

IN THE HIGH COURT OF TANZANIA

AT MBEYA

CIVIL REFERENCE NO. 5 OF 2013

(Reference from the Decision of the Taxing Master in Bill of Costs No. 13/2010)

DR. LWITIKO MWAKALUKWA & 25 OTHERS APPLICANTS

VERSUS

MBEYA CEMENT COMPANY LTD RESPONDENT

RULING

Date of Last Order: 21/07/2015

Date of Ruling: 12/08/2015

A.F. NGWALA, J.

This is an Application for an order to reverse the Taxing Masters order dismissing the incompetent bill of costs and substitute thereof an order striking out. The said order was made in the decision of n 19th September, 2013.

Mr. Herbert Nyange, the senior learned counsel contended that a matter that is incompetent cannot be dismissed; it can only be struck out as held in the case of Willow Investment versus Mbombwe Ntumba and others [1997] TLR 93. Mr. Nyange insisted that, since the matter before the Taxing Master was incompetent the Taxing Master was wrong to dismiss the application because the applicants will have no right to bring a fresh matter if they wish to do so.

In reply Mr. Tluway, learned advocate who represented the Respondent submitted that the Taxing Master was right to do so since the bill of costs that was filed by the applicants was incompetent, because it was not supported by vouchers and or receipts as required by Rules 4 and 55 of the Advocates Remuneration and taxation of costs Rules, 1991 (G. N. 515 of 1991). It was his argument that the Taxing Master had the power to dismiss the said application for Bill of costs because it was incompetent as aforesaid.

In view of the facts in the brief submissions by the learned counsels and the records which I have perused thoroughly, it is quite clear as rightly submitted by Mr. Nyange that an incompetent application should have been struck out. It should be observed that the court is not properly moved when a matter before it is incompetent for whatever reasons and therefore it cannot determine it on merits to warrant a dismissal order. When a matter is incompetent before a court of law and the court is satisfied that there is a curable error or irregularity which renders the suit incompetent, the only remedy for such proceedings which are incompetent, or not properly before the court is to struck off the application or suit. This is a clear position held in the case of **Willow Investment Vrs. Mbombo Ntumba and two others [1997] TRL 93** at page 94 that:-

"The Application was accordingly incompetent and could not be heard. Application struck off".

In the present matter, as the Taxing Master had correctly found that the Bill of costs was not legally compliant, and he could not determine, he ought to have done exactly as what the Court of Appeal of Tanzania did in the case of **Willow Investment**, Supra. Since the Taxing Master had found the Bill of costs incompetent; and he did not hear or determine it on merits, he should have said in the last words of his Ruling. *“In view of the incompetence of the Bill of costs before the court, I hereby order it to be struck off or struck out”*.

It is on those bases that I agree in toto with Mr. Nyange’s submission that the holding of the Taxing Master which dismissed the Bill of costs on the ground of incompetency was wrong because the court had not determined the taxation on merit.

In the final event, as the said Bill of costs was found to be incompetent. Accordingly the prayer to reverse the dismissal order of the Bill of costs and substitute thereof with an order of striking it out is granted with costs. That is the applicants are granted the costs of this application.



A. F. Ngwala
A.F.NGWALA
JUDGE
12/08/2015