of 2015** at page 10 where the extension of time was granted due to illegality despite the delay of 12 years.

Indeed, for the extension of time to be granted there must be sufficient cause, which depends on the circumstances of the case. It is trite law that the Applicant must show the sufficient cause for extension of time to be granted, in the case of **Laurent Simon Assenga Vs. Joseph Magoso and two others, Civil Application No. 50 Of 2016** Court of Appeal of Tanzania at Dar es Salaam, Massati J.A noted that, *what is a good cause is a question of fact, depending on the facts of each case. For that reason, many and varied circumstances could constitute good cause in any particular case.*

One of the sufficient causes for extension of time is the issue of illegality. In **The Principal Secretary, Ministry Of Defence And National Service V Devram Valambhia (1992) TLR 387**, *The Court of Appeal held that a point of law of importance such as the legality of the decision sought to be challenged could constitute a sufficient reason for extension of time.* Similar holding was given in **Hassan Ally Sandali v Asha Ally, Civil Appeal No. 246 of 2019, Court of Appeal of Tanzania (unreported).**

Aside from what has been examined herein above, the judicial officer empowered to interpret the Advocate Remuneration Order 2015 is a crucial matter.

- (1) Whether Advocates Remuneration Order 2015 is to be interpreted by taxing officers only?

The Advocates Remuneration Order of 2015 is a working tool defining jurisdiction, and procedures in taxation proceedings and matters of advocates remuneration agreements. These are shown on Rule 2 and Rule 5 of the Advocates Remuneration Order of 2015.

As for Rule 2 on application of the order it states the following:

This Order shall apply to the remuneration of an advocate by a client in contentious and non-contentious matters, for taxation thereof and the taxation of costs between a party and another party in matters in the High Court and in Courts subordinate to the High Court, arbitral tribunals and tribunals from which appeals lie to the Court of Appeal.

Parallel with the foregoing holding, it is vital to appreciate if the Magistrates and Judges have authority to adjudicate advocates

remuneration agreement. This will help to resolve the matter at hand.

- (1) Whether the ordinary Resident Magistrates or Judges can determine disputes arising out of remuneration agreements?

According rule 3 of the Advocates Remuneration Order of 2015, those responsible to determine disputes out of advocates remuneration agreements are taxing officers. The said rule states:

"taxing officer" means the Registrar, Deputy Registrar of the High Court, Resident Magistrate in-charge of a Resident Magistrates Court or a District Court, other officer of the Court as the Chief Justice may appoint or such other officer as the law may provide;

From the foregoing provision of the law, the Resident Magistrates and Judges are not taxing officers unless appointed so by the Chief Justice or where the law provides that they shall be taxing officers. In absence of the appointments by the Chief Justice or the legislation providing for the said judicial officer to be taxing masters, the RMs and Judges are excluded from determining advocates

remuneration agreements under the Advocates Remuneration Order of 2015.

In the present application, the applicant wishes to challenge the decision of the taxation proceeding which originated from the remuneration proceeding. According to Rule 3 of the Advocates Remuneration Order of 2015, remuneration agreement means *an agreement between an advocate and a client stipulating terms payment of charges in respect of services offered or to be offered by the advocate to his client*. This is to say when an advocate agrees with his or her client to perform some legal duties subject to payment of fees as agreed.

There is no doubt that the duty of An Advocate is the right of the client and the duty of the client is the right of an advocate. It may happen that either of the party decides to dishonor the agreement entered. There are different remedies available for each party in the remuneration agreement which are enforceable and recognized under the Advocates Remuneration Order, 2015 G.N. No. 263 of 17/07/2015. The said Order provides for the meaning of the taxation proceeding. Under rule 3 of the Advocates Remuneration Order,

taxation proceeding shall mean an application for taxation of a bill of costs or an application to enforce, set aside, or determine any question as to validity or effect of a remuneration agreement. In reading that rule together with Rule 5 of the Advocates Remuneration Order, 2015 an application to enforce, set aside, or determine any question as to the validity or effect of a remuneration agreement may be brought to the taxing officer within sixty days from the date on which the dispute arose. It is clearly stated in the Rules that remuneration agreement can be challenged by way of the taxation proceeding and the presence of the words or an application to enforce, set aside, or determine any question as to validity in the definition of the taxation proceeding and same words appear in the Rule 5 of the mentioned Rules in my view it is the position of the law that Remuneration Proceeding is the taxation proceeding.

Since application to enforce remuneration agreement qualifies to be taxation proceeding, the question to be resolved at this juncture is who is responsible or has authority under the law to determine application for enforcement of advocates remuneration agreement. Let me reproduce Rule 5 (1) and (3) starting with Rule 5 (1) an

application to enforce, set aside, or determine any question as to the validity or effect of a remuneration agreement may be brought to the taxing officer within sixty days from the date on which the dispute arose.

(3) The Taxing Officer shall, in determining a remuneration agreement- (a) order client who is party to the agreement to pay the advocates such costs incurred by such advocate for services rendered to that client in any matter; and (b) disallow costs incurred through over-caution, negligence or mistake, or by any other inappropriate expenditure.

From the above provisions there is a need of relying on the principle of statutory interpretation for the purpose of putting this issue clear.

Sub rule 1 use the word "may" and sub rule 3 use the word "shall".

Under section 53 of the of the Interpretation of Laws Act [Cap 1 R.E 2019] , sub section 1 provides that ***Where in a written law the word "may" is used in conferring a power, such word shall be interpreted to imply that the power so conferred may be exercised or not, at discretion.***

and sub section 2 provides that, ***Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.***

If we consider the meaning under Rule 5 (1) of the Advocate Remuneration Order together with Section 53 (1) of the Interpretation of Laws Act, it is not mandatory application for enforcement of the remuneration agreement to be entertained by the taxing officer and to that effect can be by any one with authority to adjudicate normal proceeding as it allowed by the provision of Section 53 (1) of the Interpretation of Law Act. But Rule 5 (3) of the Advocate Remuneration use the word "shall" to the effect that the taxing officer to be bound with two conditions therein. Sub Rule 3 did not mention any other person with authority to adjudicate but only Taxing Master. I asked myself as to whether sub rule 1 did not command application to enforce remuneration agreement to be entertained only by taxing master and seems like to invite others to entertain those applications but there is a condition, mentioned under Rule 5 sub Rule 3 of the Order which must be adhered by

taxing master. Therefore, it is my settled view that there is a need of extending time simply because it is unclear whether the one who entertained the matter was taxing master or not. There is the need of a higher Court to look on the validity of the decision made by the decision of the adjudicator who is appeared to be invited under Rule 5 sub rule 1 but not bound to follow mentioned conditions under Rule 5 sub rule 3 of the Advocates Remuneration Order of 2015.

In fine the application for extension of time is granted as there are traits of illegality that are worthwhile to be examined by the Court. Thus, the applicants are granted 14 days from today to file their application for reference. No order for costs is given.

DATED at TANGA this 10th Day of March 2022.




U. J. AGATHO
JUDGE
10/03/2022

Date: 10/03/2022

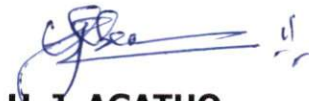
Coram: Hon. Agatho, J

Appellant: Present

Respondent: Present

B/C: Zayumba

Court: Ruling delivered on this 09th day of March, 2022 in the presence of the Appellant, and the Respondent.



U. J. AGATHO

JUDGE

10/03/2022

Court: Right of Appeal fully explained.



U. J. AGATHO
JUDGE
10/03/2022