

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

(PC) CIVIL APPEAL NO. 40 OF 2020

MALIBWA MGOMYA 1ST APPELLANT

MATARA MALIBWA 2ND APPELLANT

MUSSA YAKOBO 3RD APPELLANT

VERSUS

MAGESA NYABHAJA RESPONDENT

(Appeal from the decision of the District Court of Musoma at Musoma (Mwakihaba, S.J.-RM) dated 29th June, 2020 in Civil Appeal No. 21 of 2020

JUDGMENT

18th and 18th June, 2021

KISANYA, J.:

This appeal traces its origin from the application for taxation of a bill of costs lodged by the above named appellants in the Primary Court. The case subject to application for taxation of a bill of costs was Objection Proceeding No. 30 of 2017 that had been decided against the respondent. At the end, the trial court decided the said application in favour of the appellants. It ordered the respondent to pay TZS 3,200,000 out of costs to the tune of TZS 5,800,000 that had been claimed by the appellants. He was also ordered to pay compensation to the tune of TZS 300,000 to the appellants.

That decision aggrieved the respondent. He appealed to the District Court of Musoma (first appellate Court). His complaints were as follows:

One, that the trial court erred in awarding costs while there was no order as to costs in the case subject to application for bill of costs. Two, the application for bill of costs was time barred. Three, the trial magistrate was not a taxing officer.

The appellants resisted the appeal by filing a notice of preliminary objection on a point law that the appeal was incompetent as the appellants ought to have lodged application for reference.

In the course of composing ruling on the preliminary objection, the learned magistrate disposed of the appeal by addressing the issue of jurisdiction of the trial court in determining the matter. The learned magistrate was of the view that the trial court had no jurisdiction to hear the application for taxation of a bill of costs because the case subject to application had reached the High Court by way of appeal. Therefore, the proceedings of the trial court were nullified. The first appellate court went on to order the appellants and their counsel to compensate the respondent "for costs incurred and mental torture suffered" in dealing with the case.

Dissatisfied, the appellants have come to this court by way of appeal. For the reasons to be noticed later, I find it not necessary to reproduce the grounds raised in the petition of appeal.

In the course of determining this appeal, I asked the parties to address the Court on the competence of the application for bill of costs that led to the appeal before the first appellate court and this Court. This issue was posed after noticing that the trial court had not awarded costs

in the case which formed the basis for application for taxation for a bill of costs.

Messrs. Emmanuel Mng'arwe and Daud Mahemba, learned advocates, represented the appellants and respondent respectively. They were at one that, the order as to costs was not awarded in Objection Proceedings No. 30 of 2017. The learned counsel were also in agreement that the application was incompetent for want of order as to costs in Objection No. 30 of 2017. Therefore, they advised me nullify the proceedings of the trial court and first appellate court and the orders arising thereto.

Having heard the counsel for both parties, I shall now proceed to determine whether the application for taxation of bill of costs was competent. The Blacks' Law Dictionary, 8th Edition at page 175 defines the term "bill of costs" as:

"A certified, itemized statement of costs owed by one litigant to another prepared so that the prevailing party may recover costs from the losing party."

It follows that an application for taxation of a bill of costs can only be lodged by a person whom the court ordered in favour the costs of the case. Unless there is a specific order as to costs, the taxation of costs cannot arise or be carried out. This position was stated in **DB Shaprya and Co. Ltd vs Regional Manager TANROADS Lindi**, Civil Reference No. 1 of 2018, CAT at Dar es Salaam (unreported), when the Court of Appeal held that:

I would reiterate my earlier position that for the reasons of allocation costs to one party against the other grants a

benefit to the former and correspondingly imposes a liability of the latter, such an award must be made specifically and explicitly in the final disposal order, upon the basis of the principle discussed earlier.

The Court of Appeal went on to uphold the ruling of the taxing officer that struck out the application for taxation of bill of costs due to want of order as to costs.

It is common ground that the application for taxation of bill of costs that led to the appeal at hand was premised on the decision of the trial court in Objection Proceedings No. 30 of 2017. In that case, the trial court had dismissed the respondent's application for objection of attachment of properties in execution of the judgments and decrees of Nyambono Primary Court (Civil Case No. 60 of 1996), Musoma District Court (Civil Appeal No. 60 of 1997) and High of Tanzania at Mwanza (Civil Appeal No. 28 of 2017). However, it did not award costs in favour of the appellants as shown below:

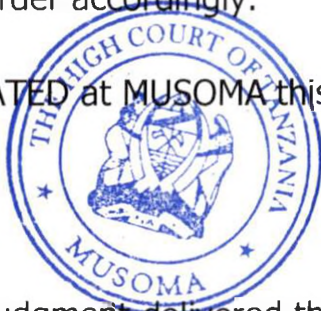
"Mahakama imepitia sababu za pingamizi na wajibu pingamizi na kuona kuwa sababu za mpingaji hazina msingi wowote kisheria na hivyo mahakama ilitupilia mbali pingamizi hilo na wajibu pingamizi kushinda kesi yao.

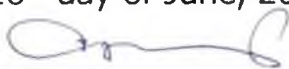
The appellants did not appeal against the said decision which denied them costs of the case. I am of the considered view that the application for taxation of a bill of costs was incompetent because the order for costs was not awarded in their favour.

In that regard, the proceedings of the trial court was a nullity. In consequence, the judgement and subsequent proceedings before the first appellate court and the present appeal cannot be allowed to stand because they arose from nullity proceedings. Therefore, I find it not necessary to address the issues raised in the petition of appeal.

To this end, I am inclined to exercise the revisional powers vested in the Court by nullifying the proceedings of the lower courts. Consequently, the judgments, decree and orders of the lower courts are hereby quashed and set aside. I make no order as to costs because the appeal has been disposed of basing on the issue raised by the court *suo motu*. Order accordingly.

DATED at MUSOMA this 18th day of June, 2021.




E. S. Kisanya
JUDGE

Court: Judgment delivered through video link this 18th day of June, 2021 in appearance of Mr. Emmanuel Mng'arwe, learned advocate for the appellants and Mr. Daudi Mahemba, learned advocate for the respondent.


E. S. Kisanya
JUDGE
18/06/2021