

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 149 OF 2022

(Arising from Taxation Cause No. 135 of 2020)

TIBE KENNETH RWAKATARE.....APPLICANT

VERSUS

AUGUSTINO LAW OFFICE.....RESPONDENT

RULING

Date of last Order: 24th August, 2022

Date of Ruling: 30th September, 2022

E.E. KAKOLAKI J.

Pursuant to Order 7 (2) of the Advocate Remuneration Order, GN No. 263/2015 and any other enabling provisions of the law, the applicant herein has by way of chamber summons moved this court to make reference on the decision of the taxing master (Hon. Magesa, DR) dated 09/02/2021, in Taxation cause No.135 of 2020, quash and set aside the same. Further to that he is praying for the costs and any other reliefs as this court deems fit to grant. As usual, the chamber summons is supported by an affidavit which in this matter is dully sworn by Tibe Kenneth Rwakatare, the applicant.

When served with the chamber summons and its affidavit, the respondent resisted the application by filing the counter affidavit through its sole proprietor, one Emmanuel Augustino, flatly denying applicant's allegations, the result of which necessitated matter to go for hearing by way of written submission. Mr. Derick Muhigi, learned counsel appeared for the applicant while the respondent appeared unrepresented through its sole proprietor one Emmanuel Augustino.

Briefly as garnered from the applicant affidavit, the respondent before this court on 21st October 2020, filed Bill of cost Cause No. 135 of 2020, intending to enforce the purported Advocate-client remuneration agreement entered between the applicant and his three siblings as administrators of the estate of their late mother Dr. Getrude Rwakatare and the respondent on 27/04/2020, the ruling of which was delivered on 09/02/2021, before Hon. Magesa, District Registrar of the High Court Dar es salaam sub registry. Before hearing could take of the three other administrators were dropped from the proceedings on the ground that they were still retaining services of the respondent, the matter proceeded against the applicant only. It appears during its hearing which proceeded by way of written submission, in his reply submission the applicant raised an objection on the point of law to the effect

that, the respondent's bill of costs matter had contravened the law for not being preferred by way of chamber summons supported by affidavit as provided by the law, but the objection was disregarded by the taxing master for being raised at the submission stage without Court's orders. The taxing master proceeded to determine the matter by ordering the appellant to pay the respondent quarter of the 2% of the total value of the estate after the inventory is filed in the Probate and Administration of Estate Cause No. 32 of 2020. It is on the basis of that ruling, the applicant has preferred this reference.

Submitting in support of the application, Mr. Kahigi while adopting the affidavit by the applicant to form part of his submission and explained briefly the background of the case submitted that, as rightly deponed by the applicant under paragraph 2 of the applicants affidavit in support of the application, the said application for bill of costs by the respondent was brought in itemized Advocate-Client, bill of costs accompanied by the certificate of urgency containing allegations that the applicant here in and his siblings breached the remuneration agreement allegedly entered into with the Respondent, before he later on withdrew claims against the rest of the siblings and proceeded with the applicant only. According to Mr. Kahigi,

the question is how does the advocate like the respondent herein enforce the remuneration agreement against the client under the law? To him, the answer is found under Order 5 (1) and (2) of the Advocates Remuneration Order, GN No. 263 of 2015 (the ARO). He argued, under guidance of the above cited provision, an advocate can only enforce the remuneration agreement entered into with the client by filling the formal chamber application supported by an affidavit, the procedure which was not adopted by the respondent. He went on arguing, such none compliance of the mandatory provisions of Order 5 (2) of the ARO, left unproved all the allegations of breach of remuneration agreement shouldered on him by the respondent for want of affidavit which would have been in place of applicant's oral had he preferred his application by way of chamber summons supported by affidavit. Mr. Kahigi insisted that, the court was notified of that illegality but disregarded it and proceeded to determine the matter on merit. He rested his submission arguing that, the taxing court was improperly moved and consequently the taxing master ought to have struck out the application. He thus requested this court to make reference to the impugned decision dated 09/02/2021, quash and set aside the same, hence grant the application with costs.

In response, Mr. Emmanuel Augustino, sole proprietor of the respondent argued that, the taxing master taxed the cost accordingly which gave rise to this application. He said, the issue for determination by this Court is whether the respondent had to file an application for enforcement of the remuneration agreement instead of bill of costs. His response to the issue is no since the bill costs was properly presented in itemized blocks as per the requirement of the law since there were no extra points of facts or concerns in the agreement for determination by the court to require the application to be preferred by way of chamber summons. He clarified that, the manner in which advocates are remunerated is regulated by the ARO, which provides for various scales upon which the advocates are allowed to charge their clients when representing or rendering legal services. He argued, it is not uncontested fact by the applicant that, respondent and his co-administrators/administratrix entered into an agreement for legal services, and that, the taxing master had an opportunity to pass through the said contract and satisfy himself of that fact. He said, Article 3 of the said contract provides that, the advocate will be remunerated in accordance with law and in turn the advocate shall at all time represent his clients' interest faithfully and be accountable to all at all time. In his view, parties were bound by the

said contract thus there was no factual issues of contention worth determination by the court, hence the respondent was justified in presenting the bill of costs in line with the law as agreed. And added that, the Court (taxing master) was justified to tax the cost in the respondent's favour after considering the provisions of ARO. Mr. Augustino further explained on the scales for Probate and Administration of Estate matter as provided for under the tenth schedule of the ARO, which justified the taxed amount by the taxing master. He thus prayed the Court to dismiss this application with costs.

In a short rejoinder Mr. Kahigi argued that, from his submission, the respondent admitted that, the application subject of this reference was a result of the purported remuneration agreement between Respondent, applicant and his relatives, and that, the respondent did not file a formal application, thus the same was not proved as submission are not part of evidence in absence of an affidavit to be relied on. He relied on the case of **Gulf Concrete & Cement Products Co. Ltd Vs. D.B. Shaprya & Co. Ltd**, Civil Appeal No 88 of 2019, (CAT unreported) and then reiterated his submission in chief, while maintaining his prayer that, this application be granted with costs.

Having considered the affidavit, counter affidavit and submissions for and against this application and relevant documents attached to along with the present application as well as the impugned decision, the only issue for determination is whether the application under contest preferred by the respondent before this Court was in compliance with the law? Before I endeavor to answer that issue, I wish to point out that, as rightly submitted by Mr. Kahigi, there are matters which are not disputed by parties. **Firstly**, it is not disputed that, parties entered into remuneration agreement dated 27/04/2020, **secondly**, that, respondent here in filed bill of cost No 135 of 2020 before Hon. Magesa, DR and **thirdly**, the said bill of cost was filed through itemized blocks. Parties part their ways when it comes to issue as to whether the said bill of cost was properly brought before the court or not. According to Mr. Kahigi, the taxing court was improperly moved as the application was brought in infraction of Order 5(2) of ARO while respondent alleges that, the application was brought properly before the Court. In order to disentangle them, I had to visit the law governing advocate remunerations which is the *Advocate Remuneration Order, GN No. 263 of 2015 (the ARO)*. Order 5(1) and (2) of the ARO provides that:

(1) An application to enforce, set aside, or determine any question as to the validity or effect of remuneration agreement may be brought to the taxing officer within sixty days from the date on which the dispute arose.

*(2) An application under sub-order (1) **shall be by way of chamber summons supported by affidavit** and may be brought by the party to the remuneration agreement or any other person who has pecuniary interest on the agreement.*
(Emphasis supplied)

As depicted from the above provision, the law is couched in a mandatory terms such that, the party who wants to enforce, set aside, or determine any question as to the validity or effect of remuneration agreement, cannot dispense with for using the word "shall". This position is articulated under section 53 (2) of Cap 1 R.E 2019, for clarity the section is cited here under;

(2) Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.

I am also aware of the position that, the word shall does not necessarily mean mandatory in every case it is used in a written law, and to determine the real intention any such provision must be read in context. See the case of **Arcopar (O.M) SA vs Harbert Marwa and Family Investment Company Limited & Others**, Civil Application No. 94 of 2013 (CAT-

unreported). Nevertheless, in the present application, the word shall is used to infer imperative function hence failure to file formal application when the party is seeking to enforce, set aside, or determine any question as to the validity or effect of remuneration agreement renders the said application incompetent.

In the present application the respondent argues that, the application was justifiably preferred with an itemized blocks and not by way of chamber summons and affidavit as there was no factual issues on enforcement of the remuneration agreement worth determination by the Court, hence there was no need of preferring it by way of chamber summons supported by affidavit as alleged. A glance of an eye to the documents presented by the respondent in Court confirms the fact that the same was presented under certificate of urgency accompanied with the agreement for appointment of a lawyer of 27/04/2020 to represent the applicant and his other co-administrators in all matters concerning the estate and the itemized blocks with client bill of costs. In the said certificate of urgency dated 13/10/2020, the respondent disclosed to reasons as to why the matter should be treated with urgency as follows:

- i. That the Letters of Administration have been granted but the administrators are dealing in the estate in total disregard to pay the advocate first.*

ii. The advocate has been terminated without due regard to his work and understanding on how he should be remunerated before disposal of the estate.

From the unearthed documents and the contents therein it is evident to me that, attachment of the advocates remuneration agreement together with the reason advanced by the respondent that, he was terminated by the applicant without due regard on of his work and how he could be paid, is clear proof that there was a dispute on the enforcement of the remuneration agreement. I therefore distance myself from respondent's argument that, there was no factual issues on remuneration agreement worth determination by the Court, as the Court could not have proceeded to tax the bill of costs without satisfying itself whether the said agreement was indeed terminated or not as the Probate and Administration of Estate Cause No. 135 of 2020 was yet to be finalised. I so view as there was no room for the parties to address the Court on that factual issue since submission which the trial court used to base its decision does not constitute evidence as it was held in the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd Versus Mbeya Cement Company Ltd and National Insurance Corporation (T) Ltd** [2005] TLR 41 where the Court stated that:

“It is now settled that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. In principle all annexures, except extracts of judicial decisions or textbooks, have been regarded as evidence of facts and, where there are such annexures to written submissions, they should be expunged from the submission and totally disregarded.”[emphasis supplied].

As found herein above, since the respondent’s application in essence was seeking to effect the remuneration agreement, her failure to prefer the application in compliance with Order 5(2) of ARO, by way of chamber summons supported with the affidavit, I hold was in infraction of the law hence the application was incompetent before the Court. Now what is the effect of the proceedings proceeded with on an incompetent matter? The effect no doubt vitiates the entire proceedings and renders the decision thereto a nullity. In this matter since the District Registrar proceeded to hear and determine an incompetent matter, I hold his act rendered the entire Court proceedings and its ruling of 09/02/2021, a nullity.

Since the proceedings of the Court in Bill of Cost No. 135 of 2020 and its ruling are a nullity, I find the applicant’s complaint that the matter before it was improperly placed to have merit and proceed to allow the application.

Further to that, I quash the entire proceedings in Bill of Cost No. 135 of 2020 and set aside its ruling dated 09/02/2021. I do so with costs.

It is so ordered.

Dated at Dar es Salaam this 30th September 2022.



E. E. KAKOLAKI

JUDGE

30/09/2022.

The ruling has been delivered at Dar es Salaam today 30th day of September, 2022 in the absence of both parties and in the presence of Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

30/09/2022.

