

THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

APPLICATION FOR REFERENCE NO. 2 OF 2021

**(Arising from the Ruling of the Taxation Officer in Taxation No. 92 of 2020, in
the District Land and Housing Tribunal for Iringa,
at Iringa).**

MWIDEWA MADAFU.....APPLICANT

VERSUS

ELIZABETH BAREHEMANA..... RESPONDENT

RULING

27 August & 23 November, 2022.

UTAMWA, J.

This is a ruling on the issues raised by the court *suo moto* in this reference application against a ruling of a taxing officer of the District Land and Housing Tribunal for Iringa, at Iringa (The DLHT) in the Taxation No. 92 of 2020. The applicant MWIDEWE MADAFU in this matter, applied to this court for the following orders:

- i. That this Honourable Court should apply its mind to interpret the points of law and issues of fact arising from the Taxation Case No. 92 of 2020 and revise, quash and set aside the ruling and orders of the DLHT.
- ii. Any other orders deemed fit to grant
- iii. Costs of the application to be provided for.

The application was supported by an affidavit of Mr. Yusuph Luwumba, counsel for the applicant. In the affidavit, he deponed that the applicant filed a suit in the DLHT against the respondent for breach of lease agreement. The said application was struck out with costs upon the DLHT upholding a preliminary objection. The respondent was represented by Mr. Stapha Oganga who is not an advocate. After the striking out of the application, the respondent filed a bill of costs before the DLHT. The same was instituted by Mr. Fredrick Kibakaya whose practising certificate had expired. The applicant then filed a preliminary objection which was overruled by the DLHT.

The affidavit further stated that, the Chairman of the DLHT thus, awarded instruction fees and other costs in contravention of the law. The applicant was aggrieved by the awarded costs to the unqualified person/advocate, hence the present application.

On her part, the respondent ELIZABETH Z. BAREHEMANA resisted the applicant's application. She deponed in her counter affidavit that, the present application is related to taxation and not lease agreement. The applicant should thus, stick to the facts regarding the taxation. He disputed

the fact that the respondent was represented by an unqualified person in the DLHT. The amount awarded by the DLHT was according to the law.

At the hearing of the application, the applicant was represented by Messrs. Yusuph Luwumba and Watson Kimbe, learned advocates. The respondent enjoyed the services of Mr. Fredrick Kibakaya.

However, before the hearing of the matter took off, the court suspected that the amended counter affidavit of the respondent was filed out of the time prescribed by the court. It thus, raised the following two legal issues *suo moto*:

1. Whether the respondent's (amended) counter affidavit was timely filed as ordered by the court,
2. What would be the legal consequences in case the answer to the first issue was negative?

The two court issues were argued by way of written submissions, hence this ruling.

According to the scheduling order for the written submissions, the respondent's counsel had to file his written submissions in-chief on or before the 1st August 2022. The applicant had to file the replying submissions on or before 5th August 2022. The rejoinder submissions by the respondent's counsel (if any) had to be filed on or before 9th August 2022. However, it was noted later that, the written submissions in-chief by the respondent had been filed on the 2nd August 2022 instead of 1st August

2022 as it had been directed by the court. The respondent's counsel had thus, delayed in filing her written submissions in-chief. The court therefore, prompted the parties to also address it on the legal effect of the respondent's non-compliance with the court's scheduling orders in filing the written submissions out of time.

The advocate for the respondent submitted that he failed to file the submissions timely because he was sick. He also indicated that reason for the delay in the written submissions themselves.

On the other hand, the learned counsel for the applicant urged this court to strike out the late submissions filed by the respondent's counsel and consider only the submissions by the applicant. He also indicated that contention in his replying submissions.

I will therefore, firstly consider the legal effect of the delay by the respondent's counsel to file the written submissions in-chief before I consider the two court issues posed above.

In fact, the record is clear that the submissions in-chief by the respondent's counsel were filed on 2nd August 2022. This fact is also not disputed by the parties. The contention by the respondent's counsel that his failure to file the submissions in time was due to his illness is, in my view untenable. This is due to the following reasons: that, though the respondent's counsel attached a medical document to support his averment, the same shows that he was admitted in a hospital on the 1st August 2022 at 06:00 am and discharged on the same day at 19:00hours. In my view, this cannot be taken as a good reason for the delay to file the

submissions in-chief because, he had time from 28th July 2022 when the scheduling order was made, but he did not comply with that court order. Indeed, the day he was allegedly admitted was the last day for him to file the submissions. It is not explained as to why he had to wait until the last day for filing his submissions.

Besides, it was the duty of the respondent's counsel to firstly apply for extension of time to file the submissions out of time before he could do so. It was not open for him to file the submissions belatedly without any extension of time and give reasons for the delay in the submissions themselves. The course he took was thus, odd in our legal system. This way of doing things is like knocking a door from inside a house for a permission to get into the same house. It cannot be permitted by courts of law.

The submissions were thus, filed out of the time prescribed by this court for a day and without no good cause. Indeed, in law, a delay is a delay, even a single day delay is a delay like any other tardiness of a longer period; see the decision by the Court of Appeal of Tanzania (The CAT) in the case of **Hemedi Ramadhani and 15 Others v. Tanzania Harbors Authority, Civil Appeal No. 63 of 2001, CAT at Dar es Salaam** (unreported).

The law is settled on the effect of failure or delay by a party to court proceedings to file written submissions within the time prescribed by the court. It guides that, such delay or failure is tantamount to a failure to appear or prepare for the hearing. This was the position underlined by the CAT case of **National Insurance Corporation (T) Ltd & Another v.**

Shengena Limited, Civil Application No. 20 of 2007, CAT at Dar es Salaam (unreported). The same position was echoed in other cases of the same CAT like **Patson Matonya v. The Registrar Industrial Court of Tanzania & Another, Civil Application No. 90 of 2011, CAT at Dodoma** (unreported) and **Godfrey Kimbe v. Peter Ngonyani, Civil Appeal No. 41 of 2014, CAT at Dar es Salaam** (unreported).

Certainly, the rationale for the rule against failure or delay to file written submissions highlighted above is not far to fetch. It is this; where a court has directed a matter before it to proceed by way of written submissions, such mode of hearing is actually, legally considered to be a hearing of the matter like oral hearing. Parties must therefore, comply with the scheduling order fixed by the court so as not to delay the matter. They have to strictly observe the schedule because, if they do not do so without good cause, cases in courts will never get to an end since each party will file submissions at his/her own whims and court orders will be rendered nugatory and disregarded with impunity. Cases will thus, be unnecessarily delayed and courts will be reduced to toothless barking-dogs, hence injustice will prevail in our courts. Courts will also fail to discharge their constitutional duty of disposing of cases speedily. This duty is imposed on courts under article 107A(2)(b) of the Constitution of United Republic of Tanzania, 1977, Cap.2 RE 2002 (The Constitution). Courts should not thus, be lenient to parties who default court orders for no good reasons. No wonder, it was emphasized by the CAT in the **National Insurance case** (supra) that, parties should not be permitted to render courts impotent for not observing their orders.

Owing to the above observations, I hereby expunge the belated submissions of the respondent's counsel from the record. I will thus, not consider them in determining the two court issues posed above. I will only consider the submissions by the applicant's counsel.

Now, in supporting the first court issue, the applicant's learned counsel submitted that, following this court's order, he lodged the amended chamber summons and affidavit on 11th February 2022. He went to the office of respondent's advocate for the purposes of serving him with the amended chamber summons. However, he could not find him. He then called him through his mobile phone. The respondent's counsel informed him that he was in Dodoma and he would thus, pick the documents from the chambers of the applicant's counsel upon his return.

The learned advocate for the applicant contended further that, the respondent's counsel has no good excuse for delaying to file the amended counter affidavit. This was because, what was amended in the chamber summons was only the part related to reliefs sought in it. The respondent could have thus, only amended his original counter affidavit without even seeing the amended chamber summons. It is more so because, in law, a chamber summons on one hand and an affidavit supporting it on the other, are two different documents and each stand on its own. To support this contention the applicant's counsel cited the case of **Ziada William Kamanga v. Amanda Brighton Kamanga & Another, Misc. Civil Application No. 390 of 2021** (unreported).

The learned counsel for the applicant further argued alternatively that, the respondent was on 8th February 2022 ordered to rectify the defect

in her counter affidavit and lodge a proper counter affidavit within seven days. The respondent was supposed to file her amended counter affidavit on 15th February 2022 which is within seven days. Nonetheless, she filed the same on 16th February 2022 which was eight days and beyond the time set by the court. The amended counter affidavit was therefore, filed out of time.

On the second court issue, the applicant's counsel argued that, any party who fails to amend a pleading after being granted leave by the court to do so, shall not be permitted to amend it again unless time is extended. This position is provided for under Order VI Rule 18 of the Civil Procedure Code, Cap. 33 RE. 2019. The belated Counter affidavit lodged on 16th February 2022 should thus, be struck out. What will remain is only the original counter affidavit lodge on 15th September 2021. Nonetheless, the same is also incurably defective since it does not indicate the name of the deponent, it was wrongly titled and has a defective verification clause. The learned counsel for the applicant thus, urged this court to strike out the said amended counter.

In concluding his submission, the applicant's advocate invited this court to follow the position enunciated in the case of **Dominic Yohana v. Salma Shite, Civil Application No. 120/03 of 2020, CAT at Dodoma** (unreported). In that precedent he contended, the CAT held that, a respondent who intends to challenge an application must do so by filing a counter affidavit. The present application therefore, remains unchallenged after the two counter affidavits being struck out. He therefore, urged the court to order the application to proceed *ex-parte*.

I have considered the applicant's submissions, the record and the law. In my view, though this court has expunged the respondent's submissions from the record and has decided to consider the applicant's submission only in this ruling, that course does not mean that the court has to decide in favour of the applicant's submissions. This is for a simple reason that, it is a firm principle of law that, courts of law in this land are enjoined to decide matters before them according to the law and the Constitution and not otherwise. This position was underlined in the case of **John Magendo v. N. E. Govan (1973) LRT n. 60**. Furthermore, the CAT emphasized it in the case of **Tryphone Elias @ Ryphone Elias and another v. Majaliwa Daudi Mayaya, Civil Appeal No. 186 of 2017, CAT at Mwanza**, (unreported Ruling). In that precedent, the CAT held, *inter alia* that, the duty of courts is to apply and interpret the laws of the country. It added that, superior courts have the additional duty of ensuring proper application of the laws by the courts below. The CAT underscored the same principle in the case of **Joseph Wasonga Otieno v. Assumpter Nshunju Mshama, Civil Appeal No. 97 of 2016, CAT at Dar es Salaam** (Unreported). I will therefore, proceed to test the two court issues being guided by the principle I have just highlighted.

In relation to the first court issue, the record clearly shows that the respondent's counter affidavit was filed on 16th February 2022. This fact is evidenced by the exchequer receipt and the court seal. They both show that, the same was received on that date. This particular fact is also not disputed by the applicant. The record further shows that, according to the order of this court dated 8th February, 2022 the respondent was ordered to

file her amended counter affidavit at issue within seven days from when the date the applicant would file and serve his amended chamber summons to her (the respondent).

The applicant's amended chamber summons was filed in this court on 11th February 2022. By simple arithmetic the respondent's counter affidavit filed in 16th February 2022 was well within the seven days as ordered by the court. Besides, the applicant's counsel only argued that he went to serve the applicant in his chambers, but he was not there and his chambers were closed. He conversed with him and he promised to collect the same from his (applicant's counsel) chambers, and he did so later. Nonetheless, the applicant and her counsel did not tell this court as to when did the respondent's counsel collect the papers from his (applicant's counsel) chambers. This was a vital fact for the court to know before it could decide in favour of the applicant. This is so because, according to the court's order dated 8th February, 2022^I, the reckoning date for the time limitation of the 7 days prescribed by this court for the respondent to file the amended counter affidavit was the date of service of the amended chamber summons to her (respondent). The applicant thus, committed a fatal omission.

Owing to the above reasons, and upon re-consideration of the record, I have cleared the suspicion I had previously that the counter affidavit was filed out of time. I accordingly answer the first court affirmatively that, the respondent's amended counter affidavit was timely filed as ordered by the court.

Regarding the second court issue, I am of the view that, since its consideration depended much upon the first court issue being answered negatively, and since I have answered the first court issue affirmatively, it becomes unnecessary for me to consider the second court issue.

Having made the above findings, I order that the application will proceed for hearing on merits and *inter-partes* by considering both the amended chamber summons and amended counter affidavit. It is so ordered.



JHK UTAMWA
JUDGE
23/11/2022

23/11/2022.

CORAM: JHK. Utamwa, J.

For Applicants: Mr. Jonas Kajiba, adv. Holding briefs for Mr. W. Kimbe, adv.

For Respondent: Mr. Fredrick Kibakaya, advocate.

BC: Gloria, M.

Court: Ruling delivered in the presence of Mr. Jonas Kajiba, advocate holding briefs for Mr. Watson Kimbe, advocate for the applicant, and Mr. Fredrick Kibakaya, advocate for the respondent, in court, this 23rd November, 2022.



JHK UTAMWA
JUDGE
23/11/2022.