

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT MWANZA
MISC. COMMERCIAL APP. NO. 13 OF 2020

AMOS NJILE LILI.....APPLICANT

VERSUS

AMANA BANK LTD.....1ST RESPONDENT

S. L. ISANGI AUCTION

MART & COURT BROKERS.....2ND RESPONDENT

Last order: 29th July, 2021

Date of Ruling: 30th July, 2021

RULING

NANGELA, J.

On the 7th day of December, 2020, the Applicant herein filed an application in this Court by way of a Chamber Summons supported by affidavit of one Amos Njile Lili. The application was brought under Order 8 (1) and 7 (1) and (2) of the Advocates Remuneration Orders, GN.No.264 of 2015 and section 95 of the Civil Procedure Code Cap 33 R.E 2019.

The Applicant is seeking for the following orders of the Court:

1. This Honourable court be pleased to
extend time within which the

reference fixing the ruling of the High court of Tanzania at Mwanza, before Hon. J.K Karayemaha, Taxing Master Dated 30th day of October, 2020, in Bill of Costs No. 04 of 2020 that was presented by the Respondents on a high side which was subsequently tax of consideration

2. This Honourable court be pleased to entertain the reference fixing the ruling of the High court of Tanzania at Mwanza, before Hon. J.K Karayemaha, Taxing master Dated 30th day of October, 2020, in bill of costs No. 04 of 2020 that was presented by the Respondents on a high side which was subsequently tax off consideration.
3. Any other and futher reliefs the court may deem fit to grant.
4. Costs to follow events.

On the 29th day of July, 2021, the parties appeared before me for the hearing of the application. The Applicant enjoyed the services of Ms Gladness Lema, learned advocate, while the learned counsel, Ms Beatrice Paul, appeared for the Respondent.

Submitting in support of the prayers sought, Ms Lema adopted the contents of the supporting affidavit of Mr. Amos Njile and its annexures. She submitted that, the

extension of time sought by the Applicant is for the purpose of filing a reference to the Court following a ruling of the Taxing Master, Hon. Karayemaha (as he then was) dated 30th October, 2020 in respect of a Bill of Costs No. 4 of 2020.

Ms Lema submitted that, the ruling of the taxing master in the respective Bill of Costs is tainted with an illegality which is apparent. As regard to the reasons for the Applicant's delay to file such reference to the Court, Ms Lema contended that, the Applicant failed to obtain a copy of the respective ruling of the Taxing Master, despite having made several follow-ups and requests to be availed with such ruling timely.

She submitted that, it was not until the 26th November, 2020, after writing officially to the Court that the Applicant got the ruling and the proceedings. She referred this Court to paragraphs 4, 5 and 6 of the Applicant's affidavit. Relying on the decision of this Court in the case of **Samuel Joel Makundi vs. Dr. Wilberforce Emanuel Meena & 1 other, Misc. commercial application No. 337 of 2017**, Ms Lema prayed that, this Court be pleased to exercise its judicial discretion and grant the application.

For her part, Ms Beatrice, the learned counsel for the Respondent challenged the application granting the extension of time sought by Ms. Lema. She commenced her submission by first adopting the counter affidavit (and

its annexures) filed on the 2nd of March 202 in this Court to contests the application.

Ms Beatrice submitted that, in the first place, the first prayer of the Applicant is dependent upon the second prayer which cannot stand. She contended that, if the first prayer is to be granted, the Applicant is supposed to file another application as per Order 7 of the Advocate Remuneration Orders GN.No.264 of 2015. She contended that, in law, the application is not tenable because for it to be granted, the Applicant needs to show sufficient cause for his delay. She contended that, currently the Applicant has failed to do so.

As regards the issue of delay to be supplied with the ruling of the Taxing Master, it was Ms Beatrice's submission that, the Applicant had a duty to follow up the matter and collect the copy of the ruling in Court and not just sitting and waiting until time lapsed, and, thereafter, writing a letter belatedly on 20th November, 2020, something which he could have done much earlier.

To support her submission, Ms Beatrice relied on the case of **FINCA (T) Ltd & Another vs. Boniface Mwalukisa Auction Mart, Civil Appeal No. 589/12 of 2018,(unreported)**. In that case, the Court pointed out that, an Applicant has a duty to account for each day of delay. She contended that, in the present application, the Applicant has not accounted for the delay.

In her further submission, Ms Beatrice submitted that, the affidavit supporting her application is defective.

She argued that, in law, since an affidavit is evidence, it must contain only factual matters and without prayers, conclusions or arguments.

Looking at the affidavit supporting the Application, Ms Beatrice was of the view that, paragraphs 3 and 4 of that affidavit evidently amount to prayers and arguments which ought to have been part of the Applicant's oral submission. To support her submission, she relied on the case of **Attorney General vs. National Housing Corporation & 5 others Misc. Land case No. 945/2017 (unreported)**.

She concluded her submission by requesting this Court to make a finding that the affidavit in support of the Application is defective and, for that matter, it cannot support of the application. She prayed that, the prayers sought by the Applicant should not to be granted.

Ms. Lema made a brief rejoinder. In her rejoinder, she reiterated her submission in chief and pointed out that, the Applicant's affidavit does not include opinion as contended. Instead, she rejoined that, paragraph 4 of the Applicant's affidavit clarified the alleged illegality that took place and thus affecting the ruling on the Bills of costs.

Besides, Ms Lema emphasized that, the attack launched on the affidavit of the Applicant was in respect of two paragraphs only, meaning that the rest of the paragraphs were intact, as they reveal the other grounds which were the cause of the delay, hence demonstrating a sufficient cause.

As regard the case of **FINCA (T) Ltd & Another (supra)**, it was Ms Lema's submission that the Applicant herein did take all necessary steps to obtain the ruling but the same was not supplied to him on time, and that, there was no any inordinate delay on the part of the Applicant. She therefore urged this Court to grant the application as prayed.

I have carefully considered the above rival submissions, and the key issue which I am called upon to determine in this ruling, is: **whether this application filed by the Applicant is meritorious**. In other words, are there sufficient grounds upon which this Court may rely upon to grant the application?

To begin with, it is trite law that, in an application for extension of time, where the Applicant has demonstrated good cause, the court is warranted to exercise judicial discretion and grant such application. The requirement to demonstrate sufficient cause in an application like the one at hand is emphasized in Order 8 (1) of the Advocate Remuneration Orders GN.No.264 of 2015, which states as follows,

The High Court may, subject to order
7 extend the time for filing a
reference **upon sufficient cause.**"
[Emphasis supplied].

As regards to what amounts to "sufficient cause" there has never been a statutory definition of such a term. However, in the case of **Tanga Cement Company**

Limited v Jumanne D. Massanga and Amos A. Mwalwanda, Civil application No. 6 of 2001, (unreported), Nsekela, JA (as he then was), stated that:

"From decided cases a number of factors have to be taken into accounting whether or not the application has been brought promptly, the absence of any valid explanation for delay, lack of diligence on the part of the applicant."

In the present application, the Applicant has argued that, the delay to be supplied with the impugned ruling of the Taxing Master was the source of the delay to apply for reference to this Court. The Respondent contends that, such a reason is not sufficient failed good cause to warrant the granting of this application.

As it may be gathered from the Applicant's affidavit and submissions, the decision of the Taxing Master was delivered on 30th October, 2020 in bill of costs No. 4 of 2020. According to paragraph 4 of the Applicant's affidavit it is averred that, there was illegality which is believed to have been committed by the said trial taxing officer in his ruling, hence the need to have it referred to the Court by way of application for reference.

It was also indicated that, the same ruling of the Taxing Master was supplied to the Applicant on 26th November 2020 as shown in the Applicant's affidavit and

was annexed as **Annexure NJ-1**. The Applicants affidavit shows that, after delivery of the said ruling, the parties were told that the same was to be ready for collection after a week, but despite several efforts made by the Applicant, the ruling was not ready for collection until the time when his advocate wrote a letter to the registrar, attached as **Annexure NJ-2**.

The respondent has contested the argument regarding delayed supply of the ruling sought to be impugned by way of reference arguing that, the Applicant was not serious. She contended that the ruling was delivered on 30th October, 2020 and the Applicant letter was written on 20th November, 2020 and the ruling was supplied on 26th November, 2020. She argued that, by look of things, if the applicant was serious he should have written such a letter earlier than that, rather than waiting until 20th November, 2020 as that delayed action shows a lack of seriousness.

In my view, I do not think it would be fair to blame the Applicant who as not the author of the ruling. The delay to supply it after the requests to do so were made and several follow ups done, as per the averments in the affidavit of the Applicant, and finally the writing of **Annexure NJ-2**, cannot be said to constitute lack of seriousness. For those reasons, the Applicant cannot be made to suffer for mistakes that are not his. The delay has, thus, been well explained and that can be condoned.

On the other hand, looking at the affidavit filed by the Applicant in support of the application for extension of time, and the submissions made afterwards before this Court, there seems to be raised an issue of illegality of the ruling in the Bill of costs No. 4 of 2020, issued by the Taxing Master on 30th October, 2020.

Essentially, it has been emphasized by this Court and the Court of Appeal, time and again that, a point alleging illegality is a legal point that warrants the granting of an application like the one at hand. This position was reiterated in the case of **Arunaben Chaggan Mistry vs Naushan Mohamed Hussein and Another**, Civil Application No. 6 of 2016 (unreported), where in this court held that:

“the legal position is settled. When there is an allegation of illegality, it is important to give opportunity to the party making such allegation to have the issue considered.”

From the above analysis, I am of the view that, there are cogent reasons or grounds regarding why I should exercise the discretion vested in this court to grant the applicant **some** of the prayers he has sought.

I say “**some**” because, prayer number 2 cannot be granted in this application. It ought to form part of what will be brought before the Court by way of reference to the Court. In other words, it was prematurely brought

before this Court and, for that reason, I hereby reject that prayer.

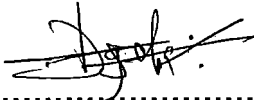
In the upshot, I hereby settle for the following orders:

1. That, the Applicant's prayer requesting for extension of time within which to file a reference to the Court and challenge the decision of the Taxing Master issued on 30th October 2020 in respect of Bill of costs No. 4 of 2020, is here by granted.
2. That, the Applicant is required to file the respective application for reference not later than fourteen (14) days from the date of this order.
3. Cost to follow the event.

It is so ordered.

DATED at MWANZA on this 30th July 2021




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HON. DEO JOHN NANGELA
JUDGE