IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. CIVIL REFERENCE NO. 35 OF 2021

(c/f Bill of Costs No. 9 of 2021 High Court of Tanzania at Moshi)

PIUS PAULO MBARUKU..... APPLICANT

VERSUS

FRANK RAMADHANI NYAKI..... RESPONDENT

RULING

9/02/2022 & 9/3/2022

SIMFUKWE, J.

The applicant herein Pius Paulo Mbaruku applied before this court for orders that:

a) That, the honourable judge of the High Court be pleased to quash and set aside the decision of the Taxing officer (Hon. Kingwele D.R) dated 30th day of June, 2021 regarding the Bill of Costs No. 9/2020 as the said Taxing officer applied wrong principle of law in taxing the bill of costs hence, reached into erroneous decision
b) Costs of this Reference
c) Any other relief(s) this honourable court may deem fit and just to grant.

The application was preferred under **Rule 7 (1) of the Advocates Remuneration Order, 2015, GN No.264 of 2015.** It was supported by the affidavit of Mr. Mussa Kahema Mziray, learned counsel for the applicant.

Mr. Benedict Bahati Bagiliye learned counsel for the respondent, raised 5 preliminary objections on point of law:

1) *THAT, this Honourable Court has no jurisdiction to grant the main relief sought through this reference.*
2) *THAT, the reference is fatally defective for being supported by an affidavit which has a defective verification which does not decipher facts in the knowledge of the deponent and matters of belief.*
3) *THAT, affidavit of the learned Counsel Mussa Kahema Mziray is incurably defective for containing extraneous matters by way of legal arguments, hearsay and conclusions.*
4) *THAT, the reference is fatally defective for being supported by a defective affidavit which has defective verification and jurat of attestation verified and sworn on falsity.*
5) *THAT, the reference is incompetent for citing a wrong number of the bill of cost in which the challenged decision emanates.*

The learned counsel for the respondent prayed that this application be dismissed with costs.

The preliminary objections were argued orally. Mr. Mussa Mziray argued the objections for the applicant while Mr. Benedict Bagiliye represented the respondent.

Supporting the preliminary objections serialism, starting with the first objection, Mr. Bagiliye submitted that, the application has prayers

which are not supposed to be included in the Bill of Costs. That, the aim of reference is to correct where the Taxing Master erred, and not to quash. That, if something is quashed, you remain with nothing. Thus, you cannot correct. The learned counsel referred to the case of **NUMAISH STEPHEN FORTES versus JOHN NWALA SAMANGU AND TWO OTHERS, Civil Application No. 27/08 of 2015,** CAT, at Mwanza at the last page, it was held that:

> *"The decision of the High Court whose proceedings we have nullified as already stated, it ceases to exist and, accordingly we strike it out."*

Mr. Bagiliye cited another recent decision of **VIP ENGINEERING AND MARKETING LTD versus CITIBANK TANZANIA LIMITED, Civil Application No. 24 of 2019,** CAT at Dsm, on the 1st page it was stated that:

> *"The applicant moves the Court to vary the decision of the Taxing Officer (Kahyoza DR as he then was) who awarded the applicant, inter alia Tshs 10,000,000/= as instruction fees on the ground that it is inordinately on the lower side."*

Mr. Bagiliye submitted further that, the aim of reference is not to quash as there will be nothing to correct. That, as a matter of practice, a party is granted what he has prayed for, thus in this application the applicant has prayed that this court should quash and set aside the decision of the Taxing officer.

On the second point of objection, it was submitted for the respondent that, the reference is fatally defective for being supported by an affidavit which has a defective verification which does not decipher

facts in the knowledge of the deponent and matters of belief. That, the deponent should have specifically stated what are based on his own knowledge and what is based on belief. He said, the remedy is to declare the affidavit to be defective and strike it out. To cement his argument, he cited the case of **ANATOL PETER RWEBANGIRA versus THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICE AND ANOTHER, Civil Application No. 548/04 of 2018**, CAT at Bukoba, at page 7 it was held that:

> *"All what is stated in paragraphs 1, 2, 3, 4, 5 and 6 of the affidavit is true to the best of my knowledge and belief."*

The learned counsel for the respondent was of the view that, the affidavit in the above decision is exactly like the affidavit in the instant matter. He referred to page 11 of the case of **ANATOL PETER RWEBANGIRA** (supra) where it was insisted that:

> *"Therefore, with respect we find Mr. Bitakwate's argument not sound on specification not being necessary merely because the facts in the applicant's affidavit are based on knowledge and belief. We say so because, one that is against the rule governing the modus of verification clause in an affidavit; and wo, without the specification, neither the Court nor respondents can safely gauge as to which of the deponed facts are based on the applicant's own knowledge and what are based on his belief. In this regard, we agree with the learned Senior State Attorney that, the verification clause of. applicant's affidavit is rendered defective which adversely impacts on the entire affidavit which is also rendered defective."*

Mr. Bagiliye insisted that, the above decision is a decision of the Full Bench which remains binding to date. Basing on that, he prayed this application to be strike out for being incompetent. On the third point of preliminary objection, Mr. Bagiliye submitted that, the affidavit of the learned counsel Mussa Mziray is incurably defective for containing extraneous matters by way of legal arguments, hearsay and conclusions. He added that, on the face of it, the affidavit of the learned counsel at paragraph 5 and 6 are full of conclusions. He prayed to quote paragraph 5 of the said affidavit, which reads:

> *"That pursuant to the amount claimed in the bill of costs, the taxing officer on 30th day of June, 2021, erroneously granted Tshs 10,538,000/=...."*

Mr Bagiliye continued to explain that, the phrase "erroneously granted" shows that the learned counsel has already concluded the matter. He went on to say that, on paragraph 6 the learned counsel is talking about hearsay. That, the same could have been stated in the verification clause that the information on paragraph 6 was according to information gathered from the applicant. That, the learned counsel for the applicant proceeded to conclude that the amount was erroneously calculated. He supported his point by subscribing to the case of **Uganda Versus Commissioner for Prison Ex Parte Matovu (1966) EA 514,** in which it was held that:

> *"The affidavit sworn too by counsel is also defective. It is clearly bad in law as a general rule of practice and procedure, an affidavit for use in court, being a substitute of oral evidence, should only contain statements of facts and circumstances to which the witness deposes*

either of his own personal knowledge or from information which he believes to be true. Such an affidavit must not contain an extraneous matter by way of objection, prayer or legal argument or conclusion."

Explaining the logic of an advocate swearing an affidavit on behalf of his client, Mr. Bagiliye stated that, the advocate should state/depone information which is from the proceedings only. Information from the client should be specifically stated. On this, reference was made to the case of **Fredrick K. Manyililiu Versus Triphonia John, HC Civil Revision No. 10 of 2008,** at page 14 paragraph 2 where it was held that:

"An advocate does not have a dual role, that is, an advocate as well as a witness. If an Advocate finds himself to be a material witness in a case, he is representing a party, he has to retire from Advocating for that party in a case.

In my view, an Advocate can only depose facts in a case he is advocating for a party in giving facts concerning Court proceedings. An Advocated is not entitled to depose facts which are in the knowledge of her client especially in a claim like the one at hand."

The learned counsel for the respondent also referred to the Court of Appeal decision in the case of **Adnan Kitwana Kondo & 3 others Versus National Housing Corporation, Civil Application No. 208 of 2014**, at page 7, 8-9 where the Court faced a similar situation. He quoted:

"VERIFICATION / I Thomas Mihayo Sipemba state that all what is stated above in paragraphs 1, 2,3, 4,5,6,7 and 8 above is true to the best of my own knowledge as Legal Counsel for the Applicants:

The starting point is paragraphs 2,3,4 and 5 which are obviously based on information whose source is not disclosed."

On the 4th objection that the reference is fatally defective for being supported by a defective affidavit which has defective verification and Jurat of attestation verified and sworn on falsity; Mr. Bagiliye submitted that the heading of this case is referred as Misc. Reference, originating from Bill of Costs No. 9 of 2020. That, paragraph 4 of the affidavit shows that this reference emanates from Bill of Costs No. 9 of 2021. Thus, it is not certain the reference emanates from which Bill of Costs. The learned counsel was of the view that, the affidavit is based on falsity. He insisted that, the court has been wrongly moved. He cemented his argument by referring to the case of **DENIS KASEGE Versus THE REPUBLIC, Criminal Appeal No. 359 of 2013,** CAT at Dsm, at page 3 where it was held that:

"It is now settled that, in compliance with the mandatory provision of Rule 68 (1) and (2) of the Court of Appeal Rules, 2009 (the Rules), a notice of appeal must insert a correct name of the High Court judge and the number of the case to be appealed against."

On the basis of the above quoted decision, Mr. Bagiliye commented that, wrong numbering of the decision sought to be challenged is fatal. He therefore submitted that this application should be dismissed.

Foreseeing that, the learned counsel of the applicant may wish to rely on the Oxygen Principle, the learned counsel for the Respondent

referred to the Court of Appeal decision in the case of **NJAKE ENTERPRISES LIMITED Versus BLUE ROCK LIMITED AND ANOTHER, Civil Appeal No. 69 of 2017,** at page 11, where it was held that:

> *"This principle is now enshrined in the Act. It enjoins the court to do away with legal technicalities and decide cases justly..... Also, the overriding objective principle cannot be applied blindly on the mandatory provision of the procedural law which goes to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the principle in the Act. According to the Bill it was said thus;*
>
> > *"The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms."*

Mr. Bagiliye concluded his submissions by praying that this application should be dismissed with costs.

Opposing the preliminary objections raised, Mr. Mussa Mziray learned counsel for the applicant; on the first objection he submitted among other things that this Court has powers to grant the reliefs sought, even to dismiss the costs awarded by the taxing master. He referred the case of **John Momose Cheyo Vs Stanbic Bank Tanzania Limited, Commercial Reference No. 72 of 2018,** in which Hon. Songolo J dismissed all the costs granted by the taxing master.

Concerning the cited case **of Numaish Stephen Fortes Versus John Nwula Samangu and 2 Others** (supra), Mr. Mziray stated that the same was distinguishable to the instant matter. That, in the said

case, the Court of Appeal dismissed the case because the 2nd Respondent was sued on a wrong name. Also, the case of **VIP Engineering and Marketing Ltd** (supra) was said to be distinguishable to this case as what was prayed in the said case was to vary the decision of the taxing officer. That, it is obvious that in the said case the Decree Holder is the one who filed the application praying for more costs. To the contrary in this case, the applicant is praying for the court to set aside excess costs granted by the taxing master. Furthermore, that the taxing master applied wrong principle of the law.

On the second preliminary objection, Mr. Mziray submitted that, the same has no basis as the affidavit which supports this application is not defective as alleged by the learned counsel of the Respondent. That, the said affidavit has verification clause and deponent. The verification clause has explicitly stated that facts on paragraph 1 to 7 are true to the best knowledge and belief of Mr. Mziray, due to the fact stated on paragraph 2 of the affidavit that he participated in Civil case No 9/2018 as he was the one who was instructed by the applicant in the said case, as well as in the application for Bill of Costs which is the subject of this reference. The learned counsel submitted further that, he was conversant of this case to the extent of swearing an affidavit on behalf of his client and that there was no need of disclosing source of information as he was knowledgeable of the facts of the case.

Regarding the cited case of **Anatol Peter Rwebangira** (supra), Mr. Mziray was of the view that the circumstances in the case of **Anatol** are different from the circumstances of this case. He said at page 9 of the Ruling of the case of **Anatol** (supra), the Court of Appeal referred

to the book of C. K. Takwani titled **CIVIL PROCEDURE 5th Edition at page 21** where it is stated that:

> *"Where an averment is not based on personal knowledge, the source of information should be clearly disclosed."*

On the basis of the cited authority, Mr. Mziray was of the opinion that the cited case is distinguishable to this case as there was no information which required disclosure of its source. He referred to page 10 of the case of **Anatol** (supra) at the last paragraph, 1st and 2nd line where it was stated that:

> *"It is thus settled law that, if the facts contained in the affidavit are based on knowledge, then it can be safely verified as such."*

The learned counsel for the applicant maintained that, the affidavit which is before this court is proper and not defective as alleged by the learned counsel for the respondent. Thus, the 2nd preliminary objection has no basis, Mr. Mziray prayed that the same should be dismissed so that the application may be determined on merit.

On the 3rd preliminary objection, Mr. Mziray submitted that paragraph 5 of the affidavit has no conclusion as they could not move the court without using the words "erroneously granted."

On the allegation that paragraph 6 of the affidavit contained information from the applicant, Mr. Mziray submitted that as a counsel of the applicant it was correct to depone such facts based on his own knowledge. Thus, the said affidavit has no extraneous matters by way of legal arguments, hearsay and conclusions.

The learned counsel for the applicant went on to submit that, in the cited case of **Adnan Kitwana Kondo** (supra) at page 8, the Court of Appeal referred to the case of **LALAGO COTTON GINNERY** in which it was held that:

> *"An advocate can swear and file an affidavit in proceedings which he appears for his client, but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during those proceedings."*

It was submitted further that it is obvious that the above quotation allows an advocate to swear an affidavit for his client in matters which he appeared earlier in the proceedings for the same client. In addition, Mr. Mziray stated that the case of **Adnan Kitwana Kondo** (supra) is distinguishable to the present case since in the said case the learned counsel who sworn an affidavit was found that he was not Coram Judice in the previous proceedings; while in the instant matter the learned counsel for the applicant was Coram Judice in the previous matter, thus he was much aware of what he deponed. Mr. Mziray prayed the 3rd preliminary objection to be dismissed.

On the 4th and 5th preliminary objections which were argued together; Mr. Mziray started by submitting on the 5th preliminary objection. He said that it was true that there was a typing error in respect of the case number, instead of Bill of Costs No. 9/2021, it was written No. 9/2020. The learned counsel for the applicant was of the view that the said typing error was curable as the same may be rectified to read Bill of Costs No. 9 of 2021 as correctly stated in the affidavit. To cement his

point, the learned counsel cited the case of **JALALUDIN HAJI JAMAL Versus SHAFIN JALALUDIN HAJI JAMAL, Civil Appeal No. 55 of 2003,** Court of Appeal of Tanzania at Dsm at page 6, on the 1st paragraph, the Court stated that:

> *"We are furthermore of settled mind that the error of citing year 2002 instead of 2001 is a minor curable defect. We therefore, overrule ground one of the preliminary objections."*

On the basis of the above cited decision, Mr. Mziray was of the view that the typing error in their application is curable and the preliminary objection has no merit.

On the 4th preliminary objection, it was submitted in reply briefly that as already stated earlier, they reiterate that the affidavit in this case has proper verification clause and jurat of attestation. That, what the learned counsel deponed, he had knowledge of the same, no information was sought from his client.

In respect of the cited case of **FREDRICK K. MANYILILI Versus TRIPHONIA JOHN** (supra), in support of the 4th objection, Mr. Mziray submitted that the said case is distinguishable to the present case as evidenced at page 13, the 4th paragraph of the cited case in which there was an order of the trial court issued on 12/3/2008 which ordered the plaintiffs to prove the case by affidavit. Mr. Mziray referred to page 13 at paragraph 5,6 and 7 of the case of **Fredrick Manyilili** where it was noted that:

> *"First, the affidavit does not state or disclose the religion of the Deponent and whether he took Oath or was affirmed before narrating the facts which were acted upon by the trial court.*

Second, it was not proper for the advocate to file his own Affidavit to prove the claim on behalf of the plaintiff now respondent against the order of the trial court."

Mr. Mziray commented that, the court found that the learned counsel turned to be a witness.

Lastly, the learned counsel for the applicant prayed this court to consider the Overriding Oxygen Principle which is embodied under **section 3A (1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019** as amended by **Written Laws Misc. Amendment Act No. 8 of 2018,** which supports the spirit in **Article 107A (2) (e) Of the Constitution of the United Republic of Tanzania,** which is to the effect that the court should consider substantive justice as opposed to procedural justice.

In his rejoinder, Mr. Bagiliye starting with the first objection in respect of jurisdiction, submitted that their point is that when you quash and set aside the decision, you remain with nothing. That, the said remedy is for revision. He said that's why they cited the case of **Numaish** (supra) to show the effect of nullifying proceedings.

Concerning the cited case of **John Momose Cheyo** (supra) cited by the learned counsel for the applicant, Mr. Bagiliye replied that the said case is a High Court case, thus, this court is not bound its own decision. That, it is merely persuasive. In addition, he said that, since we have Court of Appeal decisions like **VIP ENGINEERING** (supra), the decision in the case of **John Momose Cheyo** cannot prevail. Mr. Bagiliye went on to state that, in reference, the court ought to vary the decision of the taxing officer and not to quash.

On the 2nd objection, Mr. Bagiliye re-joined that in the alleged affidavit there is nowhere where the learned counsel has shown that he appeared for the applicant in the said previous matters. That, those are mere words from the bar, as on the 1st paragraph of the affidavit, the learned counsel for the applicant has stated to the effect that he has been instructed to represent the applicant in the present Reference. Thus, he is a total stranger to this matter.

Mr. Bagiliye stated further that, even if the learned counsel participated in the previous matters, still the cited case of **ADNAN KITWANA** (supra) directs the extent of facts which can be sworn by an advocate. Therefore, in this case the advocate ought to have shown which facts were known by him and those not known to him. The learned counsel for the respondent said that in the case of **Anatol Peter Rwebangira** (supra), at page 7, the Court of Appeal quoted the paragraphs of the affidavit and challenged the verification clause of the same. It stated that:

> *"As a general rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only contain statements of facts and circumstances to which the witness deposes either on his own personal knowledge or from information which he believes to be true."*

The learned counsel for the respondent, also referred to page 10 of the same decision where it was held that:

> *"It is thus settled law that, if the facts contained in the affidavit are based on knowledge, then it can be safely verified as such. However, the law does not allow a blanket or rather a*

general.....what is true according to knowledge, belief and information without specifying the respective paragraphs."

Mr. Bagiliye reiterated that, in this case the whole affidavit is rendered defective on the basis of a defective verification clause.

Concerning the remedy of dismissing the application, it was re-joined that the same is based on the fact that they had raised more than one preliminary objection. That, in case the court upholds only one objection, then the remedy is to strike out the application with costs.

On the 3rd preliminary objection, it was reiterated that erroneously granted means that it has been concluded. That, it is this court which can reach that decision that the costs were erroneously granted. Meanwhile, the granted amount is the law. Otherwise, the learned counsel for the applicant should have stated that paragraph 5 was according to his belief. Thus, his affidavit violates the principles of affidavits. Moreover, it was alleged that paragraph 6 of the same affidavit shows hearsay and source of information has not been disclosed.

On the 4th and 5th objections, it was re-joined that the learned counsel for the applicant conceded to the objections and alleged that those were typing errors and cited the case of **SHAFFIN** (supra) in which the Court of Appeal stated that the typing error was not fatal; It was submitted that the said decision was relevant by then as there is a most recent decision. Mr. Bagiliye cited the case of **Chama cha Walimu Tanzania Vs Attorney General, Civil Application No. 151 of 2008,** in which there was a typing error whereas **Rule 94** was

cited instead of **section 94.** The Court of Appeal in its ruling on the raised preliminary objection held at page 18 that:

> *"It may well have been a typographical error as pleaded by Mr. Patel, but if that was so, he ought to have sought to correct the error before the matter came for hearing. It is the duty of the party and not of the court to correct his pleadings and /documents relied on. If it were otherwise, we would not avoid belng reproached with putting aside our mantle of impartiality."*

Mr. Bagiliye contended that, it was the duty of the advocate to correct the errors in his pleadings.

Regarding the Oxygen or Overriding Objective Principle; it was reiterated that the same should not be used to avoid mandatory requirements of the law (procedure). That, in this matter, the requirement to specify facts deponed on one's own knowledge and facts based on one's belief. Mr. Bagiliye referred to the most recent decision of the Court of Appeal of five Judges, the case of **GIDEON WASONGA & 3 OTHERS Versus THE ATTORNEY GENERAL & 2 OTHERS, Civil Appeal No. 37 of 2018,** at Dsm.

The learned counsel concluded that they pray that their 5 raised preliminary objections be sustained. That, if all the objections will be sustained, they pray the matter to be dismissed, while if only one objection is sustained, the matter be strike out with costs.

Having carefully gone through the submissions of the learned counsels of both parties, the issue for consideration is whether the raised preliminary objections have merit.

Starting with the first point of preliminary objection **that this Honourable court has no jurisdiction to grant the main relief sought through this reference;** in his submissions in chief the learned counsel for the respondent submitted among other things that the aim of reference is to correct where the Taxing Officer erred. That, the aim of reference is not to quash because when something is quashed, you remain with nothing. Thus, you cannot correct. On the other hand, the learned counsel for the applicant stated that this court has powers to grant the relief sought, even to dismiss the costs awarded by the taxing master. He referred to the case of **John Momose Cheyo** (supra) in which **Hon. Songolo, J** dismissed all the costs granted by the taxing master. Concerning the cited case of **Numaish Stephen Fortes** (supra), Mr. Mziray for the applicant was of the view that the same is distinguishable to the instant matter as in the said case, the Court of Appeal dismissed the case because the 2nd respondent was sued on a wrong name. This court agrees with the learned counsel for the applicant that this court has powers to grant the reliefs sought by the applicant. The reliefs to be granted cannot be uniform in all applications for reference, it depends on what the applicant seeks before the court, according to what he is aggrieved of. The case of **VIP Engineering and Marketing Ltd** (supra) is a good example as submitted correctly by the learned counsel of the applicant that in the said case the relief sought was to vary the decision of the taxing officer as the Decree Holder is the one who filed the application praying for more costs. For the sake of clarity, **quash** means *reject as invalid, cancel, put an end to or suppress a decision.* **Set aside,** means to *declare a legal decision or a process to be invalid, or to overrule,*

overturn or reverse a decision. It may be noted that, the two terms somehow are similar, no wonder in most cases the said terms are used simultaneously.

The second point of preliminary objection **that the reference is fatally defective for being supported by an affidavit which has a defective verification which does not decipher facts in the knowledge of the deponent and matters of belief;** this objection is similar to the 4th objection which is to the effect that the verification clause and jurat of attestation were verified and sworn on falsity. With respect, I concur with the learned counsel for the respondent that the learned counsel for the applicant should have included a paragraph indicating that he appeared for the applicant in the said Civil Case No. 9/2018 and Bill of Costs No. 9/2021. Short of that, renders the deponed facts to be hearsay which has been raised on the 3rd preliminary objection. In that regard, I find the 2nd, 3rd and 4th preliminary objections have merit. The same are hereby upheld.

On the 5th preliminary objection, that the reference is incompetent for citing a wrong number of the bill of costs in which the challenged decision emanates; the learned counsel for the respondent submitted to the effect that wrong numbering of the decision sought to be challenged is fatal. He referred to the Court of Appeal decision in the case of **DENIS KASEGE** [illegible] of appeal must insert a correct name of the High Court Judge and the number of the case to be appealed against. On the other hand, the learned counsel for the applicant was of the opinion that since the number of the Bill of Costs was correctly indicated on paragraphs 4 and 5 of the supporting affidavit, the objection has no merit. He referred

to the case of **LEILA JALALUDIN** (supra) to support his argument. I am of considered opinion that the decisions cited by the learned counsels of both parties are overtaken by events since both decisions were delivered prior to the invasion of the overriding objective principle in 2018. In that sense, I am of the view that, since copy of the ruling showing the proper number of the said Bill of Costs has been attached, the error is not fatal.

That said, on the basis of the 2nd, 3rd and 4th preliminary objection which I have upheld herein above, the instant application is incompetent before the court. Consequently, I hereby strike it out accordingly with costs. The applicant is at liberty to file a proper application subject to time limit set out under the law.

It is so ordered.

Dated and delivered at Moshi this 9th day of March, 2022.

S. H. SIMFUKWE

JUDGE

09/3/2022.