

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

REFERENCE NO. 05 OF 2021

(Arising from the decision of Kinondoni District Land and Housing Tribunal at Mwananyamala by Hon. S.H. Wambili, Taxing Master in Misc. Application No. 1009 of 2021 as well as No. 270 of 2020)

ESTHER HERMAN KHWILI 1ST APPLICANT

JOESPH CHUWA 2ND APPLICANT

EDWIN KIMARIO 3RD APPLICANT

VERSUS

SHARIFF SALIM MKWEPU RESPONDENT

RULING

Date of last Order: 01.10.2021

Date of Ruling: 04.10.2021

A.Z. MGEYEKWA, J

This is a reference that emerged from a ruling of a Taxing Master, Hon. S.H. Wambili. The application is made under Order 7 (1) and (2) of the Advocates Remuneration Order GN.264 of 2015. This is an omnibus

application whereas, the applicants urged this court to set aside the dismissal Order in respect to Misc. Application No. 1009 of 2021. The applicants also pray for this court to for taxing of the bill of costs presented vide Misc. Application No. 270 of 2020.

To support his application, the applicants filed an affidavit deponed by Mr. Ngassa Ganja Mboje, the learned counsel for the applicants. The application has encountered formidable opposition from the respondents and has demonstrated their resistance by filing a counter-affidavit, deponed by Shafii Salim Mkwepu, the respondent. The application stumbled upon preliminary objections from the respondent's Advocate. With the permission of the court, the learned counsels for the respondent were allowed to add one objection. The objections are as follows:-

- 1. The application before this court is time-barred.*
- 2. The application before this Honourable Court cannot be maintained as it contains an omnibus application.*

When the matter was called for hearing on 1st October, 2021 the applicants enjoyed the legal service of Mr. Ngassa Ganja Mboje, learned

counsel, and respondents had the legal service of Ms. Hamisa Nkya, learned counsel assisted by Mr. Africa Mazoea, learned counsel.

As the practice of the Court has it, I had to determine the preliminary objection first before going into the merits or demerits of the appeal. That is the practice of the Court founded upon prudence which we could not overlook.

It was Mr. Mazoea, learned counsel for the respondent who started to submit, he argued that the application before this court is time-barred. Mr. Mazoea submitted that an aggrieved party is required to file a reference before the court under Order VII Rule 2 of the Civil Procedure Code Cap.3 [R.E 2019]. The learned counsel for the respondent submitted that the order in respect to Misc. Application No.1009 of 2021 was dismissed on 9th April, 2021, and the reference was lodged in this court on 30th April, 2021, counting the days the instant applicants' application is time-barred.

He further submitted that likewise the Misc. Application No. 270 of 2020 is time-barred, the order was issued on 16th November, 2021, and consolidating the two applications means both applications were filed on the same date, for that reason, it was his view that both applications were

filed out of time. Mr. Mazoea went on to submit that the applicants were required to apply for extension of time to file the instant reference. The Respondent's Advocate in the penultimate urged the court to uphold this objection and dismiss the reference with costs.

Submitting on the second limb of objection that the instant application cannot be maintained as it contains an omnibus application. He valiantly contended the applicants have consolidated 2 prayers; dismissal order in respect to Misc. Application No.1009 of 2021 whereas a review application was dismissed, and in Misc. Application No. 270 of 2020, a bill of costs was dismissed. He argued that these are two different applications therefore the applicants were required to file two separate applications. Stressing, he submitted that apart from being omnibus both applications are lodged out of time.

On the strength of the above submission, the learned counsel for the respondent beckoned upon this court to dismiss the application with costs.

In his reply, the learned counsel for the applicants strongly objected the preliminary objection. Starting with the first limb of the objection, Mr. Ngassa contended that the application is lodged within time. He went on to submit that the impugned decision was delivered on 9th April, 2021 through

Misc. Application No. 270 of 2020 and the issue which was addressed was related to powers of a Taxing Officer as per Advocates (Remunerations) Orders) GN. 263 OF 2005 which requires a reference to be filed within 21 days. He also cited section 19 (1) of the Law of Limitation Act, Cap.89 [R.E 2019] exclude the date when the decision was delivered. He went on to submit that after excluding the said day, the last day to lodge the reference was 1st May, 2021 which was a public day. Mr. Ngassa continued to submit that the last day to lodge the reference was 03rd May, 2021. He further submitted that the Electronic filing Rules; Rule 21 of the Judicature Application of Laws (Electronic filing Rules) provides that the document will be considered to have been filed from the date when it was submitted through an electronic system. Ms. Ngassa wishes to rely on the authority of **G.G.N Construction v George Johansen T/I Timber Supply**, Misc. Application No.33 of 2020. Insisting, he argued that the applicants lodged the application for reference on 1st May, 2021 through electronic system. Therefore, he was confident that the Misc. Application No.1009 of 2021 was filed within 21 days.

On the second limb of the objection, Mr. Ngassa started by inviting this court to discuss the issues whether this reference is an omnibus application and whether an omnibus application is prohibited by the law.

The learned counsel for the applicants defined omnibus application to mean one application that contains many prayers of different reliefs which are regulated by different laws. To buttress his submission, he referred this court to the case of **Ottu on behalf of P.L Asenga & 106 others v AMI Tanzania Ltd**, Civil Application No.20 of 2014, the Court of Appeal of Tanzania encourages omnibus applications. He submitted that the application was omnibus application and the same is tenable in law. To bolster his position, he referred this court to the applicants' prayers in the chamber summons and submitted that once this court set aside the dismissal order then it can order the Taxing Master to stay the applicants' prayers.

On the strength of the above submissions, the learned counsel for the applicants invited this court to dismiss the preliminary objections.

Rejoining, Ms. Nkya insisted that the application is out of time. She submitted that after excluding the date when the ruling was delivered the 21 days as per Order VII Rule 2 of the Advocate Remuneration Order

Cap.264 [R.E 2019] the days ended on 30th April, 2021. Emphasizing, Ms. Nkya contended that there is no proof of electronic filing but rather the date appearing on the chamber summons that the application was lodged on 05th May, 2021. She went on to submit that both applications were joined while each application was required to be filed with a separate reference, for the reasons that both applications; Misc. Application No. 1009 of 2021 and Misc. Application No.270 of 2020 had different decisions. Fortifying her submission, Ms. Nkya referred this court to the cases of **Rachel Joshua v Meda Joseph**, Misc. Application No.10 of 2010, **Nuru Ramadhani v Nuru Abdallah Mbehoma**, Land Case Application No. 68 of 2020 and **Rutagatina C.L v AG & Another**, Civil Application No.99 of 2010. She insisted that the applications are not dramatically related.

In conclusion, she stressed that both applications are hopeless time-barred. She urged this court to dismiss the application with costs.

The court afforded Mr. Ngassa to reply on the cited cases by Ms. Nkya, Mr. Ngassa argued that the case of **Rutagatina C.L** (supra) is distinguishable from the instant case since the decision in **Rutagatina C's** case (supra) was overruled by the Court of Appeal of Tanzania in the case of **Ottu** (supra). He went on to submit that in the cited case of Rachel

Joshua (supra) the court held that the issues were joined and brought under two different laws while in the instant application the prayer is one. Replying in the case of **Nuru Ramadhani** (supra), Mr. Ngassa stated that Hon. Mgeta, J stated that omnibus prayers cannot be mixed up.

Having considered the arguments for and against the application, I remain with one central issue for determination, and that is none other than ***whether or not the preliminary objections are meritorious.***

On the first preliminary objection, the respondent's Advocates are complaining that the application before this court is time-barred. I should now be in a position to confront this objection on which both learned counsels for the applicants and respondent locking horns. It is in the record that the impugned decision in respect to Misc. Application No. 270 of 2020 was delivered on 16th November, 2020 and the instant Reference No.5 of 2021 was lodged before this court on 05th day of May, 2021.

Counting the days from the date when the Misc. Application No. 270 of 2020 was filled to the date approximately 5 months lapsed. The second application; Misc. Application No. 1009 of 2021 was delivered on 9th day of April, 2021 and the applicants filled Reference No.5 of 2021 on 5th May,

2021. Counting the days from the date when the Misc. Application No. 1009 of 2020 was dismissal to the date when the applicants lodged the instant application on 5th May, 2021, 22 days lapsed.

The learned counsel of the applicants claims that the applicants filed their application on 01st May, 2021 via electronic filling and after computing the day when the application was delivered, the applicants filed their application on 1st May, 2021 thus, he was on time. To bolster his position he referred this court to section 19 (1) of the Law of Limitation Act, Cap. 89 which state that:-

"19. -(1) In computing, the period of limitation for any proceeding, the day from which such period is to be computed shall be excluded."

In the instant application the law governing bill of costs is the Advocates Remuneration Order GN. 264 of 2015 in particular Order 7 (1) and (2) which provides that:

"7 (1) Any person aggrieved by a decision of the Taxing Officer, may file reference to a judge of the High Court
(2) A reference under (1), shall be instituted by way of chamber summons supported by an affidavit and be filed within 21 days of
***from the date of the decision.**" [Emphasis added].*

Guided by the above provision of law it is self-explanatory that a reference is required to be filed within 21 days from the date of the decision and the limitation period for filing a reference starts running from the date of the decision. Therefore, as long as there is a specific provision of law governing taxation matters, the Law of Limitation Act Cap.89 [R.E 2019] is inapplicable in this case at hand contrary to Mr. Ngassa's submission.

It was the learned counsel for the applicants' view that the date when the application was lodged electronically is regarded as a day when the application was lodged in court. The learned counsel for the applicants has not submitted any supporting document to prove that the application was filed electronically on 1st May, 2021. Let me assume that the application was lodged on 1st May, 2021, still the application is out of time the days prescribed by law expired on 29th April, 2021. Therefore, it is vivid that the instant application was filed out of time.

With the above findings, I refrain from deciding on the second limb of the objection, I think, any result out of it will have no useful effect on this application it will be but an academic endeavour with which I do not want to associate with at this moment.

For the reasons foregoing, the Defendant's Advocate 1st limb of the Preliminary Objection is upheld. Having failed to surmount that hurdle, the Court cannot exercise its discretion to determine Reference No. 05 of 2021 for being time-barred. Therefore, his application is accordingly dismissed without costs.

Order accordingly.

DATED at Dar es Salaam this 4th October, 2021.




A.Z. MGEYEKWA

JUDGE

04.10.2021

Ruling delivered on 4th October, 2021 in the presence of Ms. Hamisa Nkya, learned Advocate for the respondent and the applicants.




A.Z. MGEYEKWA

JUDGE

04.10.2021