

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 333 OF 2021

(Arising from Bill of Cost No. 61 of 2018)

STANBIC BANK TANZANIA LIMITED.....APPLICANT

VERSUS

EDWARD EPIMACK LASWAY..... RESPONDENT

RULING

Date of last Order: 20th September, 2022

Date of Ruling: 4th November, 2022

E. E. KAKOLAKI, J.

The applicant herein Stanbic Bank Tanzania Limited under the provisions of Rule 8(1) and (2) of the advocates Remuneration Order, 2015, GN No. 263 of 2015, [published on 17/07/2015], instituted this application against the above-named respondent praying for the following orders:

(i) That this Court be pleased to extend time for the applicant to file an application for reference to a judge of the High Court against the decision of Taxing officer made on 24th July, 2019 in respect of Bill of Costs No. 61 of 2018.

(ii) Costs of this application

- (iii) Any other reliefs that this honourable court may find fit and just to grant.

The chamber summons is taken at the instance of the applicant and supported by two affidavits deposed by Lilian Gawile, the principal officer of the applicant, and Emmanuel Nashon advocate stating the reasons as to why this application should be granted. Upon being served with the application, the respondent filed a counter affidavit deposed by Edward Epimack Lasway, stating the reasons why this application should not be granted.

The material facts leading to this application as can be gathered from the affidavits are simple to tell. On 11th December, 2018 the applicant through her lawyer Locus Attorneys filed Bill of Cost No. 61 of 2018 for Taxation of costs in respect of amounting to a total of Tsh.21,656,000.00 against the respondent emanating from Civil Case No. 19 of 2015 which was withdrawn by him and notice of taxation issued on 17th December, 2018 for parties to appear before the taxing officer on 21st February, 2019. At all material time, the applicant was trading under representation of advocate Emmanuel Nasson from Locus Attorneys, who on 24th July, 2019, the date fixed for hearing defaulted appearance as a result the application was dismissed for want of prosecution under order IX Rule 8 of the Civil Procedure Code,

[Cap33 R.E 2002] now R.E 2019. Following that dismissal order the applicant unsuccessfully filed Misc. Civil application No. 431 of 2019, for an order of setting aside the said dismissal order as the same was dismissed on 30th July 2020, for want of sufficient reasons to move the court to set aside the dismissal order. Dissatisfied with that decision the applicant on 4th August, 2020 through advocate Emmanuel Nasson wrote a letter to the court requesting for copies of the ruling and drawn orders, in which only the copy of ruling was issued to him on 5th October 2020, while the drawn order supplied to him lately on 23rd June 2021, after several polite reminders from advocate Emmanuel Nasson before he left Locus Attorneys and replaced by advocate Makarious J. Tairo. Upon receipt of the said copies of ruling and drawn order, initially the applicant wanted to challenge the decision in Misc. Civil Application No. 431 of 2019, by way of review but later on discovered that there is illegality in the ruling of this Court of 24th July, 2019 by the taxing master, touching jurisdiction of the Court and its powers to dismiss the Bill of Cost No.61 of 2018, under Order IX Rule 8 of the CPC, hence changed his mind by filing the present application for extension of time to challenge the said dismissal order by way of reference before a judge of this High Court.

In this application the applicant is relying on two grounds namely, one, technical delay and second, illegality of the decision which is pegged on three grounds of reference intended to be addressed to this Court should this application be granted. She mentions the grounds as follows:

- (a) Jurisdiction and legality of the Deputy registrar as taxing Officer to shift the determination of Bill of costs No 61 from Advocates Remuneration Order, 2015, GN No. 263 of 2015, published on 17th July 2015 and determine it as a Civil Case under the Civil Procedure Code, Cap 33 R.E 2002.
- (b) Jurisdiction and legality of the Deputy registrar as a Taxing Officer to dismiss a bill of cost filed under the Advocate Remuneration Order, 2015 GN No 263 of 2015.
- (c) Jurisdiction and legality of the Deputy Registrar as a Taxing Officer to dismiss any matter before the court under Order IX Rule 8 of the Civil Procedure Code Cap33 R.E 2002.

As the delay was technical delay for spending time pursuing his rights in Court, the applicant prays this Court to grant the application as to pave a way to file reference to a Judge with a view of ascertaining the correctness or otherwise of the decision in order to ensure that justice is done to all parties concerned.

On the hearing date, Ms. Mariam Ismail advocate holding brief of Advocate Tairo Makarios learned counsel appeared for the applicant while respondent appeared in person. The application was ordered to be disposed by way of written submission in which the submissions in support of the application were prepared and filed by Dr. Onesmo Michael, learned advocate from Locus Attorneys while Mr. Johnson Msangi filing the submissions for the respondent.

Submitting in support of the application, Mr. Michael adopted both affidavits in support of the chamber summons to form part of his submission. He then argued that, extension of time is entirely in the discretion of the Court, thus the applicant is duty bound to advance good cause warranting the court to exercise such discretion, the duty which he submitted the applicant has discharged. In fortifying that stance he cited to the Court the cases of **Benedictor Mumello Vs. Bank of Tanzania**, Civil Appeal No.12 of 2002 and **Joseph Paul Kyauka Njau and Hiacintha Paul Kyauka Njau**, Civil Application No. 7/05 of 2016 [both CAT-unreported]. He went on to mention the grounds establishing good cause to include, accounting for all period of delay, that, the delay should be inordinate, the applicant must show diligence or sloppiness in the prosecution of the action that intends to take, and other

reasons such as existence of the point of law of sufficient importance, such as the illegality of the decision sought to be challenged.

According to him the applicant has shown sufficient cause to justify extension of time sought, as he has accounted for all the period of delay starting from 24th July 2019 when the Bill of Cost was dismissed up to 12th July, 2021, when this application was filed in court as appearing in paragraph 5,6,7,8,9,10,11,12,13,14 and 15 of the affidavit of Lilian Gawile. And that such account of delayed period is backed up by paragraphs 5,6,7,3,8 and 9 and 10 of the affidavit of Emmanuel Nasson. In his view, the said paragraphs justify the grounds for extension of time by stating good cause or justifiable reasons and that, the delay is not inordinate as the applicant was actively in court pursuing her rights and there was any inaction on his part. According to him the applicant has shown diligence in pursuing her rights and not negligence or apathy as the reasons as to why the applicant failed to file the reference within 21 days from the date the bill of cost No. 61 of 2018 was dismissed is technical delay. To back up his position, he cited the case of **Fortunatus Masha Vs. William Shija and Another** [1997] TLR 154 and **M.B Business Limited Vs. Amosi David Kassanda and two Others**, Civil Application No. 48/17/2018, [CAT-unreported].

On the point of illegality, Mr. Michael argued the same are apparent on the face of records as stipulated in paragraph 16.1, 16.2 and 16.3 of the affidavit. To back up this point, he cited the cases of **Laurent Simon Asenga vs Joseph Magoso and Two others**, Civil Application No. 50 of 2016 and **M.B Business Limited vs David Kassanda and Two Others**, Civil Application No. 48/17/2018 (both CAT-unreported), supporting the proposition that, illegality is a good cause for extension of time. He contended that, Advocate Remuneration Order, 2015 empowers and requires the taxing officer to proceed with ex-parte hearing in any default of appearance of either or both parties. In his view, the Advocate Remuneration Order is self-sufficient as to what should be done in case of absence of a party, thus the taxing officer had no jurisdiction to dismiss the bill of cost No. 61 of 2018, for want of prosecution under Order IX Rule 8 of the CPC. With that alleged apparent illegalities he prayed that the orders stipulated in the chamber summons be granted with costs.

In response, Mr. Msangi, who drafted and filed respondent's submission like the applicant adopted the respondents counter affidavit to form part of his submission and contended that the applicant is supposed to account for one year, 11 months and 4 days from 24th July, 2019, the date in which the decision/order sought to be challenged was issued to 12th July, 2021, when

this application was filed. In view of Mr. Msangi, Advocate Remuneration Order, 2015 is not exhaustive as the applicant failed even to identify which provision was applicable under that circumstance, hence the applicant is exercising fishing expedition by assuming the role of investigator and gather fresh evidence at the trial something which is abhorred. In his view, the applicant has failed to account for the delayed days of about 690 days, which he termed as a serious and inordinate delay.

On the issue of illegality of the decision sought to be impugned Mr. Msangi while citing the case of **Praygod Mbaga Vs. The Government of Kenya and Another**, Civil Reference No. 4 of 2019, in which the Court insisted that illegality should be apparent on the face of record, submitted that, applicant failed to demonstrate or indicate prima facie facts showing how the impugned decision is tainted with illegality to enable this court to appreciate that point leave alone failure of the applicant to demonstrate on how the said illegality prejudiced rights of the parties thereto. He finally argued that, there is no sufficient reasons warranting this court grant the sought extension of time, apart from the application being frivolous, vexation and abuse of the court process. On basis of what is stated herein above he submitted, the applicant failed to disclose sufficient reasons to warrant this

Court grant him the prayer sought, thus prayed for dismissal of the application with costs.

In brief rejoinder, Mr. Michael attacked Mr. Msangi's submission on the point that Advocates Remuneration Order is not exhaustive as to him, Rule 11 (a) of the Advocate Remuneration Order, 2015, provides for what should be done in case there is default of appearance by either party for providing the taxation officer with discretion to proceed ex-parte. He maintained that, it was illegal for the taxing officer to resort to CPC, in dealing with the issue on non-appearance of the advocate for the applicant while the issue is covered by the Advocate Remuneration Order.

Concerning the proposition that he failed to account for each and every day of delay, it was Mr. Michael's submission that, applicant has accounted for delayed days, as facts deposed in both affidavits in support of the application remained unchallenged by the respondent in his counter affidavit, apart from deposing generally statement disputing what was verified by the applicant. To buttress his point, he relied on the case of **East African Cables (Tanzania) Ltd Vs. Spencon Services Limited**, Misc. Civil Application No.61 of 2016 (HC –unreported).

On the point of illegalities, it was his rejoinder that, respondent's submission in this point is misconceived. With regard to the case of **Praygod Mbaga**

(supra) cited by Mr. Msangi, Mr. Michael argued that, the same is in favour of the applicant by referring illegality of the decision as one of the grounds for extension of time. Otherwise he reiterated his earlier position and prayers.

I have carefully considered both affidavits in support of the application, counter affidavit and the rival submission by the learned counsel for the parties herein, together with the supportive documents attached thereto. Undoubtedly, grant of an application for extension of time is a judicial discretion, exercised depending on the surrounding circumstances, with the aim of achieving real and substantial justice between parties. However, as rightly submitted by the two legal minds the submission which I embrace, the same is exercised upon the applicant advancing good or sufficient cause for delay, where upon each day of delay must be accounted. See the case of **Lyamuya Construction Company Ltd vs. Board of registered trustees of young women's Christian association of Tanzania**, Civil Application No. 2 of 2010, **Benedict Mumelo vs Bank of Tanzania**, Civil Appeal No. 12 of 2002 and **The International Airline of the United Arab Emirates vs. Nassorro**, Civil Application No 263 of 2016, (CAT-Unreported) to mention few.

Having in mind the above legal exposition, the issue which this Court is called for determination is whether the applicant has demonstrated sufficient cause warranting extension of time to her within which to file reference to this Court.

To start with the ground of technical delay, it is uncontroverted fact that, the ruling in which the extension of time is sought to have it challenged by way of reference to this Court was delivered on 24th July, 2019. As per Rule 7 (2) Of Advocate Remuneration Order (supra), the application for reference was supposed to be filed within 21 days from the date of the decision. As the applicant could not lodge it timely this application for extension of time was preferred on 12th June, 2021, which is more than 690 days, contending that the delay resulted from technical delay since she was erroneously pursuing Misc. Civil Application No. 431 of 2019, for setting aside dismissal order in the Bill of Cost No. 61 of 2018.

Technical delay is a good cause or sufficient ground warranting court to grant the extension of time, if the same is successfully established as advocate's negligence in adopting correct procedure of the law does not constitute sufficient reason for the exercise of the Court's discretion. See the case of **Fortunatus Masha Vs. William and Another** [1997] TLR 213 (CAT). The law is very clear under Rule 7(1) of Advocates

Remuneration Order that, any party aggrieved with the decision of taxing master has to file Reference to the Judge of the High Court within 21 days. In this matter no doubt applicant's advocate acted negligently or in ignorance of the law and without due diligence by wrongly taking another path and file an application for setting aside the said dismissal order, instead of filing an application for reference to challenge the decision of the taxing officer in which the resultant fact was an inordinate delay of more than 690 days. It is the law that advocate's negligence or ignorance of the law and lack of diligence on his part has never been good cause for extension of time. See the cases of **Tanga Hardware & Auto Parts Limited and 6 Others Vs. CRDB Bank Ltd**, Civil Application No. 114 of 2005 and **Omari R. Ibrahim vs. Ndege Commercial Services LTD**, Civil Application No 83/01 of 2020 and (CAT-unreported). In **Tanga Hardware & Auto Parts Limited and 6 Others** (supra) the Court had the following to say:

*"...this Court should not allow an advocate to plead oversight wherever there is a transgression of the rules or of directives of this Court on its decisions. After all, it has been said up-teen times, needing no citation of authority, **that an error of an advocate is not sufficient cause for extending time. I dare say that an oversight of an advocate is not***

sufficient cause for this Court to waive a requirement that has been observed religiously like this one.
(Emphasis supplied)

Similarly in **Omari R. Ibrahim** (supra) the Court of Appeal of Tanzania observed that:

*It should be stated once that, **neither ignorance of the law nor counsel's mistake constitutes good cause** in terms of Rule 10 of the Rules. (See Bariki Israel v. The Republic, Criminal Application No. 4 of 2011 and Charles Salungi v. The Republic, Criminal Application No. 3 of 2011 (both unreported)). In the case of Umoja Garage v. National Bank of Commerce, [1997] TLR 109, the Court stated that **lack of diligence on the part of the counsel is not sufficient ground for extension of time**. In the current application, the record speaks loudly that **the Applicant was negligent on the path he chose which culminated into inordinate delay which he failed to account for**. For the foregoing and taking into consideration the circumstances pertaining in the current application, it is my view that no good cause has been shown by the Applicant to warrant extension of time sought. In the final result, this application is devoid of any merit and the same is dismissed with costs. (Emphasis added)*

On basis of the above authorities and reasoning, it is apparent to me that the point of technical delay cannot stand, and as rightly submitted by Mr.

Msangi, hence a finding that the applicant has failed to account for that delay of 690 days.

Next for determination is the issue of illegality of the decision sought to be impugned, in which I am in line with the arguments of applicant's counsel that, when successfully established, in itself suffices to warrant this Court exercise its discretion and grant extension of time to the applicant regardless of whether the applicant has accounted for delayed days or not. This position was articulated in a number of cases including **VIP Engineering and Marketing Limited and Three Others Vs. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (CAT- Unreported) and **Principal Secretary, Ministry of Defence and National Service Vs Devram Valambia** [1992] TLR where the Court of Appeal patently stated that:

*"It is, therefore, **settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay.***
(Emphasis supplied)

The above legal position was also adumbrated in the case of **Principal Secretary, Ministry of Defence and National** (supra) where the Court held thus:

*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 records straight.*** (Emphasis supplied).

However, it is the settled principle of law that, the claimed illegality should be apparent on the face of record, as mere claim of illegality alone is not enough satisfy the Court exercise its discretion. This principle was pronounced in the case of **Lyamuya Construction Company Limited vs Board of Registered Trustees of Young Women Christian Association Tanzania**, Civil Application No. 20 of 2010 (CAT-Unreported) where the Court held that:

*Since every party intending to appeal seeks to challenge a decision either on points of law or fact, it cannot in my view be said that, in VALAMBIAS case, the court mean to draw a general rule that every applicant who demonstrate 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 that of sufficient 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 or process.

In the present application the applicant alleges that, when dismissing Bill of costs No. 61 of 2018, the taxing master illegally dismissed it under Order IX Rule 8 of the CPC, [Cap. 33 R.E 2019] as he departed from the application of the Advocates Remuneration Order. Hence she has raised the three grounds above named seeking to question the Taxing officer's jurisdiction. Now whether the taxing officer had jurisdiction to deviate from the application of the Advocates Remuneration Order or whether he was justified to dismiss it under the provisions of CPC, are the matters left to be adjudicated on by this Court through reference if this application is granted. Since the raised illegality of the decision sought to be impugned touches the jurisdiction of this Court in exercising powers of the taxing master under the Advocates Remuneration Order and the CPA, and since this Court cannot go into details of the alleged illegality which I am satisfied to be apparent on face of record, it suffices to say that, grant of an extension of time is inevitable as it overrides somewhat inordinate and unexplained delays. For those reasons, I accordingly grant the application for extension of time to

file reference out of time. The applicant should filed the same within 14 days from the date of this ruling.

No order as to costs.

It is so ordered.

Dated at Dar es Salaam this 4th November, 2022.



E. E. KAKOLAKI

JUDGE

04/11/2022

