

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MWANZA

CIVIL REFERENCE No. 11 OF 2020

(Original BILL OF COSTS No. 37 OF 2019)

DOMINIC ISHENGOMA.....APPLICANT

VERSUS

MANAGING DIRECTOR GEITA GOLD MINING.....RESPONDENT

RULING

1st & 23rd July, 2021.

TIGANGA, J.

This application has been preferred by way of chamber summons made under Order 7(1) and (2) of the Advocates Remunerations Order, 2015 seeking the following orders;

1. That this Hon. Court be pleased to quash and set aside the ruling of the Taxing Master dated 14/09/2020 in Bill of Costs No. 37 of 2019 for being premature and incompetent.
2. In the alternative to order No. 1 above, the Court be pleased to vary the Ruling of the Taxing Master dated 14/09/2020 in Bill of Costs No. 37 of 2019
3. Any other relief be granted as the Court deems fit.

The main grounds for this application are as follows;



- (a) The taxing master and the High court have no jurisdiction to deal with the Bill of Costs in the Matter because there is a notice of appeal to the Court of Appeal and leave of appeal has been obtained, against the ruling of the High Court (Hon. Siyani, J) dated 27/06/2019 in Misc. Civil Application No.39 of 2019.
- (b) The complained ruling of the Taxing Master is tainted with several errors which have occasioned injustice to the applicant as per annexed affidavit.

The application was supported by the affidavit which was sworn and filed by the applicant. In that affidavit it was deposed that the Bill of costs subject of this reference originates from HC Misc. Civil Application No. 39 of 2019 which was filed on 15/03/2019 by the applicant against the respondent. That application was however struck out with costs following the High Court sustaining the preliminary objection raised by the respondent.

The order aggrieved the applicant; on 10/07/2019 he lodged a Notice of Appeal against the said ruling to the Court of Appeal of Tanzania. During the pendency of the Notice of Appeal the respondent

filed Taxation Proceedings or Bill of Costs No. 37 of 2019 arising from the ruling HC Misc. Civil Application No. 39 of 2019.

He said after being served with the Bill of Cost, he filed a reply in which he informed the Taxing Master that he had already filed the Notice of Appeal to challenge the ruling in which the order for costs was granted. Secondly that the Bill of cost was inflated as far as items 1 and 3 were concerned.

Despite that reply, the Bill of Costs was scheduled for hearing on 17/09/2020 however on that date, when he and his Advocate attended in court for hearing of the Bill of costs only to be informed by the clerk that the matter had already been decided on 14/09/2020. On further inquiry they were supplied with a copy of ruling in the matter and on its thorough reading they noted that it contained the following errors

- (i) That the taxing Master erred in law when he dealt with the matter and determined the same in his absence and without his knowledge
- (ii) The Taxing Master erred in law when he omitted to consider and determine the grounds of objection in his written reply.

- (iii) The Taxing Master erred in law when he omitted to strike out the taxation of Bill of costs for being premature and incompetent
- (iv) That the taxed amount is highly excessive.

That on 02/03/2020 his application for leave to appeal was granted by Hon. Mgeyekwa, J and thereafter he orally informed the taxing master of this fact and that he is now in the final process of preparing the record of Appeal.

The application was opposed by the respondent who through Marina Mashimba filed the counter affidavit. She disputed the allegation of the date on which the application was called for hearing, she said it was called for hearing on 29/07/2020 and the applicant was represented by his counsel Ms Lilian Lyimo where the counsel were given opportunity to address the Taxing Master on whether at the hearing of the Bill of Costs there was a notice of appeal pending before the Court of Appeal and after hearing the submission from the parties the taxing master reserved the ruling on 18/08/2020 when the ruling was delivered in the presence of counsel for both parties to the effect that in the absence of order staying the execution the court cannot stop the bill of costs.

Following such ruling the hearing of the matter was fixed on 08/09/2020.

When the matter was called for hearing, the applicant and his advocate were absent while the respondent was represented by Mr. Silwani Galati Mwantembe, Advocate. He prayed to proceed exparte the order which was granted and the hearing proceeded exparte a ruling of which was delivered on 14/09/2020 in the presence of the applicant and his counsel.

Further to that, she deposed that the exparte hearing order was rightly entered after the applicant and his counsel failed to appear on the hearing date. And that the ground of objection raised were heard and determined in a ruling delivered on 18/08/2020 in the presence of the counsel for the applicant. That the Taxing master was right when he overruled the objection on the ground that, there was no stay of execution of the order impugned and that he reasonably took into account the nature of the application. He deposed further that the applicant has not given concrete reason for the ruling to be set aside.

With the leave of the court, the application was heard by way of written submissions. In the submission in chief, the applicant pointed out the introduction, the background of the matter, and the merits of the

application most of which are the repetition of the affidavit and which have already formed part of this ruling therefore, I will, for purposes of brevity not reiterate what has already been part of this ruling but new issues said for clarification and the laws and case authorities relied upon.

Regarding the first ground of complaint he submitted that the applicant proved that the taxing master erroneously denied him the right to be heard. He said submitted that even the respondent in paragraph 2, 3, 4, and 5 admitted that all what happened transpired exparte thereby denying him the right to be heard.

Regarding the second complaint, he submitted that the allegation by the applicant that that the preliminary objection was dealt with has not been supported by a copy, in his view lack of copy means the same were not effectively dealt with.

Regarding the third ground, he submitted that the presence of the Notice of appeal and the leave to appeal to the Court of Appeal, acted as a bar for the hearing and determination of the Bill of costs therefore, the application was prematurely determined. Furthermore, one of the grounds of appeal is challenging the award of cost in labour cases. He submitted that after being informed of the presence of the appeal process starting with the Notice and leave to appeal, the taxing master

was supposed to hold that the application was incompetent or alternatively, to stay the proceedings as it is against the interest of justice for the proceedings of this court to run concurrently with the proceedings in the Court of Appeal. He cited the case of **Arcado Ntagazwa vs Buyogera Julius Bunyango** [1997] TLR 242 in which it was held that, once a notice of appeal has been lodged to appeal to the Court of Appeal, then the High Court proceedings must be stayed until the notice is withdrawn or is deemed to be withdrawn.

He also cited the case of **Ahmed Mbaraka vs Mwananchi Engineering and Contracting Co. Ltd**, Civil Application No. 229 of 2014. In which it was said that once there is an appeal or its process has already commenced, then, the officer issuing execution should stop till the appeal is ready.

Further to that, he said the taxed amount is highly excessive. He submitted that instruction fees should not be only tagged, it must be proved he relied on the authority in **D'Souza vs Farao & Others** (1960) E.A 602 and Order 12(1) of the Advocate Remuneration Order, 2015, that, although the taxing master has discretion to tax the invoice then the discretion must be exercised in the limit of the law, especially on the amount prescribed by law. He submitted that the amount taxed



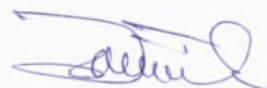
is very high. He submitted that the application be allowed and since it is a labour matter costs should be dispensed with.

In the reply filed by the respondent, while submitting on the merits Ms Marina Mashimba submitted by inviting the court to go through the record of the Bill of costs where it will be found that it is not true that the Bill of Cost was dealt with and determined without the knowledge of the applicant, but the applicant and his counsel were absent on the hearing date which they knew, and they did so without notice.

She listed the appearance records as reflected from 30/06/2020 when the matter was called up to the date of the hearing on 18/08/2020 when the matter was reserved for ruling and invited this court to pass through and satisfy itself that the hearing was not a surprise or an ambush. She reminded the court that, the objection raised by the applicant were dealt with and determined by the taxing master and the ruling was delivered on 18/08/2020 in the presence of the counsel for both parties in which the objection were overruled and fixed the bill for taxation on 08/09/2020. According to her, this is to say that, the objection was determined on its merit and overruled.

On the third alleged error that the taxation was premature and incompetent, she contended that, the taxing master was right when he held that a mere lodging of the notice of appeal by the applicant is not a bar to the hearing of the application for Bill of costs. He cited the decision of the case of **CRDB Bank Plc vs Finn W.Peterson**, Civil Application No. 367/17 of 2017, Court of Appeal, at Dar Es Salaam (Unreported) in which the court of Appeal made it clear that that unless stay of execution is sought and granted by the court execution at the High Court will proceed. The Taxing Master applied this principle in the taxation of costs as there was no order staying execution of the High Court's decision in Misc. Civil Application No.39 of 2019.

On the fourth alleged error that the taxed amount was highly excessive, it is contended by the respondent that the taxing master was reasonable in what he taxed as it was in accordance with the law. She contended further that, under order 12(1) of the Advocates Remunerations Order, 2015 the Taxing Master has discretion to allow such costs, charges and expenses as authorised by the order or as appear to him to be necessary or proper for the attainment of justice. In the instant case the Taxing Master properly exercised his discretion by taxing the bill of Costs as he did after considering all the circumstances



and being satisfied that the charged amount was fair and reasonable. He cited the authority in the case of the **Attorney General vs Amos Shavu**, Taxation Reference No. 02 of 2000 Court of Appeal of Tanzania, at Dar Es Salaam (Unreported).

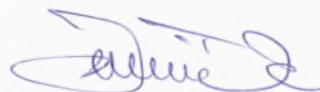
*"As a general rule, the allowance for instruction fees is a matter peculiarly in the taxing officer's discretion and the courts are reluctant to interfere into that discretion unless it has been exercised injudiciously. As stated in **Rahim Hasham vs Alibhai Kaderbhai** (1938) 1 TLR (R) 676 while the court has powers in proper cases to reduce the instruction fees allowed by the Taxing Officer, it will only do so where he has acted upon wrong principle or applied wrong considerations in coming to his decision. This position has been restated in diverse decisions including **Premchand Reichand vs Quarry Services of East Africa Ltd** [1972] E.A 162 where the court of Appeal for East Africa stated that the court will only interfere when the award of taxing officer is so high or so low to amount to an injustice to one party."*

Ms Marina was of the view therefore that, the prayer that the court interferes with items Number 1, 2 and 5 of the Bill of Costs is unfounded, as there is no sufficient reasons given by the applicant for this court to quash and set aside or even vary the ruling of the taxing master. She prayed the reference to be dismissed with costs.

The above constitutes a summary of the application, the counter affidavit, and the submission of the parties in support and against the application at hand. For easy flow, I will deal with one ground after the other without necessarily repeating what I have already summarised above.

Starting with the first ground of complaint that, the taxing master erred in law when he dealt with the matter and determined the same in the absence and without knowledge of the applicant. Now whether the applicant had knowledge of the matter or not is a matter of records to prove. As correctly submitted by Ms Marina Mashimba, Advocate for the respondent, the matter was filed in court on 12/07/2019 the record show that, the respondent was served and filed his reply on 02/08/2019 the reply which was signed by him and filed by him.

The record is further loud enough to prove that on various dates when the Bill was fixed for orders the applicant who was the respondent in the impugned proceedings, was represented by various Advocates, citing few examples, on 11/05 2020 he was represented by Mr. Mtete, Advocate, on 30/06/ 2020 he was represented by Mr.Mathias Mashauri who was holding the brief for Mr. Muhingo, Advocate, while on

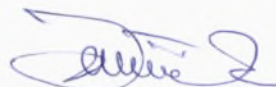


23/07/2020 he was represented by Ms. Lilian Lyimo who was holding brief for Mr. Mussa Mahimbo and so was on 29/07/2020.

On 29/07/2020 Ms Lilian Lyimo, Advocate, did not appear as holding brief, she probably had full instruction to proceed as she argued the preliminary objection. She was present on 18/08/2020 when the matter came for ruling on the preliminary objection, and was therefore informed on the date when the matter was fixed for hearing of the Bill of Cost on merits.

With these glaring examples on the record, it goes without saying that the applicant was not ambushed, as there is enough evidence to show that he was aware of the presence and existence of the proceedings of the Bill of Costs before the Taxing Master. The ground is therefore meritless, and is dismissed.

The second complaint is that, the taxing master erred in law when he omitted to consider and determine the grounds of objection in his written reply. With all due respect to the applicant, the record is vivid and clear that the objection was argued by the parties on 29/07/2020, whereby the applicant who was the respondent in the proceedings before the taxing master, and the one who raised the objection, was represented by Ms Lilian Lyimo, learned counsel. After hearing of the



preliminary objection the matter was reserved for ruling which was delivered on 18/08/2020 in the presence of the said Advocate.

That being the case, there cannot be any point where the applicant can pretend not to be aware of the hearing of the preliminary objection raised by him together with its resultant ruling. It does not matter whether the respondent presented the ruling or not, that does not obviate the fact on record which as a matter of practice the applicant is aware that there cannot be any way I could deal with these proceedings without being aided by the record of the taxation proceedings. Therefore the ground is baseless and dismissed.

Regarding the third ground of complaint that, the taxing master erred in law when he omitted to strike out the taxation of Bill of costs for being premature and incompetent. In support of the said ground the applicant submitted that, the presence of the Notice of Appeal and the leave to appeal to the Court of Appeal, acted as a bar for the determination of the Bill of Costs therefore, the application was prematurely determined.

He submitted further that, after being informed of the presence of the appeal process starting with the Notice and leave to appeal, the taxing master was supposed to hold that the application was

incompetent or alternatively, to stay the proceedings as it is against the interest of justice for the proceedings of this court to run concurrently with the proceedings in the court of appeal. He cited the case of **Arcado Ntagazwa vs Buyogera Julius Bunyango** (1997) TLR 242 in which it was held that, once a notice of appeal has been lodged to appeal to the Court of Appeal, then the high court proceedings must be stayed until the notice is withdrawn or is deemed to be withdrawn.

He also cited the case of **Ahmed Mbaraka vs Mwananchi Engineering and Contracting Co. Ltd**, Civil Application No. 229 of 2014; in which it was said that once there is an appeal or its process has already commenced, then, the officer issuing execution should stop till the appeal is ready.

On that ground, the counsel for the respondent submitted in reply that, the taxing master was right when he held that a mere lodging of the notice of appeal by the applicant is not a bar to the hearing of the application for Bill of costs. He cited the decision of the case of **CRDB Bank Plc versus Finn W.Peterson**, Civil Application No. 367/17 of 2017, Court of Appeal, at Dar es Salaam (Unreported) in which the court of Appeal made it clear that that unless stay of execution is sought and granted by the court execution at the High Court will proceed. The



Taxing Master applied this principle in the taxation of costs as there was no order staying execution of the High Court's decision in Misc. Civil Application No.39 of 2019.

Of these two contending arguments from the counsel for both parties, I entirely agree with the arguments by the counsel for the applicant that, according to the authorities in the cases of **Arcado Ntagazwa vs Buyogera Julius Bunyango** (1997) TLR 242 and **Ahmed Mbaraka vs Mwananchi Engineering and Contracting Co. Ltd**, Civil Application No. 229 of 2014.

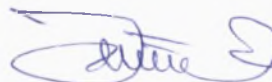
That, once a notice of appeal has been lodged to appeal to the court of appeal, then the high court proceedings must be stayed until the notice is withdrawn or is deemed to be withdrawn and where for example, the execution process has already commenced then then, the officer issuing execution should stop till the appeal is determined.

These authorities are giving the general position, of what should be done once an appeal process has been commenced, however, the case of **Matsushita Electric Co. Ltd vs Charles George t/a C.G Travers**, Civil Application No. 71 of 2001 is very specific on what should be done in the circumstances that where it held that;

"Once a Notice of Appeal is under Rule 76 (now rule 83(1) of the Rules) then the court is seized of the matter in exclusion of the High Court, except for applications specifically provided for such as leave to appeal or provision of a certificate of point of law, or execution where there is no order of stay of execution from this court"

This position was adopted by this court, in the case of **International Commercial Bank (T) Ltd & Another vs Primi Aloyce Mushi**, Civil Reference No. 2019 HC- Land Division, Hon. Makani, J. and in the case of **Peter P. Munisi (Administrator of the Estate of the Late Peter Munisi) vs Yunis Bakari Mshana & Another**, Misc. Civil Application No. 181 of 2019 HC-Dar es salaam.

Looking at the above holding of the court of appeal, Bill of Costs or taxation proceedings are not one of the specifically provided for applications under which the High Court can exercise jurisdiction, therefore, it goes without saying that, the Hon. Taxing Master was not justified when he overruled the objection raised on the ground that there is no stay of execution sought and obtained. It was supposed to stay the proceedings and await for the outcome of appeal to the Court of Appeal. That said, I find the application to have merits, the ruling by the taxing master dated 14/09/2020 is hereby quashed, the award is set aside, instead the preliminary objection raised before the taxing master



are found to be meritorious to the extent that, the taxation was supposed not to proceed. The Bill is returned to the taxing master and shall be stayed pending the hearing and determination of the appeal before the Court of Appeal of Tanzania, the notice of appeal being withdrawn or be deemed to be withdrawn.

It is accordingly ordered.

DATED at MWANZA this 23rd day of July, 2021




J.C. TIGANGA

JUDGE

23/07/2019