

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM SUB REGISTRY
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 28535 OF 2023
(Arising from the Ruling of District Court of Temeke, at Temeke in Misc. Civil
Application No. 51 of 2019 dated 16th April 2019 (Hon. Kihawa RM))

GRATIAN MAGANA.....APPLICANT

VERSUS

CAMILIUS NEUREY.....1ST RESPONDENT

CORNELIA ISMAHILI (*administrator of the estate
of the late Titus /Africana Ngoitanile*).....**2ND RESPONDENT**

STEVEN MSAKI3RD RESPONDENT

SAM WEL JITABO.....4TH RESPONDENT

RULING

Date of last Order: 6th June 2024

Date of Ruling: 10th June 2024

MTEMBWA, J.:

Under ***Order 8 (1) and (2) of the Advocates
Remuneration Order of 2015, GN No. 264 of 2015***, the
Applicant is seeking for an order of extension of time within which to
file a Reference before this Court out of time to challenge the Ruling
of the District Court of Temeke in **Misc. Civil Application No. 51 of**

2019 dated 16th April 2019. The Application is supported by an affidavit of the Applicant.

Briefly, the parties herein battled in the District Court of Temeke in **Civil Case No. 116 of 2013** where the same ended in the Applicant's favour. Dissatisfied, the Respondents successfully appealed to this Court in **Civil Appeal No. 13 of 2016** where also costs on appeal and of the Court below were awarded. Consequently, the Respondent filed before the trial Court a Bill of Costs in **Misc. Civil Application No. 51 of 2019** where the sum of Tanzanian Shillings 6,500,000/= was awarded to the Respondents. The records reveal further that, the Applicant herein happened to file an Application of this nature before this Court in **Civil Application No. 280 of 2020** which was however withdrawn with leave to refile before Hon. Masabo, J on 2nd November 2021.

When the matter was placed before me for orders on 18th April 2024, the Applicant was represented by **Mr. Erick Mhimba**, the learned counsel whereas also had full instructions to hold brief for Mr. **Venance Victor Rugemalira**, the learned counsel for 1st, 3rd and 4th Respondents. Earlier, on 31st January 2024, an order to serve summons by publication to the 2nd Respondent was entered and was

accordingly complied with. Upon request, this Court ordered arguing of this Application by written submissions exparte against the 2nd Respondent.

In the course of arguing this Application, **Mr. Venance Victor Rugemalira**, the learned counsel, argued for and on behalf of the Applicant while **Mr. Erick Mhimba**, the learned counsel, argued for and on behalf of the 1st, 3rd and 4th Respondents.

Before I proceed however, I should point out that, I was entirely not amused by the way the Applicant's written submissions in chief were uploaded to the system. First, it could appear, the same were not marked with page numbers and secondly, the same were uploaded improperly by mixing up the pages. I must hereby concede that it was not an easy task to rearrange unpagged papers uploaded to the system. Thirdly, I noted also that, the Applicant traversed to argue this Application as if he was arguing the Reference itself. However, although tiredly, I managed to get the point.

Staging the floor, Mr. Rugemalira prefaced on what transpired from **Civil Case No. 116 of 2013** to **Misc. Civil Application No. 51 of 2019** in the District Court of Temeke. He then proceeded to argue on the reasons for the delay to file the Application for reference

to this Court in time. He relied heavily on illegality as a point of delay as discussed in his Affidavit accompanied to the Chamber Summons. He pointed out that the illegality is predicated on the decision itself and the technical delay caused by the failure to know in time the whereabouts of the 2nd Respondent.

Mr. Rugemalira continued to note that, the grant of extension of time to file Reference in view of ***order 8 (1) of the Advocates Remuneration Order (supra)*** is entirely on the discretion of this Court. To fortify, he cited the case of ***VIP Engineering and marketing limited & 2 others Vs. Citibank Tanzania Limited, consolidated civil reference No.6,7 and 8 of 2006, Court of Appeal of Tanzania*** where it was observed that, illegality of the challenged decision constitutes sufficient reason for extension of time regardless of whether or not a reasonable explanation has been given and or whether days of delay have been accounted for.

In his further arguments, Mr. Rugemalira submitted that, the Bill of Costs in Misc. Civil Application No. 51 of 2018 was filed out of time, that is, beyond the prescribed period of sixty (60) days in view of ***Order 4 of the Advocates Remuneration Order (supra)***. He added that, the same was filed in 2018 whereas the Judgement of

this Court in Civil Appeal No. 13 of 2016 was delivered on 14th July 2017. He referred this Court to the annexures attached to the Chamber Summons and the case of ***Stepen B.K Mhauka Vs. the District Executive Director, Morogoro District Council & 2 Others, Civil Application No. 68 of 2019, Court of Appeal of Tanzania at Dar es salaam (unreported)***.

The learned counsel continued to argue that, the Applicant was not duly served with summons or notice of Taxation to appear and defend the Bill of Costs in blatant violation of ***order 6 (2) of the Advocates Remuneration Order (supra)***. He faulted the trial Court for hearing the bill of costs in the Applicant's absence. He noted further that, the proceedings are silent as whether the taxing officer dispensed with the mandatory requirement to serve the notice of Taxation in view of Order 6(3) thereof.

Mr. Rugemalira further argued that, the taxing master erred in law by unjustifiably awarding excessive amounts of Tanzanian Shillings 5,500,000/= instead of Tanzanian Shillings 1,000,000/= in view of ***eleventh schedule, Items 1 D, K and L of the Advocates Remuneration Order (supra)***. He considered it to be one of the points of illegality warranting the grant of this Application.

Mr. Rugemalira noted in addition that, the Applicant became aware of ten execution emanating from the bill of costs on 24th May 2020. He had then to file an appeal to this Court in Misc. Civil Application No. 280 of 2020 which however was withdrawn with leave to refile. However, that, he was unable to obtain the said ruling in time for purposes of lodging this Application. As such, he considered such delay as technical thereby warranting a grant of this Application. To give effect to the above, he cited the case of ***Fortunas Masha Vs. William Shija and another (1997) TLR 154.***

The learned counsel noted further that, there was excessive award of the amounts by the learned taxing master. As said before, some the points were raised in this Application prematurely. Issues pertaining to excessive award of the bill of costs are to be considered at the time of determination of the reference if this Application is granted. I will therefore disregard the arguments.

Lastly, the learned counsel for the Applicant implored this Court to grant the Application.

In response, Mr. Mhimba beseeched this Court to adopt the Counter Affidavit sworn by himself. He added further that, the present application is grounded on negligence and failure to account each day

of delay. He disputed the assertion that there was illegality on the face of records warranting the grant of this Application. In the outset, he implored this Court to dismiss the Application with costs.

The learned counsel further argued that, although it is within the discretion of this Court to grant or refuse extension of time, a party who desires to obtain the mercy of this Court should then provide sufficient cause warranting the exercise of such judicial powers. That, what amounts to sufficient cause depends on the facts of each case but then a party seeking for such discretion must account for each day of delay. He cited the case of ***Lyamuya Construction Company Ltd vs. Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010.***

As to whether the Bill of Costs was filed out of time, that is, out of prescribed sixty days, Mr. Mhimba argued that, the Applicant has not in his affidavit nor submissions in chief pointed out the date in which the said Bill of Costs was filed at the trial Court to enable this Court to assess the degree of lateness. He argued further that, the decision of this Court in Civil Appeal No. 13 of 2017 was delivered on **14th July 2017** whereas the Bill of Costs was filed on **18th August**

2017. That, as such, the Bill of Costs was timely filed. He referred this Court to the exchequer receipt attached to the Counter Affidavit.

As to the illegality due to failure to serve notice of Taxation, Mr. Mhimba submitted that, as per the trial Court's records, the Applicant was fully aware of the taxation proceedings in Misc. Civil Application No. 51 of 2018 prior to an order of hearing but he opted not to enter appearance to defend himself. He referred this Court to page 1 of the impugned Ruling where the trial Court confirmed the non-appearance of the Applicant although he was effectively served. That, the trial Court also confirmed to have ordered filing of the submissions but yet the Applicant did not comply.

In further submissions, Mh. Mhimba referred this Court to paragraph 10 of the Counter Affidavit and the attached summons where it is undisputedly clear that the Applicant was dully served with summons to appear whereas he appended his signature confirming receipt of the same but surprisingly opted not to enter appearance and defend the Bill of Costs. He added further that, since the summons were effectively served, there was no need to comply with ***Order 6(3) of the Advocates Remuneration Order (supra).***

That, equally, the taxing master was justified to proceed in view of ***order 68 of the Advocates Remuneration Order (supra)***.

Regarding whether the trial Court was required to order for substituted service prior to an order of hearing *ex parte*, Mh. Mhimba submitted that the provision of ***Civil Procedure Code, Cap 33, R.E 2019*** are inapplicable in taxation proceedings. He insisted that, in taxation proceedings, the law applicable is the ***Advocates Remuneration Order (supra)*** in view of order 2 thereof. Besides, since the Applicant was accordingly served, there was no need for substituted service, Mr. Mhimba added.

As to whether there was double punishment, Mr. Mhimba was of the views that the judgement in Civil Appeal No. 13 of 2016 granted costs on appeal and of the trial Court in Civil Case No. 116 of 2013. He conceded to the facts that, the trial Court erred by awarding Tanzanian Shillings 1,000,000/=. That, it was just an error apparent on the face of records committed by the taxing officer and such error is cured by a review or an amendment of the order to the same court under ***Section 96 or Order XLII Rule 1(1) of the Civil Procedure Code (supra)***. That, alternatively, the Applicant has still an avenue

to apply for objection proceedings regarding the said amounts during execution and not through reference.

In response to whether the amount awarded was excessive, Mr. Mhimba was of the views that the taxing master was correct to award the sum of Tanzanian Shillings 5,500,000/=. However, as said before, this issue has been misplaced as it was supposed to be an issue for discussion in the Application for reference if this Application is granted. I will thus disregard it.

In response to whether there is a technical delay warranting the grant of this Application, Mr. Mhimba submitted that, even if the Applicant became aware of the execution proceedings on 24th and 25th May 2020 and managed to file **Misc. Civil Application No. 280 of 2020** which was however withdrawn with leave to refile, counting from the date when the said application was withdrawn until when this Application was filed, it is almost more than two years. He disputed the assertion that for all this time, the Applicant was in search of the 2nd Respondent's administrator of the estate. Mr. Mhimba associated the delay with nothing but a relaxation towards his rights to challenge the impugned Ruling. That, he worked up after realizing that the Respondents have execution order to sell his House.

He cited the case of ***Fortunatas Masha Vs. William Shija & Another (1997) TLR 154*** where it was observed that;

a distinction has to be drawn between cases involving real or actual delays and those such as the present one which only involved technical delays in the sense that the original appeal was lodged in time but is incompetent for one or another reason and a fresh appeal had to be instituted. In the present case, the applicant acted immediately after pronouncement of the ruling of the court striking out the first appeal. In these circumstances, an extension of time ought to be granted

Lastly, Mr. Mhimba implored this Court to dismiss the Application with costs.

In rejoinder, Mr. Rugemalira insisted that, illegality is a sufficient cause warranting a grant of extension of time. While distinguishing the case of ***Lyamuya***, he cited the cases of ***VIP Engineering and marketing limited and two others Vs. Citibank Tanzania Limited (supra)*** and ***Tanesco Vs. Mufungo Leonard Majura and 15 others, Civil application No. 94 of 2016, Court of Appeal of Tanzania (unreported)***.

Mr. Rugemalira insisted further that, the Bill of Costs which is the subject matter of this Application was filed out time and faulted the Respondents' counsel for shifting blames to the Court's

administration without Affidavit to that effect. He maintained that Court records should be left to speak for themselves.

Rejoining on the illegality as to failure to serve Notice of taxation, Mr. Rugemalira observed that, the Applicant was condemned unheard as he was not duly served with summons or notice of taxation as provided for under ***order 6 (2) of the Advocates Remuneration Order (supra)***. He added further that, the Applicant failed to enter appearance as he was not notified of the presence of the Bill of Costs.

Similarly, that, it is not established by records as to when an exparte order of hearing was entered by the taxing master nor did she dispense with the mandatory requirement to issue summons or notice of taxation as provided for under ***Order 6(3) of the Advocates Remuneration Order (supra)***. He cited the case of ***Abutwalib Musa Msuya and two others Vs. Capital Breweries Ltd & 2 others, Civil revision No.2 of 2012, Court of Appeal at Dodoma (unreported)***.

As to double taxation, Mr. Rugemalira noted the admissions by the learned counsel for the Respondents. He maintained that there was an error on the face of records as the Respondents benefited

twice. He was of the views that such illegality must be cured through an Application for reference before this Court. As said before, I will not discuss the issue as to whether or not the amounts awarded in the Bill of costs were in excess.

Rejoining to whether there was technical delay, Mr. Rugemalira reiterated what he submitted in chief. I examined the submissions and noted that the arguments are the replica of what he submitted in chief and thus I will not discuss them here.

On the delay predicated on the failure to know the whereabouts of the administrator of the estate of the 2nd Respondent, Mr. Rugemalira submitted in length as to what happened resulting into withdrawing Misc. Civil Application No. 280 Of 2020. From what I gathered is that the Applicant took time in search of the administrator of the second Respondent as appearing in the impugned Ruling of the trial Court.

Lastly, Mr. Rugemalira beseeched this Court to grant the Application with costs.

Indeed, having dispassionately considered the rival urgings by the parties, the question before me is whether there are justifiable reasons warranting the grant of this Application. In the case of

Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania

(supra) which was correctly cited to me the Court of Appeal laid down factors to be considered before enlarging time thus;

(a) The Applicant must account for all the period of delay;

(b) The delay should not be inordinate;

(c) The Applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take

(d) If the court feels that their other sufficient reasons, such as the evidence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.'

(see also Mansoor Daya Chemicals Vs. NBC, Civil Application No. 88 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported).

Guided by the above position, it is high time that I determine the Application. Counsels for both parties at least agree to each other that in order for this Court to enlarge time, there must be "good cause" established. Conversely, the definition of the phrase "good cause" has not been explained in any rule or Act. That, it would appear, was not accidental. The respective power being purely

discretionary and equitable, it cannot apply identically in all circumstances and as such the categories of good cause are never closed.

In ***Masatu Mwizarabi Vs. Tanzania Fish Processing Ltd, Civil 5 Application No. 13 of 2010 (unreported)***, the Court observed that, "good cause" is a relative one and is dependent upon the party seeking extension of time to provide the relevant material for the Court to rely on. Admittedly, case law has established some principles to be considered in determining existence or non-existence of good cause. For instance, in ***Tanga Cement Company Limited Vs. Jumanne D. Massanga and Amos A. Mwalwanda, Civil Application No. 6 of 2001(unreported)***, the Court observed;

What amounts to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account including whether or not the application has been brought promptly; the absence of any explanation for delay, lack of diligence on the part of the applicant

Equally, Court is enjoined not to limit itself to the reasons for the delay at the time of determining the Application for extension of time. The Court should go further and consider the end result or implication of granting or not granting the Application. The application may be refused if it serves no purpose or it is an abuse of Court

process. In ***Reuben Lubanga Vs. Moza Gilbert and 2 Others, Civil Application No. 533 of 2021, Court of Appeal of Tanzania at Dar es Salaam (Unreported)*** where the Court observed;

It is equally the law that, in deciding whether or not to grant an extension of time, the Court should not limit itself to the delay. Instead, it has to consider as well the weight and implications of the issues involved in the intended action and whether the same is prima facie maintainable. This is because, the order being equitable, it cannot be granted where it will serve no purpose or where it is a mere abuse of the court process.

In this Application, the Applicant advanced a number of points including, but not limited to, illegalities on the face of records, charging in excess, double charging, failure to get the 2nd Respondent's administrator as per the impugned Ruling to mention but few. I am interested with undisputed fact that there was double charging of the bill of costs. As said before, the Judgement of this Court in **Civil Appeal No. 13 of 2016** awarded costs on appeal and the trial Court. As per the records, the Respondents filed the bill of costs in this Court and the trial Court. Some of the amounts were doubly awarded thereby twice penalizing the Applicant. It is for this reason the Applicant alleges that he was condemned twice or doubly taxed by two different Courts on the same subject matter.

Mr. Mhimba conceded to the very fact that the Applicant was doubly condemned in Taxation and added that it was an error apparent on the face of records committed by the taxing officer and such an error is curable by a review or an amendment of the order to the same Court under **Section 96 or Order XLII Rule 1(1) of the Civil Procedure Code (supra)**. That, alternatively, the Applicant still has an avenue to apply for objection proceedings regarding the said amounts during execution and not through reference.

In rejoinder, Mr. Rugemalira maintained that there was an error on the face of records as the Respondents benefited twice. He was of the views that such illegality must be cured through an Application for reference before this Court. I should however be cautious and avoid not to discuss the inner parts of the impugned Rulings of this Court and that of the trial Court as by doing so, I might find myself turning to be an appellate Court sitting to determine a reference thereby rendering this ruling into illegality too. I will therefore lightly and or smoothly look into whether there was illegality on the face of records warranting a grant of extension of time.

With such allegations which the Respondents' counsel seem to admit, I am of the considered opinion that there is illegality on the

face of records within the import of *Lyamuya's case* which was correctly cited to me. In that, the total amount taxed by the trial Court includes also the amounts already taxed and or awarded by this Court to the Respondents. I will therefore say no more on this because as said before, If I go further and explain the inner part of my resolution, I might turn myself into an appellate Court sitting to determine the reference. It suffices here to note that, the Ruling of the trial Court in **Misc. Civil Application No. 51 of 2016** is tainted with illegalities which can be expounded further when this Court sits to determine the reference, if any.

To that end, I see no reason to discuss the remaining grounds raised. In the premises, this Application is granted. Time is hereby extended for the Applicant to file reference to this Court against the Ruling of the District Court of Temeke in **Misc. Civil Application No. 51 of 2016** within fourteen (14) days from today. Considering the circumstances, there will be no order as to costs.

I order accordingly.

Right of appeal explained.

DATED at DAR ES SALAAM this 10th June 2024.



A handwritten signature in blue ink, consisting of stylized, overlapping loops and lines.

**H.S. MTEMBWA
JUDGE**