

**IN THE HIGH COURT OF TANZANIA**  
**AT DODOMA**

**MISCELLANEOUS CIVIL APPLICATION NO. 54 OF 2008**  
**(ORIGINATING FROM THE TAXATION OF BILL OF**  
**COSTS IN MISC. CIVIL CASE NO. 37 OF 1995)**

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**LEONARD MLUMBA SHANGO ..... APPLICANT**

**VERSUS**

**NALAILA LAZARO KIULA ..... RESPONDENT**

**24/09/2009 & 13/11/2009**

**RULING**

**HON. MADAM, SHANGALI, J.**

The applicant **LEONARD MLUMBA SHANGO** was a petitioner in the Election Petition Miscellaneous Civil Case No. 37 of 1995 in which the present respondent **NALAILA LAZARO KIULA** was also the respondent. On 14<sup>th</sup> April, 1998, the applicant's request to withdraw the petition was granted and the order for the payment of costs to the respondent was issued by this court on 26<sup>th</sup> August, 1998.

Consequently, the respondent, through his advocate Mr. Mpoki filed his main bill of costs. In that bill of costs the applicant was represented by Mr. Nyabiri, Learned advocate. The ruling for the bill of costs was pronounced in favour of the respondent on 29<sup>th</sup> September, 2000 before the (District Registrar) Taxing Master Hon. P.B. Khaday (as then was). To be precise the respondent was awarded TShs.9,106,000.00. No reference or objection was raised by the applicant to challenge that decision.

It appears that in his endeavours to execute the decree, the respondent filed an application for execution of the decree before the court so that the judgement debtor could be summoned and enter appearance to show cause why the decree should not be executed against him. That was back in 2006. All efforts to serve the applicant with a notice to appear before the court failed. Eventually the court ordered for substituted service through newspapers. That was done, and the matter was published in **Nipashe** and **Mtanzania** Newspapers in accordance to practice. At the end the application was heard and determined Ex-parte.

In his exparte ruling dated 30<sup>th</sup> March, 2006, the Taxing Master (District Registrar) Hon. J.M. Somi (as then was) allowed the application for execution and condemned the present applicant to pay an interest of 7% per annum of the principal sum from the date of the ruling till full payment for his failure or neglect to settle the debt since 2000. In addition the Taxing Master awarded the present

respondent additional minimum costs of TShs.808,760 being the costs incurred by the present respondent in pursuing the execution of his decree. The Taxing Master also allowed the present respondent to amend his decree to include the additional reliefs for execution.

It was during the execution of the amended decree carrying the amount of TShs.16,161,544.70 when the applicant resurfaced with verve and courage intending to challenge the Ex-parte order dated 30<sup>th</sup> March, 2006.

Unfortunate to the applicant he was late to file his application on objection in terms of rule 5 (1) of the Advocates Remuneration and Taxation of Costs Rules, GN No. 515 of 1991. It provide that such objection must be filed within a period of 21 days from the date of receiving a certified copy of the Taxing Master's decision.

Now the applicant being represented by Mr. Mbuya, learned advocate has filed this application under section 14 (1) of the Law of Limitation Act, 1971 and Rules 5 and 6 of the Advocates Remuneration and Taxation of Costs Rules 1991 (GN 515 of 1991) Cap, 341 R.E. 2002. He is specifically seeking for extension of time for the filing of an objection on the exparte decision of the Taxing Master dated 30<sup>th</sup> March, 2006 plus costs. The chamber application has been supported by an affidavit deponed by the applicant in person, Mr. Leonard Mlumba Shango.

The respondent was represented by Mr. Nyangarika Learned Advocate. This application would have been easy and short to determine had the applicant concentrated on his prayers as shown in the chamber application and show sufficient cause for delay. Instead he has gone further and challenged even the decision of the main bill of costs dated 29<sup>th</sup> September, 2000.

Be it as it may, the main <sup>cause</sup> case for delay as submitted by Mr. Mbuya and narrated in the applicants affidavit is that the applicant was not aware of the decision of the taxing Master until 16th July, 2007 when he visited Kisumu Resident Magistrate Court where the court clerk issued him with copies of the documents. The applicant claimed that the Court Clerk informed him that the documents which were supposed to be sent to him were still in the hand of the Court Broker.

In his affidavit the applicant conceded that initially he had approached Messrs. Rweyongeza & Company Advocates to represent him in that main bill of costs and specifically he was in contact with Mr. Rweyongeza, Learned Advocate. He admitted that he submitted several handwritten instruction notes to Mr. Rweyongeza aiming to challenge the filed bill of costs. The applicant stated that later Mr. Rweyongeza passed the matter to his colleague, Mr. Nyabiri, Advocate. The applicant continued to deal with Mr. Nyabiri, Advocate and sent him some more handwritten instruction notes. The applicant complained that later he discovered that Mr. Rweyongeza

was also engaged by the respondent in a corruption case which was pending in court. He stated that he discovered that situation when he met the respondent at the Offices of Rweyongeza & Company, Advocates about four times. As a result he felt unease about the situation and stopped giving further instructions to Rweyongeza & Company, Advocates.

The applicant avers that he later learnt that after appearing for him at the initial taxation the advocate stopped to represent him and his handwritten notes were passed to the respondent. The applicant complained that as a result the advocate refused to accept further court documents and services on his behalf and caused the additional taxation to be determined *ex parte*.

The applicant further deposed that from the time the advocates started acting for the respondent in the corruption case they ceased to represent him because of the conflict of interest. Therefore, he concluded, he was denied right to be represented because of lack of communication between him and his advocates in both initial taxation and additional bill of costs, hence late to file his objection in time.

The applicant contended that the amended bill of costs has included an element of interest which was not awarded by the judge, while the additional awarded costs originated from the costs incurred after the withdrawal of the Election Petition Case.

In his counter affidavit the respondent stated that in the main taxation of bill of cost the applicant was represented by Mr. Nyabiri, advocate and not Mr. Rweyongeza, Advocate. He stated that the alleged handwritten notes by the applicant sent to Mr. Rweyongeza and Mr. Nyabiri concerning the main taxation prove without doubt that the applicant was in full contact with Rweyongeza & Company Advocates and indeed he was being represented in the matter by Mr. Nyabiri.

The respondent prayed the court to refer to Annexure "R<sub>1</sub>" to his counter affidavit which carries several copies of handwritten instruction notes by the applicant. Therefore the main bill of costs was heard interparties, argued the respondent. Furthermore, the respondent categorically denied to have ever met the applicant in the offices of Rweyongeza & Company Advocates but conceded that the same company did defend him in a corruption case sometimes after completion of the taxation matter. The respondent argued that in the circumstances there was no conflict or interest. The respondent challenged the applicant to produce sufficient evidence to prove otherwise.

The respondent deponed that it was during the execution stage when the applicant was required to appear before the court and show cause as to why execution should not have been granted when the Taxing Master granted the additional costs. The application was determined ex-parte because the applicant was nowhere to be

traced for service and had nobody to represent him at that stage. As a result the court had no other option but to allow substituted service. The respondent further stated that, the matter was published in the **Nipashe** and **Mtanzania** newspapers as shown in Annexure "R<sub>1</sub>" to his Counter affidavit. He argued that the Taxing Master decided to allow the addition costs due to the applicants refusal and avoidance to pay the taxed amount for a period of five years while making him (respondent) to incur more expenses in following up the matter.

In conclusion the respondent insisted in his counter affidavit that the applicant was fully represented in the main taxation of bill of costs and was duly served through substituted services during the hearing of the application for execution and additional taxation. On the issue of interest and costs incurred subsequent to the decree, the respondent avers that they were legally and fairly included and granted by the Taxing Master taking into consideration the circumstances of the case. He prayed the court to consider that the present application is excessively out of time because it was made about nine (9) years from the delivery of Taxing Masters decision dated 4<sup>th</sup> September, 2000. The respondent observed that the application is a mere abuse of the court process geared at obstructing the cause of justice.

During the hearing of this application both the learned advocates viciously attacked each other in their bid to substantiate their clients proposition. Mr. Mbuya, Learned advocate attacked Mr. Nyabiri, Learned advocate for misconducts. He went further to the extent of labeling him "*Judas Eskariote*" for betraying his client, passing his written notes to his adversary, a conduct which amount to breach of trust and confidentiality, refusing to communicate with his client and causing conflict of interest.

Incidentally, during the hearing of this application, Mr. Nyabiri, advocate was present in court to attend another separate matter which was also before me. Mr. Nyabiri was tightly and silently following the missiles of accusation aimed against him. He appeared uncomfortable but managed to stomach the bitter pills. At the end of hearing, I decided to invite and allow Mr. Nyabiri to comment on what has been stated in court against him or if he would wish to file a counter affidavit against the applicants allegation. Mr. Nyabiri, learned advocate was pleased and accepted to file a counter affidavit after being served with a copy of the applicants affidavit. Mr. Mbuya and Mr. Nyangarika, learned advocates had no objection to the invitation. As a result Mr. Nyabiri, learned Advocate was able to file his counter affidavit on 3<sup>rd</sup> October, 2009 and copies issued to both parties.



At this stage let me touch on Mr. Nyabiri's counter affidavit. Mr. Nyabiri conceded that he is a partner in Rweyongeza & Company, Advocates operating in Dar-es-Salaam and Dodoma. He is stationed at Dodoma Branch. He stated that the Election Petition Miscellaneous Civil Case No. 37 of 1995 was completed in the high Court at Dodoma. The subsequent main bill of costs was filed and determined before the District Registrar at Dodoma. He also conceded that at first the applicant gave his instruction to Mr. Rweyongeza who is the senior partner in the firm and station at Dar es Salaam head office. Then the said instructions were passed to him in order to represent the applicant in the High Court at Dodoma. The applicant was satisfied with the arrangements.

Mr. Nyabiri stated that from that point he started to communicate with the applicant, receiving his several handwritten instruction notes and representing him until when the matter was finally determined in favour of the respondent. Mr. Nyabiri prayed for the court to peruse the bundle of handwritten notes from the applicant attached to his counter-affidavit as annexure "DN2" collectively. He contended that sometimes in October, 2000 he communicated with the applicant through his (applicant's) mobile phone No. 0744-448554 and informed him about the end result of the taxation. Mr. Nyabiri deposed that, the applicant was not pleased with the decision of the Taxing Master and that he got furious claiming that he never expected to be ordered to pay

anything to the respondent. Mr. Nyabiri further stated that from that period the applicant ceased to communicate with him and since his assignment was over he was not required to further deal with the applicants other matters in court.

Mr. Nyabiri stated that Mr. Rweyongeza started to deal with the respondent in his corruption case in December, 2000 when the main taxation of bill of costs was over.

Regarding to the issue of passing the handwritten instruction notes of the applicant to the respondent, Mr. Nyabiri deponed that he has never passed the instruction notes to the respondent. He said that when the applicant filed his application for stay of execution at the Kisumu Resident Magistrate he filed a supplementary affidavit alleging that he has never engaged him as an advocate and that he represented him in court without his (applicant's) instructions. Mr. Nyabiri stated that it was in the reply of that supplementary affidavit when he was forced to attach to his affidavit all handwritten instruction notes from the applicant as evidence. He prayed the court to refer to annexure "DN2" to his present counter affidavit.

Mr. Nyabiri concluded in his counter affidavit that the allegations against him are false because he was duly instructed to represent the applicant and he was in close cooperation with him to the extent of occasionally attending the court together.

The first question is whether Mr. Nyabiri, Advocate had authority and instructions to represent the applicant in the main taxation of bill of costs. Basing on the available evidence, this issue is answered in affirmative. There is abundant evidence to prove beyond doubt that Mr. Nyabiri represented the applicant with his full knowledge and instructions in the main taxation of bill of costs. At paragraph 7 of the applicants affidavit, he conceded that he approached Messrs Rweyongeza & Company, Advocates to contest the said bill of costs filed against him by the respondent. The matter was passed to Mr. Nyabiri, a partner in the Rweyongeza & Company Advocates, Law firm. Then there is a bundle of handwritten instruction notes together with comments on the bill of costs written by the applicant and sent to Mr. Rweyongeza and/or Mr. Nyabiri on how to deal with the matter (see Annexure "R<sub>1</sub>") to the respondents counter affidavit and Annexure "DN2" and "DN3" to the counter affidavit of Mr. Nyabiri dated 3<sup>rd</sup> October, 2009. Infact some of the said handwritten instruction notes were couched in very strong language. For instance the applicants handwritten instruction note dated 25<sup>th</sup> November, 1999 sent to Mr. Nyabiri, advocate partly stated;

*"Mr. Nyabiri*

*I have prepared some comments which I  
want you to go through and transform them*

*into legal arguments aimed at discrediting  
this excessive and wreckless application - - - -  
- - - - - . Please we have to  
destroy this fallacy..."*

In another handwritten instruction note dated 29<sup>th</sup> November, 1999 from the applicant to his advocate, Mr. Nyabiri; it was *concluded as follows:*

"- - - - -"

- (1) Mr. Nyabiri, please read my comments. You may find them useful to be intergraded in your views.*
- (2) Mr. Nyabiri – Please show no mercy on this faked bill of costs. When you are dealing with crooks always adopt the strategy they will understand - crooks can only understand rough handling. See you in Feb. 2000 - - - -"*

The applicant has never denied to have been the author of the alleged handwritten instruction notes. On one side he has been complaining that Mr. Nyabiri betrayed him by passing the hand written notes to his opponent, while on the other side he has been denying to have engaged Mr. Nyabiri to represent him.

Mr. Mbuya, Learned Advocate argued that there was a breach of confidentiality when Mr. Nyabiri disclosed and produced matters which were given in trust. He cited Section 134 of the Evidence Act as amended by Act No. 19 of 1990 and the case of **KAFUMA VS KIMBOWA BUILDING & CONTRACTORS (1974) EA 91**.

I am quite aware that an advocate is under a moral obligation to respect the confidence reposed in him and not to disclose communications which have been made to him in professional confidence. However, the matter before me is quite different. The truth of the matter as borne out by the facts and evidence on record is that it was the applicant who publicly denounced Mr. Nyabiri as his advocate to the extent of swearing a supplementary affidavit in court claiming that Mr. Nyabiri represented him without his authority. Such serious allegation prompted Mr. Nyabiri to defend himself because his integrity and reputation was brought into ridicule. As a result he filed a counter affidavit in which he spill the beans, disclosed and produced those hand written instruction notes before the Kisumu Resident Magistrate Court and now before this court to show that the applicant is not a trustworthy person. The same copies of handwritten instruction notes were submitted by the respondent as shown in his counter affidavit and well canvassed upon by his advocate Mr. Nyangarika.

Mr. Mbuya, Learned Advocate argued that there was a breach of confidentiality when Mr. Nyabiri disclosed and produced matters which were given in trust. He cited Section 134 of the Evidence Act as amended by Act No. 19 of 1990 and the case of **KAFUMA VS KIMBOWA BUILDING & CONTRACTORS (1974) EA 91.**

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I have been wondering, if Mr. Nyabiri was indeed representing the applicant without authority and instruction, how did he obtain the alleged disclosed communication notes. In other words if Mr. Nyabiri was not the applicant's advocate where does confidentiality and trust between them come from.

To conclude this issue, I am certain that the case of **KAFUMA** (supra) is not applicable in this matter. The accusation and allegation made by the applicant and widely amplified by his advocate are unjustifiable and false. I entirely agree with Mr. Nyangarika that the applicant was duly represented in the main taxation of bill of costs and the end result of the taxation was communicated to him by his own advocate, Mr. Nyabiri.

The second question is whether there was conflict of interest. Mr. Mbuya, argued that his client, the applicant visited the offices of Rweyongeza & Company, Advocates and discovered that Mr. Rweyongeza was defending the respondent in his corruption case. In this line of argument both Mr. Mbuya and the applicant appears so admit that Mr. Nyabiri was indeed representing him. Then Mr. Mbuya argued that it was wrong and unethical for Mr. Rweyongeza to represent the respondent in a criminal case knowing that his co-partner Mr. Nyabiri was representing the applicant in the taxation of bill of costs. Mr. Mbuya submitted that once the conflict of interest has been established there is no legal representation. He cited the

case of **KING WOOLEN MILLS LIMITED AND ANOTHER VS KAPLAN AND STRATON ADVOCATES (1990 – 1994) EA – 244 (CAT).**

Was there any evidence to establish any existence of conflict of interest? In his affidavit the applicant claimed that when he visited the offices of Rweyongeza & company he met the respondent and discovered that Mr. Rweyongeza was representing the respondent in a corruption case. Then he felt uneasy and stopped to visit those offices. He did not say whether he decided to withdraw his case from Rweyongeza & Company or just forgo his own case. Be it as it may, in his counter affidavit the respondent stated categorically that at the time when he approached Mr. Rweyongeza on his criminal case, the taxation matter was over. Therefore there was no conflict of interest. He challenged the applicant to produce evidence and prove otherwise. This issue was also repeated in Mr. Nyabiri's counter affidavit, where he stated that the relationship between Mr. Rweyongeza and respondent on the corruption case started in December 2000 at the time when the main taxation of bill of costs was over.

Apart from those allegations from both sides no further evidence was produced by the applicant to substantiate his claim. The registration file number of the said corruption case was not stated; the dates of four alleged visits at the Rweyongeza &



Company offices not disclosed; time when the alleged corruption case was filed or the exact period when Mr. Rweyongeza was engaged was not stated by the applicant. What we have on record is the words from the respondent side that Mr. Rweyongeza started to deal with the respondents corruption case after completion of the taxation matter. In short there is no evidence to prove that the two advocates from Rweyongeza & Company were representing two clients with conflicting interests.

Having said all that and having gone that far, I think it is time now to determine that crucial issue in the application, whether the applicant has shown sufficient cause for the delay in filing his objection in time. The stance of the law is that for an application for extension of time to be granted, the applicant must show sufficient reasons for the delay and hence for granting extension of time – See **ALHAJI ABDALLAH TALIB VS ESHIWAKWE NDOTOKIWEN MUSHI (1990) TLR 109.**

From the above evidence the applicant was aware of his matter in court and was legally represented. The main taxation was finalized on 29th September, 2000 and ruling delivered on 4<sup>th</sup> October, 2000. He was informed about the end result by his advocate. Later after almost five years, the respondent decided to file his application for execution and additional costs incurred by him in the exercise of pursuing his costs against applicant. The applicant

who is a well known public figure and active citizen was nowhere to be seen and served with a notice in order to enter appearance before the court and show cause as to why execution should not be effected. All efforts to serve him ended in vain. Eventually the court granted and ordered substituted service. Yet the applicant was nowhere to be seen. The matter proceeded ex parte, hence the ruling dated 30<sup>th</sup> March, 2006. The applicant never bothered to file an application to set aside ex-parte decision. He was equally late to file his application on objection in terms of rule 5 (1) GN No. 515 of 1991.

I have carefully considered all competing arguments from both sides and I have reached a conclusion that no good or sufficient reason for the delay has been put forward to warrant extension of time. The applicant's effort to shift the blame of his inordinate delay on Mr. Nyabiri, Learned advocate has backfired for no leg to support. Mr. Nyabiri ended business with him back in 2000 when the decision on the main taxation was announced and communicated to him. From that period the applicant never bothered to follow-up his matter in court nor to pay the costs ordered against him to the respondent.

I agree with Mr. Nyangarika, learned advocate that the applicant refused or neglected to respond on both two awarded bill of costs and now, albeit late, he is attempting to lump the decisions

together and assail them together claiming that he was not aware of their existence in court. Furthermore there is no evidence to substantiate the applicants claim that on 16<sup>th</sup> July, 2007 he visited Kisumu Resident Magistrate Court and got information from undisclosed court clerk about his matter in court ready for execution.

Even if one decided to go by the applicants unproved assertion that he became aware of the Taxing Masters decision on 16<sup>th</sup> July, 2007, still he is in difficulties. On 16<sup>th</sup> July, 2007 the applicant was already late to file his objection to this court because the first ruling was delivered on 29<sup>th</sup> October, 2000 while the second ex-parte ruling was delivered on 30<sup>th</sup> March, 2006. Surprisingly from 16<sup>th</sup> July, 2007 the applicant remained silent without taking any prompt action until 4<sup>th</sup> November, 2008 when his advocate filed this application for extension of time. What actually caused the applicant to stay put for another solid year or more without taking any action is best known to himself. Nonetheless, on the part of the court, such unexplained laxity and inaction can not be tolerated. In the case of **Dr. ALLY SHABHAY VS TANGA BOHORA JAMAAT (1997) TLR – 305**, It was emphasized that whilst procedural rules were meant to facilitate and not always defeat justice, there was no warrant for relaxation in the applicants favour on the requirements of the rules.

It was also noted that; quote,

*"Those who come to courts of law must not show unnecessary delay in doing so; they must show great diligence."*


The last issue is the complaint by the applicant that the additional order of the Taxing Master dated 30<sup>th</sup> March, 2006 has included an element of interest which was never awarded or ordered by a Judge and the additional costs which were allegedly incurred after the Election petition was withdrawn. It appears from this argument, the applicant was implying the likelihood of success of his objection if the application to file it out of time is granted.

In the foremost, in law, the Taxing Master have discretion to award extra costs incurred by the decree holder which have been caused by the conducts of the judgement debtor. Secondly, the position of the law is that, where there is no sufficient explanation for inordinate delay in taking required steps, it is incorrect to look for sufficient reasons in the merits of the case because the prescribed period of limitation is to all intended objections including meritorious objections. Thirdly, in an application for extension of time the court is required to look into whether the applicant has showed sufficient causes for the delay and not to predetermine the appeal, reference or objection itself. See the cases of **MOHAMEDI SELEMANI vs ALLY MOHAMED HAMZA – CIVIL APPLICATION NO. 1 OF 1997 (CA) MWANZA REGISTRY** (Unreported); **SHANT VS THE**

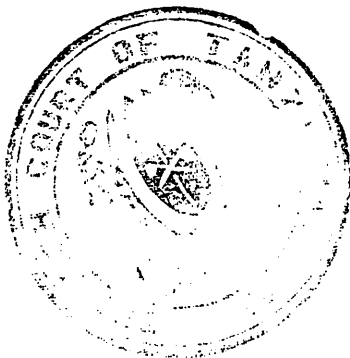
**CHAIRMAN, BUNJU VILLAGE GOVERNMENT AND 11 OTHERS  
– CIVIL APPEAL NO. 147 OF 2006 (CA) DAR ES SALAAM  
REGISTRY – (Unreported).**


In this application the applicant has failed totally and completely to show any sufficient reason for his inordinate delay to file his objection or reference in time.

For the above reasons this application is devoid of merits. It is accordingly dismissed with costs.

  
**M.S. SHANGALI**  
**JUDGE**  
**13/11/2009**

Ruling delivered todate 13<sup>th</sup> November, 2009 in the presence of the applicant Mr. Shango in person and Mr. Nalaila Kiula, respondent in person.



  
**M.S. SHANGALI**  
**JUDGE**  
**13/11/2009**