

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF MOSHI

AT MOSHI

CIVIL REFERENCE NO. 7 OF 2021

*(C/F Misc. Application No.48 of 2018, originating from Appeal No.
27 of 2017 all of Same District Land and Housing Tribunal)*

GAUDENCE DOMINIC AUFENI.....APPLICANT

Versus

NGUJINI VILLAGE COUNCIL.....RESPONDENT

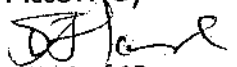
RULING

13/5/2022 & 30/6/2022

SIMFUKWE, J.

The applicant herein has filed reference against the ruling of a taxing Master, T.J. Wagine- the Chairman of the District Land and Housing Tribunal (DLHT) of Same, in a taxation matter. The application has been preferred under **Regulation 7 (1), (2) of the Advocate Remuneration Order, G.N. No. 264 Of 2015**. It is supported by the applicant's affidavit which was contested by the counter affidavit of Phillip Daniel Mvungi, the Respondent's Village Executive Officer.

The gist of this matter is to effect that in Application No. 27 of 2017 which was before the District Land and Housing Tribunal of Same (DLHT), the applicant herein was awarded costs. He thus applied for bill of costs through Miscellaneous Application No. 48 of 2018. The matter was heard and during drafting a Ruling, the Taxing Master dismissed the Application of Bill of Cost on the reason that the applicant did not join the Attorney


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General. Aggrieved, the applicant filed this application after being granted leave to file the same out of time through Miscellaneous Application No. 18 of 2021. The grounds of reference have been stated under the 5th, 6th and 7th paragraph of the applicant's affidavit as follows: -

5. That, the issue of non joinder of the Attorney General was raised by the Taxing Officer in his Ruling without affording any of the Parties right to be heard and address him on the of (sic) non joinder of the Attorney General.

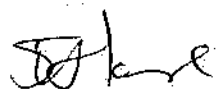
6. That the dismissal of the Bill of Costs amounts to an arbitrary and wrongful exercise of the Taxing Officer's judicial discretion.

7. That the dismissal of the Bill of Costs basing on law which was enacted after this matter was instructed.

Hearing of this application was conducted through written submissions, the applicant was unrepresented but he was assisted by Chiduo Zayumba who only drafted the submission, while the respondent was represented by Mr. Edwin B. Lusa the learned State Attorney.

In support of the application, the applicant started by narrating the background of the application which I will not reproduce as the same has been captured herein above.

In respect of the 1st ground of Revision, the appellant submitted that the decision of the Tribunal was legally wrong for being a nullity since it denied right to be heard to the parties which vitiates the decision and renders it a nullity. It was stated that the Chairman ordered the application to be argued through written submissions. That, in the course of composing the ruling the Taxing Officer *suo motto* raised the issue of



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non joinder of Attorney General, addressed the same himself and made a decision on it without calling the parties to address him on such issue. The appellant referred to the case of **Margwe Erro and 2 others vs Moshi Bahalulu, Civil Appeal No. 111 of 2014** (CAT) in which the High Court heard the application by way of written submissions and in the course of composing judgment the 1st appellate judge *Suo motto* found the appeal to be time barred and dismissed the same while none of the parties raised the issue of time bar and dismissed the appeal without hearing it on merit. On appeal, the Court allowed the appeal and stated that:

"It is not in dispute that the learned judge who heard the appeal in the High Court decided the matter on an issue she had raised and answered Suo motu in the course of composing her judgment. This court has held time and again that a denial of the right to be heard in any proceedings would vitiate the proceedings.

*The parties were denied the right to be heard on the question the learned judge had raised and we are satisfied that in the circumstances of this case **the denial of the right to be heard on the question of time bar vitiated the whole judgment and decree of the High Court.**"*

Basing on the above authority, it was the appellant's argument that the same underscores that no decision shall be reached without giving parties the right to be heard. Thus, the Taxing Officer erred when he reached a decision without affording parties right to be heard.

Supporting the second ground of reference that, the dismissal of the Bill of Costs was based on the law which was enacted after this matter was instituted; the appellant was faulted the Taxing officer for reaching into the decision basing on a provision of the **Government Proceedings Act, Cap 5** as amended by **section 25 (a) of the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2020** which come into force in the year 2020 while the Bill of Costs was instituted in the year 2018. He was of the view that, he was not required by the law to join the Attorney General because the law that set such requirement was not existing by then.

The appellant further condemned the Taxing Officer for misdirecting himself by deciding on a point of law which he raised and decided on his own without affording any of the parties the fundamental and basic right to be heard. Also, by requiring the applicant to join the Attorney General basing on a provision of law which was not in existence at the time when the applicant filed/ presented his bill of costs on 6/11/2018.

The applicant prayed the court to quash and set aside the decision of the Taxing Officer and order and remit the file back to the Tribunal to be assigned to another Taxing Officer to proceed to compose a ruling. The appellant also prayed for costs since the respondent contested the matter.

In reply, the respondent's representative submitted in respect of the 3rd, 4th, 5th, and 6th paragraphs of the counter affidavit. Mr. Lusa argued that the ground for dismissal was justifiable as it was based on the requirement of law of joining the Attorney General in any suit involving the Government. The respondent believed that the Taxing Officer was right in deciding the matter by dismissing the same **suo motto**. In that respect,

he was of the view that a court or Tribunal is at liberty to deal with matters brought before them according to the law.

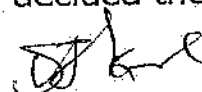
Mr. Lusa stated that **section 25 of Written laws (Miscellaneous Amendment) Act No. 1 of 2020** amended by adding **section 6(3) and (4) of the Government Proceedings Act of 2019** whereas section 6(3) provides that:

"All suits against the Government shall, upon the expiry of notice period, be brought against the Government, Ministry, Government department, Local government, Local government authority executive agency, public corporation, parastatal organization, public company that is alleged to have committed civil wrong on the civil suit is based and the Attorney General shall be joined as a necessary party."

Also, **section 6(4)** provides that:

"Non joinder of the Attorney General as prescribed under subsection 3 shall vitiate the proceedings of any suit brought in terms of subsection (3)."

Responding to the ground that the taxing master improperly raised the point of law on non joinder of the Attorney General *suo motu* and decided it without affording parties right to be heard; The learned State Attorney argued that the Taxing Officer heard the parties when allowed hearing by way of written submissions as prayed by the applicant before the trial tribunal. That, the submissions were filed and within the submissions, he realised that the point of joining the Attorney General with the applicant was not discussed by neither of the parties, thus decided the said issue *suo motto*. He was of the view that the Chairman decided the Bill of costs



by affording parties right to be heard on it. Thus, the issue narrated by the applicant has no merit and thus reference be dismissed with costs.

On the second ground of reference that the dismissal of Bill of costs was based on the law which was enacted after this matter was instituted; Mr. Lusa admitted that the law was enacted after the matter had been instituted before the tribunal. However, the matter was pending at the stage of mention. That, when the matter proceeded, the applicant had a room to apply to the Taxing Master to amend following an amendment of the law.

It was further argued that the amendment of the **Government Proceeding Act** is based on procedural law and not substantive right which the parties were obliged to comply even for cases instituted before the amendment of the said law. That, the enactment of the law applies retrospectively as it deals with procedures and not substantive issues. He referred to the case of **Lala Wino vs Karatu District Council, Civil Application No. 132/02/2018** CAT (unreported) which held that:

"The applicant's intended appeal falls under the purview of the procedural amendment alluded to earlier and that it would lie to this court as of right without necessity of the leave of the High Court."

He also referred to the case of **Municipality of Mombasa vs Nyali Limited [1963] EA 371 at 374**, and insisted that joining the Attorney General is procedural and the same does not affect the substantive or fundamental rights of the parties. Thus, the enacted law has to act retrospectively of whereas joining the Attorney General is mandatory. He prayed the reference before this court to be dismissed with costs.

The learned advocate also referred to the case of **Benbros Motors Tanganyika Ltd vs Ramanlal Haribhai Patel [1970] TLR 345** which held that:

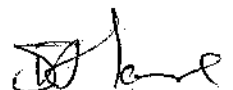
"When a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away but when it deals with procedure only unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act."

He argued that the above authorities are the same as the reference herein thus joining the Attorney General is procedural and therefore a necessary party was supposed to be joined.

Reacting to the prayer of costs as prayed by the applicant, the learned State Attorney submitted that the decision was made *suo motto* by the Taxing Officer and none of the parties benefited to the costs thereafter. Thus, contesting is a matter of interpretation and understanding of the law so this court should not consider such prayer by the applicant. Mr. Lusa called upon the court to dismiss this reference with costs.

Mr. Lusa submitted also that the Tribunal is at Liberty to decide any suit as it thinks proper pursuant to the law. Thus, the decision made *suo motto* by the Taxing Officer was accurately for interpreting laws and that the parties were heard in which the Chairman noticed as no one argued on that point of law to be favoured by the decision. That, this matter has to be dismissed with costs.

In his rejoinder, the applicant submitted inter alia that the duty of any lawyer/advocate/attorney/solicitor being the Officer of the court is to



assist a court to reach a fair and just decision and not to object and protest each and everything even when the position of the law is crystal clear.

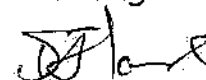
The applicant reiterated his submission in chief and added that nowhere in the proceedings the Chairman ordered parties to address him on the point of law and there is nowhere the respondent side raised a preliminary objection on the said point of law.

He blamed the learned State Attorney for deliberately refraining to comment on the cited case of **Margwe Erro and 2 Others** (supra) which set a position that a judge (adjudicator) is not allowed to raise points of law *suo motto* and decide on it without affording parties right to be heard as it violates **Article 13(6)(a) of the Constitution of the United Republic of Tanzania**.

The applicant insisted that since the point of law was raised by the Taxing Master without requiring parties to address him on that point then the decision is a nullity.

In respect of the issue of costs he stated that, the respondent should be condemned to pay costs since they have wasted time of the court to object the basic position of the law which is crystal clear.

I have examined the grounds of reference and the rival submissions of both parties in relation to what transpired before the District Land and Housing Tribunal. It is undisputed fact that the Taxing Master raised the issue of non joinder of Attorney General suo motto and decided that failure to join the Attorney General was fatal. He continued to dismiss the application for failure to join the Attorney General. It is from this fact that the applicant raised the first ground of reference that the issue of non joinder of the Attorney General was raised by the Taxing officer in his



ruling without affording the parties right to be heard and address him on the issue of non-joinder of the Attorney General.

It is established principle of law that the court /tribunal should not decide matters affecting rights of the parties without according the parties an opportunity to be heard in that aspect. This has been stated in a number of decisions. In the case of **Scan -tan tours Ltd vs The Registered Trustees of the Catholic Diocese of Mbulu, Civil appeal N.o. 78 of 2012 (CAT)** it was held that: -

"Cases must be decided on the issues on record and if it is desired by any court to raise other issues, not founded on the pleadings they should be placed on record by amendment and the parties should be given an opportunity to address the court"

The Court of Appeal at page 11 stated further that:

"We are of the considered view that in line with the audi alteram partem rule of natural justice, the court is required to accord the parties a full hearing before deciding the matter in dispute or issue on merit."

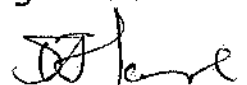
Guided by the authority above and equating it with the present situation it goes without saying that the Taxing Officer was duty bound to accord parties right to address the court in respect of the issue of joining the Attorney General as a necessary party. Failure to do so results to miscarriage of justice. I am not saying that it was wrong for the Taxing Officer to raise the issue *suo motto*. It was correct to do so, but he was supposed to invite the parties to address him on the raised issue. Since he did not call the parties to submit in respect of that issue, then he curtailed the parties' rights to be heard, which is a fundamental right enshrined

under **Article 13(6)(a) of the Constitution of United Republic of Tanzania 1977**. In the case of **Pili Ernest vs Moshi Musani, Civil Appeal No. 39 of 2019, [2021] TZCA 297**, The Court of Appeal referred to a number of cases including the case of **Abbas Sherally & Another v. Abdul Sultan Haji Mohamed Fazal Boy, Civil Application No. 33 of 2002 (unreported)** in which the Court among other things observed as follows:

"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.

It may be noted that the above findings on the first ground of reference, dispose of the 2nd ground as well. As a result, and considering the above reasons that there is miscarriage of justice to the parties by curtailing their right to be heard, I hereby nullify the ruling of the Tribunal dated 12th day of April 2021. In the circumstances I order the record to be remitted back to Same District Land and Housing Tribunal before another Taxing Officer for determination of the raised point of law as well as application for Bill of costs.

In respect of costs, the applicant prayed to be granted costs on the reason that this application was contested by the learned State Attorney. To the contrary Mr. Lusa was of the view that the respondent should not be condemned to pay costs since the decision was made by Taxing Officer



suo motto and none of the parties benefited for costs and that contesting the matter is a matter of law. In respect of this issue, I wish to refer to the case of Mohamed **Salmini v. Jumanne Omary Mapesa, Civil Application No. 4 of 2014, Court of Appeal of Tanzania at Dodoma, (unreported)**, where the Court in respect of the costs had this to say:

"As a general rule, costs are awarded at the discretion of the Court. But the discretion is judicial and has to be exercised upon established principles, and not arbitrarily or capriciously. One of the established principles is that, costs would usually follow the event, unless there are reasonable grounds for depriving a successful party of his costs. A successful party could lose his costs if the said costs were incurred improperly or without reasonable cause, or by the misconduct of the party or his Advocate."

Guided by the above authority, in exercising my discretion in respect of costs I will be guided by the fact that this reference was prompted by the act of the Taxing Officer of raising the issue *suo motto* without according parties right to be heard. Thus, condemning the respondent to pay costs just because he contested this reference as a matter of law and procedure won't be reasonable. In the upshot I grant this application with **NO** order as to the costs.

It is so ordered.




S. H. SIMFUKWE

JUDGE

30/6/2022

