

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. CIVIL REFERENCE NO. 2 OF 2021

(c/f Bill of Costs No. 18 of 2020 High Court of Tanzania at Moshi)

LUCAS JOSEPH MIREMI..... APPLICANT

VERSUS

JOSEPH JOHN MASSAWE..... RESPONDENT

RULING

14/02/2022 & 22/3/2022

SIMFUKWE, J.

The Applicant herein Lucas Joseph Miremi preferred the instant application under **Order 7 (1), (2), (3) and (4) of the Advocates Remuneration Order, 2015**; seeking the following orders:

- (a) That, this Honourable Court be pleased to determine the validity of the decision of High Court of the United Republic of Tanzania at Moshi Bill of Costs No. 18 of 2020 dated 24th May, 2021 before Honourable O. H. Kingwele DR dismissing the Bill of Costs with Costs.*
- (b) Costs to be provided.*



The application was supported by an affidavit sworn by the applicant herein. In the counter affidavit sworn by Mr. Martin Kilasara learned counsel for the Respondent, two preliminary objections on point of law were raised that:

- 1. This application for Reference is bad in law and incompetent before this honourable Court for been (sic) hopelessly time barred.*
- 2. This application for Reference is bad in law and incompetent before this honourable Court for contravening mandatory provisions of **Order 7 (3) of the Advocates Remuneration Order, 2015.***

The preliminary objections were argued by way of written submissions. Mr. Martin Kilasara argued the objections for the respondent, while the applicant was unrepresented.

On the first preliminary objection that this application is hopelessly time barred; Mr. Kilasara submitted that there is no dispute that as a matter of law and as provided for under **Order 7 (1) of the Advocates Remuneration Order, 2015**, any party who is aggrieved by a decision of the Taxing Officer, can file reference to a judge of the High Court. That, **Order 7 (2) of the Order, 2015** (supra) categorically provides further that:

"A reference under order (1) SHALL be instituted by way of chamber summons supported by an affidavit and be filed within 21 days from the date of decision."

Mr. Kilasara contended that **Order 7 (2)** is couched by using the word **SHALL** which in terms of **section 53 (2) of the Interpretation of Laws Act, Cap 1 R.E 2019** the function so conferred implies that it must be performed.



It was submitted further for the respondent that it is apparently clear from the record that the decision subject of this reference was delivered on 24th day of May 2021. Thus, computing the period of limitation from that date, then the applicant ought to have filed his reference within twenty-one days, that is by 14th June, 2021. However, the applicant filed the present Reference in this court on 28th day of June 2021, by then a period of 14 days had already lapsed.

Supporting the second limb of preliminary objection, that this application contravenes the mandatory provisions of **Order 7 (3) of the Advocates Remuneration Order** (supra); Mr. Kilasara submitted that even assuming for the sake of argument that this reference was filed in time, which fact they vehemently dispute, the same will still be incompetent and bad in law for contravening the mandatory provisions of law. The learned counsel for the respondent went on to state that the provisions of **Order 7 (3) and (4) of the Order, 2015** (supra), provides further that:

"The applicant SHALL within seven clear days of filing reference save copies to all parties entitled to appear on such taxation. For purposes of service under sub order (3), it SHALL be sufficient if the chamber summons has been endorsed and stamped by the Registry Officer."

Mr. Kilasara insisted that this reference as seen vividly on page 1, it was endorsed and stamped by the Registry Officer since 28th June 2021, which means it was supposed to be served upon the respondent by 05th day of July 2021. That, eleven (11) days had already lapsed. He reiterated that, this reference was filed and served upon the respondent beyond the



statutory period of limitation and without leave of the court. That, the same is bad in law and incompetent before the Court. He prayed that this reference should be dismissed in its entirety with costs for being time barred and contravening the mandatory provisions of the law.

In his reply opposing the preliminary objections, the applicant submitted among other things that when the Bill of Costs No. 18 of 2020 was set for mention before the Deputy Registrar, the respondent herein filed a preliminary objection that the said Bill was time barred as the same was filed out of 60 days as prescribed by law. That, the said preliminary objection was sustained and the Bill of Costs was dismissed with costs. The applicant was aggrieved by the said decision and he had to seek assistance to prepare a civil reference as against the said decision and thus he filed civil reference No. 2 of 2021 on 23rd June 2021 through online system. On 28th June 2021 he brought the hard copy after payment of the same. The applicant conceded that he had noted that Civil Reference No 2 of 2021 was filed beyond the prescribed time.

The applicant also conceded that the said application was served upon the respondent beyond the 7 days from the date of instituting the same before the court. He prayed that the prayer of the respondent as to costs should not be awarded due to the history of the matter. That, what has remained between the applicant and the respondent herein is the claim of costs.

Replying in rejoinder, Mr. Kilasara submitted inter alia that they have noted that the applicant has conceded to both preliminary objections raised by the respondent. On the other hand, he said that it should be noted that it was the applicant herein who knowingly initiated all these



frivolous and unfounded proceedings/ cases against the respondent since May 2015 (Application No. 65/2015) alleging that the respondent had trespassed into his land by four paces. That, it was also the applicant herein who refused/ neglected to pursue that core issue of the alleged trespass/ ownership, and vigorously opted for costs of the suit; even though he was all along duly represented by learned counsel.

Mr. Kilasara went on to submit that, if at all the applicant had any genuine equitable claim against the respondent, as he tries to insinuate, he would obviously seek to pursue his claim thereof. Failure to do so, renders his claim frivolous and his alleged inability to appeal, was purely an afterthought.

It was submitted further that; the applicant has dragged the respondent to court for over six (6) years now; and that the respondent has been forced to incur substantial and unnecessary expenses to engage an advocate to defend/pursue claims against him including the present application. Mr. Kilasara concurred that there should be an end to litigation, but at the same time, justice should be accorded to both parties.

In addition, Mr. Kilasara alleged that, the objections were raised since July 2021 but the applicant did not seek counsel and /or concede to them at the earliest opportunity; but maintained that the objections be argued by way of written submissions hence further costs. That, had the circumstances of this case been different and the applicant had clean hands, they would never press for costs.

The learned counsel for the respondent concluded by urging this court to invoke court's discretion judiciously and award the respondent costs of this application to meet the ends of justice.



Having gone through submissions of both parties, on the outset the applicant has conceded to both preliminary objections. However, the applicant has prayed that the preliminary objections should be upheld without costs. In his rejoinder the learned counsel for the respondent has opposed the prayer of the applicant vehemently on the reason that the applicant did not concede to the preliminary objections at the earliest opportunity and that they had incurred costs in pursuing the matter. In the case of **Hezekia Kyakatuka vs James Felix Nyarugenda, Civil Application No. 27 of 2020**, CAT (unreported); It was held that:

*"I have considered the uncontested prayer by the applicant to have this matter struck out on the ground of concession to the preliminary objection. I have also considered the contested prayer with regard to costs and the flanking contending arguments by the parties. Admittedly, the learned counsel for the applicant has readily conceded to the preliminary objection. **Also, true is the fact that the respondent engaged an advocate who has entered appearance today and has spent time and resources to research, file an affidavit in reply and file the present preliminary objection. The respondent is certainly entitled to have his costs.**" Emphasis added*

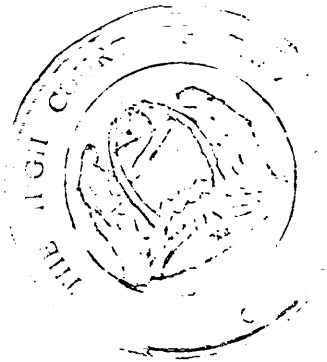
On the strength of the above cited authority, I totally agree with the learned counsel for the respondent that the respondent deserves to be granted costs. The reason for the same is obvious, the respondent engaged an advocate who raised and argued the preliminary objections for him. In the circumstances, the respondent deserves to be indemnified his costs incurred to prosecute the preliminary objections.



It is on that basis that, due to the fact that the applicant has conceded to the preliminary objections, I hereby uphold the same with costs to the respondent.

It is so ordered.

Dated and delivered at Moshi, this 22nd day of March 2022.



S. H. SIMFUKWE

JUDGE

22/3/2022