

IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT APPEAL

AT MWANZA

CIVIL REFERENCE No. 21 OF 2021

*(Arising from the decision of the taxing Officer Hon. C.M. Tengwa dated 24th
September 2021 in Taxation No. 39 of 2021)*

SAMWEL NYALA NGHUNI & 5 OTHERS-----APPLICANTS

VERSUS

PATRIC OSOSRO NYAWANGAH----- RESPONDENT

RULING

Last Order: 16.03.2022

Ruling date: 29.03.2022

M. MNYUKWA, J.

This is an application for reference made under Order 7 Rule (1) and (2) of the Advocates' Remuneration Order GN. No. 262 of 2015 where the applicants by way of chamber summons prays this court to examine the decision of the taxing officer in taxation no. 39 of 2021 as to its legality and fairness.

At the hearing, the applicant was serviced by Ms. Flora Makaya advocate holding brief of Mr. Boniface Sariro learned advocate and the respondent afforded the service of Milembe Lameck learned advocate.



When the respondent was served, she filed the notice of preliminary objection with three points that: -

1. That the application for reference is time-barred.
2. That the application is incompetent for lacking complained ruling.
3. That the affidavit in support is defective for containing arguments and conclusions.

The court gave orders for the preliminary objection to be argued by way of oral submissions whereas, the respondent was the first to submit and she opted to abandon the 2nd point of preliminary objection and decided to argue on the 1st and the 3rd points of preliminary objection.

On the 1st point of preliminary objection, that this application for reference is time bared, she cited rule 7(2) of the Advocates Remuneration Order GN. No. 262 of 2015 that requires the application to be brought by way of chamber summons supported by affidavit and should be brought within 21 days from the day of the decision. She went on that, the decision of bill of costs which is the subject to this reference was issued on 24th September 2021 and this application was endorsed by the registrar on 25th November 2021 and shown to be stamped on 16th October 2021. She went further that, based on the dates, and giving the benefit of doubt that the application was filed on 16th October 2021, still



based on the requirement of the law, the application is out of time. She went further that, there is a purpose for the limitation of time and the court is precluded to entertain the matter which is out of time before it. She insisted that, the applicant delayed to file the application and she prays this court to dismiss the application.

On the third point of preliminary objection, while citing paragraph 6 of affidavit she claims that, it gives conclusion which is the duty of the court and not the applicant. Citing the case of **Uganda vs the Commissioner of the Prison Exparte Matovu** 1966 EA 514 she insisted that, the principle laid down is that, an affidavit should contain statements of facts and should not contain arguments and conclusions. She insisted that the same was stated in the case of **Francis Eugene Polycarp vs Ms. Panone & Co. Ltd**, Misc. Civil application no. 02 of 2021 HC Moshi. She avers that, paragraph 6 of the applicant's application is the root of this application and the error committed by the applicant is grave and can not be rectified. She, therefore, prays this court to strike out the affidavit.

Responding to the points of preliminary objection, on the first point the applicants' learned counsel avers that, the preliminary objection should be on the point of law referring to the holding of the famous case



of **Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd** (1969) EA 696. And claims that the application was filed on 15th October 2021 as indicated on the affidavit and it was within time. She insisted that, the application was received on 16th October 2021 and stamped on that date. Insistingly, she avers that from the date of the decision to the date the application was filed that was on 15th October 2021, when calculated, it shows that the application was filed within time. Citing rule 21 of the Judicature and Application of Laws (Electronic Filing) Rules 2018, the day for filing ended on a particular day at around 11:59 pm therefore, the application was filed on time. She, therefore, prays this court to overrule the 1st point of the preliminary objection.

On the 3rd point of the preliminary objection that the applicant's affidavit contains arguments and conclusions, it was her submission that, it is not true that the contents of paragraph 6 of the affidavit draws a conclusion, for it based on the decision of the taxing master. For that reason, she again prays this point of the preliminary objection to be overruled.

Rejoining, the respondent learned counsel insisted that the raised points of preliminary objection is purely on the point of law. Adding on the 1st point of preliminary objection, she insisted that the date of



preparation of the application specifically the affidavit can not be the filing date. She insisted that, the filing was on 16.10.2021 and the Registrar endorsed some days later.

On the 3rd point, she maintains that paragraph 6 of the affidavit draws conclusion which was not supposed to be included in the application. She therefore, prays the same to be struck out with costs.

Having carefully considered the arguments by the counsel for the parties on submissions in regard to the 1st and 3rd argued points of preliminary objections, I proceed to determine the 1st point as to whether it is a pure point of law and if so, whether the application is time barred. I find this to be central issue for consideration and determination because, the question of time limitation touches on the jurisdiction of the court to determine a matter before it.

In **National Insurance Corporation of (T) Ltd and Parastatal Sector Reform Commission v. Shengena Ltd**, Civil Application No. 20 of 2007 (unreported), the Court of Appeal asked itself as to what amounts to the preliminary objection and it has this to state: -

*"What is a preliminary objection? We think the rational answer to this question can be found in what the court observed in the case of **Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd** (1969) EA 696. At page 700 Law,*



JA observed as follows: - So far as I am aware, a preliminary objection consists of a point of law which has been or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

What I can add is that for a preliminary objection to be successful, generally, it should not need support from evidence as stated in the case of **The Soitsambu Village Council v. Tanzania Breweries Ltd and Another**, Civil Appeal No. 105 OF 2011 (unreported), which held that: -

"A preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate such facts, such an issue cannot be raised as a preliminary objection on a point of law. The court must, therefore, insist on the adoption of the proper procedure for entertaining applications for preliminary objections. It will treat as a preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should not condescend to the affidavits or other documents accompanying the pleadings to support the objection such as exhibits."

The above laid down principle on what is a preliminary objection has been followed by courts in Tanzania for many years and there is a number



of authorities to that effect. However, I wish to add the case of **Swilla Secondary School v. Japhet Petro**, Civil Appeal No. 362 of 2019 (unreported) where it was held that: -

*"The law is settled that the issue of jurisdiction for any court is basic as it goes to the very root of the authority of the court or tribunal to adjudicate upon cases or disputes. **Courts or tribunals are enjoined not to entertain any matter which is time-barred and in any event they did so, the Court unsparingly declare the proceedings and the consequential orders a nullity.**"*

Going by the above authorities, it is clear that an objection on account of the time limit is one of the preliminary objections that courts have held to be based on a pure point of law that touches on the jurisdiction of the court and whose determination does not require ascertainment of facts or evidence. To determine such an objection, the court needs only to look into the complaints/application and its annexures without any further facts or evidence to be ascertained in determining as to whether the suit is time-barred.

In the case of **Ali Shabani and 48 Others vs Tanzania National Agency & the Attorney General**, Civil Appeal No. 261 of 2020 when the Court of Appeal was faced with an akin situation, it stated that: -

"It is clear that an objection as it were on account of time bar is one of the preliminary objections which courts have held to be



based on pure point of law whose determination does not require ascertainment of facts or evidence. At any rate, we hold the view that no preliminary objection will be taken from abstract without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence."

Similarly, in the our case at hand, having perused the pleadings and specifically the applicant's pleadings, it was my observation as indicated from the records that, the decision which is subject to this application is taxation No. 39 of 2021, which was delivered on 24.09.2021. The law is clear under Order 7 Rule (2) of the Advocate Remuneration Order of 2015, that any person aggrieved by the decision of the taxing officer shall by way of reference refers the matter to the High court within 21 days. The respondent's point of preliminary objection is based on the date the application was received in court which shows that the application was stumped on 16.10.2021. Based on this date and in normal calculations, it is clear that the application was filed beyond the time of limitation.

On the side of the applicant, she insisted that, she filed the matter on 15. 10.2021 as shown in the affidavit and the same is an evident that she complied with the electronic filing as required by the law under section 21 of the Judicature and Application of Laws Act (electronic Filling) Rules, 2018.



Coming back to our case at hand, it is clear that objection on time limitation raised by the respondent was based on a pure point of law. She was therefore justified to pray before this court to dismiss the applicant's application for being time barred.

I am accord with the respondent learned counsel that, the application was filed out of time as required by the law and based on what has been decided in the case of **The Soitsambu Village Council (supra)**, the calculation as to whether the matter was time bared can only be done by revisiting the pleadings. In the instant application, it is on record that the matter was filed on 16.10.2020 and though the applicants' counsel claims to file the same on 15.10.2020, she did not exhibit the court with proof as to when it was filed taking into consideration that the date of presenting for filling as appear in the applicants affidavit which was signed by the applicants' counsel can not be regarded as a filing date. Thus, it ought to have clear evidence if at all he filed via electronic way, including the printout dashboard for his verification.

In the absence of the clear evidence to substantiate that, filing was done on 15th October 2021, I agree with the respondent learned counsel that the filing date was on 16th October, 2021 as it appear and the law is



settled that, issue of limitation goes to the root of the matter as it determines the jurisdiction of the court.

In the upshot, I find that, this point alone is decisive to dispose of the application for dealing with the remaining point will impact nothing to the decision unless it was for an academic purpose. In the fine, therefore, I proceed to uphold the 1st point of preliminary objection that this application is indeed time bared and I proceed to dismiss this application with costs.

Order accordingly.



M.MNYUKWA
JUDGE
29/3/2022

Ruling delivered on 29th day of March, 2022 in the presence of parties' advocate

M.MNYUKWA
JUDGE
29/3/2022