

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL REFERENCE APPLICATION NO. 3 OF 2022

(Arising from proceedings and orders in Misc. Civil Application No. 3 of 2022 before Hon. O. H. Kingwele, DR)

THE MOSHI HOTEL 2010 LIMITED APPLICANT

Versus

SALIM JUMA MUSHI T/A DEXTER ATTORNEYS..... RESPONDENT

RULING

2nd & 28th August, 2023

A.P.KILIMI, J.:

In this application, the applicant hereinabove has moved this court by way of chamber summons under Rule 8 (1) and 7 (1), of The Advocates Remuneration Order, 2015, G.N 263 of 2015, and Section 95 of The Civil Procedure Code, Cap 33 R.E 2019 and any other enabling provision of the Law, praying for the following orders;

1. That this honorable court be pleased to extend time within which to present the reference application.

2. This Honorable Court be pleased to declared that the purported Remuneration Agreement entered between the applicant and the Respondent was illegal, void, fraudulently procured and therefore unenforceable.
3. That, this honorable court be pleased interfere with and correct the findings of Hon. Deputy Registrar dated 14th February, 2022 for they were procured illegally.
4. That this court be pleased to examine, revise, quash, and set aside the proceedings and resultant orders of the Deputy Registrar dated 14th February, 2022 in Misc. Civil Application No. 03 of 2022 at the High court of Moshi at Moshi, on the ground that the said proceedings and resultant order is tainted with gross illegality and procedural irregularity which occasioned failure of justice.
5. That this Honorable Court be pleased to interpret the point of law to wit whether the agreement for enforcement of Application for Remuneration ought to be certified and all other accompanying annexures.
6. Cost of this application.
7. Any other reliefs Honorable Court deem just and fit to grant.

The application has been supported by affidavit of one Joan Auye Mrema who introduced himself at paragraph two, that is a sole surviving director and shareholder of the applicant hereinabove.

Following a brief dialogue with both learned counsels of parties above and me. I opted for this application to be argued at first, only on the first prayer for extension of time and I ordered parties to do so accordingly.

At the hearing of this prayer of extension of time, Mr. Merzedeck Hekima learned advocate appears for applicant while Mr. Ngereka Miraji learned counsel appears representing the respondent.

In supporting his prayer, Mr. Hekima submitted that under Advocate Remuneration Order, order 7 provides that a party who is aggrieved by decision of Taxing Officer may file extension of time. Mr. Hekima further submitted that, the respondent filed application before Deputy Registrar under order 5(1) of Advocate Remuneration order, claiming the attachment of Tshs. 141,603,540/=, claiming that was remuneration fee, to be withdrawn from Account No. 420410000032 maintained by TIB disbursement collection. But the same was filed without notification to the Applicant, therefore applicant did not get summons which was contrary to the requirement of law.

In respect to amended application, Mr. Hekima contended that the same was not served to the applicant, therefore, all of the two violated the applicant right to be heard and all decision therein of the Deputy Registrar renders to be nullity. To buttress his assertion, he has referred the case of

Efrasie Mfugale vs. Andrew J. Ndimbo and Another Civil Application No. 38/10 of 2017 CAT at Iringa.

Furthermore, Mr. Hekima submitted that, The Deputy Registrar issued the ruling on 14/2/2022 and 9 days later he continued to issue Garnishee absolute without notification, without garnishee order nisi and without summoning the applicant or notification to him of the date of the Ruling which denial of applicant right. To fortify his contention, he referred the case of **Awadhi Idd Kajass vs. Mayfair Investment Limited** Civil Application No. 281/17 of 2017 CAT at Dsm.

Mr. Hekima submitted further, to substantiate that the respondent had ill motive, he has alleged that one advocate appeared without instruction to represent the applicant in Miscellaneous Civil No. 3 of 2022 which is contrary to the rule, no instruction no right to represent the case. To bolster this the counsel referred the case of **Simbo Yona Laban Nkya vs. David Sewa and 2 Others** Civil Appeal No. 42 of 2018 CAT at Dar-es-Salaam.

Mr. Hekima further insisted that the applicant was not given right to be heard, there was procedural irregularity, he was not notified, thus not aware, therefore, pray for extension of time, he supported his submission by the

case of **Dar Express Co. Ltd vs. Mathew Paulo Mbaruku** Civil Appeal No. 132 of 2021. Thereafter, the counsel for applicant concluded that, the above are illegality which are sole ground for extension of time. He then referred the cases of **Hassan Abdulhamid vs. Erasto Eliphase** Civil Application No. 402 of 2019 and **Lyamuya Contraction Company vs. Board of Registered Trustee of Young Women's Christian Association of Tanzania** Civil Application No. 2 of 2022.

Responding to the submission above, Mr. Miraji commenced by addressing this court that, the propriety of the application before this court, that the application is filed under order 8(1) and 7(1) of GN 264 of 2015 Advocate Remuneration Order, the two provision means if someone has to filed reference need first to file application for extension of time contrary to what it appears before the court as per chamber summons, the applicant has prayed seven prayers, looking at these prayers it is of no doubt that is praying for extension of time and other prayers. However, before even the extension has been granted, already applicant has already presented the application for reference.

Mr. Miraji further contended that, the application cannot be presented since the court has no jurisdiction, because the application of reference already filed even before extension of time is extend. Therefore, the application for extension of time is not proper, since the affidavit in support of application contains all prayers contained in the chamber summons, there is no paragraph categorically stated in respect with application of extension of time, then the counsel prayed this application be dismissed or be ordered amendment to be separate, and to bolster his position he has referred the case of **Alaf Limited vs. The Board of Trustees of the Public Service Social Security Fund (PSSSP) and one other** Civil Application No. 529/01 of 2023.

In respect to other submissions in chief by applicant, Mr. Miraji contended that, the applicant and respondent entered Remuneration agreement, so it was for respondent to take care of the affairs of the Applicant. When the respondent filed the matter notified the applicant as evidence in counter affidavit via letter to that effect (SJM2) and also made publication (SJM4), Also in the counter affidavit, he has attached the copy of application which was signed of Viv Mrema annexure SJM 3 served on 10th February, 2022. So, it is not true that was not served with Misc. Civil

application No. 3 of 2022 who per annexure SJM1 was appointed to deal with company properties. Therefore, the applicant did not adduce sufficient reason for court to use its discretion power, and did not account each day of delay. To buttress this the counsel referred the case of **Muse Zangor Kisere vs. Richard Kusika Mugend and 2 Others** Civil Application no. 244/01 of 2019 at page 4.

In respect to cases referred by the applicant's counsel. Mr. Miraji contended that, chamber summons was served to Director one Viv Mrema, and the counsel who appeared was duly instructed, who is one Helen Mahuna, therefore cases **Ephrasie Mfungale vs. Andrew J. Ndimbo and Another** (supra) and **Simbo Yona Laban Nkya vs. David Sewa and 2 Others** (supra) are distinguishable, since that right was availed to applicant. He also contended that in respect to the case **Atuganile vs. Atuganile Mwaiteye** Civil Appeal no.122 of 2007 is also distinguishable since applicant was notified and was fully represented.

In brief rejoinder Mr. Hekima contended that, the cited case of **Alaf Limited** (supra), the said case the court was dealing with two different laws, stay of execution and leave to appeal, as per Appellate Jurisdiction act and Court of Appeal rules, leave to appeal is filed at the High Court, this prayer

is entertained by two courts, and it refers different laws, the Appellate Jurisdiction Act and Court appeals rules, therefore they are not related, as it was also ruled at page 11 of the Ruling delivered by my Brother Mwenempazi, J. that the matter could have been different under different laws, therefore, since this case is brought under specific provision and it is in the same court, while the case cited by counsel for respondent deals with two court cannot be the same. However, the counsel this court has already ruled on this matter, therefore this court is functus official on this matter.

In respect to the issue of service of summons, Mr. Hekima contended that, there is no prove of service attached in reply, also there is nowhere that the amended application was served, the order/Ruling date 23/4/2023 is court proceeding as attached at annexure MHS collectively. Further, he said there is no point in time Viv Mrema acted as Director of the company, but the said Viv Mrema signed as an afterthought, because in original it was not signed.

Mr. Hekima concluded that, in respect to account on each day of delay, the case of **Hassan Abdulahamid vs. Erasto Eliphase** (supra) provides illegality sufficiently constitute extension of time, and in that illegality must be apparent on the face of court record, in this matter the whole procedure

from Application, execution for Garnishee Order amended application was not served to the Applicant which illegality apparent on the face of record.

As presented above, the applicant has sought in this court extension of time with other prayers under the auspice of order 7(1) of Advocate Remuneration Order GN. 264 of 2015. Order 8 (1) of this Order which governs application for extension of time, provides that;

"8 (1) The High Court may, subject to order 7 extend the time for filing a reference upon sufficient cause."

It is a trite law that, it the discretion of the court in deciding whether or not to extend time. In the case of **Abdulrahman Mohamed Ally vs Tata Africa Holdings T. Limited** Civil Application 166/16 of 2021 CAT at Dsm, the discretion of the court was expounded when the court observed that;

"The discretion of the court, must be exercised judicially and not arbitrarily or capriciously, nor should it be exercised on the basis of sentiments or sympathy. Fundamentally, the said discretion must aim at avoiding injustice or hardships resulting from accidental inadvertence or excusable mistake or error, but should not be designed at assisting a person who may have deliberately sought it in order to evade or otherwise to obstruct the cause of justice."

Nonetheless, what amount to sufficient cause is not statutorily stated, but in my view depends on the circumstances of individual case, and further depends from decided cases, where therein a number of factors have to be taken into account including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay and lack of diligence on the part of the applicant. See **Usufu Same and Hawa Dada vs. Hadija Yusufu**, Civil Appeal No. 1 of 2002.

In the premises above, I have dispassionately considered the submissions of learned counsels in support and opposition to the application along with the authorities cited, conveniently, I see the main issue which I am invited to address is whether or not the instant application for extension is meritorious to be granted.

Before I proceed, I wish to commence with the concern raised by Mr. Miraji to the effect that, this application is improperly presented, since before the extension has been granted, already applicant has presented the application for reference with multiple prayers, therefore this court has no jurisdiction and prayed the same be amended to remove this anomaly.

It is true that in this application, there is a combination of main two prayers, extension of time and application for reference wherein several reliefs have been sought. In our jurisdiction no law prohibits omnibus application, this means court of law abhor multiplicity of proceedings depending particular circumstances of the case concern (See **Shida Simeo vs Samwel Bwire**, Misc. Land Application No. 07 /2020 HC Musoma and **Tanzania Knight wear Limited vs Shamsu Esmail** [1989] TLR 48)

In my view of the nature and circumstances of this application, since as rightly presented by applicant' counsel, all prayers are filed under the same law, which is order 7(1) and 8 (1) of Advocate Remuneration Order (supra) and in my consideration of the alleged claims in applicant's affidavit to be determined by this court, these prayers being together in one chamber summons in my opinion cannot occasion failure of justice on any party, thus must be allowed.

To emphasis more of the above observation, practice in our jurisdiction has been very clear, that the application of this nature, always court hears all prayers on merit and in determining, court starts with application for extension of time, if it has merit and granted, is when the court proceed with other prayers, and if application for extension of time is devoid of merit,

court conclude and dismiss the whole application in its entirety. The purpose of this is apparent for avoidance multiplicity of suits but to serve the time of litigation.

The case of **Alaf Limited vs. The Board of Trustees of the Public Service Social Security Fund (PSSSP) and one other** (supra) referred by the learned counsel for respondent, to my view is distinguishable from this application, and this is due to its circumstances that, therein, the court of appeal observed so when interpreting rule 4(1) of the Court of Appeal rules, in regarding the application for stay of execution of the judgment of the High Court; an ex-parte order for stay pending determination of the application interparty and Order staying the Execution of the Decree of the High Court pending final determination of the intended Civil Appeal. The above said rule 4 (1) provides practice and procedure of the Court of Appeal, and for easy reference the same is reproduce as follows;

"4 (1) The practice and procedure of the Court in connection with appeals, intended appeals and revisions from the High Court, and the practice and procedure of the Court in relation to review and reference; and the practice and procedure of the High Court and tribunals in connection with appeals to the Court shall be as prescribed in these Rules or any other

written law, but the Court may at any time, direct a departure from these Rules in any case in which this is required in the interests of justice.”

From the excerpt above, it is clear that the above is the practice and procedure of the Court of Appeal when is dealing with an application which affect two courts, the Court of Appeal itself and relief sought to affect the decision of the High Court. Moreover, that rule above gives the Court of Appeal discretion to depart for the interest of justices. Having considered as above, in my opinion the above observation of the Court cannot be imported in the practice and procedure of the High Court. Therefore, I am settled this raised concern devoid of merit and dismissed.

Now, in respect to substantive application for extension of time, the applicant in essence have raised the ground or illegality for extension of time. I am mindful, it is a trite law for illegality to be a ground for extension of time, it must be apparent on the face of record. There is a litany of case laws as to what is apparent error on the face of record, such as cases of **African Marble Company Limited (AMC) vs. Tanzania Saruji Corporation (TSC)**, Civil Application No. 8 of 2005 [2005] TZCA 87 **Candrakant Joshubhai Patel v. Republic**, [2004] TLR 218, **Principal Secretary,**

Ministry of Defence vs. D.P. Valambia 1992 TLR 387, **Abdi Adam Chakuu vs Republic**, Criminal Application No. 2 of 2012 and **Ansaar Muslim Youth Center vs Ilela Village Council & Another**, Civil Application No. 310 of 2021 (unreported) to mention but a few. In the case of **Principal Secretary, Ministry of Defence vs. D.P. Valambia** (supra) the court observed that "

"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 purposes to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right"

According to Joan Auye Mrema's affidavit in crux at paragraph 16, 17, 18 and 19 he has deposed that the applicant was not given right to be heard, because he was not notified, thus not aware. The same was highly insisted by Mr. Hekima in his submission. I have considered the circumstances of the matter before the Deputy Registrar, the fact the applicant is negating that he was not informed of the existence of the case before the court, thus means he was not aware. But something strange the record shows that the applicant was represented, under this circumstances, to my view this is a

peculiar matter which need the attention of this court to know what happen and address this allegation. In the case of **Abdulrahman Mohamed Ally vs. Tata Africa Holdings T. Limited** (supra), the court of appeal observed at page 9 that;

*"Illegality of the impugned decision is not a panacea for all applications for extension of time. **It is only one in situations where, if the extension sought is granted, that illegality will be addressed.**"*

[Emphasis added]

On the same case above, the Court of Appeal developing a broader approach for purpose of doing justice, at page 8 the court state as follows;

*"In determining whether sufficient reason for extension of time exists, the court seized of the matter should take into account not only the considerations relevant to the applicant's inability or failure to take the essential procedural step in time, but also any other considerations that might impel a court of justice to excuse a procedural lapse and incline to a hearing on the merits. Such other considerations will depend on the circumstances of the individual cases and include, but are not limited to, such matters as: the promptitude with which the remedial application is brought, whether there was manifest breach of the rules of natural justice in the decision sought to be challenged on the merits, **and the prejudice that may***

*be occasioned to either party by the grant or refusal of the application for extension of time. **This broad approach is preferable as a judicial discretion is a tool, or device in the hands of a court for doing justice or, in the converse, avoiding injustice.***"

[Emphasis added]

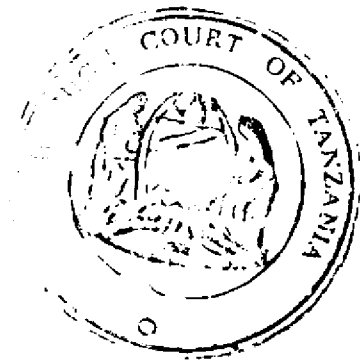
With respect to Mr. Miraji his contention that, the respondent after filing the matter, notified the applicant as evidence of annexures appended to respondent's counter affidavit shows, I think the counsel was endeavoring to prove on matter which is premature. This is because, it is settled law that a Court hearing an application like this should restrain from considering substantive issues that are to be dealt with in the main application sought, this is so in order to avoid making decisions on the substantive issue before the main application sought is heard. See the case of **Regional Manager-TANROADS Lindi vs. D.B Shapriya and Company Limited**, Civil Application No. 29 of 2012 (Unreported)

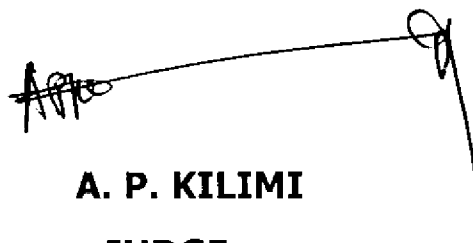
In view of what I have detailed hereinabove, I have considered the refusal to grant extension of time to the appellant versus granting it, in my considered opinion, this is suitable matter, to invoke the discretion of this court as said above to grant the extension of time, so that the alleged

illegality be heard substantively. Consequently, I find merit in this application for extension of time and allow it forthwith. Since, there are other prayers brought concurrently with this application, hearing of other prayers to proceed forthwith.

It is so ordered.

DATE at MOSHI this day of 28th August, 2023.




A. P. KILIMI
JUDGE
28/8/2023

Court: - Ruling delivered today on 28th day of August, 2023 in the presence of Mr. Merzedeck Hekima learned counsel for applicant and Mr. Ngereka Miraji learned counsel for the respondent.

Sgd: A. P. KILIMI
JUDGE
28/8/2023