

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

**MISCELLANEOUS CIVIL APPLICATION NO. 4014 OF 2024
(Arising from the Ruling and Order of this Court in Taxation No. 146 of
2023 (Hon. J.D. Luambano, Taxing Officer) dated 22nd December 2023)**

OTA EDWARD MSOFU & COMPANY.....APPLICANT

VERSUS

EQUITY BANK TANZANIA LIMITED RESPONDENT

RULING

Date of last Order: 20th June 2024

Date of Ruling: 25th June 2024

MTEMBWA, J.:

This Application originates from the Ruling of this Court in Taxation No. 146 of 2023 where the sum of Tanzanian Shillings 14,780,000/= was awarded to the Respondent as costs in Taxation. The facts reveal that the impugned Ruling was delivered in the absence of the Applicant however, later on, the same was divulged to him. Having perused it, the Applicant discovered several irregularities warranting a reference to this Court. As

such, he has filed this Application for an extension of time to file reference out of time under ***section 14(1) of the Law of Limitation Act, Cap 89, RE 2002 and Order 8 rule (1) & (2) of Advocates Remuneration Order, 2015.*** The same has been supported by an Affidavit of **Mr. SAULO JACKSON KUSAKALAH**, the Applicant's learned counsel. The Respondent resisted the Application.

On 9th May 2024 when the matter came for orders, the Applicant was represented by **Mr. Sabasi Shayo** holding briefs for **Mr. Saulo Kusakalah**, the learned counsel while the Respondent was symbolized through by **Mr. Robert Mosi**, the learned counsel. By consent, parties agreed to argue this Application by way of written submissions.

Staging the floor, Mr. Kusakalah implored this Court to consider the averments under paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the supporting affidavit. He prayed for an extension of time to file a reference out of time against the Ruling of Hon. J.D. Luambano, Taxing officer in Taxation Cause No.146 of 2023. To fortify, He cited the case of ***Lyamuya Construction Company LTD Vs. Board of Registered Trustee of Young Women Christian Association of Tanzania, Civil Application***

No. 2 of 2010. In view of the cited case, Mr. Kusakalah observed that the Applicant has fronted good reason warranting the grant of this Application. In addition, he noted that the Applicant raised points of law before the Taxing Officer who did not bother to determine them.

The learned counsel continued to argue that on 30th August 2023, the learned Taxing officer ordered arguing of the Bill of Costs by way of written submissions whereby parties adhered to the order. However, in his reply submissions, the Applicant raised points of law which were not considered in the Ruling. He considered it to be an illegality because, being the preliminary objections on points of law, the Taxing Master was supposed to look into them first before embarking into the Bill of Costs.

In his further submissions, Mr. Kusakalah observed that the matter was scheduled for Ruling on 10th October 2023 then adjourned to 9th November 2023 and lastly to 29th November 2023 where also it was adjourned to sine die. That, parties were promised to be informed of the date of the Ruling. He faulted paragraph 5 of the Respondent's Counter Affidavit for not telling as to when the matter was scheduled for Ruling, that is, 22nd December 2023. Stretching further, Mr. Kusakalah faulted paragraphs 4 to 13 of the

Counter Affidavit and in that he noted that the allegations that there was no preliminary objection raised is a lie.

Mr. Kusakalah insisted that the Applicant was not informed of the date of the ruling and as such, it was pronounced in his absence. In his usual follow-ups, he learned that the Ruling was pronounced on 22nd December 2023. That, having noted that, on 6th February 2024, the Applicant wrote a letter to this Court seeking to be supplied with a copy of the said ruling. Having been so supplied, he went through it and noted some irregularities warranting the filing of a reference before this Court. He cited the case of ***Eli Akim Swai and Frank Swai Vs. Tobias Kara Iva Shoo, Civil Application No. 2 of 2016.***

In addition, Mr. Kusakalah submitted that having received the Ruling, the Applicant acted diligently and filed this Application. He cited the case of ***Bulyanhulu Gold Mine Vs. George Allen Gwbo, Civil Appeal No. 23 of 2015.*** Lastly, he beseeched this Court to grant the Application.

In rebuttal, Mr. Mosi submitted that extension of time to perform a particular act is within the discretion of this Court having satisfied itself of the following factors; whether there is an important point of law on the

illegality or otherwise of the decision sought to be challenged; whether the Applicant has accounted for each day of delay and whether the Applicant has provided sufficient reasons or sufficient cause for the delay. He added further that the Applicant has not been able to point out an important point of law on the illegality or otherwise of the decision sought to be challenged which is apparent on the face of the record, such as the question of jurisdiction or time limit, and which can be discovered without a long-drawn argument.

In addition, Mr. Mosi contended that the Applicant has failed also to account for each day of delay and to show sufficient reasons for this Court to grant an extension of time. He implored this Court to adopt the contents of the Respondent's counter affidavit filed in this Court on 30th April 2024 to form part of the reply submissions. He further contended that the Applicant has blatantly and disregard manner slept on his right to file a reference to this Court since 22nd December 2023.

In his further urgings, Mr. Mosi repeatedly insisted that the Applicant has not accounted for each day of delay and has no sufficient reasons for extension of time. He insisted further that there is no illegality in the Ruling

sought to be challenged. He recited the case of ***Lyamuya Construction Company Ltd versus the Board of Registered Trustee of Young Women's Christian Association of Tanzania (supra)***. He noted further that the Applicant is complaining of inconsideration of the preliminary objection however the Court clearly stated at page 2 of the Ruling that the same was improperly raised through a reply submissions in the circumstances where the Respondent (Applicant by then) had already filed her written submissions in chief.

The learned counsel further submitted that the so-called or purported illegality by the Applicant must be apparent on the face of the record and not one that would be discovered by a long-drawn argument as pointed out. He cited the case of ***Chiku Harid Chionda Vs. Getrude Nguge Mtinga, of Appeal in Civil Application No. 509/01 of 2018*** where the Court also considered the decision of ***Lyamuya Construction (supra)***. Based on the above the Respondent's counsel reiterated his submissions that the Applicant has not pointed out any important point of law worth to be regarded as illegality.

To add what I can call salt to the wound, Mr. Mosi insisted that the Applicant did not follow up on his case, as a result, the Ruling was delivered in his absence. He considered the arguments on pages 3 to 4 of the submissions in chief to be submissions from the bar as it is not true that the Applicant was following up his case. Had it been a case, the same would have been featured in the supporting affidavit, Mr. Mosi added. That, the facts would at least be different if the ruling was delivered in the absence of all parties. He was of the view that the Applicant was negligent. To fortify, he cited the case of ***Salome Kahamba Vs. Siril Augustine Mallya, Mise. Civil Application No. 557 of 2021.***

Mr. Mosi also resisted the assertion by the Applicant that he became aware of the impugned Ruling on 5th February 2024. He reiterated that a copy of the Ruling was ready for collection by 22nd December 2023. That, the decision of the Taxing Officer was delivered on 22nd December 2023 and this Application was filed on 15th March 2024, approximately 84 days from the day of pronouncement which were not accounted for. He referred this Court to the case of ***Dawi Akko Vs. Petro Ingi & Others, Mise. Civil Application 31 of 2018*** where also the decision of ***Hassan Bushiri***

Vs. Latifa Luiko Mashayo, Civil Application No. 3 of 2007 was referred. To fortify the need to adhere to time limitations, Mr. Mosi cited the case of ***Juma Nassir Mtubwa vs. Namera Group of Industries Ltd, Revision Application No. 251 of 2019.***

From the foregoing arguments, the learned counsel for the Respondent implored this Court to strike out the Application with costs. It could appear, as per the records, that the Applicant never rejoined.

Indeed, having dispassionately considered the rival urgings of 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 by both parties, 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.

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 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 an 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 the 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 that what amounts to sufficient cause has not been defined. From decided cases several factors have to be considered including whether or not the application has been brought promptly; whether there is any explanation for the delay offered and whether there is proof at the lowest of the 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 an 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 if it is an abuse of the Court process (see ***Reuben Lubanga Vs. Moza Gilbert and 2 Others, Civil Application No. 533 of 2021, Court of Appeal of Tanzania at Dar es Salaam (Unreported)***).

In this case, the Applicant has fronted multiple reasons for the delay in my considered opinion. From the chamber summons, supporting Affidavit and submissions in chief, among others, he appears to have been prevented from filing a reference within time due to the reason that the

impugned Ruling was delivered in his absence and was not initially informed of the date of pronouncement. On the other hand, he is complaining of the failure to determine the preliminary objection raised through his reply submissions.

According to Mr. Kusakalah, initially, the matter was scheduled for Ruling on **10th October 2023**. It was however not pronounced as scheduled. It was therefore adjourned to **9th November 2023** and again adjourned to **29th November 2023** where parties were promised to be informed of the subsequent date of Ruling. He contended that the Applicant was never informed of the date of Ruling which is **22nd December 2023**. In his reply submissions, Mr. Mosi seemed to have not been bothered at all by the allegations. He did not reply against them.

Having considered the records, I am of the considered opinion that, having adjourned the matter with a pleasant promise that parties will be notified of the subsequent date of Ruling, the Taxing Officer was duty bound to inform them accordingly. I am not far from holding that a party has a right to appear on the day of pronouncement of the decision affecting his or her rights so that he or she can be well informed of the outcome and

or the impacts arising therefrom. This also will include knowing further steps to be taken in time if he or she is dissatisfied or offended by the decision. I could have arrived at a different conclusion if the Applicant had been present on the scheduled date before the date of pronouncement. For that reason, I am constrained to hold the view that it was an illegal experience. That alone suffices to dispose of this Application on the point of illegality.

In the circumstances, this Application is granted. Time therefore is enlarged for the Applicant to file a Reference to this Court within fourteen (14) days from today. There will be no order as to costs.

I order accordingly.

Right of appeal explained.

DATED at DAR ES SALAAM this 25th June 2024.



H.S. MTEMBWA
JUDGE

