

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOKA DISTRICT REGISTRY

AT BUKOKA

CIVIL REFERENCE NO. 7 OF 2021

(Arising from Taxation Cause No.13 of 2021 of the High Court of Tanzania at Bukoba, Originating from Misc. Civil Application No. 15 of 2020 of High Court of Tanzania at Bukoba)

KENNEDY BAKEBULA..... APPLICANT

VERSUS

EDWIN KAJUMULO.....RESPONDENT

RULING

31/03/2022 & 28/04/2022

NGIGWANA, J.

This is an application for reference made under Order 7(1), (2) and (3) of the Advocates Remuneration Order, 2015 G.N No. 264 of 17th July, 2015 (Advocates Act Cap 341). The applicant is contesting the tax master's award of TZS. 1,730,000/= awarded in the impugned taxation cause No. 13 of 2021.

The brief facts leading this application for reference is to the effect that, in 2014 the applicant Kennedy Bakebula, filed Probate Cause No. 09 of 2014 at Nshambya Primary Court-Muleba District whereas the judgment was entered in his favor. The respondent was aggrieved, hence successfully lodged an appeal to the District Court of Muleba at Muleba, Probate Appeal No. 15 of 2014. Aggrieved by the decision, of the District Court, the applicant lodged an appeal to this Court to wit; Appeal No. 9 of 2017, but the same ended being dismissed on 27/03/2020 for want of merit. Aggrieved by the decision of this court (Kairo J as she then was), the applicant lodged a notice of appeal to the Court of Appeal and Misc. Civil

Application No. 15 of 2020. However, on 09/04/2021, the same was struck out with costs for being incompetent.

From there, the respondent Edwin Kajumulo filed Taxation Cause No. 13 of 2021 claiming for a total sum of TZS. 1,940,000/= as costs incurred for prosecuting Misc. Civil Application No. 15 of 2020. At the end, the respondent was awarded the sum of **TZS. 1,730,000/=**. The applicant was aggrieved by the decision of the Taxing Officer, hence this application.

At the hearing, the applicant was represented by Mr. Eliphaz Benges, learned advocate, while the respondent was represented by Mr. Frank Karoli, learned advocate.

In the applicant's affidavit sworn by Kennedy Bakebula, paragraph 3 and 4 constitutes the contention at issue. Mr. Bengesi prayed to adopt the same in his submission in chief. That the respondent's application through taxation Cause No. 13 of 2021 was prematurely filed since there was a Notice to the Court of Appeal. He cited the case of **Noman-Mahboub (T/A Noman Al Mahboub General Trading Corporation versus Milcafe Limited**, Commercial Case No. 41 of 2003, HCT Commercial Division at DSM (Unreported), **Matsushita Electric Co (EA) Ltd versus Charles Genge t/a G.G Traders** Civil Appeal No. 71 of 2001, CAT (Unreported). Both cases held that once the notice of appeal is filed in the Court of Appeal, the Court of Appeal is seized with the matter and the High Court is excluded except for the application of leave or certification on point of law or execution where there is no order of stay.

In reply, Advocate Frank Karoli who stood for the respondent concurred with the applicant advocate and therefore prayed for the application to be granted without costs.

In rejoinder, Mr. Bengesi had nothing to add than praying the costs to be in the due course.

My task now is to determine whether the application is meritorious.

Since both parties' advocates are at one that taxation cause No. 13 of 2021 (Impugned decision) which was determined by the Deputy Registrar proceeded while there was a notice of appeal filed in the Court of Appeal and there was also an application for certification on point of law filed in this court which was certified on 07/12/2021, this court holds the same view that the decision which was born out was a nullity. I derive help from the two cited cases by applicant's counsel that of **Matsushita Electric CO** (Supra) which was quoted in the case of **Noman-Mahboub**. (Supra)

*"I am of the considered opinion that once a notice of appeal is filed under Rule 76, then this court is seized of the matter in exclusion of the High Court except for application specifically provided for such **as leave to appeal, provision for a certificate of point of law or execution where there is no order of stay from this court.**"*

In this matter both the learned counsels have unanimously submitted that Taxation cause which is impugned is not one of the proceedings which are allowed to proceed once the Notice of appeal is filed to the Court of appeal, but, with due respect to the learned advocates, I do not agree with that position because it is trite law that Notice of appeal or pendency of appeal is

not a bar to the execution. 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 that taxation of Bill of costs is part of the execution process. Therefore, as a general rule, even if there is a notice or a pending appeal before the court, **the respondent would still be obliged to seek an order for stay of execution from the relevant authorities.** In other words, where the Notice of appeal has been filed but there is no order of stay, the High court can still entertain application for execution. See the case of **Matshushita Electric** (Supra). In the matter at hand, there was no evidence that, the respondent ever sought and obtained order of stay. A stay of execution is a stay issued by the court suspending or delaying the enforcement of the judgment against a person. It denotes that no party or interested individual nor entity is to act until the court has given a green light.

However, the officer who carries out execution of the decree or award (Normally the Deputy Registrar) must warn him/herself not to carry out the execution to the extent that may interfere and prejudice the proceedings in relation to judgment or order resulting into the said costs being challenged in the Higher Court. There is no doubt that in the administration of justice, each case has its own peculiar circumstances. Under the circumstances of this matter, considering the order which resulting into the said costs, it would not have been in the interest of justice to continue taxing Bills of costs while not aware what would be the results of the Court of Appeal decision in the intended appeal. Had the Taxing officer adjourned the matter pending determination of the respondent' application for certification on point of law, and if granted, pending the outcome of the Court of Appeal

decision in the intended appeal, this application would not have been filed. In the upshot, I allow the application and quash the proceedings in taxation cause No. 13 of 2021 and set aside its resultant decision thereon. Costs in due course.

It is so ordered.



E.L. NGIGWANA

JUDGE

28/04/2022

Ruling delivered this 28th day of April, 2022 in the presence of both parties in person, Mr. E. M. Kamaleki, Judges Law Assistant and Tumaini, BC.



E.L. NGIGWANA

JUDGE

28/04/2022.