

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND REFERENCE NO. 31 OF 2023

(Arising from Extended Misc. Land Application No. 85 of 2022, Hon. Kisongo- Taxing Officer dated 18th September, 2023)

EFC MICROFINANCE BANK LIMITED APPLICANT

VERSUS

STELLA DANIEL MUNNA RESPONDENT

RULING

Date of Last Order: 29/11/2023

Date of Ruling: 07/12/2023

A. MSAFIRI, J

This is a reference application whereas the applicant was aggrieved by the decision of the Taxing Officer Hon. C. M. Kisongo in Extended Misc. Land Application No. 85 of 2022 delivered on 18/09/2023 before the Resident Magistrates Court of Dar es salaam at Kivukoni/Kinondoni.

This Application was instituted before this Court on 06/10/2023 by way of chamber summons supported with an affidavit of Cleoplace James, introduced as an advocate of the applicant.

The Application was made under Order 7(1) (2) of the Advocates Remuneration Order, 2015.

Alls.

The respondent was contesting the Application and raised, one point of preliminary objection to the effect that; -

(a) That, the applicant has failed to serve the application for reference to the respondent within the period of seven (7) days contrary to the mandatory provision of Order 7(3) of the Advocates Remuneration Order, 2015.

As it is the law and procedure once a preliminary objection has been raised, it have to be heard and determined before proceeding with the matter on merit. Therefore this Court set the preliminary objection to be heard orally on 29/11/2023. On the said date the applicant was represented by Mr. Stephan Mayombo, learned Advocate, while the respondent enjoyed the service of Mr. Theodory Primus, learned Advocate.

On his submission in support of the preliminary objection, Mr Primus stated that this Application was filed on 06/10/2023 and that the copy of the Application was served to the respondent on 25/10/2023. He contended that the copy of the Application was served to the respondent out of time contrary to the law requirement under Order 7(3) of the Advocates Remuneration Order, 2015. That it was served out of seven (7) days which is set by the said Order.

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Mr Primus stated further that the remedy available for the bill of costs that is served out of time is for the same to be struck out as it is incompetent before this Court. He prayed for the same to be struck out with costs. To bolster his point he referred the Court to the case of **Ahmed Mabrouk & another vs. Rafiki Hawa Mohamed Sadik**, Civil Reference No. 20 of 2005, CAT at DSM (Unreported) at page 11 where it was held that the bill of costs which was served out of time was incompetent and it was struck out.

On reply, Mr. Mayombo admitted the fact that the Application was filed on 06/10/2023 and that the service to the respondent was made on 25/10/2023. However, he pointed that the summons was issued to the Applicant on 10/10/2023 as per the chamber summons hence the respondent was served 15 days later from the date of summons.

Mr Mayombo also admitted that Order 7(3) of the Advocates Remuneration Order, 2015 have set for the service to be done within seven days but it does not provide that the remedy of failure to serve on time is striking out the Application.

He added that the respondent has not substantiated as to how he was prejudiced by the delay of service for 8 days and that the defect can be cured under the principle of overriding principle. He cited the case of **Safari Anthony @Mtelemko& Another vs. Republic**, Criminal Appeal

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No. 404 of 2021 where it was held that the procedural omission cannot vitiate proceedings if there is no miscarriage of justice. He prayed that the preliminary objection be overruled and the Application to be heard on merit.

On rejoinder, Mr. Primus reiterated what was submitted in chief. He added that the provisions of Order 7(3) of the Advocates Remuneration Order does not specify on the consequences of failure of service within the prescribed time but there are case law which give guidance on that. He cited the case of **Alex Msama Mwita vs. Emmanuel Nasuzwa Kitundu & Another**, Civil Application No. 538/17 of 2020. He reiterated his prayers.

Having gone through the rival submission of the parties, the pertinent issue is whether the preliminary objection has merit.

In determining the same, I will be guided by the provision under Order 7(3) of the Advocates Remuneration Order, 2015 which provides that;

*Order 7(3): The applicant **shall within seven clear days** of filing reference save copies to all parties entitled to appear on such taxation. (emphasis added).*

Since the Application was instituted on 06/10/2023, seven clear days within which the reference was filed was by 13/10/2023. Assuming

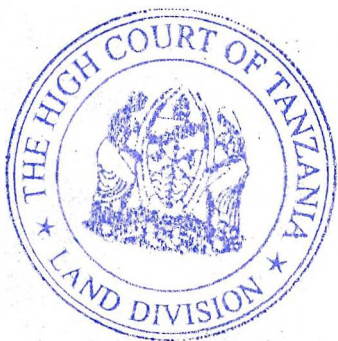
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that the summons was issued to the Applicant on 10/10/2023 as alleged by the counsel for the applicant then the clear seven days have expired by 17/10/2023, the service was not yet served to the respondent until on 25/10/2025.

It is very clear that the service to the respondent was out of time contrary to the law requirement under Order 7(3) of the Advocates remuneration Order, 2015. I find that the delay to serve the Application cannot be cured under the principle of overriding objective as this is not a matter of technicality but it is a mandatory requirement of law. (see the case of **Mondorosi Village Council & 2 Others vs. Tanzania Breweries Limited & 4 Others**, Civil Appeal No. 66 of 2017, CAT at Arusha (Unreported).

Resultantly, I find the raised preliminary objection to have merit and basing on the analysis and reasons herein above, this Application is incompetent before me. I proceed to strike out this Application with costs.

It is so ordered.



A. MSAFIRI

JUDGE

07/12/2023