

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA
MISCELLANEOUS CIVIL APPLICATION No. 79 OF 2020**

(Originating from the Ruling of Bill of Cost No. 15 of 2019)

EMMY EPHRON NGOWI ----- 1ST APPLICANT

JOSEPHINE SAMSON KIWIA ----- 2ND APPLICANT

VERSUS

BANK OF AFRICA (T) LIMITED & 2 OTHERS ----- 1ST RESPONDENT

MABUNDA AUCTION MART CO. LIMITED ----- 2ND RESPONDENT

MZALENDO AUCTION MART & CO. LIMITED ----- 3RD RESPONDENT

RULING

03rd & 17th August, 2021

TIGANGA, J:

This ruling intends to determine Civil Reference arising from the ruling of Bill of Costs No. 15 of 2019 dated 26th May 2020 here in after referred to as "Taxation proceedings", which originated from Land Case No. 22 of 2017 decided by this court, Hon. Matupa, J which was dismissed with costs after finding the decree holders having no case to answer.

Following that order of the High Court, the decree holder filed the taxation proceedings, claiming a total of Tshs. 14,200,000/= as a total costs of defending the said Land Case. After full hearing of that taxation

proceedings, the Taxing Officer taxed a total of Tshs. 8,400,000/= which included, instruction fees of Tshs. 6,500,000/=:, attendance fees Tshs. 1,100,000/=:, disbursement Tshs. 300,000/=:, and the costs for the bill of costs Tshs. 500,000/=:.

The order aggrieved the applicants; they decided to move this court by way of reference, under Rules 5(1) (2) of the Advocates (Remuneration and Taxation of Costs), Rules GN. No. 515 of 1991, asking this court to reverse the decision of the Taxing Officer dated on 26th May 2020, with costs.

The reasons for that application are made clear in the affidavit jointly sworn by the applicants and filed in support of the application in which the applicant deposed that, the claim in the suit was estimated to be valued Tshs. 160,000,000/= which was supposed to be charged 3% (three percent) as instruction fee, which when computed, it was Tshs. 4,800,000/= not Tshs. 6,500,000/=: . He said that is according to the 9th schedule, item 7 of the Advocates Remuneration Order GN No. 264/2015 as the trial did not take too long.

That the Taxing Officer erred in law by charging Tshs. 1,100,000/= attendance fees for a stone throw distance from the office of the Advocate to the High Court which ought to have been Tshs. 100,000/= only, last that the Taxing Officer erred when he charged the bill of costs Tshs. 500,000/=

In his conclusion, he submitted that, had the Taxing Officer properly exercised his discretion he would have taxed the bill as follows,

- i. Instruction fees Tshs. 4,800,000/=
- ii. Attendance fees Tshs. 100,000/=.
- iii. Disbursement fees Tshs. 300,000/=.

Thus totalling the amount Tshs. 5,200,000/=.

The application was opposed by the respondents, who through one Elizabeth Muro, a Company Secretary and Head of Legal Department of the 1st Respondent, sworn and filed the counter affidavit in which she deposed that, at the material time, the taxed amount of Tshs. 8,400,000/= was justified, reasonable, fair and in accordance with the rules applicable in taxation proceedings in Tanzania. Together with this Counter Affidavit, she filed the Notice of Preliminary Objection on point of law that;

- i. That the application was preferred under the wrong provision of the law, that is Rule 5 (1) and (2) of the Advocates Remuneration and Taxation of Costs Rules GN 515 of 1991.
- ii. That the application was filed out of time, that is the prescribed period of twenty one days and without securing extension of time to that effect, in terms of the provision of order 7 (2) and 8 of the Advocates Remunerations Order GN. No. 263 of 2015. The second point being an alternative to the 1st point.
- iii. The affidavit in support of the application by the applicants is bad in law for containing statement of argument, opinion and submissions contrary to Order XIX Rule 3 (1) of the Civil Procedure Code [Cap 33 R.E 2019].

As a matter of practice, the preliminary objection was to be heard first, whereby with leave of the court the preliminary objection was argued by way of written submission. In the submission in chief filed by the counsel for the respondent, while arguing the first point of preliminary objection, he submitted that the law upon which this application was filed that is Rule 5 (1) & (2) of the Advocates Remuneration and Taxation of Costs Rules GN. No. 515 of 1991, no longer exists as it was revoked or repealed by the

Advocates Remunerations Order 2015 GN. No. 263 of 2015. He said the proper provision ought to have been order 7 (1) & (2) of the Advocate Remunerations order, 2015.

He submitted that, the consequence of failure to move the court under proper provision are well articulated in the decision of **Jimmy Lugendo vs CRDB Bank Limited**, Civil Application No. 171/01 of 2017 CAT - DSM in which it was held *inter alia* that, while relying on the decision of the same court in the case of **Edward Bachwa & Three others vs The Attorney General & Another**, Civil Application No. 128 of 2006 - CAT (unreported), where it was held *inter alia* that;

"It is trite law that wrong citation of the enabling or applicable law in moving the court renders the application incompetent and liable to be struck out"

Regarding the second point of objection he submitted in the alternative to the first point of preliminary objection, that the reference at hand was filed out of time as prescribed under Order 7 (2) of the Advocates Remuneration Order (supra) which is twenty one days from the date of delivery of the decision. He submitted that the application for reference was filed on 27/06/2020 about 31 days from the date of the

ruling and that on 27th was on Saturday on which no any court business could be held in relation to that matter. Therefore the applicant was late for 10 days and filed the application without leave of the court extending time in terms of the provision of order 7 (2) and 8 of the Advocates Remunerations Order (supra). He submitted that the application is time barred and asked for the same to be dismissed forthwith costs.

In addressing the third point of objection, that the affidavit is defective for containing statement of arguments, opinion and submission contrary to Order XIX Rules 3 (1) of the CPC [Cap 33 R.E 2019], she cited the case of **Uganda vs Commissioner of Prisons Exparte Motovu**, [1966] E.A 514 at 520, in which it was held *inter alia* that, affidavit must not contain extraneous matter by way of objection, prayers, legal arguments or conclusion and that the affidavit containing such impurities should be struck out.

The counsel referred to paragraphs 5, 6, 7 and 8 and the verification clause. He submitted that the contents of paragraph 5, 6 and 7 are purely argumentative while paragraph 8 contains conclusion. He cited the case of **Juma S. Busiyah vs The Zonal Manager, South Tanzania Post Corporation**, Civil Application No. MBY 8 of 2004 in which it was

held that, the affidavit made and filed in contravention of Order XIX, Rules 1 and 3 of the CPC is incurably defective and renders the application incompetent. In that, the respondent asked the court to find the application to be incompetent and strike it out with costs.

In reply, the applicant whole adopted the contents of the affidavit filed in support of the application; she did not at all argue the preliminary objection raised and argued by the respondent. She instead argued the application and concluded that, the amount which was supposed to be taxed is Tshs. 5,200,000/=

In dealing with the preliminary objections, I will start with the second ground of objection which raises a complaint that this application was filed out of time contrary to Order 7 of the Advocates Remuneration Order GN 263 of 2015 which requires the reference to be filed within 21 days from the date of the decision, and that it was filed without obtaining the extension of time in terms of Order 8 of the same law.

To appreciate the merit or demerit of the said objection, I have passed through the record and the following facts are not disputed. One the decision of bill of costs No. 15/2019 which was before the Taxing

Officer, Hon. J. M. Karayemaha, DR, was delivered on 26/05/2020, the copy of such ruling was certified and therefore ready for collection on 29/05/2020, that is four days after the delivery of the decision. The application for reference was presented for filing and therefore is deemed to be filed on 27/06/2020, which is about 32 days from the date of delivery of the decision which taxed the bill of costs.

As correctly submitted by Mr. Maliki Khatib Hamza, Advocate for the respondent, the procedure and time limit of filing reference by a person who is aggrieved by the decision of the Taxing Officer in execution proceedings is provided by Order 7 of the Advocates Remuneration Order 2015 GN No. 263 of 2015. For purposes of clarity, I hereby reproduce it as follows:-

*"7 (1) Any party aggrieved by a decision of the Taxing officer, may file reference to a Judge of the High Court.
(2) A reference under order (1) shall be instituted by way of chamber summons supported by an affidavit and be filed within 21 days from the date of the decision."*

Where a person fails, for any reason to file reference within 21 days prescribed under Order 7 (2) he may, under Order 8 of the same law, apply for extension of time and the High Court upon sufficient cause may

grant such extension. As earlier on pointed out the application for reference was filed more than 30 days from the date of the decision, thus, it was filed out of time for more than 10 days; that fact has not been disputed, therefore having been not disputed by the applicant, I find it established that, the application at hand was filed out of time and without leave of the court extending time.

Now what are the consequences of filing an application out of time? It is obvious that the application which is filed out of time is not maintainable in law. As this application on was filed out of time, the same is not maintainable and is therefore struck out.

As this ground of objection is enough to dispose the application, I find no need to deal with the rest of the grounds. The application is thus struck out with costs.

It is accordingly ordered.

DATED at MWANZA, this 17th day of August, 2021



J. C. TIGANGA

JUDGE

17/08/2021