

TANZANIA / JUDGMENT

elizabeth temu vs felix kitipo temu 3 others 2023 tzhc 23499 15 december 2023

COURT
TZHCDECIDED
15 December 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DAR ES SALAAM DISTRICT
REGISTRY AT DAR ES SALAAM MISC. CIVIL APPLICATION NO. 214 of 2023 (Arising from Bill of
Cost No. 92 of 2023) ELIZABETH TEMU.....APPLICANT VERSUS FELIX
KITIPO TEMU.....1ST RESPONDENT MAGDALENA MARCO
TEMU.....2ND RESPONDENT ROBERT MARCO TEMU.....3RD
RESPONDENT CAESA MARCO TEMU.....4TH RESPONDENT

RULING

POMO, J In the instant Application, the Applicant, ELIZABETH TEMU, seeks for enlargement of time to lodge a Reference against her Bill of Cost No.92 of 2022 which was struck out on 12th April 2023, Hon. S.B. Fimbo, Deputy Registrar for want of prosecution. The Application is predicated under Order 8 (1) of the Advocate Remuneration Order 2015, making prayers thus: -

1. That this Honorable Court be pleased to extend time within which the applicant is to file an application for Reference vide the order of striking out the bill of cost 1 No. 92 of 2022 filed by the applicant but struck out by the Tax Officer Fimbo, DR on 12 day of April 2023
2. Any other order (s) / relief the Honorable court may deem fit to grant
3. Cost of this application An affidavit deponed on 8th May, 2023 by Mr. Joseph Sang'udi, learned counsel for the Applicant is in support of the Application. In it, it is stated under paragraph 3 that on 12th April, 2023 when the bill of costs came for hearing the 1st and 4th respondents were absent for want of service. Further, it is averred under paragraphs 4 and 5 of the affidavit, that reason for not serving the said respondents was due to short interval of time given by the court for her to serve them the serving time which fell within public holidays and the 4th respondent resides in Arusha. According to him, refusal by the court to adjourn the matter and thereby striking out the Applicant's bill of costs instead of proceeding ex-parte was and remains illegal. The application is resisted by the respondents through a counter affidavit deponed by Robert Marco Temu, the 3rd Respondent. It is averred under paragraph 7 of it that the Applicant willfully neglected to serve the other respondents. In their further response, it is stated under paragraph 8 that the bill of costs when it was struck out for want of 2 prosecution the court went on granting her fourteen

(14) days within which to refile it. That, a court cannot proceed ex-parte against a party to a proceeding who has not been served, this is paragraph 9 of the respondents' counter affidavit. When the Application was called on for hearing, the Applicant enjoyed legal representation of Ms. Jacqueline Rweyongeza, learned counsel from RK RWEYONGEZA & CO ADVOCATES while Mr. Novatus Michael Muhungwa, learned counsel from ADVOCATE INK LAW CHAMBERS represented the respondents. I ordered the application be disposed by way of written submissions. Submitting, Ms. Jacqueline adopted the affidavit accompanying the Application and argued that the Applicant didn't refile the bill of costs as she opted for a reference in this court against the taxing master decision striking out the Applicant's bill of costs because the decision is tainted with illegality thus filed the instant extension of time Application because the twenty one (21) days' time provided under Order 7(2) of the Advocates Remuneration Order, 2015 within which to file reference expired. That, in striking out the bill of costs, the taxing master contravened Order 68 of the Advocates Remunerations Order, 2015 in that it does not allow a bill of costs to be struck out instead directs the court to proceed ex-parte. Following such allegation of existence of 3 illegality, as good cause for extending time, she cited the case of Ezrom Magesa Maryongo versus Mohamed Said and Another, Civil Application No. 227 of 2015 CAT at Dar es Salaam in which is cited the case of VIP Engineering Limited and 2 Others versus Citibank Tanzania Limited, Consolidated Reference No. 6, 7 and 8 of 2006 explaining illegality as good ground for extension of time. Concluding her submission, Ms. Jacqueline asked the court to grant the application. Replying, Mr. Muhangwa adopted the counter affidavit and argued that the applicant has failed to demonstrate sufficient cause for the delay which is the requirement set under Order 8(1) of the Advocates Remuneration Order, 2015. His contention is that the applicant has failed to account for each day of her delay. That, the decision intended to be challenged was handed down on 12th April, 2023 while this application was filed on 16th May, 2023. That, excluding twenty one (21) days within which to file reference, there exists 13 days not accounted for. To support his stance of accounting each day of delay, Mr. Mhangwa cited the case of Zuberi Nassor Moh'd versus Mkurugenzi Mkuu Shirika la Bandari Zanzibar, Civil Application No. 93/15 of 2018 CAT at Zanzibar and Lyamuya Construction Company Ltd versus Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010 CAT at Arusha 4 (Both unreported). He then prayed the Application be dismissed for want of merit. In her rejoinder, Ms. Jacqueline basically reiterated her submission in chief insisting that, in terms of Order 68 of the Advocates Remuneration Order, 2015, the Taxing Officer had no power either to dismiss or strike out the Bill of costs for non-appearance of the Applicant or both parties. The power vested in the Taxing Officer is that of proceeding ex-parte. Insistent of the allegation of illegality as good ground for extension of time, Ms. Jacqueline cited the case of The Principal Secretary, Ministry of Defence and National Service versus Devram Valambia [1991] TLR 389. This marked the end of submissions by the parties. Having considered both sides submissions, the application together with the supporting affidavit and the counter affidavit as well, the issue for determination is whether the Application is merited. In an application for extension of time to file a reference against the Taxing Officer's decision in Bill of Costs, a

party applying for it must demonstrate sufficient cause/reason for the delay. This is per Order 8(1) of the Advocates Remuneration Order, 2015. It reads thus: - 5 “Order 8(1) - The High Court may, subject to Order 7 extend the time for filing a reference upon sufficient cause”. End of quote In Benedict Mmello versus Bank of Tanzania, Civil Appeal No. 12 of 2002 CAT at Dar es Salaam (Unreported) the court of appeal had this to state at pages 5 - 6: - “It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause”. End of quote Guided by the above settled principle, I have traversed into the affidavit supporting the Application containing eight (8) paragraphs, and my findings in all the paragraphs is that nothing is said on what prevented the Applicant to prefer a reference against a Bill of Costs No. 92 of 2022 within twenty (21) days’ statutory time provide under Order 7(2) of the Advocates Remunerations Order, 2015 from 12th April, 2023 the date on which it was struck out. The herein Application was filed on 16th May, 2023 being 13 days after the expiry date of allowable 21 days of filing reference. In regards to these 13 days of delay, nothing on them is said by the Applicant. 6 The law as it stands is, a party seeking indulgence of the court in and application for extension of time a duty is cast on him to account for each day delayed. See William Kasanga versus Republic, Criminal Appeal No. 79/01 of 2020 CAT at Dar es Salaam; Vedastus Raphael versus Mwanza City Council and 2 Others, Civil Application No. 594/08 of 2021 CAT at Mwanza; Airtel Tanzania Limited versus Misterlight Electrical Installation Co. Limited and Another, Civil Application No. 37/01 of 2020 CAT at Dar es Salaam and Bushiri Hassan versus Latifa Lukio Mashayo, Civil Application No.03 of 2007 (All unreported) to mention but a few. For instance, in the Bushiri case (supra), it was held by the Court of Appeal thus: “...Delay of even a single day, has to be accounted for, otherwise there would be no point of having rules prescribing period within which certain steps have to be take”. End of quote Now, as alluded above, from the applicant’s affidavit, there isn’t any account for the delay in filing reference. Instead, the only ground given by the Applicant is the allegation of existence of illegality of the decision intended to be challenged to the effect that, in terms of Order 68 of the Advocates Remunerations Order, 2015 the Taxing Officer ought to proceed ex-parte instead of striking out her Bill of Costs No. 92 7 of 2023. According to her, this is an illegality sufficient to extend time sought. Does the above allegation amount to illegality? I will resolve it. What constitute an illegality was stated by the Court of Appeal in the case of Charles Richard Kombe Vs Kinondoni Municipal Council, Civil Reference No.13 of 2019 CAT at Dar es Salaam (unreported). At page 7-8 the court had this to state in respect of illegalities: “The term illegality as defined in Black’s Law Dictionary 11th Edition, page 815, means: “1. An act that is not authorized by law

2. The state of not being legally authorized” The above definition is consistent with Mulla’s Code of Civil Procedure where the learned authors wrote at page 1381 that: - “It is settled law that where a court has jurisdiction to determine a question and it determine that question, it can not be said that it has acted illegally or with material irregularity, merely because it has come to an erroneous decision on a question of fact or even of law”. The Court of Appeal

went on holding, at page 8, that: - 8 “From the above definitions, it is our conclusion that for a decision to be attacked on ground of illegality, one has to successfully argue that the court acted illegally for want of jurisdiction, or for denial of right to be heard or that the matter was time barred”. In Lyamuya Construction Company Ltd Vs Board of Registered Trustees of Young Women’s Christian Association of Tanzania, Civil Application No.2 of 2010 CAT at Arusha (Unreported)] the Court of Appeal, at pp.8 – 9 had this to state: - “Since every party intending to appeal seeks to challenge a decision either on points of law or fact, it cannot in my view, be said that in VALAMBHIA’s case, the Court meant to draw a general rule that every applicant who demonstrate that his intended appeal raises points of law should as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law, must be that “of sufficient importance” and I would add that it must also be apparent on the face of the record, such as the question of jurisdiction, not one that would be discovered by a long drawn argument or process”. [See also: Ngao Godwin Losero versus Julius Mwarabu, Civil Application No.10 of 2015 CAT at Arusha and Omary Shabani Nyambu versus Dodoma Water and Sewerage Authority, Civil Application No. 146 of 2016 CAT at Dar es Salaam (both unreported)] 9 Applying the decisions of the Court of Appeal (supra), in my view, the Applicant’s allegedly illegality of the impugned decision doesn’t meet the test and instead it is a normal ground which could conveniently be raised as ground of appeal. Therefore, the same can not be used to warrant this court exercise its discretion in extending time to lodge reference out of time against the Bill of Cost No.92 of 2023 In the upshot, I find the application devoid of merit and dismiss it. I make no order as to costs It is so ordered Dated at Dar es Salaam this 15th day of December, 2023 MUSA K. POMO JUDGE 15/12/2023 10

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