

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL REFERENCE NO. 20 OF 2023

TRANSIT LIMITED 1ST APPLICANT

NISCHAL RAJEY2ND APPLICANT

Versus

AZIM ALARAKHIA HOODA (*Holder of power of Attorney of NIZARAJI*

HOODA)..... **RESPONDENT**

RULING

30th October & 23rd November 2023

MWANGA, J.

The applicants, **TRANSIT LIMITED** and **NISCHAL RAJAY** are discontent with the order of the taxing master Hon. S.B Fimbo DR dated 10th July 2023 in Bill of Cost No. 108 of 2023. Henceforth, this application is brought by chamber summons supported by the affidavit of **Nazario Michael Buxay** seeking to set aside the said order and for the court to hear the matter on merit before another Taxing Officer. In essence, the chamber summons contained the prayers that;

- i. This court be pleased to interfere and vary the order of this court by taxing officer Hon. Deputy Registrar S.B Fimbo made on 10th Luly, 2023 by striking out the taxation Cause No. 108 of 2023 on the ground of being incompetent.
- ii. The order striking out taxation Cause No. 108 of 2023 be reversed and set aside and taxation cause be ordered to proceed before another taxing master.
- iii. The cost of this application be paid by the respondent.

This application is brought under orders 7(1) and (2) of the Advocates Remuneration Order GN. No. 264 of 2015. The respondent filed a counter affidavit protesting the application stating that the taxation Cause No. 108 of 2023 was defective in its nature, and nothing wrong was done by the taxing master.

The contentious issue leading this application is that the respondent failed to comply with the mandatory provision of order 55 of the Advocate Remuneration Order, GN. No. 264 of 2015. The Bill of Costs before the Taxing master contains items that were not drawn on a sequence of day, month, and year. Also, Part of the items in the bill of costs lack dates of the particulars of the items charged.

When the matter came for hearing, the applicants were represented by Ms Josepha Tewa. The respondent never entered appearance, hence the application for reference was heard ex-parte.

The counsel Ms. Yosepha contends that the Taxing Master was supposed to bill the tax presented since it was timely filed and the Taxing Master was supposed to deal with the items that were properly dated and disregard the undated ones, instead of striking out the whole bill of costs. The counsel cited the case of **Juma Likobora and others versus Tanzania Medicine and Medical Devices Authority (TMDA)**, Misc. Application No. 642 of 2020.

I have considered the submissions from Ms. Josepha's counsel for the Applicants. It is my view that the Hon. Deputy Registrar properly exercised her powers vested under the law. It is because, Order 55 of the Advocate Remuneration Order, G.N. No. 264 of 2015 provides for the format required in filing the bill of costs. The relevant order reads;

*"55.-(1) Bills of costs **"shall"** show the case and title of the name concerned and **shall** be prepared in five columns, as follows-*

*(a) the first- or left-hand column **for dates showing year, month, and days;***

- (b) the second for the number of items;*
- (c) the third for the particulars of the service charged for;*
- (d) the fourth for the professional charges; and*
- (e) the fifth for the taxing officer's deduction.*

(2) Disbursements shall be shown separately at the foot of the bill.

(3) Fees for attending taxation shall not be included in the body of the bill, but the item shall appear at the end, and the amount left blank for completion by the taxing officer”.

The above provision can be given its interpretation under the provision of Section 53(2) of the Interpretation of the Law Act, Cap. 1 (R: E 2002) which defines the word “**shall**” to mean;

*“Where in a written law **the word "shall"** is used in conferring a function, such word **shall be interpreted to mean that the function so conferred must be performed**”*

Given the above provision, it is obvious that the word shall as used in the provision connotes a mandatory function. In that regard, there is a need to comply fully with the requirements of the law under order 55 of G.N. No. 264 of 2015.

To cement the position above, the law is settled that once the written law provides for the format of how a particular document should be drafted that format should be fully complied with, and failure to do so the matter is subject matter shall be struck out. That is the position in the case of **DPP versus Sendi Wambura, Kasongo Otiang'a, Elisha Albertus, and Charles Marwa**. Cr. Appeal No. 480/2016 (CA-Unreported) where it was held that;

"If there is prescribed form/format on how the document should be drafted that format should be observed failure to do so that document should be struck out"

Because of the above case cited, I am inclined to state that the Hon. Deputy Registrar exercised her powers properly and according to law. Hence, this ground of Reference fails.

In the 2nd ground and 3rd grounds, the applicant's counsel submitted that the taxing master declared item 8 to 19 as undated while it can be seen that, item 11 to 14 is the disbursement where the dates were shown in item 3, 4, and 5. Also, she submitted that the taxing officer did not consider that item 19 is the future event and item 15 to

18 is secretarial expenses such as printing and typing, therefore cannot be dated.

With due respect, I find the arguments of the applicant's Counsel not meritorious. From the records, specifically on the Bill of Cost as annexed in the application for reference, it is an undisputed fact that items 8 to 19 are undated. As the law requires, dates showing year, month, and days are mandatory, failure to do so in the application is incurably defective. The argument that items 11 to 14 are disbursement where the dates are shown in Items 3,4 and 5 is misapplied because item 11 to 14 only shows fees that were supposed to be paid and item 3, 4, and 5 show that is just a mere visitation. It does not indicate if the documents were filed on that particular date or not.

So, it is my humble view that the applicant's Counsel has to follow the dictates of Order 55 of the Advocate Remuneration Order, GN. No. 264 of 2015 in filling Bill of Cost. The counsel cannot hide behind the dates of other items, since the same items do not disclose the actions done in full.

That said and done, the lamentations of the applicant's Counsel in the 2nd and 3rd grounds of reference as seen in the Affidavit are unmerited.

For the 5th ground, the counsel submitted that failure to indicate the date is not a ground to strike out the whole bill of cost because the applicants were awarded cost before Nkwabi, J. in Misc application 514 of 2023. According to her, once a written law provides for the format of how a particular document should be drafted that format should be observed. This court is aware that the other items were dated but the law needs to be complied in fully and failure to do so renders such document defective.

I am alive with the oxygen principle which was introduced to our jurisdiction through the Written Laws (Miscellaneous Amendments) Act No. 8 of 2018. The principle encourages courts to consider substantive justice as opposed to legal and procedural technicalities. However, this principle cannot be invoked blindly, especially in situations where noncompliance goes to the root of the case. It is said so because failure to put the date of some items in the bill of cost, such bill of cost is bad in law. Having said that, the applicant failed to comply with a mandatory provision of the law, hence, the application is bound to fail.

In the upshot, this application is not meritorious and I am bound to dismiss it.

Order accordingly.



H. R. MWANGA

JUDGE

23/11/2023