

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

REFERENCE NO. 07 OF 2022

(Originating from Bill of Costs No. 123 of 2021 and Bill of Costs
No.165 of 2021)

GIDION FARES OPANDA APPLICANT

VERSUS

MOHAMED OMARY MASOUD RESPONDENT

RULING

Date of Last order: 21.07.2022

Date of Judgment: 22.07.2022

A.Z.MGEYEKWA, J

This is a reference that emerged from Bill of Costs No. 123 of 2021 and Bill of Costs No. 165 of 2021. The application is made under Order 7 (1) and (2) of the Advocates Remuneration Order GN.263 of 2015. The application is

supported by an affidavit deposed by Gideon Fares Opanda, the applicant. The respondent filed a counter-affidavit deposed by Mohamed Omary Masoud, the respondent. The application did not have a smooth sail, for, ahead of the hearing, it is hurdled by two points of preliminary objection lodged by the respondent's counsel. The preliminary objection, notice of which was lodged on 22nd June, 2022, reads:-

- 1. That, Civil Reference No.7 of 2022 was served to the Respondent on 21st June, 2022 contrary to Order 7 (3) of the Advocates Remuneration Order of 2016.*
- 2. That the Civil Reference is incompetent before the Honourable Court.*
- 3. That the application is an Omnibus.*

When the matter was called for hearing on 21st July, 2022 the applicant appeared in person and the respondents had the legal service of Mr. Peter Bana, learned counsel.

On the preliminary objection, the respondent's advocates, speaking through Mr. Bana, sought to drop the second point at the very outset. The

Court thus marked the second point of the preliminary objection as abandoned. On the remaining point, the learned counsel was very brief in its argument but to the point. On the first limb of the objection, the learned counsel for the respondent argued that the application was time-barred. To buttress his point of objection he cited the case of **Robatia Mwinuka v Kikundi cha Kinda (Nancy Sanga)**, Civil Reference No.01 of 2020. He submitted Order 7 of the Advocate Remuneration Order of 2015. He submitted that the word shall is a mandatory word.

The learned counsel for the respondent went on to submit that the applicant filed the instant application on 8th June, 2022, and serve the respondent on 21st June, 2022, 13 days lapsed. He insisted that the law requires the applicant to serve the respondent within 7 days. He added that the Reference was signed by Hon. Deputy Registrar on 8th June, 2022 the date of filing. It was his view that the matter is time-barred.

On the second limb of the objection, the learned counsel submitted that the application is omnibus. He contended that the applicant is challenging the award emanating from Reference No. 165 of 2021; a Bill of Costs emanated from Misc. Land Application No.345 of 2021 and the applicant

was applying for leave to appeal via Bill of Costs No. 123 of 2021 emanating from Land Appeal No. 79 of 2020. He added that the respondent won the appeal with costs. Thus, in his view, the applications are different applications since each Reference had a separate award. To fortify his submission he cited the case of **Juma M. Mkondo v TOL Gases Ltd/ Tanzania Oxygen Ltd & Another**, Civil Application No. 382/01 of 2019. He stress that omnibus is not allowed thus the applicant was required to file two distinct references because one Reference emanated from the District Land and Housing Tribunal and another application was for leave to appeal. He added that the Court of Appeal strike out the said applications.

On the strength of the above submission, Mr. Bana beckoned upon this court to strike out the application for being incompetent.

In reply, the applicant came out forcefully and argued that the preliminary objection is misconceived. He stated that Order 7 (4) of the Advocates Remunerations Order of 2015 is related to endorsement. He submitted that the endorsement was made from the date when the

applicant filed his application online and at that moment the application was not under the control of the applicant. He went on to submit that the chamber summons does not show when the applicant was served with the said document. The applicant submitted that the applicant received the documents on 21st June, 2022, and on the same date he served the respondent and there is a seal. Therefore, the service was done within 2 hours and the respondent was ordered to file a counter affidavit before 24th June, 2022. He insisted that there is no lapse of time. He distinguished the cited case of **Robatia** from the instant application. He stated that the word shall is not always used in the mandatory form.

The applicant contended that the process started when the applicant filed the application electronically on 7th June, 2020, and on 08th June, 2020 he was issued with an exchequer receipt, and the Deputy Registrar issued a notice on 10th August, 2020.

On the second limb of the objection, the applicant contended that the applicant application contains only one prayer. He stated that they are praying for this court to examine the decision of the Deputy Registrar and

the application is accompanied by a Decree from Land Case No. 13 of 2019. He claimed that the applicant is not restricted to file a reference. Supporting his submission he referred this court to Order 7 of the Advocate Remuneration Order of 2015.

The applicant continued to submit that the court is encouraging omnibus applications to save costs and time. He added that a combination of applications is not fatal as long the reference originates from the same matter. Fortifying his submission he cited the case of **NIC Tanzania Ltd v The Minister for Labour**, Civil Appeal No. 103 of 2004. He argued that the case of **Robatia** is distinguished from the instant application.

On the strength of the above submission, the applicant beckoned upon this court to find that the objection are misconceived.

In his rejoinder, the respondent's counsel reiterated his submission in chief. He added that the applicant was negligent. He insisted in accounting for the days of delay, the court applies the Registry Officer endorsement. He submitted that in the **NIC** (supra) case the omnibus application was

not opposing each other but in the matter at hand, each application had its own award. Ending, he urged this court to strike out the application.

Having summarized the contending arguments of the respondent's advocate and the applicant, I should now be in a position to confront the point of contention between the parties.

On the first limb of the objection, I wish to state at this juncture that the lustrous arguments of both sides are attractive at first sight. The question which posed a tug of war between the parties is the date from which the seven days should be reckoned. In a nutshell, while the applicant claims that the day to service the respondent started to run the date when the applicant received the documents on 21st June, 2022. It was the learned counsel for the respondent firm view that the seven days reckoned from the date when the Registrar Officer endorsed the document. Both arguments are very attractive. However, for reasons that we will endeavour to show herein below, I am disinclined to agree with both sides.

I wish to start my determination by reproducing the Order under which the impugned application has been made. The Order and sub-paragraphs state as follows:-

" 7. (1) Any party aggrieved by a decision. The sub-rule reads:-

(2) A reference under order (1), shall be instituted by way of chamber summons supported by an affidavit and files within 21 days from the date of the decision."

Applying the above provision in the matter at hand, it is clear that the above provision under which the present application has been taken cannot be read in isolation. I think the provisions in relation to the time limit is equally important in applications of this nature. This proposition was predicated upon the provisions of Order 7 (3) of the Advocate Remuneration Order of 2015 GN. No. 262 of 2015 which provide that: -

" 7 (3) The applicant shall within seven clear days of filing reference save copies all parties entitled to appear on such taxation." [Emphasis added].

As rightly submitted by Mr. Bana for the respondent, and to my mind rightly so, it is no gainsaying that the time limit starts to run from the date when after filing the reference. In such situations, the applicant was required to save copies to the respondent within seven days of filing the

reference. This position is stated in the case of **Robatia** (supra). Relying on the decision of **Robaria** (supra), the reference is time-barred.

Therefore, the applicant contentious that the days started to run from the date when the applicant received the documents on 21st June, 2022 cannot stand as by the above findings the law is very clear that the applicant was required to save the respondent within seven days after filing the reference not otherwise. Taking to account that the how to effect the service is elaborated well under Order 7 (4) of the Advocate Remuneration Order which states that:-

" For purpose of service under sub order (3) it shall be sufficient if the chamber summons has been endorsed and stamped by the Registry Officer."

Applying the above order, the applicant was not required to wait for a summons to be issued to the respondents but he was required to save the respondent after the chamber summons being endorsed and stamped by the Registry Officer. The instant Chamber Summons was endorsed by the Registry Officer on 8th June, 2022, counting the days of delay the seven days lapsed on 15th June, 2022 and the respondent was saved on 21st June, 2022 a lapse of 13 days.

I take inspiration from the interpretation injected into the provisions of Order 7 (3) of the Advocate Remuneration Order of 2015 the catchword 'shal'. As rightly pointed out by Mr. Bana and the holding of this court in the case of **MSK Refinery Limited** (supra) the word 'shall' means that the provision is imperative. Section 53 (2) of the interpretation of Laws Cap.1 [R.E 2019] provides that:-

" 53- (2) Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

Similarly, the Courts on different occasions have interpreted the word shall. For instance, in the case of **Shabani Iddi Jololo and three (3) Others V. Republic**, Criminal Appeal No. 200 of 2006, the Court of Appeal of Tanzania at Dodoma observed that:-

*"In this context, section 53 (2) of the Interpretation of Laws Act Cap.1 [R.E. 2002] is important. It provides that wherein a written law the word "**shall**" is used in conferring a function, such word*

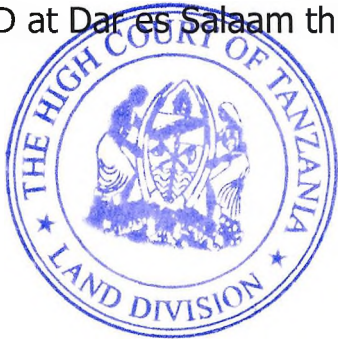
shall be interpreted to mean that the function so conferred must be performed.”

Therefore, the use of the word **shall** denote mandatory compliance with those requirements. Consideration of the second limb of objection will not affect the above finding. I accordingly refrain from delving into it.

In the upshot, I sustain the first limb of preliminary objection and proceed to strike out Reference No. 07 of 2022 without costs.

Order accordingly.

DATED at Dar es Salaam this 22nd July, 2022.




A.Z.MGEYEKWA

JUDGE

22.07.2022

Ruling delivered on 22nd July, 2022nd July, 2022 via audio teleconference whereas, the applicant and Mr. Peter Bana, advocate for the respondent were remotely present.




A.Z.MGEYEKWA

JUDGE

22.07.2022