IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT MWANZA

MISCELLANEOUS COMMERCIAL APPLICATION NO. 08 OF 2020

(Arising from Bill of Costs No. 1 of 2019)

AKO GROUP LIMITED.....APPLICANT

Versus

NISHATI PLUS LIMITED.....RESPONDENT

Last Order: 10th Nov, 2020

Date of Ruling: 12th Nov, 2020

RULING

FIKIRINI, J.

The applicant aggrieved by the decision in the Bill of Costs No. 1 of 2019, in which the ruling was delivered on 25th February, 2020, preferred a reference to the High Court under Rule 8 (1) & (2) of the Advocates Remuneration Order, 2015. The application is supported by an affidavit of Mr. Samwel Kazenga which is accompanied by a number of annextures. Opposing the application Mr. Msafiri Aloys Henga filed a counter affidavit.

On 10th November, 2020, the Court had opportunity to hear parties through Mr. Kazenga counsel representing the applicant and Mr. Masanja Ngofilo who appeared for the respondent. Mr. Kazenga prayed the affidavit filed in support of the application be adopted to form part of the submission for the application, the

deponent has aside from listing the occurrence of events, he as well in paragraphs 9, 10 and 11 averred being denied right to be heard. Countering the averment, Mr. Henga in paragraph 6 disputed the assertion that parties were not afforded right to be heard.

Orally routing for the application, it was Mr. Kazenga's submission that on 13th January, 2020 the application registered as Bill of Costs No. 1 of 2019, was heard. During the hearing the decree holder's counsel prayed to be allowed to add electronic fiscal device (EFD) receipts to support her application for bill of costs. The judgment debtor's counsel objected to the prayer. After the close of their submissions, the Deputy Registrar fixed a ruling date to be on 17th January, 2020. The ruling was not ready on the date fixed, another date was thus given. Again onn the 14th February, 2020, the ruling was not yet ready. The matter was adjourned to 25th February, 2020. On that day the ruling was delivered. From the ruling, the applicant felt that parties have been denied opportunity to be heard in full, since the issue on whether the EFD receipts prayed to be admitted were to be admitted or not, the issue which was to be determined prior to proceeding with hearing of the bill of costs could proceed, was not made.

It was Mr. Kazenga's further submission that the ruling pronounced on 25th February, 2020 was in essence tainted with illegality since it was pronounced

without giving parties an opportunity to argue in full on the bill of costs which was before the Court.

Based on his submission he prayed for the application for extension of time to file reference out of time be granted in the Bill of Costs No. 1 of 2019.

Mr. Ngofili, besides praying for his counter-affidavit be adopted and form part of his submission, he also opposed the application. His reason for the position was that the applicant has failed to fulfil the requirement under Rule 8 (1) of the Advocates Remuneration Order, because the applicant failed to furnish sufficient cause as required by the said rule.

Addressing the applicant's reason for seeking for reference, it was Mr. Ngofili's submission that the account that parties were not heard was not correct. Referring to page 2, paragraph 3 of the ruling dated 25th February, 2020, he indicated that parties were heard and the issue of EFD receipts was considered by the District Registrar. On the complaint that there was illegality in the delivered ruling as parties were not afforded opportunity to be heard, the counsel submitted that the alleged illegality was not apparent on the face of the record, to warrant consideration by the Court. Buttressing his submission, he referred this Court to the decision of the Court of Appeal in the case of **Ngao Godwin Losero v Julius Mwarabu, Civil Application No. 179 of 2014 (unreported),** in which the Court

clearly stated that illegality as a point can only be raised when it is clear on the face of the record, the situation which was different in the present case as it was not easy to decipher the illegalities claimed by the counsel for the applicant.

Concluding his submission, he urged the Court to dismiss the application, as the applicant has failed to advance sufficient cause upon which the Court can exercise its powers and grant extension of time sought to file reference out of time.

In a brief rejoinder, Mr. Kazenga maintained that there was illegality apparent on the face of the ruling and that can be proved by going through the proceedings as to whether the parties were heard in full in the items of the Bill of Costs No. 1 of 2019. He thus prayed for the application to be allowed with costs.

I have dully considered the application and the accompanying affidavits in light of the rivalry submissions by the counsels. The Court is bestowed with unlimited discretionary powers to grant or refuse grant of the application. However, those discretionary powers have to be exercised according to the rules of reason and justice, and not according to private opinion, whimsical inclinations or arbitrarily. There is a long list of authorities on that. To name a few are **Yusuph Same & Hawa Dada v Hadija Yusuph, Civil Appeal No. 1 of 2003, CAT; Regional Manager, Tanroads Kagera v Ruaha Concrete Company Limited, Civil**

Application No. 96 of 2007 and **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania.**

With the discretionary powers bestowed on it, in order for the Court to act there must be sufficient reasons advanced or material facts upon which the Court can deliberate on. Although what amounts to sufficient reasons or cause, has not been defined as illustrated in the case of **Philemon Mang'ehe t/a Bukine Traders v Gesbo Hebron Bajuta, Civil Application No. 8 of 2016 (unreported)**, but over time and through case laws a number of factors to be taken into account have been established.

The **Lyamuya Construction** case (supra) is one of the decisions in which the Court of Appeal, elucidated factors or rather indicators which can assist in arriving at the conclusion as to whether the applicant has advanced sufficient reasons or not warranting the grant or not of the application before it. And those pointers are: (i) the delay should not be inordinate; (ii) there must be account of each delayed day; (iii) diligence, and not apathy, negligence or sloppiness in the prosecution of the action the applicant intends to take; and (iv) existence of point of law of sufficient importance, such as illegality of the decision challenged. Any of the pointed out criteria can attract the Court to examine the application in favour of the applicant.

After setting the stage, I will now embark on discussing the application in light of the 4 (four) elements established in **Lyamuya Construction** case (supra). Accounting for each and every day of the delay is one of the requirements. In the present application and the affidavit in support, the applicant has not been able to explain or account for each and every day of the delay.

Tracing from the affidavit and counter-affidavit, the following is revealed, that the contested ruling was delivered on 25th February, 2020. Aggrieved by the decision and as per paragraph 6 of the affidavit, the applicant applied to be supplied with records of proceedings and copy of the said ruling, vide a letter dated 03rd March, 2020 which did not bear fruits. The applicant had to write another one dated 17th March, 2020. This bore fruits as requested documents were supplied on 19th March, 2020. Both letters were annexed as AGL -2.

Following the supply of the documents, the applicant filed her application on 08th April, 2020 which was well within time. However, due to challenges with the online filing system the application was not admitted until June, 2020, which was already out of time. This is as deponed in paragraphs 7 and 8 of the affidavit in support.

The assertion is controverted by the respondent as averred in paragraphs 6, 7, 8 and 10 of the counter affidavit. The contents therein revealed that the ruling was ready

for collection as from 27th February, 2020 after it has been certified by the Deputy Registrar, the account which is equally evidenced by the copy of ruling annexed to the affidavit as annexture AGL-1, certified and signed on 27th February, 2020. No explanation was given to the contrary and thus making the applicant's account that the copies were availed on 19th March, 2020 baseless and unsupported. And even if, it was correct that they collected the copy on 19th March, 2020, then it was out of the applicant's own negligence to secure a copy as it was ready for collection since 27th February, 2020. After receiving the documents, the applicant stated to have proceeded filing her application for reference on 08th April, 2020, which by then as argued by the applicant was well within time. This account is nonetheless not backed up by any evidence, which is contrary to section 110 of the Tanzania Evidence Act, Cap. 6 R.E. 2002, which requires, that the onus is on the one who alleges.

In paragraph 8 of the affidavit, the applicant stated that the application which was timely filed to wit on 08th April, 2020, was not admitted for the reasons averred in there. No evidence has been adduced to support the version of the story. In the case of **Tanzania Milling Co Ltd v Zacharia Aman t/a All Gold Co. & Another, Civil Application No. 415 of 2018** and **Benedict Kimwaga v Principal Secretary Ministry of Health, Civil Application No. 31 of 2000, CAT,**

(unreported), the Court had this to say in the scenario almost akin to the present one in this application that:

> "*If an affidavit mentions another person, that other person has to swear an affidavit.*"

Although no names were mentioned, but the claim that there were challenges with the online filing system as deponed in paragraph 8 of the affidavit, could only be established and proved had there been an affidavit from the Court IT personnel and/or the Deputy Registrar who is tasked with admission of all the Court filings including applications as the one preferred by the applicant. Without any affidavit in that regard, the applicant's assertion is left bare.

Putting all the above together it is vivid that by the time the application was filed in June, 2020, it was almost 80 days from the date when the ruling was collected and 102 days from the date when the ruling was delivered. On this I am at one with Mr. Ngofilo, that the applicant has not been able to furnish this Court with sufficient reasons and/or cause to warrant grant of the application. The applicant failed to account for each day of the delayed day and the delay was inordinate.

Mr. Kazenga also flagged the illegality card, that, the parties were not afforded opportunity to be heard in full on the application for Bill of Costs, the account which was disputed by Mr. Ngofilo. The reason advanced on illegality

undoubtedly can pass as sufficient reason even where the delay is of a long time. The cases **Principle Secretary Minister of Defence and National Service v Dervam Valambhia [1991] T.L.R 387, VIP Engineering & Marketing Limited and 2 Others v City Bank Tanzania Limited, Consolidated Civil References No 6, 7 and 8 of 2006 (unreported)** and **Etiennes Hotel v National Housing Corporation, Civil Reference No. 32 of 2005, CAT at DSM (unreported)** as well as that of **Ngao Godwin Losero** (supra) referred by Mr. Ngofilo, have all advanced the principle. However, the principle requires that the claimed illegality must be the one apparent on the face of record and not something which will require intensive work of sieving through the material availed for Court to decipher the claimed illegality. Applying the principle to the present application and in particularly after going through the records of proceedings including the ruling delivered on 25th February, 2020, have not been able to work out the illegality alleged.

My reading of the ruling suggests, to me that there was full hearing whereby counsels for the parties made submissions for and against, taking into account the EFD receipts issue which was raised by Mr. Kazenga.

In light of what I have examined, I find this application devoid of merits and hence proceed to dismiss the application with costs. It is so ordered.

P. S. FIKIRINI

JUDGE

12th NOVEMBER, 2020