

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 193 OF 2023

(Arising from Misc. Civil Application No. 661 of 2021)

DB SHAPRIYA AND COMPANY APPLICANT

VERSUS

EL MALICK ABOOD t/a

SANTANA INVESTMENT LIMITED..... 1ST RESPONDENT

SOGEA SATOM COMPANY LIMITED..... 2ND RESPONDENT

RULING

21st September, & 10th October, 2023

BWEGOGGE, J.

This is an application for an extension of time within which the applicant may file reference against the decision of the Taxing Master in Misc. Civil Application No. 661 of 2021 dated on 28th April, 2022. The application is brought under the provision of section 14(1) of the Law of Limitation Act [Cap. 89 R.E. 2019], among others, and supported by the affidavit of Mr. Roman S.L. Masumbuko, the applicant's counsel.

The factual background of this case as depicted from the record of this case is thus: The second respondent herein successfully commenced civil proceedings (Civil Case No. 166 of 2015) in this court against the applicant herein. The 1st respondent herein was engaged to execute the decree of this court by attaching the properties of the applicant herein. Later on, the deputy registrar had entered an order in Misc. Civil Application No. 358 of 2019 lifting the attachment of the applicant's properties and instructed the 1st respondent herein to release the attached properties. The said order was upheld by this court in Misc. Civil Reference No. 15 of 2021. Later on, the 1st respondent herein presented a Bill of Costs in Misc. Civil Application No. 661 of 2021 claiming costs incurred in attaching the applicant's properties from 13th June, 2019 to 06th July, 2021. The Taxing Master granted the application and awarded the 1st respondent costs to the tune of TZS. 340, 958, 480/-. The applicant was not amused. She filed reference (Reference No. 13 of 2022) in this court which was struck out on a technical ground. Hence, the applicant preferred an application herein for extension of time to re-institute the reference against the impugned order of the Taxing Master.

The applicant and the 1st respondent were represented by Messrs Roman S.L. Masumbuko and Joseph Asenga, learned advocates. The matter herein was argued by written submissions as hereunder recounted.

In substantiating the application herein, Mr. Masumbuko argued that the delay in filing the intended reference is what in law termed as “technical delay.” That the reference lodged in this court to challenge the decision of the Taxing Officer was filed timely but the same was struck out for failure to attach a copy of drawn order sought to be referred. Therefore, the time spent in prosecution of the same is excusable in law and which the applicant is not obliged to account. In supporting his argument, the counsel cited the cases of **Shayo vs. Consolidated Holdings Corporation (as an Official Receiver of Tanzania Film Co. Ltd.,** (Civil Application 366 of 2017) [2018] TZCA 252; and **Emmanuel Rulihafi & Another vs. Jonas Mrema** (Civil Appeal 314 of 2019) [2021] TZCA 332. Further, the applicant’s counsel submitted that the application for extension of time was promptly filed on 15/12/2022, just three days after the Civil Reference No. 13 of 2022 was terminated.

Apart from above, the counsel submitted that the decision of the Taxing Master is tainted with illegalities. That the award of the Taxing Master in Misc. Civil Application No. 661 of 2021 encompassed the charges incurred

by the 1st respondent from 13th June, 2019 to 6th July 2021 whereas the attachment order was lifted on 15 July, 2019 by the deputy registrar in Misc. Civil Application No. 538 of 2019. The counsel asserted that it is trite law that illegality on the face of record is the sufficient cause for grant of extension of time. The case of **Principal Secretary, Ministry of Defence National Service vs Devram Valambhia** [1992] T.L.R 185 was cited to buttress the point.

In the same vein, the applicant's counsel charged that the Taxing Master failed to pay regards to taxing scales provided under the Court Broker and Process Server (Appointment, Remuneration and Disciplinary) Rules, 2017. That the amount taxed is unjustifiable for want of supporting evidence on record. Lastly, the applicant's counsel alleged that the Taxing Master entertained the application which was time bared as rule 27(4) Court Broker and Process Server (Appointment, Remuneration and Disciplinary) Rules, 2017 bars the executing officer to file bill of costs after the lapse of 30 days from the date of hearing. That the purported bill of costs was supposed to be dismissed on ground of time limitation vide the provision of section 3(1) of the Law of Limitation Act. On the above grounds, the applicant's counsel prayed the application herein be granted.

Mr. Asenga, counsel for the 1st respondent, opened his submission in reply by charging that the applicant's affidavit contains offending paragraphs. That paragraphs 9 and 13 contains conclusions and legal argument whereas paragraph 14(i)(ii)(iii)(iv)(v) and (vi) is unverified by the applicant contrary to Order XIX, rule3(1) of the Civil Procedure Code. That the remedy available for offending paragraphs is to expunge them from the record and determine the application with the remaining paragraphs. Therefore, as the sufficient cause for grant of extension sought are contained in paragraph 14 (i)(ii)(iii)(iv)(v) and (vi), it follows that there is no affidavit supporting the application herein. The case of **Mantrac Tanzania Limited vs. Goodwill Ceramics Tanzania Limited** (Civil Appeal 269 of 2020) (2023) TZCA 17506 was cited to bring home the point.

Apart from the above, the counsel contended that the applicant has failed to account for each day of delay. That the Civil Reference No 13 of 2022 was struck out on 12/12/2022 and this application was belatedly filed on 4/5/2023. Hence, the applicant failed to account for 180 days of delay. Likewise, the counsel contended that the technical delay raised by the applicant is not applicable since the civil reference was filed out of time.

In tandem to above, the counsel contended that the application is incompetent for citing inapplicable provisions which do not give this court jurisdiction. That section 93 and 95 of the Civil Procedure Code are irrelevant provisions in the circumstances of this case as the decision of the Taxing Master in determining the bill of costs was not based on the provisions of the Civil Procedure Code. Hence, the counsel asserted that the applicant moved this court with irrelevant provisions. The case of **Aero Helicopter (T)Limited vs. F.N. Jansen (1990)** TLR 142 was cited to bolster the point.

In rejoinder submission, the applicant's counsel contended as follows: **First**, the purported preliminary objections advanced by the 1st respondent's counsel are misconceived as the same were withdrawn on 17th August, 2023. Otherwise, the applicant's counsel asserted that the affidavit supporting the application herein contains deposed facts which are within his personal knowledge. Therefore, in his opinion, the affidavit doesn't contain any offensive paragraphs. Likewise, the counsel opined that the affidavit was properly verified. **Secondly**, the applicant has accounted for the whole period of delay. That the earlier reference (Civil Reference No. 13 of 2022) was struck out on 12/12/2022 whereas the first application (Mis. Civil Application No. 575 of 2022) for extension of

time was filed on 15/12/2022. And, on 20/04/2023 the relevant application was withdrawn with leave to refile. Otherwise, the counsel vehemently disputed the allegation that the previous reference (Civil Reference No. 13 of 2022) was time barred as the record entails that the case was struck out for the applicant's failure to attach the copy of drawn order. **Thirdly**, this court is properly moved by citation of the provision of section 14(1) of the Law of Limitation Act which is relevant in the circumstances of this case. Based on above premises, the counsel reiterated his prayer in that the application herein be granted with costs.

As aforementioned, the application herein is brought under the provision of section 14(1) of the Law of Limitation Act. The relevant provision provides as thus:

*"Notwithstanding the provisions of this Act, **the court may, for any reasonable or sufficient cause**, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application."*
[Emphasis supplied].

The above-revisited provision enjoins this court with power to enlarge the period of limitation for "reasonable" or "sufficient cause." The court is

duty-bound to ascertain whether the advanced reasons for delay amount to “reasonable” or “sufficient cause” to warrant the extension of time sought based on the circumstances of the case. See also the cases of **Wambele Mtumwa Shahame vs. Mohamed Hamis** (Civil Reference 08 of 2016) [2018] TZCA 39 and **Bertha Bwire vs. Alex Maganga** (Civil Reference 07 of 2016) [2017] TZCA 133 and **Tanga Cement Company Ltd vs Jumanne Masangwa & Another**, Civil Application No. 06 of 2001, CA (unreported). In this respect, I would borrow a leaf from the case of **Shanti vs. Handocha** [1973] EA 2007 cited in the case of **Wambele Mtumwa Shahame vs. Mohamed Hamis** (supra) whereas the Apex Court opined:

*"The position of an application for extension of time is entirely different from an application for leave to appeal. He is concerned with showing "**sufficient reason**" why **he should be given more time** and the most persuasive reason he can show is that the delay has not been caused or contributed to by dilatory conduct on his part. But there may be other reasons and these are all matters of degree."*

Moreso, the factors to consider in gauging whether the reasons furnished by the applicant meet the scales of justice were laid down in the celebrated case of **Lyamuya Construction Company Limited vs.**

Board of Registered Trustees of Young Women's Christian Association of Tanzania as follows:

- 1. The applicant must account for each and every day of delay.*
- 2. The delay should not be inordinate.*
- 3. The applicant show diligence and not apathy, negligence or sloppiness in prosecution of the action he intends to take.*
- 4. If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance, such as illegality of the decision sought to be challenged."*

The factual matrix deposed by the applicant's counsel in the 18-paragraph affidavit states reasons for delay in filing the intended reference seeking to defeat the order of the Taxing Master. It has been deposed that the applicant herein had taken appropriate legal action in filing a reference in this court intended to challenge the decision of the Taxing Master in respect of the impugned award of bill costs. That the reference was filed timely. However, the matter was struck out based on the technical aspect of the law on 12th December, 2022. Thus, the counsel asserted that the time spent in the execution of an abortive matter in this court amounts to excusable technical delay.

Unarguably, it is settled law that the period spent in court prosecuting a case which would otherwise be struck out on technical reason, apart from time limitation, amounts to technical delay which is excusable. In the case

of **Fortunatus Masha vs. William Shija and Another** [1997] TLR 154

the Apex Court opined thus:

"A distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any refers to the filing of an incompetent appeal, not the delay in filing it. The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal. In fact, in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal."

See also the cases; **Shayo vs. Consolidated Holdings Corporation (as Official Receiver of Tanzania Film Company Limited)** (Civil Application 366 of 2017) [2018] TZCA 252, **Elly Peter Sanya vs. Ester Nelson** (Civil Appeal 151 of 2018) [2020] TZCA 157 and **Bank M (Tanzania) Limited vs. Enock Mwakyusa** (Civil Application 520 of 2017) [2018] TZCA 291.

Admittedly, based on the authorities aforecited, the time spent by the applicant herein prosecuting the abortive and, or incompetent reference

amounts to technical delay of which she should not be called upon to account.

Further, it has been deponed by the applicant's counsel in the affidavit supporting the application herein that having this court struck out the application filed to contest the order of the Taxing Master, within three (3) days, the applicant refiled the application (Misc. Application No. 575 of 2022) for extension of time within which to file reference against the decision of the Taxing Master in this court. The counsel explained his delay in that he had to peruse the relevant file to apprehend the reason for striking out before he would refile the same, a process which had to follow the established procedure. The said application was withdrawn on 20th April, 2023 with leave to refile the same within 14 days. Hence, this application was filed on 04th May, 2023, within the prescribed period. The above accounts were not specifically controverted by the respondents herein. It is likewise settled principle in this land that diligence in prosecuting a case, is yet a sufficient ground for the extension of time. In the case of **Mumello vs. Bank of Tanzania** [2006] 1 EA 227, the Apex Court held that:

".....applying for copies of proceedings and judgment within such a short time from the date of judgment, and later making a follow up by way of reminder and finally

lodging the application immediately after being supplied with the same, depicts diligence on the of the respondent."

Based on the court documents annexed to the pleadings filed herein which support the deposed facts, I am satisfied that the applicant has accounted for the period between the date upon which the impugned decision was entered by the Taxing Master on 15th April, 2021 to 04th May, 2023 when this matter was filed in court. It is obvious that the applicant had not let grass grow under her feet but acted diligently in taking the intended legal action.

Lastly, it was deposed by the applicant's counsel that there are points of law involved in the decision of the Taxing Master which amounts to illegalities. The particulars of the alleged points of law are laid down under paragraph 14 of the affidavit supporting the affidavit. Among others, it alleged that:

- 1. That the Taxing Master grossly erred in law by taxing the charges incurred after the warrant of attachment was lifted by the order of the deputy registrar in the Misc. Civil Application No. 538 of 2019 dated 15th July, 2019.*
- 2. That the amount taxed by the Taxing Officer is wholly unreasonable, unjustifiable and contrary to the decision of this court in Civil Reference No. 15 of 2021 delivered by His Lordship Mruma J.*

It was charged by the applicant's counsel in that the awarded bill of costs had disregarded the period upon which order of deputy registrar in Civil Misc. Civil Application No. 538 of 2019 uplifted the attachment order entered against the applicant and ordered the 1st respondent herein to release the attached goods. That, likewise, the bill of costs was entered contrary to the instructions of this court in Civil Reference No. 15 of 2021 (Mruma J.) made on 02nd March, 2022.

It is uncontroverted fact that the deputy registrar in Civil Misc. Civil Application No. 538 of 2019 uplifted the attachment order entered against the applicant and ordered the 1st respondent herein to release the attached goods on 15th April, 2021. Likewise, this court in Civil Reference No. 15 of 2021 opined that, I beg to quote:

" Parties are in agreement that the orders of Honourable Deputy Registrar Massam postponed the attachment of the 2nd Respondent's equipments. Black's Law Dictionary 9th Edition by Brayan A. Garner defines the word postponement as putting off or defer an action.

It follows therefore that after the order to postpone attachment, the 3rd Respondent, the court broker, ought to have refrained from further attachment and if there were any equipments that he had seized, he should have released them to eliminate the possibility of incurring storage and security costs without good reason. A court broker being a person appointed by the court to carry out the functions of attachment and sale of property under an order of a court is not a party to the proceedings. He is an agent of the court and not of any party. Like the

court itself, he must be impartial and upon carrying out his functions he is entitled to present his bill of costs to the court for taxation. He must therefore comply with all orders given by his employer – the court.”

The above instructions are patently clear, needing no further interpolation. The 1st respondent was supposed to release the applicant's tools of labour previously attached with effect from 15th April, 2021. The instructions made by this court were likewise clear in that the 1st respondent was obliged, as an officer of the court, to comply with the order to prevent inflated bills of costs for storage and security incurred. I need not mention that the 1st respondent didn't take heed of the instructions given.

It is glaring in the impugned taxation order entered by the deputy registrar that the Bill of Costs prayed for and awarded entails that the cost covered the period from 18th July, 2019 to 23rd December, 2021, over and above the period the attachment order was uplifted and the 1st respondent ordered to release the plaintiff's property.

The 1st respondent, in justifying his non-adherence to the order of the deputy registrar and instructions made by this court, cited the decision in the Miscellaneous Civil Application No. 104 of 2022 whereas Hon. Justice Luvanda opined that the order of the deputy registrar was contradictory.

The trial Judge made his opinion when he was determining an application for extension of time to appeal to the Apex Court against the decision of the deputy registrar in Misc. Civil Application No. 538 of 2019 preferred by the 1st respondent. The purported contradiction was construed to amount to illegality and invoked to grant the extension sought. Assuming that his opinion was right, the clarification made by Hon. Justice Mruma, in my opinion, made it clear that from the date the order of deputy registrar was entered in Civil Misc. Civil Application No. 538 of 2019, the 1st respondent was supposed to release the properties attached. It follows that the 1st respondent had acted in disregard of the order of this court in claiming for costs for the amount he was not entitled to, which he was awarded. It follows that the award of costs in itself is tainted with illegality. Therefore, the allegation made by the applicant's counsel herein has substance.

Admittedly, it is the settled law in this land that illegality of the decision sought to be challenged constitute sufficient cause for extension of time whereas the court is obliged to extend the time for ascertaining the alleged illegality and take appropriate measure to put the record right, if the allegation is ascertained. See the cases: **Principal Secretary, Ministry of Defence & National Service vs. Devram Valambia**

[1992] TLR 185; **VIP Engineering and Marketing Limited & Three Others vs. Citi Bank Tanzania Ltd**, Consolidated Civil Reference 6,7, and 8 of 2006 CA (unreported) and **Kalunga and Company Advocates vs. National Bank of Commerce** [2006] TLR 235, among many others.

Before I pen down, I find it pertinent to address several issues raised by the 1st respondent's counsel. **One**, the respondent's counsel raised preliminary objections in the submission in reply. As rightly lamented by the applicant's counsel, the 1st respondent's counsel had previously withdrawn the purported preliminary objections. By clinging on the discarded preliminary objections at this eleventh hour, in contesting the application herein, the 1st respondent's counsel exhibits typical instinct of a drowning man. I would not be obliged to inquire into the alleged infractions. However, to clear doubts, I find myself obliged to respond thereto. It was alleged that the contents of paragraph 14 (i) (ii) (iii) (iv) (v) and (vi) of the affidavit sworn by the applicant's counsel were not verified. The kernel of the charge being that the verification clause was made in respect of paragraph 14 but without subparagraphs thereof. Likewise, it was alleged that the contents of paragraphs 9 and 13 contain conclusions and arguments; hence, liable to be expunged from the affidavit supporting the application herein. As rightly contended by the

counsel for the applicant, paragraph 14 of the affidavit is contained in the verification clause. The only sin committed being that the sub-paragraphs thereof were not included. Can the omission justify the conclusion that the whole paragraph was unverified? My answer is negative. I am of the settled view that, as it is not controverted that paragraph 14 is verified, no way the subparagraphs thereof may be excluded. Fortunately, there is a decision of this court to spare me from the charge that my conclusion is merely a presupposition of my sole mind. When this court was faced with the like controversy in the case of **William Benedict vs. Platinum Credit Limited**, Labour Revision No. 34 of 2019) HC (unreported) held thus:

"This issue needs not detain me much: It is common knowledge that a subset within a set is part of the main set. Borrowing a leaf from the mathematical experience, it goes without saying that the subparagraphs which are under the paragraphs which were verified were also verified....."

The above quotation said it all. I find the 1st limb of the purported preliminary objections misconceived. The 2nd limb of the preliminary objections need not detain me as well. Having scrutinized the affidavit herein in its entirety, I am of the settled opinion that even if paragraphs 9 and 13 are expunged from the affidavit supporting the application

herein, yet the substance of matters deponed therein remains unaltered. In view of the foregoing, I find the purported preliminary objections on points of law raised by the 1st respondent bereft of substance. I hereby overrule the same.

Two, it was likewise alleged by the applicant's counsel that the previous reference (Civil Reference No. 15 of 2021) was filed beyond the statutory time limitation. However, upon scrutiny, I found that the allegation made herein is not supported by the record of the respective case. Admittedly, the 1st respondent raised the preliminary objection on point of law in that the reference preferred by the applicant herein was time barred, among others. The trial judge overruled the objection on ground that the 1st respondent's counsel misapprehended the law. As rightly pointed by the applicant's counsel, the record entails that the relevant reference was found incompetent for want of drawn order, not time limitation. I find the allegation made herein unfounded. **Three**, it was charged by the 1st respondent's counsel that that the application herein is incompetent for citing inapplicable provisions. That the provisions of sections 93 and 95 of the Civil Procedure Code are irrelevant in the circumstances of this case as the decision of the Taxing Master in determining the bill of costs was not based on the provisions of the Civil Procedure Code. As rightly

responded by the applicant's counsel, the provision of section 14(1) of the Law of Limitation Act which has been cited to move this court, among others, is appropriate to the circumstances of this case. It is the relevant provision which this court invoked in gauging the merit of this matter whereas the inapplicable provisions were ignored.

That said, I find that the applicant herein has advanced sufficient cause to warrant grant of extension sought. Consequently, I find the application herein meritorious. I hereby grant the extension sought within which the applicant may file reference against the decision of the Taxing Master. The applicant to lodge the intended reference within a period of 14 days. No order as for costs.

I so order.

DATED at DAR ES SALAAM this 10th October, 2023.


O.F. BWEGOGHE
JUDGE

