

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY OF MOSHI

AT MOSHI

CIVIL REFERENCE APPLICATION NO. 3 OF 2022

(Arising from proceedings and orders in Misc. Civil Application No. 3 of 2022 before Hon. O. H. Kingwele, DR)

THE MOSHI HOTEL 2010 LIMITED APPLICANT

Versus

SALIM JUMA MUSHI T/A DEXTER ATTORNEYS..... RESPONDENT

RULING

28th August & 16th October, 2023

A.P.KILIMI, J.:

In this application, the applicant hereinabove has moved this court by way of chamber summons under Rule 8 (1) and 7 (1), of The Advocates Remuneration Order, 2015, G.N 263 of 2015, and Section 95 of The Civil Procedure Code, Cap 33 R.E 2019 and any other enabling provision of the Law, praying for the following orders;

1. That this honourable court be pleased to extend time within which to present the reference application.

2. This Honourable Court be pleased to declared that the purported Remuneration Agreement entered between the applicant and the Respondent was illegal, void, fraudulently procured and therefore unenforceable.
3. That, this honourable court be pleased interfere with and correct the findings of Hon. Deputy Registrar dated 14th February, 2022 for they were procured illegally.
4. That this court be pleased to examine, revise, quash, and set aside the proceedings and resultant orders of the Deputy Registrar dated 14th February, 2022 in Misc. Civil Application No. 03 of 2022 at the High court of Moshi at Moshi, on the ground that the said proceedings and resultant order is tainted with gross illegality and procedural irregularity which occasioned failure of justice.
5. That this Honourable Court be pleased to interpret the point of law to wit whether the agreement for enforcement of Application for Remuneration ought to be certified and all other accompanying annexures.
6. Cost of this application.
7. Any other reliefs Honourable Court deem just and fit to grant.

The application has been supported by affidavit of one Joan Auye Mrema who introduced himself at paragraph two as a director and shareholder of the applicant hereinabove.

The first prayer above for extension of time was argued earlier separately by parties in this court whereas on 28th August 2023 this court ruled out granting extension of time for this application be heard substantively on other remaining prayers.

Before I proceed, I find appropriate first to recap the facts gave rise to this application discerned from the record, which are simple and straight forward; it was the respondent above was engaged by the applicant hereinabove to sell Moshi Hotel (hereinafter "the property") which by then has a lien with Tanzania Investment Bank "TIB", the respondent manage to dispose it, after being purchased by Ms Setway Investment Company Ltd. Consequently, the respondent raised an invoice of Tshs. 141,603,540/= for the services done to affect the said sale. Therefore, seeking to settle his fees out of the proceeds of sale of the Respondent's Hotel. The respondent filed an application before the taxing officer of the High Court of Moshi at Moshi under Order 5(1) and (2) of the Advocates Remuneration (GN 264) of 2015, Sections 68(C) and 95 order XXXVII Rule 8(1) and Order XXXVI Rule 6(1) (a) of the Civil Procedure Code, Cap. 33 R.E. 2019.

Subsequently the hearing of the application above the Taxing Officer on 14th February 2022 ordered the branch manager of TIB Development bank to remit Tshs. 141, 603,540/- out of balance of Tshs. 455,838,415.88 of the proceed of sale of Moshi Hotel, He further ordered the said amount Tshs. 141,603,540/= be credited to Account No.0150391895701 by the name Dexter Attorney at CRDB Arusha Branch. Thereafter issued Garnishee

Order Absolute to TIB. But TIB responded that to the Taxing officer by a letter with Ref.no. TIB/TH/6067/VOL.IV/19 dated 17 February, 2022 informing him that it does not operate any account and therefore said money was not kept therein.

This caused the respondent to pray for amendment of the application to include the Bank responsible. The same was done and after heard the amended application, the Taxing officer issued another ruling dated 23rd February 2023 and ordered this time The Managing Director TPB Bank PLC bank to withdraw Tshs.141,603,540/- out of balance of Tshs.455,838,415.88 of the proceed of sale of Moshi Hotel, which by then was held at Account No. 420410000032, then the same was ordered be credited to Account No.0150391895701 by the name Dexter Attorney at CRDB Arusha Branch.

At the hearing of the said remaining prayers above, Mr. Merzedeck Hekima learned advocate appears for applicant while Mr.Ngereka Miraji learned counsel appears representing the respondent. The hearing was by way of written submissions, both counsels complied effectively, however since each party filed evidence by way of affidavit in support and in oppose of this application, I will refer to their submissions when the need arises.

Having considered the prayers above, for purpose of convenient I will start with fourth prayer which the applicant is alleging the proceedings and resultant order is tainted with gross illegality and procedural irregularity which occasioned failure of justice, thus pray the same be quashed.

Starting to issue of service to the applicant, Mr. Hekima submitted that the sole Director of the applicant is one Joan Auye Mrema was not served with the application, further he refuted the service effected to one Viv Mrema to be cooked, but he added that even if she was properly served, she neither a shareholder nor director of the Company for her to qualify taking service on behalf of the company. Therefore, Joan Auye Mrema the sole surviving director and shareholder was denied right to be heard. To buttress his argument the counsel referred the case of **Efrasia Mfugale vs Andrew J. Ndimbo & Another** [2021] TZCA 164 (TANZLII) and **Registered Trustees of Movimento Popula De Libertacao De Angola (MPLA) vs Hamisa Mohsin & Others** [2022] TZCA 759 (TANZLII).

Mr. Hekima further contended that the court did not adhere procedure of issuing of garnishee absolute since the law requires first to issue a

garnishee nisi before garnishee absolute. To fortify this referred the case of **Mogas International Ltd and 1 Another vs Usangu Logistics Ltd** [2021] TZHCComD 3252 (TANZLII). The counsel also added that, the Applicant was not notified the date of Ruling and date of garnishee absolute hence the whole proceeding and resultant order of the whole application is null and void for contravening Order XX Rule 1 Order XXI rule 9, 20 and 46 of the Civil Procedure Code, also invited me to see the cases of **Omary Shabani Nyambu vs Dodoma Urban Water Supply and Sewage**, Civil Appeal No 303 of 2020, CAT at Dae es salaam (unreported) and **Cosmas Construction Co Ltd vs Arrow Gannets Ltd** (1992) TLR 127.

In respect to advocate appeared on behalf of applicant at the trial, Mr. Hekima submitted that sole serving director and shareholder one Joan Auye Mrema, has never issued letter of engagement nor passing resolution to appoint one Hellen Mauna to represent her in any case, therefore she had no instruction to make representation in court. To bolster his argument the counsel urged me to consider the case of **Simbo Yona Laban Nnkya vs David Sewa and Two Others**, Civil Appeal No. 42 Of 2018, CAT at Dar es salaam (Unreported).

Responding to above submissions, Mr. Miraji contended that, the application filed by the Respondent was not an application for taxation as submitted by the counsel for the Applicant, while the same was filed under Order 5(1) of Advocate Remuneration Order (supra) which was for enforcement of the remuneration agreement between the two and not application for taxation as submitted by the counsel for the Applicant, therefore the counsel urged this court to distinguish the cited provision because has misplaced.

In respect to service and advocate appeared in court. Mr. Miraji contended that the application was not determined *ex-parte* because the Applicant was dully represented by a qualified advocate. He further argued that the application was served to one of the directors of the Applicant one Viv Mrema, and this was pursuant to the minutes of the meeting and the resolution of respondent's company which passed and resolved that one Viv Mrema to fill the vacancy left by the late Melleo Auye Mrema who was the director, therefore it was served to proper person. Hence the counsel said the applicant being represented was dully heard, thus all case above saying the right to be heard was denied are highly distinguishable.

In respect to illegality, Mr. Miraji contended that throughout his submissions the applicant failed to point out any illegality which is contrary to the principle of the law and that he who alleges must prove.

I have considered the above rival submissions and having scanned the trial court record, one issue appears to me very convenient for the disposal of this matter, is whether at the trial court, the proceeding was vitiated with procedural irregularity which occasioned failure of justice on part of the applicant. And for this purpose, I wish to reiterate the case cited above by the applicant of **Registered Trustees of Movimento Popula De Libertacao De Angola (MPLA) vs Hamisa Mohsin & Others** (supra) wherein the court referred it earlier case of **Halfani Sudi vs Abieza Chichili** [1998] TLR 527 and said at page 15 that;

"a court record is a serious document that cannot be impeached lightly. For there is always a presumption of its sanctity to the effect that it accurately represents what happened in court."

Having the above in mind, according to the record, it is true as per annexure SJM-1 to the counter affidavit filed by the respondent in this court

it shows that one Viv Mrema signed the chamber summons which in my view acknowledged to be served. The question is whether was one of the directors and was proper to be served. Again, according to para 10 of the counter affidavit filed in this matter annexure thereto shows that on 29th day of July 2019 the existing share holder and Director Joan Mrema had a company meeting with administrators of the estate of the late Melleo Auye Mrema who was a co-director, in that meeting they appointed Viv Mrema to fill the vacancy left by the late Melleo Auye Mrema in the office of Director, thus the said meeting made ordinary resolution of the company on the same date and under para 2 of the said resolution the above was explicitly stated. From the foregoing which was shown through respondent' s counter affidavit and not refuted by the applicant, I am settled that Viv Mrema was appointed to be a director of the said company. Therefore, the above fact that she signed a summons, then effective service was made, and therefore the applicant was fully informed.

Furthermore, according to the handwritten record at the trial, on 22nd February 2022 one Hellen Mahuna appeared as advocate for the applicant (respondent therein) and said;

"Ms. Hellen Mahuna; we have served with the application. We do not intend to challenge the application the court to order the manager of the bank to pay the applicant as prayed."

Then after rejoinder by Mr. Miraji on above, the court proceeded to order Ruling to be delivered on 23/02/2022. As warned above by the court, that court record should not be impeached. I am mindful Advocates are officers of the court. At para 10 of the counter affidavit filed by the respondent deposed that the above counsel was duly instructed by Viv Mrema as Director duly appointed as per resolution stated above. I have considered above in relation to the disposed applicant allegation. I am of considered opinion the respondent has proved that the said advocate was duly instructed and it was proper to appear before the Taxing Officer representing the respondent, therefore the allegation by the applicant that no advocate was instructed fails forthwith.

In respective to the issuance of garnishee order absolute, garnishee proceedings are applicable in Tanzania based on common law procedure in terms of section 2 of Judicature and Application of Laws Act Cap. 358 R.E.

2019. The procedure and practice in our jurisdiction upon receipt of the application and ruled out for execution, the court has to issue a notice (garnishee order nisi) to the judgment debtor's creditor (the garnishee) calling upon him/ her within the period specified in the notice either to pay into Court the said amount or to appear before the Court in Chambers and show cause why he should not be ordered to do so. Then, if nothing has done by the judgment debtor subsequently the garnishee order absolute is issued. (See item 16 of Tanzania Execution Guidelines 2020)

Therefore, the rationale of garnishee order nisi is to attach the account and further give an opportunity to the judgment debtor to do something, either to contest or pay by other means before the last order which is absolute to the attached account. It therefore in my view, the above has an exception, under the circumstances of this court, where the Taxing Officer believed that the respondent have consented, I am settled that did not occasion any failure of justice.

In respect to irregularity in the proceeding, I have checked the proceeding at the trial, although the counsel learned Heleni Mahuna rightly attended the trial as pointed above, what she stated as quoted above are submission from the bar, therefore is not evidence according to the law. The

Court of Appeal of Tanzania in the case of **Bruno Wenceslaus Nyalifa vs Permanent Secretary, Ministry of Home Affairs and the Attorney General**, Civil Appeal No. 82 of 2017 held that:

"Submissions are not evidence submissions are generally meant to reflect the general features of a party's case. They are elaborations on evidence already tendered. They are expected to contain arguments and the applicable law. They are not intended to be a substitute for evidence."

(See also **Registered Trustees of the Archdiocese of Dar es Salaam versus The Chairman, Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 (unreported).

It has been observed by the court, an advocate being a professional, is also an officer of the Court and plays a vital role in the administration of justice. An advocate is therefore expected to assist the Court in an appropriate manner in the administration of justice. Indeed, one of the important characteristics of an advocate is openness in different ways to

share to the court the relevant information or message which comes to his attention either from his client or his colleagues concerning the handling of the case regardless of whether he has been requested by the court to do so or not. (See **Mohamed Iqbal vs Ezrom M. Maryogo** [2020] TZCA 1831 (TANZLII)).

I have deeply perused the trial court record, I am satisfied that the said advocate did not file any counter affidavit, in my opinion by not doing so, many questions remained unanswered, such as whether she was instructed by the respondent to concede the prayer and other issues pertaining to amount to be paid. Therefore, in view of the above law, I am of considered opinion her admission is nothing as if nobody conceded. Therefore, it was not proper for the taxing officer to rely on her submission to reach the decision of this matter. At last paragraph of page 4 of the typed ruling the Taxing Officer had this to say;

"I have considered the application; the annexed affidavit and annexures. I have equally considered the conceding respondent towards the application."

According to the excerpt above, it is undisputed that the Taxing Officer used the said submission to reach the decision. Therefore, as observed above, since the applicant is disputing the said grant of application, then the applicant's counsel submission cannot be taken to be words from the applicant without affidavit to prove the same. Thus, I am of settled view this was a flaw which occasioned failure of justice.

Another anomaly I can see from the record, the said ruling of Taxing Officer dated 23rd February 2022 does not show circumstances of its deliverance, I may say, it does not show whether it was in chamber or open court, also it does not show whether parties to the case was present or not. I think the law is very clear, Order XX rule 1 of the Civil Procedure Code Cap.33 R.E.2019 (the CPC) provides:

"The Court, after the case has been heard, shall pronounce judgment in open court, either at once or on some future day, of which due notice shall be given to the parties or their advocates".

[Emphasis added]

In my view, the fact that the wording above is couched in mandatory terms, my interpretation is that the court must record the presence or absence of parties. In respect to notice to parties to know the ruling when it will be delivered is not the case in this matter, since they were present the last day before the above ruling. But the fact that the said ruling does not show the above requirements, It is therefore a rebuttable presumption that the said Ruling was delivered in the absence of the parties which is contrary to the law above, since the opposite is not proved, I am settled it is not effective, operative and a valid Ruling.

In the circumstances, and basing on above stated flaws, I find merit in this application and I proceed to allow it forthwith. Furthermore, I find the same are sufficient to dispose of this application, thus I find no need to consider and determine the remaining allegations by the applicant.

In the final analysis, I invoke revisional powers vested in this Court, and I thus order the proceedings of the Taxing Officer hereby nullified and consequently its Ruling and orders thereon is hereby quashed and set aside.

However, in contemplation of the above, I find suitable for the respondent if he still wishes is allowed to file a fresh application to enforce his remuneration agreement entered with the applicant if any within thirty (30) days from the date of this ruling.

After considering the circumstances of the case, I order each party to bear its own costs. It is so ordered.

DATED and delivered at **MOSHI** this 16th day of October 2023.



X 

JUDGE
Signed by: A. P. KILIMI

Court: - Ruling delivered today on 16th October, 2023 in the presence of Mr. John Mushi, Advocate holding brief of Ngereka Miraji for the Respondent. Mr. Melkizedeck Hekima for applicant also present.

Sgd: A.P. KILIMI
JUDGE
16/10/2023