

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

REFERENCE NO 22 OF 2023

*(Arising from the Ruling and Order of the High Court of Tanzania Land Division
at Dar es Salaam in Taxation Cause No. 247 of 2022, Honourable Hamza, Taxing
Master dated 21st June 2023)*

**HASAN SEIF MTUNGAKOA & OTHERS 1ST APPLICANT
SALEHE SEIF MTUNGAKOA..... 2ND APPLICANT
ALLY SEIF MTUNGAKOA..... 3RD APPLICANT**

VERSUS

**KURUTHUMU YUSUPH
(As administratrix of the estate of late Sugra Safari..... RESPONDENT**

RULING

Date of last order: 03/11/2023

Date of Ruling: 06/11/2023 3

MWAIPOPO, J

This is an application for extension of time filed by Hassan Mtungakoa and two others, hereinafter to be referred to as the applicants versus Kuruthumu Yusuph, hereinafter to be referred to as the respondent.

The Application contains three prayers to the effect that;

1. This Honourable Court be pleased to extend time for filing taxation reference to seek for examination of the propriety of the ruling made by Hon. W. Hamza, Taxing Officer, on the 22nd June 2023 and seek for directions as it shall deem fit.
2. Costs be provided
3. Any other relief this Hon. Court may deem fit and proper to be granted.

Hamza

I must state from the outset that this Ruling is in respect of matters that were raised partly by the Court *suo moto* and partly the Counsel for the Respondent as narrated herein below;

When this matter was set for hearing on the 25th of October 2023, the Counsel for the Applicants, Advocate Job C. Kerario requested for an adjournment of the matter for the reason that he felt indisposed. There was no objection on the part of Ms. Sarah Matembo, Advocate for the Respondent. Thus, the Court proceeded to adjourn the matter and fix it for hearing on the 3rd of November 2023. The Court further ordered the parties, on the next date of hearing, to come and first address the Court on the propriety of the title or heading of the purported application for extension of time, in particular the manner in which it was drafted and presented before the Court as a Taxation Reference no. 22/2023 between the parties cited herein above. To put it clear, the said front page of the Application for extension of time was drafted and styled as a "**Taxation Reference No. 22 of 2023**" instead of a **Miscellaneous Land Application No. 22 of 2023** and again just down the line, below the names of the parties the following words were inserted to show its origin, whereby it was titled again as a Reference. The words read;

(Reference from the Ruling and Order of the High Court of Tanzania (Land Division) at Dar es salaam in Taxation Cause No. 247 of 2022 (Honourable W. Hamza, Taxing Master) dated 21st of June 2023).

At the commencement of the hearing on the 3rd of November 2023, I ordered both parties to address the Court on the last order recorded in the Court Proceedings on the 25th of October 2023. The Applicants herein, were represented by Advocate Job Kerario, and the

Respondent enjoyed the services of Advocates; Alphonse Peter Kubaja and Ms. Sarah Matembo.

The Counsel for the Applicants began his submissions by informing the Court that the Application before it is a Chamber summons which has been brought under the provisions Rule 7(1) of the Advocates Remuneration Order, 2015 together with other enabling provisions of the law. It is supported by an Affidavit sworn in by Job Chacha Kerario, an Advocate of the High Court and Courts subordinate thereto, dully instructed to represent the Applicant therein. He went on submitting that the contents of the Affidavit are specifically on the question of extension of time, stating the circumstances which led to delay of not having filed the Reference within the prescribed period. Alongside with that, the Chamber Summons contains prayers relating to extension of time. He intimated further that; the document has been titled as a Taxation Reference but it is a defect which is curable under the circumstances. It is not even a technicality that could be treated under article 107A of the Constitution of the United Republic of Tanzania, 1977, as it is less than that. He further prayed for the Court to apply the provisions of overriding objective principle so that, if the defect has not accessioned any prejudice to the respondents, they (Applicants) be allowed to argue the question of extension of time as it has been filed before the Court.

Submitting in rebuttal, the Counsel for the Respondent, Mr. Alphonse Peter Kubaja, took off by first opposing the submissions of the Counsel for the Applicant. He alluded to the Court that, at this stage it supposed to be moved by an application for extension of time, which has been properly filed before the Court and not a Taxation Reference

itself. He alerted the Court that the Counsel for the applicant has also admitted that there is a defect on the title of the Application which reads as a "taxation Reference No. 22" instead of a **Miscellaneous Land Application no. 22/2023**. He stated that the title of the Documents reads as such in both the Chamber summons and Affidavit. He further asserted that the High Court is a Court of record, the defects are seen on the record and therefore the only way is for them to be rectified. He went on to state further that the preparation of the case starts with the case itself. This case was prepared as a Taxation Reference as evidenced from both the Chamber summons and Affidavit and was filed as such by the Applicant. The defects reflect nothing but the intention of the Applicant to file the same as a Taxation reference. The Applicant has made the Court to recognize it as a Taxation Reference and that is how it also appears on the Cause list for this session. The Counsel submitted that; assuming it is a Taxation Reference, it has still been filed beyond 21 days of filing a Taxation Reference required under Order 7(2) of the Advocates Remuneration Order, 2015. This is because the record indicates that the Decision in Bill of Costs no. 247/2022 was given on 21st June 2023 and the document was filed on 22nd July 2023 as per the copy served to the Respondent. Therefore 21 days expired on the 13th of July 2023.

On a different angle, he also submitted further that, the reference was filed in two different dates; while the Respondent's copy is dated 22nd of July 2023, the Court's copy and that of the Applicants are both dated 25th July 2023. He also lamented about the documents being dated 22nd July 2023, which was a Saturday. He questioned on the

appropriateness of the document being filed on a weekend. He finally found the document to be very defective as it raises a number of doubts.

He thus prayed for the purported Reference to be dismissed with costs for being filed in contravention of the procedures for filing a Taxation Reference. In the same spirit, he further stated that the Advocates Remuneration Order, 2015 does not provide for the effect of Applications which have been filed out of time, however the Court of Appeal in the case of **Barclays Bank Tanzania Ltd Versus Phylsisa Hussein Mcheni Civil Appeal no. 19/2016 page 15**, while citing the case of Hezron Nyakiya stated that;

"The Law Reform (Fatal Accidents and Miscellaneous Provisions) Act sets the time limit for instituting actions to be six months, but did not provide for the consequences of filing a matter out of time, section 3 of the Act was applicable in dismissing the petition. In view of that position of the law, it is our conclusion that the learned High Court Judge should have resorted to section 3(1) of the Act to dismiss the complaint instead of striking it out as she did".

Therefore, based on the case cited above, he submitted that although the Advocates Remuneration Order, 2015 has not stated the effect of a defective application, he prayed that section 3 of the Law of Limitation Act Cap 89 to be applied in the circumstances.

In rejoinder, the Counsel for the applicant began by responding on the issue of the date of filing of the Application, he stated that the Chamber summons indicates that they were filed on the 25th of July

2023 contrary to the document served upon the Applicant which bore 22nd of July 2023 as a date of filing. He submitted that the Registrar and the Registry Officer signed the document under the hand and seal of the Court on 25th of July 2023. That the Affidavit in support of the Chamber summons signed by Advocate Kerario was also received by the Court on the 25th of July 2023, however the figure 25 appeared to have been recorded and corrected to read 25th of July 2023. He therefore did not see any defect.

With regard to the dismissal of the case, he submitted that the Application has been brought under the Advocates Remuneration Order, 2015 and it is for extension of time and the law does not provide that if it is brought beyond time it should be dismissed. Order 8 of the Advocates Remuneration Order, 2015 is very clear that the High Court may extend time for filing a Taxation Reference upon sufficient cause being shown. The Counsel for the Respondent submitted on order 6 and 7 of the Advocates Remuneration Act which make reference to a Taxation Reference and that it should be dismissed. He submitted that the matter was not brought under the Law of Limitation Act Cap 89 RE 2019 but Order 8 (1) and (2) of the Advocates Remuneration Order, 2015. The section states that the High Court may extend time for filing a Reference and that application must be accompanied by Chamber Summons supported by an Affidavit. The Counsel has argued as if we have reached the stage of justifying the extension of time for filing a Reference. He referred the Court to Para 6 and 7 of the Affidavit which state that the matter before the Court is an application for filing an intended Reference and therefore not a Reference and that grounds contained therein are grounds for

extension of time. He finally admitted in his conclusion that the defect is a result of the slip of the pen or mind but it is a curable matter. He concluded by praying for the Court to book matter for hearing of an application for extension of time to file a reference.

Having heard the submissions from both parties, my judicial duty is now to examine whether this Application for extension of time titled as a Taxation Reference is proper before the Court and whether it should be booked for hearing as contended by the Counsel for the Applicant. I will now give my analysis and reasons for my decision as follows;

One; When I began writing this ruling, I indicated that this matter was fixed for hearing on the 25th of October 2023 before it was adjourned for hearing on the 3rd of November 2023. I must state that when it was called for hearing on the 25th of October 2023, it was the Counsel for the Applicant who intimated in his brief submissions before the Court that the matter before the Court seems to put the horse before the cart. Nonetheless, he proceeded to pray for an adjournment of the case for the reasons stated above and prayed for the court to set the matter for hearing of an application for extension of time. Indeed since I had also noted the defect before the hearing, I proceeded to grant an order for adjournment and indicated to the parties that in the next hearing session they would address the Court on the propriety of the title of the Application or appropriateness of the document filed before the Court. To be more specific, on whether it was proper to file an application for extension of time to file a Reference **by way of a Reference itself.**

With regard to the wrong title of the Application; I indicated above that, upon my careful perusal of the purported Application on the 25th of October 2023, I discovered that there was a misnomer on the heading or title of the document. The Application was titled 'Taxation Reference no. 22/2023 instead of a Miscellaneous Application no. 22/2023. The defect is so obvious on the front pages of the Chamber Summons and the Affidavit. It does not need a long-drawn process to discover it. Luckily enough, the Counsel for the Applicant also admitted during hearing on the presence of the defect and that it was a result of the slip of the pen or a slip of the mind. Similarly, in his brief salutations on the 25th of October 2023, he alerted the Court that they have filed an application for extension of time, but it seems like they wanted to be ahead of time. Instead of arguing the extension of time, they want to proceed with the Taxation Reference, like the old adage says; they wanted to put the horse before the cart.

Further, as narrated above, the Counsel for the Respondent also argued that; the title of the Documents appears as such in both the Chamber summons and Affidavit. He submitted that the title is not acceptable since it is incompatible with the provisions of Order 6 and 7 of the Advocates Remuneration Order which require Taxation References to be filed by way of Chamber summons and Affidavit within 21 days of delivery of the decision of the Taxing Master. The Reference before the Court was filed on different dates of 22nd and 25th of September 2023, which are both beyond the 21 statutory days. The Counsel for the Applicant emphasized that the document before the Court was an application for extension of time and that it should not be treated as Reference ready to be heard on merit.

While I agree that the document should not be treated as a Reference that has to be heard on merit, I would still agree with the counsel for the Respondent that the defective document bears a defective title and on top of that two inconsistent dates of filing. Assuming that it was indeed a proper Reference before the Court, it would still be premature since the Applicants are yet to be approved or cleared to bring a Reference. Whether the purported Reference is within time or not is a question for another day and time as also alluded to by the counsel for the applicant. I am aware that what we are concerned now are preliminaries leading up to the filing of the proper Application for extension of time to file a Reference and eventually a Reference itself.

With regard to the issue of different filing dates raised by the Counsel for the Respondent in the course of hearing, I would like to register that when the issue was brought up, I decided to give a quick perusal of the filing date on all the documents of the Parties and the Court. I noted that mine tallied with that of the Applicants, i.e. 25th of July 2023. However, those served to the Respondent had a different filing date, i.e. 22nd of July 2023. I also checked on the Calendar and noted that 22nd of July 2023 was indeed a Saturday. The Counsel for the Respondent submitted further that such defects are intolerable since the date of filing is inconsistent and falls on a Saturday which is not a working day for receiving and filing applications. He was quick to submit that they raise a number of doubts. They must be worked upon.

Based on the submissions of the parties, it is my firm position that the two filing dates do not portray an accurate picture of the exact filing date for proper rendition of justice especially in a situation where the Court is invited to determine an application for extension of time and when time

itself is a crucial factor or of essence. Thus, the filing date must be accurate and consistent and it must appear to be so on the documents served to all the parties and the Court itself.

As to the effect of the defects found on the purported application, the Applicant submitted that it is curable and that it be saved under the doctrine of overriding objective. The Counsel for the Respondent rebutted that such defects must be rectified and they should not be allowed to stand. He implored the Court to dismiss it based on section 3 of the Law of Limitation Act, CAP 89. Apart from the misnomer on the heading, he treated it as a Reference, which was filed out of time and the only remedy was for the court to dismiss it. (See the case of **Barclays Bank (Supra)** cited by the Counsel for the applicant.

As to whether this Court can apply the doctrine of overriding objective, I am of the firm position that, the defect is so obvious that in such a way the Counsel for the Applicant has admitted it as a slip of the pen. In this regard I cannot use the overriding objective principle to cure a defective document or to use the words of Honourable Justice Kiwelu to gloss over the defects which appear therein and go to the root of the record of the Court. **(See Alex Msama Mwita versus Emmanuel Nasuzwa Kitundu, Civil Appeal no. 538/17 of 2020 Dsm.** It bears re affirming that the principle cannot be applied blindly and in total disregard of the blatant defects found in the instant case. The Chamber Application being supported by an Affidavit must be accurate in its form and content. The Contents therein must much with the title of the document and reflect the nature of the case under determination. I emphasize further that Advocates have a duty to ensure that Documents filed before the Court

are properly drafted and titled and copies arising from the same case number are appropriately assigned similar dates of filing to avoid any inconsistency and ambiguity as stated above. Indeed, as submitted by the Counsel for the Respondent, the High Court is a Court of record. We must therefore uphold the sanctity of Court records because they are vital to the legal process, can be used as evidence or point of reference in future proceedings and they help to ensure that proceedings are conducted fairly and impartially. Therefore, there must be uniformity in the manner in which Applications for extension of time to file a Taxation Reference are instituted in Court.

The Counsel for the Respondent invited me to invoke section 3 of the Law of Limitation Act, CAP 89 to dismiss the said Taxation Reference for being filed out of time. In response to his invitation I state that; this is a fit case for me to strike it out than to dismiss. We have not reached that stage yet. We haven't crossed that bridge either.

In the result, and in view of the defects identified therein, I proceed to strike out the purported application for extension of time styled as "**Taxation Reference no 22/2023**" with costs. The applicant is at liberty to institute it subject to time limitation.

It is so ordered.

DATED at DAR ES SALAAM this 6th day of November, 2023



Baippi
S.D. MWAIPOPO

JUDGE

06/11/2023

The ruling delivered this 6th day of November, 2023 in the presence of Learned Counsel Job Chacha Kerario for the Applicants, Alphonse Peter Kubaja and Ms. Sarah Matembo, leaned counsel for the Respondent, is hereby certified as a true copy of the original.



D. Mwaipopo

D. MWAIPOPO

JUDGE

06/11/2023