

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

CIVIL REFERENCE NO. 4 OF 2019

(C/F High Court of Arusha, Taxation Cause No. 28 of 2018)

PARSEKO VICENT KONE.....APPLICANT

VERSUS

MIKE WILHELM KITWANA (as a lawful attorney of FLOYD

VERNON HAMMER and KATHERYN MARIE

HAMILTON).....RESPONDENT

RULING

19/05/2020 & 30/07/2020

GWAE, J

The applicant above has brought this application under order 7 (1), (2), (3) and (4) of the Advocates Remuneration Order, 2015 seeking the following orders;

- i. That, this Court be pleased to determine the validity of the dismissal order made on the 29th April, 2019 by Hon. J. F. Nkwabi (Taxing Officer) in which Taxation Cause No. 28 of 2018 was dismissed for being incompetent due to incorrect citation of case upon which the Taxation cause arose.
- ii. That, this court be pleased to determine the validity of the preliminary objection raised in the cause of submission and being upheld to dismiss the entire application instead of struck out.
- iii. Costs.
- iv. Any other order(s) the Court may deem fit.

The application is supported by a sworn affidavit of Mr. Edward Ole Lekaita, the applicant's learned advocate. The application is resisted by the respondent whose advocate, Mr. Gasper Majaliwa filed a counter affidavit. After filling the counter affidavit the respondent together with his counsel disappeared and after several adjournments by the court, the matter was ordered to proceed ex-parte.

On the date fixed for hearing of this matter, the applicant was still under the legal representation of the learned counsel **Mr. Edward Ole Lekaita**. The applicant's advocate orally submitted that, his rejoinder to the respondent's written submission before the Deputy Registrar was to the effect that the P.O canvassed had no merit and that even the prayer advanced by the respondent was an order of striking out the applicant's application. To support his argument the counsel cited the case of **Parseko Vicent Kone v. Floyd Vernon Hammer & another**, Civil Reference No. 2 of 2018 High Court at Tanga.

Before getting to the merit of the application, a brief fact of the case is that the applicant who was the decree holder filed an application for a bill of costs against the respondent who was the judgment debtor in Taxation Cause No. 28 of 2018, being the costs incurred when the applicant was prosecuting Miscellaneous Application No. 131 of 2017. The application was tabled before Hon. Deputy Registrar (Tax Master) and by his order the application was disposed of by way of written submissions. The respondent in his written submission (reply to the applicant's written submission) raised a preliminary objection on point of law that the taxation cause is incompetent for the applicant (decree holder) in his submission in

chief misdirected himself by submitting that the bill of cost arose from Misc. Civil Cause No. 16 of 2017 while in fact the matter arose from Misc. Civil Application No. 131 of 121(sic). The applicant did not file a rejoinder to reply the preliminary object raised by the respondent.

The preliminary objection raised by the respondent 'was considered by the Taxing Master and the same was sustained and the taxation Cause was consequently dismissed on the 29th April 2019.

That being told, this Court is invited to determine the validity or otherwise of the dismissal order which led to dismissal of the entire application instead of striking out. I am of the considered view that, it is already settled law as to when it comes for a court to make a decision as to whether to dismiss or strike out the matter before it. See the case of **Mabibo Beer Wines & Spirits Limited v. Fair Competition Commission & 3 others**, Civil Application No. 132 of 2015 (Unreported) CAT at DSM. In an old case of **Ngoni Matengo Cooperative Marketing Union Ltd vs. Alimohamed Osman** [1959] EA 577 the defunct Court of Appeal for Eastern Africa made the following statement of principle;

"..This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it, for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of."

In the present matter, the records reveal that, the applicant in his application for Taxation had properly cited the case number to which the Taxation Cause arose. In the cause of writing his submission in chief the applicant cited a different case number in which the taxation arose, and for his reasons best known to himself. The applicant did not file a rejoinder however in his affidavit the learned counsel stated that he had filed his rejoinder on the **25th March 2019** with no supportive evidence to that effect worse enough the record does not entail to that effect. With such anomaly, I am therefore constrained to maintain and join hands with the decision by the Deputy Registrar that no rejoinder was preferred by the applicant in respect to the objection raised.

Nevertheless, I am of the considered view that, the dismissal order by the Deputy Registrar's decision was a misconception of the already settled position by the courts on when should courts decide to dismiss the matter or struck out. I say so simply because the preliminary objection was raised in the cause of the parties' written submission, the matter had not yet been conclusively determined and taking into account that when the application was filed the case number was properly cited by the applicant as depicted in the case file, though no rejoinder had been filed but I find the omission to properly the case number is not an inordinate or serious error which would perhaps prejudice the interest of justice nevertheless that defect would be cured by either an order of correction or an order of an amendment rather than dismissal order. Moreover to that with advent of the principle of the overriding objective brought by the Written Laws (Miscellaneous Amendments), (No. 3) of 2018, requiring our courts to deal

with cases justly and to have regard to substantive justice rather being tied with legal technicalities (See a decision in **Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017 (unreported-CAT))

The applicant has also invited this court to assess the validity of a preliminary objection raised in the cause of written submission ordered by the DR. Preliminary objections being purely matters of law to my decided view may be raised at any stage of the hearing of a case before judgment. Therefore even a preliminary objection raised during written submission is proper for court's consideration so long as both parties are accorded an opportunity to argue on the raised P.O. to this end, the respondent's preliminary objection raised in the cause of his written submission is therefore valid.

For reason stated herein, the order of the Deputy Registrar of the court dismissing the applicant's Taxation Cause is hereby set aside, the citation to the applicant's written submission is hereby corrected to read as Misc. Civil Application No. 131 of 2017 instead of Misc. Civil Application No. 16 of 2017 and the matter be determined on merit. No order as to costs is made.

Ordered accordingly.




M.R. GWAE
JUDGE
30/07/2020