

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB REGISTRY)
AT DAR ES SALAAM
CIVIL REFERENCE NO.17 OF 2023**

**BARNABAS THOMAS.....1ST APPLICANT
MWIRA KATI KIRO.....2ND APPLICANT
DAVID MAIBA.....3RD APPLICANT**

VERSUS

**THE REGISTERED TRUSTEES
OF 7TH DAY ADVENTIST CHURCH OF
TANZANIA.....1ST RESPONDENT
THE PRESIDENT OF EAST
AFRICAN CENTRAL TANZANIA CONFERENCE.....2ND RESPONDENT
THE PASTOR OF KINONDONI
7TH DAY ADVENTIST CHURCH.....3RD RESPONDENT**

RULING

*Date of Last Order: 20/11/2023
Date of Judgment: 19/12/2023*

DING'OHI, J;

This is an application for reference made under Order VII of the Advocate Remuneration Order, GN No. 263 of 2015. The application is made of chamber summons supported by a joint affidavit of Barnabas Thomas, Mwira Katikiro, and David Maiba, the Applicants herein.

According to the chamber summons the Applicants pray that this Court be pleased to examine the proceedings of the Taxation Cause No. 104 of 2022 dated 13/3/2023 and the Ruling of Taxing Master in Misc.

Civil Application No. 127 of 2023 to satisfy itself as to the correctness, legality, or propriety of the decisions made on those applications.

The background of this application goes like this, the Applicants won a Civil case No.203 of 2019 against the Respondents with costs. The Applicants then filed Taxation Cause No. 104 of 2022 for payments of costs incurred in the aforementioned civil case. The objection was successfully raised against that Taxation Cause that the same was tainted with irregularities. The Taxation Cause was struck out with leave to refile within 14 days.

The Applicants did not refile the Taxation Cause within the given 14 days. Being aware that they were out of time, they filed Application No. 127 of 2023 for an extension of time to refile the said Taxation Cause. The said application also did not pass without successful preliminary objection. It was struck out for being tainted with irregularities.

After those two incidents, Applicants resorted to filing the instant application for reference. Against this application which is before me now, Respondents filed a notice of preliminary objection which is the subject matter in this ruling. According to the notice, the Respondents notified this Court that on the first day of the hearing, they shall raise preliminary objections to the effect that;

1. The application for reference is time-barred in respect of Taxation Cause No.104 of 2022.
2. The application is bad in law for combining more than one application in this reference.
3. That the application is bad in law for being omnibus.

4. The application is bad in law for abusing the Court process.
5. The reference is fatally defective for being supported by a defective affidavit as the same is not properly verified.
6. The affidavit in support of the application is incurably defective for containing extraneous matters by way of legal arguments, assumptions, and conclusions.
7. The affidavit supporting the application is incurably defective for containing untrue statements.

In this application the Applicants appeared in person, unrepresented. The Respondents were represented by Mr. Gadi Kabeli, the Learned Counsel. The preliminary objections were ordered to be heard by way of presenting written submissions. Written submissions were filed by both parties per the court order.

In submitting the first preliminary objection the counsel for Respondents averred that the application for reference is time-barred in respect of Taxation Cause No. 104/2022, which was heard before a Deputy Registrar. The said Taxation Cause was struck out on 13th March 2023 on a ruling of a preliminary objection raised against it. It is submitted, that the Deputy Registrar apart from striking out the Taxation cause, ordered that the said taxation cause be refiled within 14 days. As previously stated, the taxation cause was not refiled on time. It was filed on the 18th day of July 2023.

Order 7(2) of The Advocate Remuneration Order GN. No 263 of 2015, as regards the way of the institution of reference against the taxed bill of costs, provides as follows;

"A reference under Order 1, shall be instituted by way of chamber summons supported by affidavit and filed within 21 days from the date of decision".

The time limitation of filing reference where any party is aggrieved by the decision of the taxing master in the bill of costs is within 21 days from the date of the decision. It is the submission by the counsel for Respondents that, having failed to make an application within the prescribed time and in the presence of this reference the Taxation Cause is time-barred.

With regards to the second and the third points of preliminary objections, the Respondents have the view that the application is bad in law for combining more than one application. It is also contended that the application is also bad in law for being omnibus. On two of those concerns, according to the counsel for the respondents, the applicants have filed this application against two different applications that were before the Deputy Registrar. He mentioned those applications to be; the **Taxation Cause No. 104/2022** and the second one was in respect of **Misc. Civil Application No. 127/2023**, which was the application for an extension of time to file the Taxation Cause.

The learned counsel went on to submit that the **Taxation Cause No. 104/2022** and **Misc. Civil Application No. 127/2023** are two different applications that were filed and admitted in this court on different days and containing different prayers, named different case numbers and types and even different rulings were delivered on different days.

It was submitted that, if the Applicants were aggrieved by the rulings, they were supposed to file different reference applications. The learned counsel cited the case of **Mohamed Salimin V Jumanne Omary Mapesa** Civil Application No.103 of 2014 CAT (unreported) to support his submissions.

Submitting on the fourth point of preliminary objection, the Respondents averred that the application is bad in law for abusing court processes. On this point, it was the Respondent's submission that **Taxation Cause No. 104/2022** was struck out by the Deputy Registrar, and the Applicants being aggrieved by the said decision were supposed to file a reference under **Order 7(2) of The Advocate Remuneration Order** GN. No 263 of 2015, within 21 days from the date of decision. According to the Respondent, the Applicants decided to comply with the decision of the taxing master because when they failed to meet the deadline, they applied for an extension of time to file the same. If the Applicant were aggrieved, the Respondent submits, in the first place they were supposed to challenge the decision because you cannot eat your cake and have it. According to the learned counsel, the Applicants did comply with the order of the taxing master, as they stated under paragraph 8 of their affidavit in support of the application.

It was further submitted that, **Misc. Civil Application No. 127/2023** which is an application for an extension of time, was again struck out by the Deputy Registrar for being incompetent after the Respondent raised preliminary objections and the Applicants opted to file this application for reference. On that, the Respondents have the view that this is an abuse of the court process. It was contended that if the Applicants were not satisfied with the ruling delivered on the 13th

day of March 2023 which struck out the application as said herein above, they could make an application for reference immediately.

On the fifth point of preliminary objection, according to the Respondents, the application for reference is fatally flawed because of a poorly verified affidavit. They cited Order VI Rule 15(2) of the **Civil Procedure Code** [CAP. 33 R.E 2019] which provides for requirements of proper verification in the affidavits. It was submitted that the purpose of verification in the affidavit is basically to enable the court to know which facts can be said to be proved on the affidavit and those which may be true from information received from other persons or allegations based on records as was the position in the case of **Jacqueline Ntuyabaliwe Mengi and two Others VS Abdiel Reginald Mengi and 5 Others** Civil Application No 332/01 of 2021 CAT (unreported).

The learned counsel argued that since the verification clause in the Applicant's affidavit is defective for not disclosing the source of information, renders the whole application incompetent, and therefore he prays the whole application to be struck out with costs.

On the sixth point of the preliminary objection, the Respondents contended that the affidavit in support of the application is incurably defective for containing extraneous matters by way of legal arguments, assumptions, and conclusions. It is submitted that the same appears under paragraphs 3,4,8,9, and 12 of the affidavit. The learned counsel reminded this court of the current decision of the Court of Appeal in the case of, **Jacqueline Ntuyabaliwe Mengi and two Others VS Abdiel Reginald Mengi and 5 others** (supra) where the court cited the case of **Chanda Company Advocate v. Arunaben Chaggan Chhita**

Mistry and 2 others, Civil Application No. 25 of 2013 (Unreported). In that later case it was held that;

"As a general rule of practice and procedure an affidavit for use in court, being a substitute for oral evidence, should only contain statements of facts and circumstances or which the witness deposes either of his own knowledge. Such affidavit should not contain extraneous matters by way of objection or prayer or legal arguments or conclusions".

According to the counsel for Respondents, the Applicant's affidavit containing conclusions, assumptions, and legal arguments leads to the offensive paragraphs in an affidavit and the effect of such offending paragraphs is to be expunged from the affidavit.

The last point of the preliminary objection raised by the Respondents is that the affidavit supporting the application is incurably defective for containing untrue statements. According to the Respondents, an affidavit in support of the application contains untrue statements where the Applicants stated that the Respondents were not responding in their application. That was stated in paragraph 9 of the Applicant's affidavit. The counsel for Respondents contended that the effects of an affidavit that contains an untrue statement were discussed in the case of **Jaliya Felix Rutaiwa v. Kalokora Bweshwa and Another** Civil Application No. 392/01 of 2020 CAT on page 12 the Court cited the case of **Ignazio Messina v. Willow Investments SPRL**, Civil Application No 21 of 2001 which were cited to back up the objection. It is the learned counsel submissions therefore that the Applicant's affidavit should not be relied upon by this court because it contains untrue statements.

In reply, the Applicants began with the first preliminary objection. The Applicants submit that, on the reference being time-barred in respect of **Taxation Cause No.104/2022** and the same being filed beyond the time limit of 21 days contrary to the requirement of the law is an undisputed position of the law as submitted by the Respondents. It is the Applicants' like position that a person who is aggrieved by the decision or order of the Taxing Officer shall institute the application for reference to the Court within 21 days from the date of decision per **Order 7(1)(2) of the Advocate Remuneration Order** GN.No.263 of 2015.

Moreover, the Applicants submitted that the record revealed that the trial deputy registrar unprocedural heard, sustained, and disposed of the preliminary objection raised by the Respondents on **13/3/2023** in the absence of the **1st** and **3rd** Applicants and in the presence of the **2nd** Applicant only, the irregularity which occasioned injustice to the **1st** and **3rd** Applicants in that they were condemned unheard.

Further, the Applicants averred that on **14/3/2023** they requested to be availed with that copy of the court order tainted with irregularity so that they would institute an application for reference to this honorable Court within 21 days as required by law, but unfortunately, the said certified copies of proceeding and court order were issued to them on **24/4/2023**, while **Misc. Civil Application No. 127/2023** was already instituted and is pending determination in this honorable Court. That is to say, according to the Applicants, they failed to prosecute two cases at per as that would be against the principle of *res-subjudice* as stipulated under **Section 8 of the Civil Procedure Code**, Cap.33, RE. 2019. Thus, they were to wait for the

institution of the intended application for reference after the **Misc. Civil Application No. 127/2023** was disposed of on **3/7/2023**. He submitted further that it is the settled position of the law that in computing the period of limitation, the time spent in prosecuting the case in the very court or other court, against the same parties for the same relief shall be excluded. They cited **Section 21(2) of the Law of Limitation Act**, Cap. 89, RE. 2019 to support their submissions.

Arguing against the second and third points of objections, the Applicants contended that generally, the omnibus prayers are not allowed as decided in several cases and as appended by Respondents to back their stance, but it is the general rule which is not without conditions as stated in the case of **Mohamed Salmini v Jumanne Omary Mapesa (Supra)** which cited by the Respondents in their written submission where the Court of Appeal observed that the conditions precedent for applicability of this rule is that the applications should not be opposed to each other or preferred under different laws, complete with different timelines, and distinct considerations in their determination.

According to the Applicants, it is an elementary principle stated and settled on numerous occasions by the court of records that a combination of prayers in a single application is not only permissible conduct but is highly encouraged by the courts for the avoidance of multiplicity of proceedings in the court. This was emphasized in the case of **Tanzania Knitwear Ltd v. Shamshu Esmail** [1989] TLR. 48

Moreover, the Applicants submitted that prayers sought in the chamber summons are not distinct because are interrelated or interlinked for reversing the orders for striking out Taxation Cause No.

104/2022 and Misc. Civil Application No. **127/2023** which are not opposed to each other and preferred under the same laws within the same timelines without having distinct consideration in their determination, and the same originated from the very case which is **Taxation Cause No. 104/2022** as correctly decided in the binding and appended case of **Global Agency Limited and 2 Others v. Rabo Rural Fund B.V.(RRF)** Misc. Commercial Application No.117/2020 is cited herein. The Applicants pray that this Court be pleased to overrule the second and third points of objections by dismissing the same with costs.

With regards to the fourth point of preliminary objection, the Applicants in reply prayed that this honorable Court be pleased to adopt all facts, reasons, and laws submitted and opposed on the first, second, and third points of objection, but additionally, they are of the view that this point also failed due to the reason that nothing has been abused in the court process because the court process is not pure point of objection within the meaning of point of objection stated in the case of **Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd** [1969] E.A. 696, but rather is a matter of practice which needs the proof by evidence and does not cause any injustice to the parties once improperly proceeded.

On the fifth point of preliminary objection, it was argued by Applicants that the case of **Jacqueline Ntuyabaliwe Mengi and 2 Others vs. Abdiel Reginald Mengi and 5 Others (Supra)** cited on revealing the incompetence of their affidavit is distinguishable to the instant application since each case is determined according to its facts unlike as the Respondents alleged. According to the Applicants, the

Respondents have been misleading this honorable Court that hearing the Judge in the Court when pronouncing the judgment through the visual court in their presence but in the absence of the Applicants are the facts which should be verified because they were obtained from other sources. It was further argued that **Hon. J. Masabo, J**, when pronouncing judgment through visual court, introduced herself that she was pronouncing that judgment through visual court from Moshi-Kilimanjaro where she has been transferred, thus, the Applicants vividly heard that introduction. It is the Applicant's further submissions that, even if we are to believe as alleged by Respondents that the Applicant's affidavit is defective for improper verification clause, still, the application cannot be struck out as prayed by the Respondents; the defective verification clause can be cured by being amended as the amendment will not prejudice the Respondents as was the position the case of **Jamal. S. Mkumba and Another v Attorney General** Civil Application No. 240/01/2019.

Replying to the sixth point of objection, the Applicants argued that with dismay and due respect to the Respondents and their advocate, their allegation is also unfounded and meritless because it shows and proves that the Respondents failed to underscore the provisions of the laws governing the application for reference. He argued that this application emanated from an order delivered in **Taxation Cause No. 104/2022** and ruling in **Misc. Civil Application No. 127/20232**, in which if the party aggrieved by any decision determined by the Taxing Officer who is Deputy Register according to this case, may file a reference to a Judge of the High Court within 21 days as they did according to **Order 7(1)(2) of the Advocates Remuneration**

Order, 2015. Notably, the applicants argued, that the said provision of the law does not provide on how the reference is required to look, but it paves the way for how the reference is required to be made by way of chamber summons and support with an affidavit of which its contents and reasons as provided under **Order XLI, Rule 1 of the Civil Procedure Code**, Cap. 33 RE.2019.

From the above-cited provision of law, it is argued by the Applicants, that the Respondent ought to understand that in an affidavit used to support the application of this nature, the court or parties must disclose, opine, and draw the reasons on the points of laws and facts which were offended by the trial court unlike as alleged by Respondents and their Advocate too. Therefore, the Applicants contend, based on the submission of this objection, they are of the firm view that this honorable Court will agree with their opposing arguments on the Respondents' point of objection which is also meritless and ought to be overruled with costs.

Lastly, on the last point of objection, the Applicants submit that the same should not detain this court to decide. That is because according to the Applicants, it is not a pure point of objection within the meaning preliminary objection on points of law as per the leading case of **Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd** [1969] E.A. 696. In that case, it was observed that the point of objection must be on the pure point of law.

Having submitted as herein above the Applicants prayed the court to overrule the objections raised by the Respondents with costs.

I had ample chance to go through the raised preliminary objections by the Respondents together with the challenged application.

I have further gone through written submissions for and against preliminary objections. For the reason that will be apparent herein, I will begin by determining the second preliminary objection which states that **"The application is bad in law for being omnibus.**

The Respondent's Counsel has raised this objection by contending that the Applicants have sought prayers against two distinct applications that were determined before a Deputy Registrar in this registry. The Respondents have spotted that the Applicants have made this single reference against the Taxation Cause No. 104 of 2022 and Miscellaneous Application No. 127 of 2023. It is the Respondent's view that this is an omnibus application which is not allowed by the law. According to him, the Applicants ought to have made two distinct references in respect of each application.

The Applicants have stated that on the second and third objections where their application has been attacked to be omnibus for obtaining more than one prayer, the same is not allowed and has been decided by several cases in the courts. However, restricting omnibus applications is a general rule that is not without conditions or exceptions. It is the Applicants' view that the application can be made where it should not be opposed to each other or preferred under different laws, complete with different timelines and distinct considerations in their determination. Every enacted law has an exception and so it is when it comes to an omnibus application.

It is a common understanding that two or more independent matters cannot go together in one application unless they are interrelated and can conveniently be jointly determined by the court. In this matter, the record shows that there was an application made by the

Applicants originating from a Taxation cause that was struck out for its irregularities. The records also show that the taxation cause was struck out with leave to refile. As observed herein above, the refiling of the application was not done on time. The applicant unsuccessfully made an application for an extension of time to file taxation cause as the same was struck out for irregularities.

The records are very clear that the Applicants are asking for this court to satisfy itself as to the correctness, legality, or propriety of the said decisions. It is in law that each matter has to be determined by its circumstance. In this application, the Applicants have been aggrieved by the outcomes of two different decisions. One is Taxation Cause No. 104 of 2022 which was struck upon a preliminary objection that was raised and the same was sustained. The court ordered leave for the said Civil Cause to be refiled. Moreover, concerning Misc. Application No. 127 of 2023 which was an application for extension of time of which the same was also struck out upon objections raised. Records reveal that the Applicants have sorted a reference on these two matters in this reference.

In the case of **Mohamed Salimin v Jumanne Omary Mapesa** Civil Application No.103 of 2014 CAT, it was held that: -

"There is one difficulty relating to this application. As it is, the application is omnibus for combining two or more unrelated applications. As this court has held for time (s) without number an omnibus application renders the application incompetent and liable to be struck out"

Again, in the case of **Rutagatina, C.L. v The Advocates Committee and Clavery Mitindo Ngalapa**, Civil Application No. 98 of 2010 (CAT) held that;

"In the totality of the foregoing, we are satisfied that the rules do not provide for an omnibus application. For this reason, we hereby strike out this omnibus application."

Moreover, it was in the Court of Appeal in the case of **Mohamed Salimin v. Jumanne Omary Mila**, Civil Application No.103 of 2014 where they cited with approval the case of **Jonas Kanondo v. Yasinta Andrea**, Misc. Civil Application No.90 of 2018 (High Court of Tanzania) and addressed application which unites two distinct applications, the Court held that; -

"Distinct applications should be filed and lumping them together renders the application incompetent and liable to be struck out".

I do believe the essence and intention of the precedents above is to allow the court to focus on one aspect when engaged in determination and making decisions rather than to make the court loiter when hearing matters or even when making decisions to avoid confusion. I do not find it proper for such applications to be in one reference. To me, it appears the applicant is forum shopping and not certain about what is required to be done by them.

In the final result, I hold that the second objection raised by the Respondents has substance and is hereby sustained. This application is hereby struck out. Since this objection disposes of the whole application I find no reason to determine the rest.

Owing to the circumstances of this case, there will be no order as to costs.

Dated at Dar es Salaam this 19th day of December 2023.

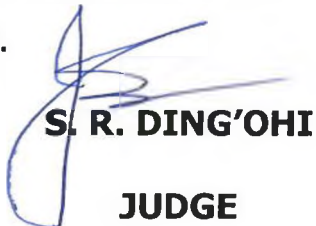


S. R. DING'OHI

JUDGE

19/12/2023

Court: Judgment delivered this 19th day of December, 2023 in the present of the applicants in person and Mr. Gadi Silasi, the learned advocate for Respondent.



S. R. DING'OHI

JUDGE

19/12/2023