

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

CIVIL REFERENCE NO. 7 OF 2019

(C/f Taxation Cause No. 53 of 2018, Originating from Misc. Land Appeal No. 40 of 2017)

SILVANO JONH APPLICANT

Versus

MAGDALENA SHAURI RESPONDENT

RULING

7th December, 2020 & 5th March, 2021

Masara, J.

This Application has been preferred under Order 7(1)(2)(3) and (4) of the Advocates Remuneration Order 2015, GN No. 264 of 2015. The Applicant is moving the Court to quash and set aside the decision of the Taxing Officer in Taxation Cause No. 53 of 2018 and tax the Bill filed by the Applicant. The Application is supported by the affidavit deposed by Silvano John, the Applicant. The Respondent contested the Application by filing a counter affidavit deposed by herself.

Brief facts leading to this application as can be gathered from the affidavits of the parties and the record available can be summarized as follows: The Respondent preferred Misc. Land Appeal No. 40 of 2017 against the Applicant. The appeal was dismissed by this Court, Mwenempazi, J on 27/9/2018. The Applicant being the decree holder, filed Taxation Cause No. 53 of 2018 before the District Registrar claiming to be paid Tshs 5,321,000/= as costs. In his ruling delivered on 23/9/2019, the Taxing Officer taxed off the whole Bill of Cost for being exorbitant. The Applicant was dissatisfied, he has filed the instant reference seeking to

challenge the decision of the taxing officer and moving the Court to tax the Bill of Cost as presented.

On 27/3/2020, the counsel representing the Respondent raised a Preliminary Objection to the effect that ***the application is bad in law thus untenable for contravening mandatory provisions of Order 7(3) of the Advocates Remuneration Order, 2015***. The Court ordered both the Preliminary Objection and the application to be argued simultaneously. At the hearing of this application, the Applicant was represented by Mr. Ombeni C. Kimaro, learned advocate while the Respondent was represented by Mr. Richard Valerian Massawe, learned advocate.

The issue is whether this Application has merits. I will first determine the competency of the application before this Court by dealing with the Preliminary Objection raised before discussing the merits of the application.

Submitting in support of the Preliminary objection, Mr. Massawe began by confronting the Applicant's counsel for seeking leave and filing reply to counter affidavit, since by so doing he was pre-empting the Preliminary Objection raised. He cited the decision of the Court of appeal in ***Commissioner General (TRA) Vs. Pan African Energy (T) Ltd***, Civil Application No. 206 of 2016 (unreported). He contended that he was even not served by the said reply to counter affidavit therefore implored the Court to disregard it.

On the Objection raised, Mr. Massawe fortified that the application was filed on 11/ 10/2019 and the Respondent was served on 22/11/2019. He argued that Order 7(3) of the Advocates Remuneration Order, 2015 requires the Applicant to serve the Respondent within seven days after the date the chamber summons is stamped by the registry officer. Mr. Massawe maintained that the application at hand is unmaintainable since the Respondent was served after 42 days, which is beyond the time prescribed by law. To buttress his argument, the learned advocate cited the decision of this Court in ***Josia Lengoya Sademaki Vs. Julius Cleopa and Others***, Civil Reference No. 4 of 2016 (unreported). He concluded that since service was to be effected within seven days and it was not done, the Applicant ought to have applied for extension of time to serve the reference, but he did not do so. Mr. Massawe prays that the application for reference be struck out with costs.

Contesting the Preliminary Objection, Mr. Kimaro submitted that whether the Respondent was served with the copy of reference within time or not, is purely a matter of fact and not of law. He strenuously averred that the Respondent's counsel contended that the reference was served to her on 22/11/2019, but it was neither supported by any evidence nor stated in any paragraph of the Respondent's counter affidavit. Further, the Respondent's counter affidavit is not accompanied with any proof that the reference was filed out of time, and in ascertaining whether the application was filed the Court will have to receive evidence from both sides which will disqualify the Preliminary Objection raised. On that account Mr. Kimaro cited the decision the Court of Appeal in ***Ms Safia Ahmed Okash (as Administratrix of the Estate of the Late Ahmed***

Okash) Vs. Ms. Sikudhani Amiri and 82 Others, Civil Appeal No. 138 of 2016 (unreported). He therefore concluded that the Preliminary Objection raised does not on the face of it qualify to be a pure point of law. On the complaint raised by Mr. Massawe, Mr. Kimaro responded that there was no reply to counter affidavit filed in this Court as it can be traced from the Court record. He therefore prayed that the Preliminary Objection be overruled for being misconceived.

I have considered the Preliminary Objection raised by Mr. Massawe, as well as the submissions by both counsel for the parties, the pertinent issue for determination remains whether the Preliminary Objection raised has merits. According to Order 7(3), as soon as the application for reference is filed, service of the reference to the other party has to be effected within seven days from the date it was filed or on the date the chamber summons was stamped by the registry officer. That is generally the gist of Regulation 7. The relevant Regulation 7(3) provides:

"The Applicant shall within seven clear days of filing reference serve copies all parties entitled to appear on such taxation"

In his submission, Mr. Massawe submitted that the Respondent was served on 22/11/2019; however, as contended by Mr. Kimaro, such assertion was not supported by any evidence of the said service. It is also not stated in the counter affidavit deposed by the Respondent as to when the reference was served to her. Therefore, in the absence of any evidence, the allegation that the Respondent was served on 22/11/2019 remains an unsubstantiated allegation. Therefore, in the absence of any evidence to support the contention that the Respondent was served on

22/11/2019, ascertaining whether the said provision was violated is complex in the circumstance.

That said however, I do not agree with Mr. Kimaro that proving service is a matter of fact because the cited provision expressly sets time limitation upon which service can be effected. Therefore, proving whether the provision was complied with, one needed to show evidence on the date the reference was served unto him. Therefore, mere fact that it needs some evidence showing the date service was issued,¹ does not erode the spirit that it is a Preliminary Objection as contemplated by Mr. Kimaro.

I also agree with the Applicant's counsel that no reply to counter affidavit was filed in this matter. Having so said, since there was no evidence proving the date of service to the Respondent, the preliminary objection cannot have legs to stand on. The Preliminary Objection therefore fails. I accordingly overrule it and proceed to determine the application on merits.

Submitting on the reference, Mr. Kimaro stated that in Misc. Land Appeal subject of the Taxation Cause, the Applicant was attending the case from Barodesh Ward, Hanang' District, Manyara Region. The Applicant therefore incurred costs for transportation, accommodation, lunch and breakfast in attending the appeal whenever it was fixed for either hearing or mention. Regarding item 51 to 67 of the Bill of Cost, Mr. Kimaro submitted that it is not true that the Applicant spent all days from 10/11/2019 to 23/11/2019 in preparing and filing the Bill of costs, but he

only spent two days, that is 12th & 13th November, 2018. He came to file the Cause in Arusha 22/11/2018, the same was filed on 23/11/2018.

In so far as items 20 to 23, Mr. Kimaro submitted that Misc. Land Appeal No. 40 of 2017 was set for mention on 24/5/2018 and 27/6/2018, therefore the money claimed was justified. Regarding the instruction fee to the tune of Tshs. 2,000,000/=, Mr. Kimaro stressed that it was wrongly taxed off because receipt was issued on 16/6/2017, and the appeal documents were drawn by Nelson Merinyo, learned advocate. Therefore, exercising his discretion powers under Order 12, the Taxing officer could have taxed the amount he thought proper. On the fuel costs, Mr. Kimaro faulted the course taken by the taxing officer in refusing such costs for the reason that the Applicant did not describe the car. He averred that the taxing officer did not cite any provision of the law which mandatorily requires the Applicant to disclose the owner of the car.

In summing up, Mr. Kimaro contended that the whole bill of cost comprised of 71 items, the taxing officer dismissed items 51 to 67, items 20 to 23 and item 7 of the Bill, the other items were not considered but, in the end, he taxed off all the Bill of cost. He maintained that the taxing officer erred in using order 48 of G.N No. 264 of 2015 to tax off the whole bill. He therefore prayed that the ruling in respect of Taxation Cause No. 53 of 2018 be quashed and set aside and the Court be pleased to tax the bill according to law. He also prayed for an order that the taxation cause be re-heard by another taxing officer.

Contesting the Application for Reference, Mr. Massawe began by faulting the submission filed by Mr. Kimaro stating that it is full of arguments of facts and evidences contrary to the long-established principle that submissions are not evidence. On that basis, he cited the following decisions: ***Registered Trustees of the Archdiocese of Dar es Salaam Vs. The Chairman Bunju Village Government and 11 Others***, Civil Appeal No. 147 of 2006 and ***Gilbert Zebedayo Mrema Vs. Mohamed Issa Makongoro***, Civil Application No. 369/17/2019 (both unreported).

Mr. Massawe further stated that in order for this Court to interfere with the decision of the Taxing officer, there must be an error in principle or the Applicant has to show exceptional circumstances necessitating Court's interference. He cited the Court of Appeal decision in ***Gautam Jayram Chavda Vs. Covell Mathews Partnership***, Taxation Reference No. 21 of 2004 to support his argument. According to Mr. Massawe, the Applicant has not shown such exceptional circumstance moving this Court to interfere with the decision of the Taxing officer. What has been challenged throughout the submission are factual allegations relating to quantum which should be proved by evidence something which also the Applicant's affidavit lacks. That the Applicant has failed even to state that the bill is excessive as held by the Taxing officer. He maintained that there was no evidence adduced by the Applicant on whatever his advocate alleged. He cited the decisions in ***Juma Hussein Vs. Republic***, Misc. Criminal Case No. 18 of 2020 and ***Alfayo Tingisha Vs. Simon Laanyumi***, Misc. Civil Application No. 47/1998 (both unreported) to support his submissions.

In a rejoinder submission, Mr. Kimaro maintained that paragraphs 3 and 4 of the Applicant's affidavit explain the reasons for filing the reference. He added that there is evidence that the Applicant attended Misc. Land Appeal No. 40 of 2017 as it can be seen in the proceedings which he appended in his rejoinder submission.

I have duly considered the affidavits of the parties and the submissions of the counsel for the parties. At the outset, I need to state that the principle governing applications for reference as rightly contended by Mr. Massawe is the one reflected in the cited case of ***Gautam Jayram Chavda Vs. Covell Mathews Partnership*** (supra), in which the Court of Appeal cited the decision of the defunct Court for Eastern Africa to the effect that:

"Where there has been an error in principle the Court will interfere, but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the Court will intervene only in exceptional circumstances"

Having gone through the Applicant's affidavit as well as the written submission in support of the application, there is nothing showing that the taxing officer made an error or that there are exceptional circumstances that calls for the intervention of this Court. What the counsel for the Applicant seem to challenge is the way the bill was taxed which as rightly stated by Mr. Massawe falls in the quantum of the bill of costs.


Further, the Applicant's application is not supported by any evidence in of whatever claim he raised including the alleged receipts which would have assisted me in arriving in a just decision. Neither the proceedings of the Taxation cause nor the evidence that there were payments made were

attached in the Application. This has made composition of the ruling rather difficult because it is the duty of the Applicant to furnish the Court with the necessary documents for a proper determination of the taxation cause. The Applicant has not done so. The Applicant tried to do so by attaching the proceedings in Misc. Land Application No. 40 of 2017 in the rejoinder submissions, but that is not the procedure.

From what I have endeavoured to discuss above, the application for reference is unsubstantiated, and it does not conform to the underlying principles in making applications of this nature. Guided by what I have endeavoured to state above, the application for reference has no legs to stand on. I proceed to dismiss the same. As was done by the Deputy Registrar, I make no order as to costs.

Order accordingly.




Y. B. Masara
JUDGE
5th March, 2021