

IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA

CIVIL REFERENCE NO. 10 OF 2022

(Originating from Application of Bill of Cost No. 6 of 2021 at Musoma District Court)

MRAGA MKAMA SELEMANI APPLICANT

VERSUS

PETER MAGESA RESPONDENT

RULING

15th & 18th May, 2023

M. L. KOMBA, J.:

This is an application for reference made under Order 7 (1) and (2) of the Advocate Remuneration Order, GN. No. 263 of 2015 (GN. No. 264 of 2015) where the applicant by way of chamber summons prays this court to grant this application with costs.

During the hearing of this application, the applicant was serviced by Mr. Thomas Makongo, learned advocate and on the other hand, Mr. Ostack Mligo, the learned advocate, represented the respondent.

In the course of hearing this application, the court need to make reference to some issues as raised by parties and noticed the impugned decision was not attached to the application, that make the trial judge to probe

the parties to address whether the impugned decision was attached in the application, and if not, what is the consequences.

Mr. Makongo was the first to step into the battle ring. He submitted that the provisions of Order 7 of GN. No. 263 of 2015 (the Advocate Remuneration Order) which provide for reference from decision of the taxing officer to the High Court, does not set a mandatory requirement that the impugned decision must be attached. He proceeded that, failure to attach a copy of impugned decision cannot render the application to be null or bad in the eyes of the law.

Mr. Makongo submitted further that, reference should be distinguished from an appeal and it should not be applied *mutatis mutandis*. The counsel was of the views that the application is competent and the court may even request the parties to submit the missing copy for necessary action. He finalized by beseeching the court to do away with technicalities.

On his part, the respondent's counsel Mr. Mligo submitted that the application should have attached with impugned decision to enable this court to make the reference thereto. The counsel was of the opinion that the court cannot make a reference where there is no ruling or judgment to rely upon. He argued further that, it is mandatory to attach the document which is complaining of in order to enable the court to reach

into the decision. Having submitted that, Mr. Mligo prayed the application to be struck out.

Upon the parties' submission, it is now the time this court has to determine whether the anomaly is fatal.

First of all, I would like to agree with Mr. Makongo's submission that pursuant to Order 7 of the GN. No. 263 of 2015 which provide for an application of reference to the High Court, an attachment of the copy of the impugned decision is not one of the prerequisites. However, the law provides that the application should be instituted by way of chamber summons supported by an affidavit. The cited Order provides;

'7.-(1) Any party aggrieved by a decision of the Taxing officer, may file reference to a judge of the High Court.

(2) A reference under order (1), shall be instituted by way of chamber summons supported by an affidavit and be filed within 21 days of from the date of the decision.'

It is well established that, affidavit is the sworn statement used to adduce evidence in court and that should be made under oath and all documents must be attached to it. It is also a trite law that failure to attach documents where there could be one or some to prove averment in affidavit amounts to failure to prove such averments in the affidavit. See **Regional**

Manager TANROAD Kagera vs. Ruaha Concrete Co. Ltd, Civil Application No. 96 of 2007, CAT at Dar es salaam (unreported).

As it was depicted from the applicant affidavit, the main issue of this application at hand is to vary the decision of Taxing Master in Application of Bill of Cost No. 6 of 20121 of District Court of Musoma. Thus, without much ado, I can say the copy of the impugned decision is of paramount important.

Nevertheless, it is quite clear that the court that would be sat to determine the reference would want to be assured that the said impugned decision exists. Inevitably, such process would entail going through the copy of impugned decision. It would also help court to find out if there is an issue needed to be addressed/determined first.

Notwithstanding of the provisions of Order 7 (1) and (2) of GN. No. 263 of 2015, it is not a rule of law to attach a ruling of the Taxing Master to the application for reference but, it is currently an established and accepted as part of the procedure in the proper administration of justice that an attachment of rulings and judgments in applications and appeals in this country. The rule is designed to ensure that the applicant and/or appellant has a fair hearing. On this point, I agree with Mr. Mligo that it is good practice to attach the impugned decision since it is impracticable to challenge a decision which you do not have.

It is apparent that, the applicant will have no room to tender any documentary evidence during hearing of this application except those attached to the affidavit which is a substitute of oral evidence. In the case of **Bruno Wenceslaus Nyalifa vs. The Permanent Secretary Ministry of Home Affairs**, Civil Appeal No. 82 of 2017, CAT at Arusha (unreported) it was held:

'Affidavit is evidence and annexure thereto is intended to substantiate the allegations made in the affidavit unless it is controverted thereof, the document can be relied upon to establish a particular fact.'

In the reasons explained above, I find this application is incompetent before the court for failure to attach the impugned decision of Taxing Master in Application of Bill of Cost No. 6 of 2021 of District Court of Musoma which is the subject of this application. I therefore proceed to struck out this application for being incompetent before the court. Each party should bear its own costs.

Order accordingly.

Right of appeal is explained.

DATED at MUSOMA this 18th day of May 2023



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M. L. KOMBA
JUDGE