

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**BUKOBIA DISTRICT REGISTRY**

**AT BUKOBIA**

**CIVIL REFERENCE NO. 05 OF 2021**

*(Arising from Ruling of the High Court at Bukoba (J.M. Minde) - Taxing Officer in Taxation Cause No. 27 of 2020 dated 4<sup>th</sup> October, 2021 and originating from the decision of the High Court at Bukoba (F.H. Mtulya, J.) in Land Case No. 1 of 2015 dated 28<sup>th</sup> September, 2020)*

**WALII HASSAN MIYONGA..... APPLICANT**

**VERSUS**

**AARON KABUNGA.....RESPONDENT**

**22/04/2022 & 13/05/2022**  
**E. L. NGIGWANA, J.**

The applicant has brought this application for Reference under Order 7 (1) and (2) of the Advocates Remuneration Order; G.N. No. 264 of 2015, moving the court to quash and set aside the decision of the Taxing Master in Taxation Cause No. 27 of 2020, and order that the matter be determined on merit before the Taxing Master. The applicant is also asking the court to grant costs of this application. The applicant faults the Taxing Master for failure to consider that the court had jurisdiction to determine the Bill of costs awarded to the applicant and as a result, she struck out the matter on the major ground that there is a pending Notice of Appeal lodged on 15<sup>th</sup> day of October 2020 at the Court of Appeal, Bukoba sub-Registry.

Briefly, the facts leading to this reference as can be extracted from records are to the effect that, on 28<sup>th</sup> day of September, 2020, this Honourable Court (Mtulya, J.) delivered its judgment in Land Case No. 1 of 2015 in favour of

the Applicant whereas the applicant was awarded general damages at the tune of Tshs. 50,000,000/= and costs of the suit.

Following the said decree of this court, the applicant initiated Taxation Cause No. 27 of 2020 against the respondent in order to enforce the awarded costs of the suit whose filing is limited by time to wit; 60 days from the date of the delivery of the judgment. Upon being served with the copy of the Bill of costs, the respondent through advocate Frank Karoli, filed the reply thereto together with a notice of Preliminary Objection on point of law that;

*"This Honourable court is not vested or clothed with Jurisdiction to hear and determine the matter on account that there is a valid pending Notice of appeal lodged on 15<sup>th</sup> October, 2020 in the court impugning the whole decision on which the costs in this application emanate."*

Since, it is common understanding that, as per court practice, the raised points of preliminary objection have to be disposed first before proceeding with the main application, the P.O raised was heard by way of written submissions. At the conclusion of the hearing, the P.O was sustained. Consequently, the application for reference was struck out with leave to re-file after the hearing and determination of the intended appeal at the Court of Appeal or after the withdrawal of the said Notice by the Judgment Debtor or after the dismissal of the Notice by the Court of Appeal. The applicant was aggrieved by the said decision hence this application.

When the matter came for hearing, the applicant was represented by Mr. Marwa Samwel and Mr. Salim Fundikira, both learned advocates while the respondent Mr. Aaron Kabunga appeared in person, unrepresented.

Taking the floor, Mr. Salim Fundikira argued that Bill of costs is part of the execution process therefore; Notice of Appeal has never been a bar to execution. To support his argument, the learned counsel referred me to Rule 11 (3) of the Court of Appeal Rules, 2009 as amended.

The learned counsel went on submitting that the existence of the Notice of Appeal was not a justifiable ground to strike out Taxation No. 27 of 2020. **Mr. Fundikira further referred me to the case of Jawinga C. Ltd. Versus Aristeprol Investment Co. Ltd**, Commercial Case No. 103 of 2012 where it was held inter alia that it is not automatic that whenever a Notice of Appeal is filed, execution should be stayed. Mr. Fundikira added that if the respondent had the intention of staying the execution, he could have sought and obtained an order of stay and that, since there was no such order, the court had jurisdiction to entertain the application. He added that in the premise, the Taxing Master erred in law to strike out the matter for want of Jurisdiction. Mr. Fundikira referred me to the Case of **Serenity on the Lake Ltd versus Dorcus Martin Nyanda**, Civil Revision No. 1 of 2019 (CAT) (unreported) where the Court of Appeal held among other things that what the Registrar of the High Court was supposed to do after realizing that there was a pending appeal before the Court of Appeal was to halt the proceedings and pave the way for the appeal process to proceed. By entertaining the application for stay of execution while there was a pending Notice of Appeal lodged in this court, the Deputy Registrar slipped in an error for lack of

jurisdiction. Fundikira also argued that striking out the matter would subject the parties to incur unnecessary costs including lodging of application for extension of time within which to file taxation. On his side Mr. Marwa stated that, the Taxing Master ought to have adjourned the matter sine die.

In reply, Mr. Kabunga submitted that the order of the Taxing Master is very clear as the application was struck out with leave to re-file, thus it is not correct to say the doors for the applicant have been closed. Mr. Kabunga went on submitting that the act of filing Taxation cause while the Notice of appeal has been filed is to circumvent the Appeal process. Kabunga further stated that the court had no jurisdiction over the matter therefore, the order striking it out was very proper. Mr. Kabunga distinguished the case of **Jawinga** (supra) with the present arguing that **Jawinga's case**, the court was dealing with execution, and not bill of costs. Mr. Kabunga added that the Court of Appeal Rules are not applicable in the High Court, thus the High Court misdirected itself in the case of "*Jawinga*." Mr. Kabunga went on submitting that, according to the case of "**Serenity**" (supra), whenever there is a Notice of Appeal, the High Court ceases to have Jurisdiction over the matter, and since Bills of costs filed was part of the decree, the High Court had no jurisdiction.

In his rejoinder, Mr. Fundikira insisted that the Taxing Master had jurisdiction over the matter. On his side, Mr. Marwa stated that the law is very clear that an appeal or Notice of Appeal is not a bar to execution, thus the case of *Jawinga* was properly decided, and it has never been reversed by the Court of Appeal, therefore, it is still a good law.

I have heard the rival arguments from both sides and carefully gone through the record of the application. The issue for determination is whether the High court (Deputy Registrar) had no Jurisdiction over Taxation Cause No. 27 of 2020 on the ground that there was a valid Notice of Appeal lodged in the Court of Appeal.

I am alive of the decision of the **Court of Appeal in Tanzania Electric Supply Company Ltd versus Dowans Holdings S.A. (Costa Rica) and Dowans Tanzania Limited (Tanzania)**; Civil Application No. 142 of 2012 (unreported) in which the Court of Appeal had this to say;

*"It is settled law in our jurisprudence which is not disputed by the counsel for the applicant, that the lodging of a Notice of Appeal in this court against an appealable decree or order of the High Court commences proceedings in the court. We are equally convinced that it has been established that once a Notice of Appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter." Likewise, the case of **Awiniei Mtui and three Others versus Stanley Ephata Kimambo (Attorney for Ephata Mathayo Kimbambo)**, Civil Application No. 19 of 2014 (unreported) in which the Court of Appeal held that once the Notice of Appeal has been duly filed, the High Court ceases to have jurisdiction over the matter."*

However, it is my considered view that the herein above authorities have to be read together with the case of **Mitsushita Electric Co. Ltd versus Charles George t/a G.G. Traders**; Civil Appeal No. 71 of 2001 where the Court of Appeal had this to say;

*"Once a Notice of Appeal is filed, this court is seized of the matter in exclusion of the High court **except for applications specifically provided***

***for. Such as leave to appeal, provision of the certificate of a point of law or execution where there is no order of stay of execution from this court."***

From the above authorities it is apparent that, the general rule is that once a Notice of Appeal has been duly lodged to the Court of Appeal, the High Court ceases to have jurisdiction over the matter. Basically, every general rule has its own exceptions. In our situation, the exceptions to the general rule were stated in the case of **Matsushita** (supra) that irrespective that appeal process to the Court of Appeal has already been initiated by the Notice of Appeal, the High Court can entertain:-

- (a) Application for leave to Appeal to the Court of Appeal.
- (b) Application for certificate on point of law.
- (c) Application for execution where there is no order of stay of execution issued by the Court of Appeal.**

As far as I know, the Court of Appeal has never reviewed its decision in the case of **Matsushita** on the ground that it was decided *per incuriam*, therefore, it is still good law. In that vein, I subscribe to the holding of my senior brother Hon. Mruma, J in **the Jawinga's case** that it is not automatic that whenever a notice of Appeal is filed, execution process should be stayed.

It should be noted that execution is the process of enforcing or giving effect to the decree or award of the court as the case may be. In that premise, it is clear to me and to the parties that Taxation of Bill of costs part of the execution process.

In the matter at hand, there is no evidence that the respondent ever filed an application for stay in the Court of Appeal and obtained order of stay or that there is an application for stay in the Court of Appeal, or that there is a pending Appeal before the Court of Appeal.

It is also worth noting that in the instant case, the matter intended to be appeal against require no leave of this court to appeal to the Court of Appeal because it is the Land matter that was determined by this court while sitting in its original jurisdiction.

Since a Notice of appeal is a sufficient expression of an intention to file an appeal, and that such an action is sufficient to find the basis for grant of orders of stay in appropriate cases, the respondent ought to have done so. See **Attorney General of the Republic of Uganda versus the East African Law Society & Another**, EACA Application No. 1 of 2013.

In that premise, I agree with both advocates for the Applicant that this court had jurisdiction to entertain Taxation Cause No. 27 of 2020.

Part of the ruling of the Taxing Master reads;

*"Reading advocate Julius's submissions, I found the gist of his submissions is the fact that the Decree Holder has the right to enjoy his costs awarded in Land Case No. 1 of 2015 by this court. It is well known that taxation cause must be filed within 60 days from the date of the order as per Order 4 of the Advocate Remuneration Order, G.N. No. 264 of 2015. On that basis, the Decree Holder was required to file his bill of costs within the said 60 days, the prescribed period. Never the less, based on the Court of Appeal decisions by Advocate Frank, one must not dispute the truth that this court's*

*jurisdiction ceases instantly after the Notice of Appeal to the Court of Appeal filed in the Court of Appeal sub-registry."*

Despite the fact that the High Court has jurisdiction to entertain application for execution or Bill of costs where there is no order of stay, the officer who carries the execution must be extra-careful not to carry out the execution or deal with the matter to the extent that may interfere or prejudice the proceedings in relation to the judgment or order resulting into the said costs being challenged in the Higher Court.

To avoid unnecessary and unexpected chaos in the administration of justice, It is my considered view that where there a Notice of Appeal lodged in the Court of Appeal and no order of stay issued by the Court of Appeal, the best practice is for the applicant to ask for the withdrawal of the application with leave to re-file after the determination of the intended appeal or after the withdrawal or dismissal the Notice of Appeal.

Where the prayer to withdraw the same with leave to re-file is granted, it is very important for the Taxing Master to specify the time within which the same has to be filed; for example 14 days, 21 days or 30 days from the date of the judgment of the Court of Appeal, or from the date of the withdraw or dismissal of the Notice of Appeal. Leave to re-file, will save the applicant from seeking extension of time within which to file Bill of costs.

Another option is for the Taxing Master to adjourn the matter pending hearing and final determination of the intended appeal at the Court of Appeal, or withdrawal or dismissal of the Notice of Appeal according to law.



However, the problem with the 2<sup>nd</sup> option is that, it will make the court to continue adjourning the matter for unknown period of time and that will definitely create unnecessary backlog cases, the vocabulary which is currently not desired in the administration of justice in our jurisdiction.

In the case of the Registered Trustees Catholic, **Arch Diocese of Arusha versus Nestory Msofe, and 6 Others**, Land Reference No. 3 of 2018, when addressing the matter which was struck out by the Taxing Master on the ground that it was prematurely filed as the Notice of Appeal was still existing. My Brother Hon. Robert, J. allowed the reference, quashed and set aside the order of the Taxing officer and directed that the matter be adjourned pending the determination of the Respondents application for leave to the Court of Appeal, and if granted, pending the outcome of the Appeal before the Court of Appeal of Tanzania.

Indeed, I subscribe to the position taken by my brother Hon. Robert J. in the herein above case save for the order adjourning the matter. In the event, I allow this reference and proceed to quash and set aside the order of the Taxing Master (J. M. Minde) made on 4/10/2021, striking out Taxation Cause No. 27 of 2020. I further direct that the parties should appear before the Taxing Master in Taxation Cause No.27 of 2020 for necessary orders. Costs to follow the event. It is so ordered.



  
E.L. NGIGWANA

JUDGE

13/05/2022

Ruling delivered this 13<sup>th</sup> day of May, 2022 in the presence of Mr. Salim Fundikira learned advocate for the Applicant Mr. Frank Karoli, learned advocate for the Respondent, Mr. E. M. Kamaleki, Judges' Law assistant and Ms. Tumaini Hamidu, B/C.



  
E.L. NGIGWANA

JUDGE

13/05/2022