

IN THE HIGH COURT OF TANZANIA

TANGA SUB-REGISTRY

AT TANGA

MISC. APPLICATION NO. 40 OF 2023

MIKE WILHELM KITWAKA (as a lawful Attorney of
FLOYD VERNOM HAMMER) **APPLICANT**

VERSUS

WAREHEMA KIBAHA (Interim Liquidator)**RESPONDENT**

*(Arising from Taxation No. 17 of 2022 of the High Court of Tanzania at Tanga
Originating from Civil Case No. 07 of 2018 of the High Court of Tanzania at
Tanga)*

RULING

14/05/2024 & 24/05/2024

NDESAMBURO, J.:

The applicant has approached this court, seeking an extension of time for filing an application for reference to set aside the *ex parte* ruling in Taxation No. 17 of 2022, issued by the Taxing Master at the High Court of Tanga. The application has been made under Order 8(1) and (2) of the Advocates Remuneration Order, 2015 and section 95 of the Civil Procedure Code, Cap 33 R.E 2019, and is accompanied by an affidavit from the applicant. However, the respondent has

contested this application, submitting a counter affidavit duly sworn by him.

The background of this application unfolds as follows: the applicant originally initiated Civil Cause No. 7 of 2018, seeking the winding-up of Shallom Farming and Plantation (T) Limited, with the respondent appointed as interim liquidator. During the course of his duties, the respondent filed Misc. Civil Application No. 48 of 2021, seeking court directives regarding the obligations of the parties and expenses related to managing the company, as well as liquidation duties, in accordance with the terms of his appointment as an interim liquidator. However, before the application could be determined, the applicant withdrew the petition for winding up the company in Civil Cause No. 07 of 2018. Consequently, the matter was marked as withdrawn, with interested parties awarded costs in accordance with the law. As a result of the withdrawal of Civil Cause No. 07 of 2018, Misc. Application No. 48 of 2021 was deemed overtaken by events, leading the court to strike it out without costs, but ordering the respondent to be repaid for expenses incurred while carrying out interim liquidator tasks.

The respondent initiated Taxation No. 17 of 2022, the focal point of this application, seeking reimbursement for expenses accrued during his duties as interim liquidator. The taxation proceeded *ex parte* after the court was satisfied that the applicant was duly served but failed to enter an appearance.

In paragraphs 4 to 11 of his affidavit, the applicant stated that he was unaware of and not served with a summons for Taxation No. 17 of 2022 until the 2nd of August 2023, when he received an email regarding notice of appearance for execution No. 23 of 2023 from this court. Subsequently, he sought legal counsel, managing to engage one on the 15th of August 2023. However, on the 19th of August 2023, he fell ill and on the next day, he was hospitalized at Arusha Regional Hospital until the 31st of August 2023. Upon his return to Tanga, he signed the necessary documents on the 1st of September 2023.

Additionally, in paragraph 12, the applicant alleged that the ruling of this court is marred by serious irregularities. In the supplementary affidavit, specifically paragraphs 4 to 7, the applicant asserted that serious irregularities and illegalities mar the ruling of this court in Taxation No. 17 of 2022, evident from the record itself. The identified illegalities within the ruling are as follows: Firstly, the

respondent was not granted costs in Misc. Civil Application No. 48 of 2021. Secondly, the respondent neither acted as a party nor as counsel for the said application. Consequently, the initiation and determination of Taxation No. 17 of 2022 contravene Order 2 of the Advocate Remuneration Order, 2015.

In paragraph 4 of his counter-affidavit, the respondent deponed that he diligently attempted to serve the applicant in vain and subsequently obtained a court order for service through publication, executed vide the Nipashe Newspaper dated 1st of September 2022, despite which the applicant failed to appear.

In paragraph 6, the respondent noted the applicant's failure to explain his whereabouts from the 15th to the 18th of August 2022.

In the supplementary affidavit, the respondent disputed any irregularities apparent on the face of the record concerning Taxation No. 17 of 2022. He stated that the expenses of the interim liquidator are assessed and taxed by the court's taxing officer, who in this instance is the Deputy Registrar. Furthermore, he clarified that Taxation No. 17 of 2022 was not for costs as a party to the suit, but rather for the assessment and taxation of expenses incurred as a duly appointed interim liquidator under Civil Cause No. 07 of 2018.

On the hearing date, the applicant was represented by Mr. Odhiambo Kobas, a learned counsel while the respondent had the service of Mr. Eric Akaro, also a learned counsel. The application was argued by way of written submissions.

In the submission, the applicant asserts that his application rests on three grounds. Firstly, he contends that he was denied the right to be heard due to a lack of proper service. Secondly, he highlights his sickness as another factor. Thirdly, he argues that irregularities and illegalities tainted Taxation No. 17 of 2022.

The learned counsel commenced his submission by elaborating on the irregularities and illegalities within the court's decision. He emphasized that Taxation No. 17 of 2022 stemmed from Civil Cause No. 07 of 2018. However, the respondent was neither a party nor an interested party in the proceedings, and therefore no costs were incurred by him or granted to him, which would justify his filing of Taxation No. 17 of 2022.

Mr. Kobas further argued that the respondent was not awarded costs in Misc. Application No. 48 of 2021, as the matter was struck out without any costs. Consequently, according to Mr. Kobas, the respondent lacked the basis to initiate Taxation No. 17 of 2022, and

as a result, the taxing officer had no jurisdiction to entertain such a matter. He, therefore, asserted that this discrepancy constitutes an illegality in the face of the decision of the matter mentioned above.

The learned counsel further contended that Taxation No. 17 of 2022 was initiated contrary to Order 2 of the Advocate Remuneration Order, 2015, constituting serious irregularities and illegality that justify this court extending the time sought by the applicant. He emphasised that the respondent's prayer was for expenses incurred in the discharge of his duties. However, these expenses are not covered by the Advocate Remuneration Order, 2015, as the respondent was neither a counsel nor a party in Civil Cause No. 07 of 2018, but rather a party in Misc. Application No. 48 of 2021, which was struck out without any costs. Consequently, the taxing officer lacked jurisdiction to entertain the application, constituting a serious illegality evident within the court record. The learned counsel supported his argument with various authorities, including **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** [1992] TLR 185 and **Juto Ally v Lukas Komba and Aloyce Msafiri Musika**, Civil Application No. 448/17 of 2019 CAT (unreported).

He concluded this segment of his argument by asserting that the applicant has presented ample evidence of irregularities and illegality concerning Taxation No. 17 of 2022, justifying this court to exercise its discretion and grant the extension of time to file a reference.

On the matter of lack of service, the learned counsel contended that his client was not summoned to appear for Taxation No. 17 of 2022, nor was he notified of the delivery date of the *ex parte* ruling. In response, the respondent stated in his counter affidavit that he was granted leave to effect substituted service through publication, yet the applicant failed to appear. However, there was no mention of a summons to appear on the date of the *ex parte* ruling's delivery, indicating a clear breach of the right to be heard. Citing Order XX Rule 1 of the Civil Procedure Code, Cap 33 R.E 2019, which mandates informing parties of the delivery date of an *ex parte* decision, the learned counsel argued that a breach of this right renders the decision inoperative, invalid, and ineffective, thus constituting an illegality. He supported his argument with the decision of the Court of Appeal in **Omary Shaban Nyambu v Dodoma Urban Water**

Supply and Sewerage Authority (DUWASA), Civil Appeal No. 303 of 2020.

Furthermore, the learned counsel emphasized that the failure to notify the applicant of the ruling date not only amounted to illegality but also constituted a point of law significant enough to warrant the application. He referenced the decision of this court in the case of **Joflo Co. Ltd v Bank of Africa Tanzania Ltd**, Misc. Civil Application No. 562 of 2021, to support his argument.

Regarding the sickness of the applicant, the learned counsel asserted that illness, when properly pleaded and substantiated, constitutes a sufficient cause for the extension of time, as indicated by this court in the case of **Pimak Profesyonel Mutfak Ltd v Primak Tanzania Ltd and another**, Misc. Commercial Application No. 55 of 2018. He alluded that, the applicant has successfully advanced sickness as a ground for the extension of time.

Based on the aforementioned, he prayed for this court to grant the application.

In response, Mr. Eric Akaro began his submission by addressing the alleged illegality raised by the applicant. The learned counsel asserted that the law has established a standard for what constitutes

illegality. He cited the case of the Court of Appeal in **The Attorney General v Micco's International (T) Ltd. & Another**, Civil Application No. 495/16/2022, where the Justices of Appeal defined illegality as "the state of not being legally authorized." He further asserted that when a person alleges errors apparent on the face of the record as the ground for an extension of time, he must meet the standard set in the case of **Damatico General Supply v Maweni Limestone Limited**, Civil Application No. 129/12 of 2020 (CAT). In this case, the Court of Appeal, referring to the definition provided in MULLA, 14th Edition, stated:

"An error apparent on the face of record must be such that can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two options".

He further argued that, in the applicant's supplementary affidavit, the alleged illegality in the ruling was outlined as follows: first, that the respondent was not awarded costs in Misc. Civil Application No. 48 of 2021; second, that the respondent was neither a party nor counsel for a party in Misc. Civil Application No. 48 of 2021, and there was a contravention of Order 2 of the Advocates

Remuneration Orders, 2015. He criticized the applicant for emphasizing that the ruling in Taxation No. 17 of 2022 arose from Civil Cause No. 7 of 2018, simply because it was headed as such. However, after reviewing the proceedings and the ruling, he observed that the Bill of Costs emanated from Misc. Civil Application No. 48 of 2021.

He argued that the mere heading in the *ex parte* ruling, indicating that the Bill originated from Civil Cause No. 7 of 2018, was nothing more than a typographical error that does not affect the substance of the bill. He asserted that such a defect is curable without affecting the merits of the Bill. Consequently, labelling this typographical error as an illegality is a misconception on the part of the applicant. He submitted that the Bill pertained to expenses incurred by the respondent as an interim liquidator, which were granted in Misc. Civil Application No. 48 of 2021.

Regarding the powers of the taxing officer, which were questioned by the applicant, the learned counsel submitted that these powers are vested in the taxing officer by the Advocates Remuneration Order, 2015. He cited the case of **Eric Sikujua Ng'maryo v Joseph Sinde Warioba** [2005] T.L.R 333 to support

his assertion. Additionally, he criticized Mr. Kobas for failing to cite any provision or case law to suggest otherwise regarding who is responsible for taxing the expenses incurred by the interim liquidator.

Mr. Akaro concluded this part of his submission by beseeching the court to find the first ground void of merit and to dismiss it.

Regarding the issue of service, where the applicant complained that he was not served with a court summons and notice of the date of delivery of the ruling, the learned counsel submitted that the applicant, in his submission, admitted that the records show an attempt to effect service was made but without success. Consequently, the court resorted to service by substitution through publication, contrary to what the applicant deposed in his affidavit. Therefore, the applicant cannot claim that he was not served.

However, Mr. Akaro acknowledged that the applicant was not served with a notice of the date of delivery of the ruling. But he argued that this is merely a submission from the bar by the learned advocate and was not deposed by the applicant. He emphasized that parties are bound by their pleadings.

Mr. Akaro further argued that taxation matters differ from normal civil suits. In taxation matters, no evidence is adduced as in

normal civil proceedings. Order 68 of the Advocates Remuneration Order, 2015 grants the Taxing Officer the authority to tax the bill in the absence of either party. Consequently, it was not a legal requirement for the Taxing Officer to re-issue a summons for the date of delivery of the ruling to the applicant. He concluded that the applicant has to blame himself for his failure to enter his appearance.

Regarding the last issue, Mr. Akaro contended that the law clearly requires each day of the delay to be accounted for. He submitted that while the applicant acknowledges that there was substituted service by way of publication, he has failed to account for the days from the date of delivery of the ruling on the 22nd of February 2023 to the 2nd of August, 2023, when he alleges that he became aware of the Taxation through an email. Furthermore, the applicant has neither attached nor produced the said email, rendering its existence as mere words that are unreliable. Additionally, the applicant has also failed to account for the 7 days he used to seek legal consultation from advocates.

On the days the applicant claimed to be sick, Mr. Akaro acknowledged that sickness could be a valid reason for requesting an extension of time. However, he emphasized that such sickness must

be reasonably proven. The learned counsel argued that only the days the applicant was hospitalized should be considered, as there are still other days unaccounted for.

Based on the above submission, Mr. Akaro prayed that the grounds asserted by the applicant be denied and with costs.

In rejoinder, Mr. Koba submitted that the applicant has duly complied with the holdings in the cases of **The Attorney General v Micco's International (T) Ltd** and **Damatico General Supply** (supra), as cited by the respondent which emphasize that the illegality must be apparent on the face of the record. The learned counsel argued that in his submission in chief, he demonstrated that the alleged illegality is indeed apparent on the face of the record.

He refuted the respondent's claim that the indication that the ruling arose from Civil Cause No. 7 of 2018 was a mere typographic error. He reiterated his submission in chief, asserting that Misc. Civil Application No. 48 of 2021 was withdrawn with no order as to costs. Therefore, expenses incurred by the interim liquidator in the course of discharging his duties should not be taxed under Order 2 of the Advocates Remuneration Order, 2015.

He further submitted that the costs of interim liquidators are paid out of the properties of the company if a winding-up order is not made. Where a winding-up order is made, they are paid out of the assets of the company. If the relevant funds are insufficient, they are paid out of the deposit as provided by Rules 116(2)(a), (b), and (c) and Rule 116(2) of the Companies (Insolvency) Rules, 2005.

The learned counsel further submitted that the case of **Eric Sikujua Ng'maryo** (supra) cited by the respondent is distinguished from this application. In that case, the applicant was seeking his costs as an advocate for the services he rendered to the company in the winding up of the respondent.

On the issue of being served with the summons, Mr. Kobas argued that this issue was properly pleaded in paragraph 4 of the applicant's affidavit. Additionally, he argued that the critical question is whether the taxing officer had the mandate to proceed to deliver the ruling without serving the applicant. He emphasized that Order 68 of the Advocates Remuneration Order, 2015 is not an exception to the legal requirement to give notice of the delivery of the ruling to the applicant. He cited the case of **Cosmas Construction Co. Limited v Arrow Garment Limited** [1992] TLR 127, which emphasizes the

need to inform the party even if the proceeding was conducted *ex parte*.

Having reviewed the submissions and the record of this application, the question for determination is whether the applicant has met the criteria to enable this court to exercise its discretion and grant the extension of time sought.

As it can be collected from the affidavit of the applicant, his application is premised on three allegations, one irregularity and illegality; two lack of service and three sicknesses of the applicant.

I would like to start with the allegations of irregularity and illegality. The position of the law indeed states that illegality in a decision sought to be challenged is a good ground for an extension of time. In the case of **Lyamuya Construction Limited v Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 it was stressed that in **Valambhia's** case, it was not meant to say that whenever an illegality is pleaded in an application for extension of time the application should be granted as of right if the applicant applies for one. The Court emphasized that such a point of law, must be "of sufficient importance" and added that it must also be apparent on the

face of the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process.

In the current application, the applicant contends, both through his affidavit and main submission, that the decision he seeks to challenge, and for which he requests an extension of time, stems from an *ex parte* ruling in Taxation No. 17 of 2022, originating from Civil Cause No. 7 of 2018. He asserts that this decision is marred by irregularities and illegalities. Specifically, the applicant highlights that the respondent was not awarded costs in Civil Cause No. 7 of 2018 since he was neither a party nor an interested party in that case. Moreover, no costs were awarded to the respondent in Misc. Application No. 48 of 2021, thereby rendering the taxing officer with no jurisdiction to tax the bill of costs. Consequently, the initiation of Taxation No. 17 of 2022 contravenes Order 2 of the Advocate Remuneration Order, 2015, as the respondent's claimed expenses, incurred in the performance of his duties as an interim liquidator, are not covered by this Order.

Conversely, the respondent firmly denies any illegalities. He argues that Taxation No. 17 of 2022 arose from Misc. Application No. 48 of 2021 and that there was a typographical error in the court's

ruling on Taxation No. 17 of 2022. Additionally, the respondent clarifies that the awarded expenses were those incurred by the respondent as an interim liquidator, which were granted in Misc. Civil Application No. 48 of 2021.

I have reviewed the ruling to determine whether there is an error on the face of it. The analysis on page 2 reveals that the applicant therein sought to recover his expenses. Specifically, item 1 details the applicant's claim for a liquidator's fee for acting on behalf of Shallom Farming and Plantations (T) Limited. Item 10 claims the liquidator's fee from the 3rd of November 2021, to the 30th of March 2022. Items 2 to 7 encompass expenses incurred during this period, including costs for staff food, livestock vaccination and veterinarian fees, cattle feed, repairs or services of pumps, and ranch staff salaries. Items 8 and 9 detail his travel and accommodation costs for trips to and from the ranch, as well as visits to the NARCO ranch in Handeni and the TRA offices.

As indicated above, the applicant has cited illegality as one of the reasons for requesting an extension of time. This court, however, is not an appellate court and is not in a position to determine whether the respondent was among the interested parties granted costs in

Civil Cause No. 7 of 2018, or whether the respondent was justified in filing the bill of costs to recover expenses incurred as an interim liquidator, which was filed as Taxation No. 17 of 2022. Furthermore, the question of whether the taxing officer had jurisdiction to entertain the matter or not cannot be answered by this court at this stage. However, these issues collectively to my point of view, constitute sufficient causes to warrant extending the time and allowing the applicant to file a reference to set aside the *ex parte* ruling in Taxation No. 17 of 2022. I understand that the learned counsel for the respondent has argued that there are no apparent errors on the face of the ruling in Taxation No. 17 of 2022, however, I find the issues of illegality raised by the applicant compelling enough to justify the extension.

I now turn to the issue of lack of service, where the applicant asserts that he was not notified of the date of the ruling. Mr. Akaro acknowledged that the applicant was not served with a notice of the date of delivery of the ruling but argued that this was merely a submission from the bar by the learned counsel and was not deposed by the applicant. He further distinguished taxation matters from normal civil cases, asserting that there is no legal requirement for the

taxing officer to re-issue a summons for the date of delivery of the ruling to the respondent/judgment debtor.

It is true that this point was not deposed in the applicant's affidavit and that parties are bound by their pleadings. However, as this is a pure point of law, this court has a duty to determine and resolve. See **William Sulus v Joseph Samson Wajanga** Civil Appeal No 193/2019 **Elibariki Malley v Salimu Karata** Civil Appeal No 67/2022 both from the Court of Appeal. Having stated, it is a settled law that in an *ex parte* hearing, the party against whom the hearing proceeded *ex parte* has a right to be notified of the date of judgment delivery. Failure to do so is fatal and renders the decision a nullity. The primary purpose behind this requirement is to afford such a party the right to take necessary steps to protect his or her rights where the judgment is prejudicial. That was insisted the Court of Appeal in **Cosmas Construction Company** (supra), where it held:

"..... a party who fails to enter an appearance disables himself from participating when the proceedings are consequently ex parte, but that the furthers extent he suffers. Although the matter is therefore considered without any input by him, he is entitled to know the final outcome. He has to be told when the judgment is delivered

so that he may if he wishes, attend to take it as certain consequences may follow”.

Yet in another decision of this court of **Chausiku Athumani v Atuganile Mwaitege**, Civil Appeal No. 122 of 2007, it was stated:

“...in ex parte proceedings, failure to notify the defendant when the ex parte judgment will be delivered render such proceedings null because it denies the defendant the right to take necessary steps to protect his or her rights where the judgment is prejudicial to his or her interest.”

Further, as alluded to by Mr. Kobas, the provisions of Order XX Rule 1 of Cap 33, require the party in this instance to be notified of the date of judgment. Order XX Rule 1 of Cap 33 entails that the due notice be issued to the parties on the delivery of the judgment.

The respondent's counsel acknowledged that the applicant was not informed of the date of the delivery of the *ex parte* ruling but argued that it is not a legal requirement in taxation matters as the law is different. Whether the law is different in taxation matters is not for this court to decide at this stage. Nevertheless, I find this to be a sufficient cause for granting the extension of time sought by the applicant to file a reference to set aside the ruling as provided by Order 8(1) of the Advocates Remuneration Order, 2015.

Based on the analysis aforementioned, this court is satisfied that the applicant has successfully demonstrated sufficient cause for granting the extension of time sought to file a reference to set aside the ruling in Taxation No. 17 of 2022 as provided by Order 8(1) of the Advocates Remuneration Order, 2015. Therefore, the applicant is granted 30 days to file a reference to set aside the *ex parte* ruling in Taxation No. 17 of 2022. No order is made regarding costs.

It is so ordered.

DATED at **TANGA** this 24th day of May 2024.



H. P. NDESAMBURO

JUDGE