

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA DISTRICT REGISTRY
AT ARUSHA

CIVIL REFERENCE NO. 15 OF 2022

(Originating from Taxation Cause No. 54 of 2021, High Court of Tanzania at Arusha)

JUBILATE MASSAWE APPLICANT

VERSUS

EMMANUEL NNKO RESPONDENT

RULING

21st April & 19th May, 2023

TIGANGA, J.

On 19th September, 2022, the Taxing Master, Hon. R. B. Massam, Deputy Register of the High Court of Tanzania at Arusha (as she then was) delivered her decision in **Taxation Cause No. 54 of 2021** in which the applicant was the respondent while the respondent was the applicant. Aggrieved by the decision, the applicant, under Order 7 (1) and (2) of the **Advocates Remuneration Order, 2015 GN. No. 263 of 2015**, (The Order) preferred this reference by way of chamber summons supported by an affidavit which was sworn by him.

In the said affidavit, he deponed that, in the impugned Bill of Cost decision, the respondent herein was awarded Tshs. 1,670,000/= as cost for prosecuting Land Appeal No. 25 of 2020 from Resident Magistrates

Court of Arusha (Extended Jurisdiction). She was aggrieved by such a decision thus, preferred this application and in the 5th paragraph of her affidavit she mentioned two grounds of reference.

With leave of the court, there was also an additional of one ground of reference making a total of three grounds as follows;

- a. The Hon. Taxing Master was not correct to allow and tax the sum of Tshs. 30,000/= for each date of appearance which is excessive regarding where the Decree holder resides to and from the court.
- b. There was no justification for awarding Tshs. 30,000/= for each date of appearance making it a total of Tshs. 360,000/= for items 2 to 8 of the Bill of Costs.
- c. The ruling of Taxation Cause No. 54 of 2021 was premature and against the principle of '*stare decisis*' as this Court has no jurisdiction over the matter.

The reference was opposed by the respondent who filed his counter affidavit in which he noted most of the facts and disputed some of the facts while putting the applicant to strict proof.

Hearing the application was by way of written submissions. The applicant was represented by Mr. Bashir Ibrahim Mallya, learned

Advocate, whereas the respondents appeared in person and were unrepresented.

Supporting the application, Mr. Mallya submitted on the first ground that, the Taxing Master awarded Tshs. 30,000/= for each date of appearance while the respondent resides at King'ori ya Juu within the District of Arusha hence the amount ought not to exceed Tshs. 10,000/= per each appearance. Thus, the amount taxed was unreasonable and excessive. On the second ground, learned counsel also argued that, the Taxing master did not justify awarding Tshs. 360,000/= for each day of appearance in items 2 to 8 of the Bill of Cost.

As to the third ground, it was Mr. Mallya's submission that, while on 11th November, 2021 the applicant filed a Notice of Appeal to the Court of Appeal, on 20th December, 2021 the respondent herein filed a Bill of Cost subject to this reference. In that regard, it was wrong for the Taxing Master to proceed with the hearing and determining the matter while the Notice to Appeal to the Court of Appeal had already been filed. To cement his argument, the learned counsel cited a number of Court of Appeal cases such as the case of **Mohamed Enterprises Tanzania Ltd vs The Chief Harbour Master and Another**, Civil Appeal No. 24 of 2015 and **Noman Mahboub (T/A Noman Al Mahboub General Trading Corporation)**

vs Milcafe Ltd, Commercial Case No. 41 of 2003 (al unreported). In all cases, he submitted that, the Court of Appeal insisted on the importance of halting any proceedings in the High Court once a Notice of Appeal to the Court of Appeal has been filed.

Under the circumstances, the learned counsel challenged the Taxation Cause No. 54 of 2021 for being impaired from its inception to its demise. He prayed this court to quash and set aside the Taxing Master's decision.

In reply, the respondent submitted only on the additional ground number three that, an order by the Taxing Master dated 19th September, 2022 is within the ambit of law since taxation cause is mandatorily required to be filed within sixty days from the date of the decision. He added the Taxing Master had jurisdiction to preside over the matter as a result the prayer sought can just be refused by this court for not being maintainable in law.

In his brief rejoinder, Mr. Mallya reiterated his earlier position and added that, the failure of the respondent to respond to the other two grounds draws adverse inference that he has accepted them hence they should be granted.

After I have gone through the parties' submissions I find the following to be issues calling for determination by this court;

- a. Whether the amount taxed was just and fair;
- b. Whether the Taxing Officer had jurisdiction to determine the Taxation Cause before her;

Generally, taxation of the bill of costs is governed by the **Advocates Remuneration Order, 2015**. The rationale behind awarding costs is to refund the decree-holder the costs incurred in after being declared the winner in an application, suit, appeal, etc. The Taxing officer has the discretion under Order 12(1) of the Order, to allow such costs, charges, and expenses which are within the scales authorized in law. Such discretion however has to be acted judiciously.

In dealing with the merits of the reference, I will start with the last ground of reference, I do so because by its nature the ground is couched in the style of a point of law, which challenges the jurisdiction of the court. In the words of the respondent, challenges the Taxing Master's decision to proceed with hearing and determining the bill of cost while the applicant had already filed the Notice of Appeal prior to the filing of the application for the Bill of Cost filed by the respondent. I am aware of a number of Court of Appeal decisions regarding the requirement of the

High Court to halt any proceedings once there is a Notice of Appeal filed or an appeal pending in the Court of Appeal. In the case of **Serenity on the Lake Ltd vs Dorcus Martin Nyanda**, Civil Revision No. 1 of 2019 CAT Mwanza (Unreported) the Court of Appeal cited the case of **Tanzania Electric Supply Company Limited vs Dowans Holdings S.A. (Costa Rica) and Dowans Tanzania Limited (Tanzania)**, Civil Application No. 142 of 2012 where it was held that;

*"It is settled 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 long been established law that once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter**". (Emphasis added)*

The Court went on holding that;

*"Similar position was taken by this Court in **Awinel Mtui and Three Others vs Stanley Ephata Kimambo (Attorney for Ephata Mathayo Kimambo)**, Civil Application No. 19 of 2014 (unreported) in which the Court held that:-*

"...once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter."

(Also see; **Tanzania Electric Supply Company Ltd versus Dowans Holdings S.A. (Costa Rica) and Dowans Tanzania Limited (Tanzania)**; Civil Application No. 142 of 2012; **Awiniei Mtui and three Others vs Stanley Ephata Kimambo (Attorney for Ephata Mathayo Kimbambo)**, Civil Application No. 19 of 2014 **Ahmed Mbaraka vs Mwananchi Engineering and Contracting Co. Ltd**, Civil Application No. 229 of 2014 (all unreported)).

This is to say, 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. These authorities are giving the general position of what should be done once an appeal process has been commenced. However, the above authorities have to be read together with the case of **Matsushita Electric Co. Ltd vs 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 under Rule 76 (now rule 83(1) of the Rules) then the court is seized of the matter in exclusion of the High Court, except for applications specifically provided for such as leave to appeal or provision of a certificate of point of law, or execution where there is no order of stay of execution from this court."

This position was adopted by this court, in the case of **International Commercial Bank (T) Ltd & Another vs Primi Aloyce Mushi**, Civil Reference No. 2019 HC- Land Division, Hon. Makani, J. and in the case of **Peter P. Munisi (Administrator of the Estate of the Late Peter Munisi) vs Yunis Bakari Mshana & Another**, Misc. Civil Application No. 181 of 2019 HC-Dar es salaam. Looking at the above holding of the Court of Appeal, Bill of Costs or taxation proceedings are not one of the specifically provided for applications under which the High Court can exercise jurisdiction.

Applying these authorities in the application at hand, the records show that, on 16th March 2022, learned counsel for the applicant herein notified and made a prayer before the Taxing master that, the taxation cause be stayed pending determination of the appeal to the Court of Appeal of Tanzania. However, the Taxing master ignored such prayer as no order or ruling was given to that effect.

Although I am aware of the fact that, Item 4 of the Order provides for a bill of costs to be filed within 60 days from the date of the order awarding costs, the Taxing Master was not justified when she overlooked the prayer raised by the applicant's counsel. Item 4 of the Order reads;

"4. A decree holder may, within sixty days from the date of an order awarding costs, lodge an application for taxation

by filing a bill of costs prepared in a manner provided for under Order 55."

This hypothetically means that, since the bill of costs are proceedings which by their nature are instituted after the judgment or the ruling is pronounced; failure to file the bill of costs within 60 days renders it time-barred. Nevertheless, since the Court was made aware of the notice, the Taxing Master erred in proceeding to determine the bill of costs on merit. She was supposed to stay the proceedings waiting for the outcome of the appeal from the Court of Appeal or until when the Notice of Appeal would be withdrawn.

That said, I will not deal with other grounds of reference as the above suffices to finalise this application. In the end, I find this application to have merits, the ruling by the Taxing master dated 19th September, 2022 is hereby quashed and the award is set aside. The Bill is returned to the Taxing master and shall be stayed pending the hearing and determination of the appeal before the Court of Appeal of Tanzania or until when the notice of appeal will be withdrawn or deemed to be withdrawn. Given the circumstances of the case, each party is to bear their own costs.

It is so ordered.

DATED and delivered at **ARUSHA** this 19th day of May, 2023




J.C. TIGANGA

JUDGE