

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

MISC. COMMERCIAL APPLICATION NO. 215 OF 2018

(Arising from Taxation Cause No. 78 of 2013)

TOL GASES LIMITED -----APPLICANT

VERSUS

CHANG QING INT. INVESTMENT LIMITED-----RESPONDENT

RULING

B.K. PHILLIP, J

The applicant herein has lodged this court application under the provisions of Rule 7(1) and 8 (1) (2) of the Advocates Remuneration Order, 2015, G/N. 263 praying for the following orders;

- (i) That this Honourable Court may be pleased to extend time within which the applicant can be allowed to file an application for reference against dismissal order dated 18th May 2016 which dismissed Taxation Cause No. 78 of 2013, by Hon. D.R, Taxing Master, High Court Commercial Division at Dar es salaam.
- (ii) Costs of this application be provided for
- (iii) Any other/further relief (s) that this Honourable Court deems fit to grant.

The application is supported by an affidavit sworn by the Applicant's advocate Mr. Isaya Gibson Matambo. The learned advocate for the respondent Mr. Raphael Rwezahula filed a counter affidavit in opposition to the application.

A brief background to this application is that in 2013 the applicant filed an application for bill of costs vide Taxation cause No 78 of 2013 following the Judgment of this court in commercial Case No. 78 of 2013 in which this court granted costs to the applicant. On 18th May 2016, Taxation cause No. 78 of 2013 was dismissed by the Registrar, for want of prosecution. On 2nd June 2016, the applicant lodged an application for setting aside the dismissal order vide application No. 101 of 2016 on 18th May 2018, the said application No. 101 of 2016 was dismissed for being filed out of time. Thereafter, the applicant filed an application for extension of time to set aside the dismissal order vide application No. 146 of 2018. On 16th July, 2018 when the application was called for orders, the court *suo motto* raised a concern on whether the court was properly moved. On 10th September, 2018 the applicant withdraw the said application No. 146 of 2018 and was granted leave to file the same, then he filed the present application.

In his affidavit the applicant's advocate narrated the background to this application and further stated that the applicant has tirelessly struggled to restore the application for the bill of costs, by making application for restoration of the same and extension of time as well as taking prompt steps all the time. Other grounds stated in the affidavit are; That the time

for filing an application for reference has already expired and applicant is not the source of all the delays, the applicant is desirous and has been diligently and bonafide prosecuting the application, and if this application is not allowed the applicant's interests will be prejudiced.

In addition to the above the applicant alleged that the court order for dismissal of the said taxation cause No.78 of 2013 which is a subject of this application, is tainted with serious illegalities to wit;

- (i) That the Taxing master erred in law and in fact in dismissing an application for bill of costs without satisfying himself as to the prove of service of summons to the applicant.
- (ii) That the Taxing master erred in law and in fact in dismissing the bill of costs without hearing the parties.
- (iii) That the taxing master erred in law and in fact in dismissing the bill of costs which had been suspended pending determination of the review pending before the Court of appeal of Tanzania.
- (iv) That the taxing master erred in facts and in law in dismissing the Bill of costs contrary to the Tax Remuneration Rules.

On the other hand, the respondent's advocate in his counter affidavit stated that the dismissal of Taxation Cause No 78/2013 for want of prosecution by the registrar was proper since the applicant and his advocate did not act diligently in prosecuting the application. Other grounds stated by the respondent's advocate in opposition to this application are; That the applicant's advocate was aware that the

application was fixed for hearing on 18th May 2016, but he did not appear in court, no sufficient reasons have been adduced by the applicant to move this court to grant the extension of time sought, since the applicant and his advocate negligently filed irrelevant applications.

Submitting for the application, the learned Advocate Isaya Matambo started by adopting the contents of his affidavit in support of the application and argued that Under the Provisions of Rule 8(1) (2) of the Advocate Remuneration Order, 2015,GN.263 (hence forth 'the Rule') this court has discretionary powers to enlarge time for filing the application for reference. Mr. Isaya referred this court to Rule 7 of the rule which provides that the High court may extend time for filing a reference upon sufficient cause being given. Mr. Isaya argued that what constitutes sufficient cause has not been defined by the Rules, hence there is no hard and fast rule in determination of what constitutes "*sufficient cause*". He argued further that the court is supposed to put into consideration all the circumstances surrounding each particular case, which should include factors like, the length of delay, reasons for the delay and the degree of prejudice the respondent stands to suffer if time is extended. Mr. Isaya contended that the grounds for the delay as stated in the affidavit in support of this application are sufficient and acceptable reasons that can move this court to grant the extension of time sought. To cement his arguments, Mr. Isaya referred this court to a number of cases including the following; **Irene Temu Vs Ngassa M. Dindi & 2 others, Civil Application No.278 of 2017**, (unreported), **International Airline of United Arab Emirates Vs. Nasser Nasser, Civil Application No. 263 of 2016**, (unreported),

Robert Scheltens vs. Mr. Balden Norataran Varma, Mr. Vikas Varma and National Furnishers Limited, Civil Application No.112 of 2016, (unreported) and Mwantumu Ndugumbi as the administratrix of the estate of Noti Ndugumbi Vs. Venance Shirima, Misc. Civil application No. 346/01 of 2017(unreported).

On the ground on illegality that was stated in the affidavit, Mr Isaya submitted that our courts have taken grounds of illegality as one of the grounds that can move the court to grant an application for extension of time, to enable it to determine the illegality complained of. Mr. Isaya referred this court to the case of **Tanzania Portland Cement Company Limited Vs. Khadija Kusiwa, Civil Application No. 437 of 2017** (unreported), in which the Court of Appeal allowed the application for extension of time on the ground that there was an alleged illegality. The learned Advocate submitted that the alleged illegalities in this application are sufficient reasons for granting the extension of time sought.

Furthermore, Mr. Isaya submitted that, in case this application is not granted, the applicant's interests will be prejudiced as he will not enjoy the fruits of the judgment which the court granted unto him, while on the other hand the respondent shall not suffer any loss. This court was referred to the case of **Samwel Kobelo Muhulo Vs. National Housing Corporation, Civil Application No 302/17/2017,**(unreported), in which, the Court of Appeal among other factors granted the application for extension of time on the reason that dismissal of the application would prejudice the applicant's right.

In conclusion of his submission, Mr. Isaya insisted that the application has merits and the grounds given by the applicant are sufficient for granting the prayers in the chamber summons.

In rebuttal, the respondent's advocate, Ms Bora Nicholaus adopted the contents of the Counter affidavit filed in opposition to the application and submitted further that, when Taxation cause No. 78 of 2013 was dismissed at the first time, the applicant's advocate was supposed to file a proper application. Ms Bora brought the attention of this court to Rule 8 of the rules, which provides that this court can grant extension of time for filing an application for reference only where the applicant gives sufficient cause. She contended that the fact that the applicant wasted time in filling applications which were dismissed is not a sufficient reason but reveals the applicant's negligence. She insisted that, no sufficient reasons have been adduced, hence this application cannot escape the wrath of the law. It has to be dismissed. Ms. Bora Referred this court to the case of **Yusufu Same and Hawa Dada vs. Hadija Yusufu, Civil Appeal No.1 of 2002**, (unreported)

As regards the ground on illegality, Ms Bora was of the view that the applicant has not shown any illegality. She insisted that the applicant was aware of the hearing date but did not appear in court on the date the application was called for hearing and thus it was dismissed.

On the issue of balance of convenience, the learned advocate submitted that if this application is granted the respondent will suffer loss as he has been attending several applications filed by the applicant.

In his rejoinder Mr. Isaya, submitted that the case of **Yusufu Same** (supra) that has been referred to by the respondent does not support the respondent's contention, to the contrary it supports the applicant's arguments. The learned advocate insisted that if this application will not be allowed, it is the applicant who will be prejudiced, not the respondent.

Before I embark on the analysis of the rival arguments submitted by the learned advocates, let me make it clear that it is now a settled law that for an application of this nature to sail through, the applicant has to adduce sufficient reasons for the delay. There is no hard and fast rule in determining what constitutes "*sufficient cause*," however as correctly submitted by the applicant's advocate, in exercising their discretionary powers, courts have been considering the circumstances of each particular case, as such each case is determined on its own merit. Factors that are taken into consideration are such as the length of delay, the applicant's diligence in pursuing the matter, reasons for the delay and whether there are serious points of law such as illegality of the decision sought to be challenged [see the cases of **Principal Secretary ,Ministry of Defence and National service Vs. D.P Valambhia (1992) TLR 185, International Airline of the United Arab Emirates,(supra) and Yusufu Same (supra)**].

Having stated the position of the law, what follows is to make the determination as to whether the applicant has adduced sufficient reasons for the delay in filing the intended application for reference from 18/5/2016 when Taxation Cause No. 78/2013 was dismissed.

I have dispassionately analysed the submissions made by both counsels and noted that from the submission made by the applicant's advocate, the main reason for the delay adduced by the applicant is that he has been pursuing an application to set aside the dismissal order thereafter he filed an application for extension of time to set aside the dismissal order which he prayed to withdraw it with leave to refile the same and he ended up filing this instant application.

On the other hand the respondent's advocate does not dispute that the applicant has been pursuing applications to set aside the dismissal order, however, the respondent is of a view that the delay is due to the applicant's negligence as he failed to file a proper application right from the beginning when the Taxation Cause No 78 Of 2013 was dismissed.

From the foregoing, with due respect to the applicant's Advocate it is my considered view that the sequence of events in this application reveal elements of lack of diligence and/or negligence on part of the applicant's advocate, I am saying this because the application that was filed by the applicant for the first time was an application to set aside the dismissal order which was dismissed for being filed out of time, the second application was for extension of time to set aside the dismissal order which

was withdrawn by the applicant after the court had questioned whether the same was proper before the court or not. The applicant was granted leave to refile it. In fact the applicant was granted leave to refile the application for extension to set aside the dismissal order, however he opted to fill this application for extension of time for filing an application for reference.

It has to be noted that an error made by an advocate through negligence or lack of diligence is not a sufficient cause for extension of time. In the case of **Yusufu Same** (supra), the Court of Appeal, deliberating on an application for extension of time had this to say,

'.....Generally speaking, an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time.....'

It is my finding that the above explained reasons for delay as presented by the applicant are not sufficient to move this court to grant the extension of time sought.

The applicant has also submitted that the decision intended to be challenged is tainted with serious illegalities which need the attention of this court. I have read all of the points of illegality alleged by the applicant, with due respect to the applicant's advocate, I have not seen any sufficient explanations in the applicant's submission to support the alleged points of illegality, in fact to my view ,they are just normal of grounds of appeal. They do not establish in any way that the dismissal order was illegal. For example, a mere mentioning of a ground that the taxing master erred in

fact and law in dismissing the Bill of costs contrary to the Tax remuneration Rules is not enough to establish that decision of the taxing master is tainted with illegality, likewise with the other grounds that have been mentioned as grounds for illegality. To my understanding a point on illegality has to be supported by strong and concrete explanations, which in this application are lacking.

I am alive of the fact that, the term 'sufficient cause' has to be given a wide interpretation to encompass all causes which are outside the applicant's power to control or influence resulting in delay in taking the necessary step in time, [See the case of **Yusufu Same** (supra),] with due respect to the applicant's advocate, in this application I do not see any unique circumstances that can move this court to grant the extension of time sought in the absence of any sufficient cause as I have demonstrated herein above.

In the upshot this application is dismissed with costs.

Dated at Dar es Salaam this 22nd day of 2019




B. K. PHILLIP
JUDGE