

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
IRINGA DISTRICT REGISTRY
AT IRINGA

APPLICATION FOR REFERENCE NO. 2 OF 2020

(Arising from the Bill of Costs No. 3 of 2019, in Matrimonial Appeal No. 1 of 2019, in the District Court of Iringa

District, at Iringa).

TAIMU JACKSON SANGA..... APPLICANT

VERSUS

UPENDO EDSON MGAYA..... RESPONDENT

RULING

3rd March & 21st April 2022.

UTAMWA, J

This is an application for reference whereby the applicant, TAIMU JACKSON SANGA filed this application under Order 7(1) and (2) of the Advocates Remuneration Order, GN. No. 264 of 2015, henceforth the GN in short. According to the amended chamber application filed in this court on the 28th July, 2021, the applicant is seeking for the following orders:

- i. That this Honourable Court be pleased to reverse the ruling and orders of the Taxing Master (Hon. A Mwankejela, Resident Magistrate) in the Bill of Costs No. 3 of 2019 delivered on 30th April, 2020,

- ii. Any other order this court deems fit to grant,
- iii. Costs of the application be provided for.

The application is supported by an affidavit deposed to by the applicant himself stating the grounds for supporting his prayers.

The affidavit essentially states as follows: that, the applicant was respondent in the bill of costs No. 3 of 2019 before the District Court. The respondent, Upendo Edson Mgaya was the decree holder thereto. This followed the fact that the District Court had awarded costs to the respondent, in Matrimonial Appeal No. 1 of 2019 from a decision of a Primary Court. In that appeal, the respondent was the appellant. The applicant lodged a preliminary objection (PO) against the appeal. However, his PO was dismissed with costs on 18th September, 2019. However, the respondent withdrew the appeal latter. She then filed the bill of costs (which raised this reference) before the same District Court to recover the costs that had been awarded to her following the dismissal of the PO. Upon hearing the parties the taxing master decided the bill of costs in favour of the respondent through its ruling dated 30th April, 2020 (impugned ruling). It taxed it at the tune of Tanzanian Shillings (Tshs.) **1, 900, 000/=**, hence the reference at hand.

The affidavit further shows that, in considering the bills of costs (which led to this reference), the taxing master failed to hold that the same had been filed before the District Court out of time, i.e. after the expiration of 60 days from the date when the order awarding costs was made (i.e. on 18th September, 2019). This followed the fact that, it was filed on the 18th

November, 2019, which was after the expiration of 62 days from when the award for costs was made in favour of the respondent. The taxing master in fact, dismissed the PO which had been raised by the applicant on time limitation.

In addition, the affidavit deponed that, the taxing master also wrongly accepted forged EFD receipts that were tendered by the respondent in court since they did not bear the dates of issue. There was also no justification in taxing the sum of Tshs. 1, 000, 000/= as instruction fees paid by the respondent to her counsel.

On her part, the respondent vehemently resisted the application by filing her counter affidavit. In the counter affidavit, she basically stated that the bill of costs was timely filed and the amount taxed was in fact, small and contrary to the law. The counter affidavit also faulted the applicant for not filing reference or take any legal action as soon as the order dismissing his PO against the bill of costs on time limitation was made (i.e on 31st March, 2020). It further claimed that, the applicant could not thus, complain against the dismissal of his PO belatedly in this reference against the taxation of the bill of costs that was made by the taxing master on 30th April, 2020.

At the hearing of the application at hand, the applicant appeared in person and unrepresented whereas the respondent was represented by Mr. Shaba A. Mtung'e, learned counsel. The application was argued by way of written submissions.

In the applicant's written submissions which had a legal flavour though he had claimed to be unrepresented, he essentially reiterated the contents of his affidavit. He added that, the respondent filed the bill of costs before the District Court out of time without firstly seeking an extension of time. The taxing master also wrongly dismissed the applicant's PO on point of time limitation.

He further argued that, the bill of costs contravened Order 55(2) of the GN for failing to indicate the section of disbursements at its foot. The section provides that, disbursements shall be shown separately at the foot of the bill. The word "shall" used under such provisions is imperative as provided by the Interpretation of Laws Act, Cap. 1 R.E 2019. Despite this irregularity, the taxing master proceeded to tax the bill of costs as shown above.

It was also the applicant's contention that, the GN does not provide for any amount to be taxed in the hearing of a preliminary objection. The taxing master therefore, erred in taxing the sum of Tshs. 1,000,000/= (One Million Shillings). There was no any legal justification tax such a high amount as instruction fees for the hearing of the PO. He cited the case of **Abdulatif Salum v. Saada Mohamed (1991) TLR 119** and submitted that, in that precedent, it was held that, in assessing the instruction fees, the court is enjoined to consider the nature of the case, work done by the parties and all other circumstances rightly connected with the case.

He further argued that, the nature of the matter that gave rise to the bill of costs at issue was simple and cannot be quantified in monetary

terms. The matter did not exercise the minds of both parties and the court. The taxed sum of Tshs. 1,000,000/= was therefore, unreasonable. To cement his position, the applicant referred this court to the cases of **Rourafic Trading Co. Ltd v. Kassamali Peera (1969) HCD 76** and **Amirali Ali Abdula Jan Mohamed v. Mohamed Hassan Bhaloo, Civil Case No. 36 of 1965.**

Additionally, the applicant submitted that, the EFD receipt alleged to have been issued by the respondent's counsel was issued on 14th April, 2020 which was after the finalization of the matter in which the costs were awarded to the respondent. Moreover, the instruction fee was for prosecuting the whole appeal and not for the PO only. Furthermore, the EFD receipt that was tendered in court did not show the case number and the names of the parties of the case.

Moreover, the respondent's counsel had prayed before the taxing master to amend the bill of costs in the name of the parties and to attach the EFD receipt. However, but he went beyond the extent that had been allowed by the court. Some receipts were thus, changed and new forged receipts were added in the amended bill of costs. That trend contravened Order 56 of the GN. These provisions provide that, no alterations or addition shall be made after the bill of costs has been lodged for taxation except by consent of the parties and leave of the court.

The applicant also faulted the taxing master for taxing the sum of Tshs. 970,000/= as expenses which the respondent used in making follow ups of the matter. Nonetheless, the same was not proved in court.

Disbursements require justification and a litigant should only be reimbursed for the costs he or she has incurred in the course of trial, and not as benefit from the case. He cited the cases of **Premchand Rainchand Ltd & Another v Quarry Services (EA) Ltd & Another (1972) EA 162** and **Lehman's (EA) Ltd v. Lehman & Co Ltd (1970) HCD 315** to cement his contentions.

The applicant thus, urged this court to reverse the ruling of the taxing master owing to the reasons shown above. He also pressed it to apply the provision of Order 48 of the GN which he argued, guide that; when one sixth of the total amount of a bill of costs exclusive of instruction fees is disallowed, then a party presenting the bill for taxation shall not be entitled to the costs of such taxation. He therefore, contended that, under this provisions the respondent is not entitled to any amount.

In his replying submissions, the counsel for the respondent basically argued that, the bill of costs was filed timely. It was also drafted as per Order 55 of the GN. Even though the bill of costs contravened the provisions of the law, the proper way was for the applicant to file an objection before the taxing master. The applicant's concern is therefore, an afterthought.

The learned counsel added that, the respondent had employed an advocate to handle the PO that had been raised by the applicant before the District Court against the appeal. Nevertheless, the PO was dismissed with costs. On the issue of the allegedly forged EFD receipt, he submitted that the complaint was handled by the Tanzania Revenue Authority (TRA). The

amount taxed by the trial court was too little taking into consideration the nature of the case and the amount involved in prosecuting the matter. The amount of work done involved various institutions like the TRA, Police, District Offices and the District Court.

In further submissions, the counsel for the respondent maintained that, the payment for instruction fees was delayed since the respondent's properties were still under the applicant's custody. The value of the case was estimated at the rate of Tshs. 70,000,000/= based on the list of properties in dispute as shown in the matrimonial proceedings before the primary court mentioned above. He cited the cases of **National Microfinance Bank PLC v. Joseph Stephen King and Restuta Joseph, Taxation Cause No. 30 of 2018** and **Premchand Raichand [1972] EA 162, Joreth Ltd v. Kigano and Associates (2002) 1 EA 92** and **Ujagar Singh v. The Mbeya Cooperative Union (1968) H.C.D 173** to fortify his stance

On the issue of time limitation in filing the bill of costs before the District Court, the respondent's counsel argued that, the last date for filing the bill of costs was on 17th November, 2019. Nonetheless, this day was Sunday. It was thus, an excluded day in computing the time limitation since it fall on a weekend. The matter was therefore, filed on 18th November, 2019 in the District Court. It was thus, well within time based on Section 60 (1) (c) (e) (f) and (2) of the Interpretation of Laws Act (supra). He therefore, prayed for the application under consideration to be dismissed with costs.

By way of rejoinder the applicant reiterated his submissions in chief. He added that, the respondent's advocate discussed extraneous matters to this application in his replying submissions. He was also engaged to handle the entire appeal before the District Court. The PO raised by the applicant was inclusive in the appeal. The respondent has also not shown the legal basis for the sum taxed by the taxing master. The principles governing taxation of costs were not followed by the taxing master. The respondent is not therefore, entitled to any sum.

I have gone through the records, the rival submissions by the parties and the law. My adjudication plan in this matter is as follows: I will firstly consider the issue on time limitation. I will consider the merits of the sum taxed by the taxing master only if I will find that the bill of costs was filed timely. Otherwise I will make necessary orders according to the law. This plan is based on the fact that, an issue of time limitation touches the jurisdiction of a court of law. The issue of jurisdiction is in law, fundamental and must be decided before other issues are considered in a matter; see **Richard Julius Rukambura v. Issack Ntwa Mwakajila and Tanzania Railways Corporation, CAT, Mza Civil Applicatin No. 3 of 2004, at Mwanza** (Unreported).

Before I tackle the issue on time limitation, I feel indebted to deliberate on one concern raised by the respondent in her affidavit (under paragraph 5). She questioned the propriety of the course taken by the applicant in challenging the order of the taxing master (made on 31st March, 2020) dismissing his PO against the bill of costs on time limitation.

She was trying to argue that, since the applicant did not prefer any reference or take any legal step against that order earlier, he is not entitled to challenge it at this late stage through the reference under discussion which is also against the merits of the sum ultimately taxed in favour of the respondent (on 30th April, 2020).

Though the parties did not give a hot discussion to this point of contention, it is my duty to deliberate on it. This is because, apparently the respondent was trying to raise a PO against the applicant's move of challenging that order at this stage.

In my view however, the applicant's concern is baseless for different reasons; in the first place he did not cite any law that prohibits the applicant from challenging the order of the District Court at this stage and through the reference under discussion. In law, it is not open for a party to court proceedings to object a legal step taken by an adverse party merely because he/she feels like disliking the step so taken. One must make the objection basing on the law which he/she must cite. This is the essence of one of the important legal principles on preliminary objections that, a preliminary objection must be based on a pure point of law. A list of precedents supporting this position of the law is too long; see for example the landmark case of **Mukisa Biscuits Manufacturing Company Limited v. West End Distributors [1969] E. A. 701** and decisions by the Court of Appeal of Tanzania (the CAT) in **Karata Ernest and others v. Attorney General, TCA Civil Revision No. 10 of 2010, at Dar es**

salaam, (unreported) and COTWU (T) OTTU Union and another v. the Hon Iddi Simba and others [2002] TLR. 88.

Indeed, I am convinced that, the applicant prudently complied with the law in waiting for the taxing master to finally complete the taxation of the bill of costs so that he could challenge the order dismissing his PO against the bill of costs (on time limitation) together with the sum that was ultimately taxed. This is because, the order dismissing his PO (against the bill of costs) was a mere interlocutory order which did not finally determine the rights of the parties. Taking steps like reference against before the taxation was finalized would obviously frustrate the main matter, i.e. the taxation of the bill of costs itself. It is in fact, a contemporary legal principle in our jurisdiction that, one cannot appeal or take any other legal step against an interlocutory order or decision unless it has the effect of finally determining the main matter (i. e. it finally decides on the rights of the parties involved in the main matter).

Examples of statutory provisions which expressly reflect the legal principle highlighted above are abundant. See for example the provisions of section 74(2), 78(2) and 79(2) of the Civil Procedure Code, Cap. 33 RE.2019 (the CPC) which restricts appeals, reviews and revisions respectively against interlocutory orders unless they meet the qualification underlined above. Section 43(2) of the Magistrates Court Act, Cap. 11 RE. 2019 (the MCA) also restricts appeals and revisions against such orders unless they meet the same condition.

The rationale of the principle of law just highlighted above is that, it avoids delays and frustrations against main matters before courts. It also saves the parties from the ordeal of simultaneous proceedings. The CAT in the case of **Generator Logic v. Eli Mukuta, CIVIL APPEAL NO. 272 OF 2019, CAT at Dar es Salaam** (unreported) following its previous decision in **Celestine Samora Manase & 12 Others v. Tanzania Social Action Fund & Another, Civil Appeal No. 318 of 2019** (unreported) also gave a valuable remark on the rationale of such useful legal principle. It observed that, the rationale of the bar to appeals against interlocutory decisions, is that, it promotes an expeditious administration of justice, ensures timely justice and makes access to justice affordable, i.e. less costly. The CAT added in that precedent that, the legal principle affords both parties in the case, equal opportunity to be heard at the full trial.

In my settled opinion therefore, the object of the legal principle discussed above is to promote fair trial to the parties to court proceedings. The parties' right to fair trial is fundamental and well enshrined under Article 13 (6) (a) of The Constitution of the United Republic of Tanzania, 1977, Cap. 2 RE. 2002. The CAT underlined this right as one of the corner stones of the process of adjudication in any just society: see the decision in the case of **Kabula d/o Luhende v. Republic, CAT Criminal Appeal No. 281 of 2014, at Tabora** (unreported).

My further views therefore are that, though the GN does not embody provisions akin to those of the CPC and MCA cited above, the legal principle discussed above applies *mutatis mutandis* to bills of costs like the one

under discussion. This is due to its rationale underlined above and the parity of reasons in bills of costs one hand, and in other proceedings on the other. This is so because, justice must be done to all such proceedings including the proceedings for bills of costs. It is more so considering the advent of the principle of overriding objective. This principle requires courts to *inter alia*, deal with cases justly, speedily and to have regard to substantive justice as opposed to procedural technicalities. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported) and its many other decisions. It follows thus, that, applying the legal principle discussed above to proceedings related to any bill of costs, amounts not only to cherishing the principle of overriding objective (highlighted earlier), but also to promoting the parties' fundamental right to fair trial discussed above.

Due to the reasons shown above, the applicant in the matter at hand cannot be blamed for the course he opted in waiting until when the bill of costs was finally taxed so that he could challenge both the order of the District Court dismissing his PO on time limitation and the sum that was ultimately taxed in favour of the respondent. This course was in fact, for the benefit of both parties considering the rationale of the legal principle discussed above, the principle of overriding objective and the need to promote the parties' right to fair trial which were all discussed earlier. I therefore, dismiss the complaint-cum preliminary objection raised by the respondent. I will consequently, proceed to test the merits of the issue on

time limitation raised by the respondent in the reference under consideration.

The issue before me is therefore, *whether or not the bill of costs under consideration was timely filed before the District Court*. The law on time limitation for filing a bill of costs is clear. Order 4 of the GN requires a decree holder to file a bill of costs for taxation (if he intends to recover the awarded costs) within sixty (60) days from the date when the order awarding costs was made. In the present matter, it is not disputed, according to the record and arguments by the parties that, the order which dismissed the applicant's PO against the bill of costs was made on 18th September 2019 by the taxing master. Indeed, it is this same order which awarded the costs at issue to the respondent since it dismissed the PO with costs. Likewise, it is not contested, that, the bill of costs at issue was presented before the same District Court on the 18th November 2019.

The applicant therefore, contends that the bill of costs was filed after the expiry of 60 days because he computes the days arithmetically. Indeed, it is true that if this mode of computation is adopted, one would agree with the applicant that the bill of costs was filed after the expiry of 61 days. However, this is not the way we compute time limitation. I therefore, agree with the computation made by the learned counsel for the respondent only to the extent that, it was proper to consider the exclusion of the last day which was a Sunday as per section 60 (1) (c) (e) (f) and (2) of the Interpretation of Laws Act (supra). Indeed, that was the position which had been taken by the taxing master in his ruling dismissing the PO

raised by the applicant against the bill of costs (dated 31st March, 2020). According to the taxing master in that ruling and the submissions of the counsel for the respondent before this court, the last date (the 60th date) for filing the bill of costs was the 18th November, 2019 when the same was actually presented before the District Court. It is for this reason that they claim that the bill of costs was timely filed, meaning that it was properly filed at the 60th day from the date when the costs were awarded to the respondent (in the appeal upon it dismissing the PO raised by the appellant against that appeal).

Actually, though I agree with the learned counsel for the respondent and taxing master that the bill of costs was presented before the District Court on the said 18th November, 2019 which was the last date (i.e. the 60th date) for filing it, I do not agree with them that the same was filed on that date before the eyes of the law. Our law is trite that, a document is deemed to have been duly filed in court on the date when the necessary filing fees are fully paid. This full payment of the necessary filing fees is exhibited by the Exchequer receipt issues in respect of such payment. This was the position underlined by the CAT in the case of **John Chuwa vs. Antony Ciza [1992] TLR 233**. Many other precedents in this land have underscored the position. They include **Hemed Rashid v. Salma Hussein, High Court Civil Appeal No. 60 of 2009, at Dar es Salaam** (unreported), **John Barnaba Machera v. Barrick North Mara Gold Ltd, High Court Civil Case No. 113 of 2012, at Dar es salaam** (unreported) and **the Board of Trustees of Mbomimpa and another v.**

Jaghan Gulam Haji, Chairman, Hunters Association of Tanzania, Iringa Branch, High Court Misc. Civil Appeal No. 9 of 2004, at Mbeya (unreported).

In the matter at hand, it is on record that, though the said bill of costs was presented for filing in court on 18th November 2019, the court's exchequer receipt No. 23514047 showed that, the filing fees (i.e. Tshs. 20, 000/=) were paid on the next day, i. e. on 19th November 2019. It follows therefore that, the bill of costs at issue was legally filed on the said 19th November 2019 when the filing fees were paid. It cannot be taken that the bill of costs was filed on the 18th November 2019 as held by the taxing master and as argued by the respondent's counsel before this court since that was only the date for presenting it in the District Court and not for filing it. This is so simply because, no filing fees were paid on that date. The phrase "filing a document in court" is therefore technical in law. Presenting a document in court alone is thus, a distinct phenomenon from filing it. One may actually present a document in court and abandon it there without paying the necessary filing fees. He/she cannot be considered to have filed it in court before the eyes of the law until, and only until he/she pays the necessary filing fees. The rationale of this principle is that, it controls laxity in taking legal actions especially by feign litigants who present documents in court and disappear in thin air without taking any further action promptly. It also ensures that, the law on payment of necessary filing fees is complied with since the court cannot

take any step in relation to the document presented to it without any statutory filing fees being paid.

Furthermore, in the case at hand, the respondent did not offer any explanation in the counter affidavit or in the replying submissions by her counsel as to why the filing fees were not paid on the date when the bill of costs was presented in the District Court (on the 18th November, 2019 being the last date of time limitation). She cannot thus, avoid the consequences of the law discussed above. It is thus, concluded that, the bill of costs at issue was filed in the District Court a day after the expiry of the time limitation prescribed by the law, i. e. the 60 days. The law further guides that, a delay is a delay, whether of a single day or of years. This is the emphasis made by the CAT in the case of the **National Bank of Commerce Ltd v Partners Construction Company Ltd, Civil Appeal No. 34 of 2003** (unreported) and the case of **Hemedi Ramadhani and 15 others v. Tanzania Harbour Authority, Civil Appeal No; 63 of 2001, at Dar es Salaam** (unreported).

For the above reasons, I agree with the applicant that the bill of costs under discussion was filed before the District Court out of time though on slightly different reasons from the one he adduced. I consequently answer the issue posed above negatively that, the bill of costs under consideration was not timely filed before the District Court. It was thus, time barred. The only legal remedy for a matter filed in court out of time, is none other than dismissing it; see section 3 (1) of the Law of Limitation Act, Cap. 89 RE. 2019 and the decision of the CAT in the case of

Hezron Nyachiya v. Tanzania Union of Industrial Commercial Workers and another, CAT No.79 of 2001 (unreported). The taxing master was thus, enjoined to uphold the PO raised by the applicant before him and dismiss the bill of costs, but he did not do so, hence an error in law.

The findings I have made above are capable enough to dispose of the entire matter without considering the other reasons adduced by the applicant in challenging the merits of the sum taxed in favour of the respondent. I will not thus, consider them since by doing so I will be performing a superfluous or academic exercise of kicking a dead horse, which is not the core object of the process of adjudication like the one I am currently finalising.

Having said all, I nullify the proceedings of the bill of costs at issue and set aside both rulings of the taxing officer, to wit: the one that dismissed the PO raised by the applicant against the bill of costs at issue on time limitation (dated 31st March, 2020) and the one which taxed the sum of Tshs. **1, 900, 000/=** in favour of the respondent (dated 30th April, 2020). Each party shall bear his/her own costs since this matter has been finalized mainly due to the point related to the proper meaning of filing a document in court as shown above. This point was not highlighted by the parties, but by this court, hence the justification to apportion the costs. It is so ordered.



J.H.K. Utamwa
Judge

21/04/2022.

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CORAM; J. H. K. Utamwa, Judge.

Applicant: Absent (but one Mr. Abasi Mbosa is present for him).

For Respondent: Mr. J. Kajiba, holding briefs for Mr. S. Mgung'e advocate.

BC; Ms. Gloria. M.

Court: Ruling delivered in the presence of Mr. Abasi Mbosa (Sent by the applicant to inform the court that he could not attend for being in Makete) and Mr. Jonas Kajiba, learned counsel holding briefs for Mr. Shaba Mgung'e, learned counsel for the respondent, in court, this 21st April, 2022.


J. H. K. UTAMWA
JUDGE
21/04/2022.