

THE UNITED REPUBLIC OF TANZANIA
(JUDICIARY)
THE HIGH COURT
(MUSOMA SUB REGISTRY)
AT MUSOMA

Misc. CIVIL APPLICATION No. 4 OF 2023

*(Arising from the High Court [Musoma Sub Registry] in Civil Reference
No. 8 of 2021 & Taxation Cause No. 13 of 2021; originating from Misc.
Civil Application No. 16 of 2021)*

FINCA TANZANIA LTD APPLICANT

Versus

SHABAN SAID MGANDA RESPONDENT

RULING

19.07.2023 & 19.07.2023
Mtulya, J.:

Order 48 of the **Advocates Remuneration Order, GN. No. 264**

of 2015 (the Order) provides that:

*When more than one-sixth of the total amount of bill
of costs exclusive of court fees is disallowed, the
party presenting the bill for taxation shall not be
entitled to the costs of such taxation:*

*Provided that, at the discretion of taxing officer, any
such instruction fee claimed may be disregarded in
computation of the amount taxed that fee in the
computation of the one-sixth.*

According to **Ms. Milembe Faith Lameck**, learned counsel for
FINCA TANZANIA LTD (the applicant), the general rule in the
provision has to be invited and applied before resorting to the
proviso. In her opinion, when the proviso in the Order is invited, the
Taxing Officer has to register reasons of declining the general rule.

Persuading this court in the present application to grant leave for the applicant to access the **Court of Appeal** (the Court), Ms. Lameck submitted that the Taxing Officer in the **Taxation Cause No. 13 of 2021** (the Cause) had taxed more than one-sixth of the total claim of the bill of costs, and awarded **Mr. Shaban Said Mganda** (respondent) costs based on the proviso without giving reasons of escaping the general rule as enacted in Order 48 of the Order. In her opinion, she filed the present application for leave to access the Court to inquire on the limits of Taxing Officers in exercising their discretionary mandate enacted in the Order.

Regarding specific issues related to the present application intended to be raised at the Court, Ms. Lameck stood up and cited two (2) issues namely: first, whether it was proper for this court, in **Civil Reference No. 8 of 2021** (the Reference), filed in this court, to uphold the decision of Taxing Officer, which held that more than one-sixth of the bill of costs may be taxed without reasons; and second, whether the other items on complaints of appearances of parties in **Misc. Civil Application No. 16 of 2021** (the application) decided in this court, were legally taxed while there was unresolved issues of proof of appearances.

According to Ms. Lameck, the decision of this court in the Reference supported the move taken by the Taxing Officer without any relevant materials on reasons of escaping the general rule of the enactment in the Order. Ms. Lameck submitted further that during

hearing of the Cause, it was vivid that there were disputes on dates of the respondent's appearances. However, the Taxing Officer awarded costs without first scrutinizing and resolving the issue of appearances, which is contrary to the law.

Replying the two (2) raised issues, Mr. Cosmas Tuthuru, learned counsel for the respondent protested the application contending that this court in the Ruling of the Reference at page 3 and 4 had replied the raised issues and in any case Order 48 of the Order empowers the Taxing Officer to do what she has done. In his opinion, Mr. Tuthuru thinks that, the Taxing Officer was correct and complied with the provision of the Order and this court in the Reference correctly supported the move and reasoned that there was no misapprehension of justice. In that case, according to Mr. Tuthuru, this court may decline to grant leave to the applicant to avoid congestion of cases at our superior court and in any case the holding of the issues will be the same as in this court.

Regarding the second raised issue, Mr. Tuthuru had decided to decline any reply arguing that the issue is based on facts, which are unnecessary to be disputed at this stage, especially when there is serious contest of interpretation of the law in Order 48 of the Order.

I have read Order 48 of the Order, and decisions in the Cause and Reference. The law requires that when more than one-sixth of the total amount of bill of costs exclusive of court fees is disallowed, the party presenting the bill for taxation should not be entitled to

costs of such taxation. The provision has already received precedent of this court in **John Memose Cheyo v. Stanbic Tanzania Ltd**, Commercial Reference No. 72 of 2018. However, the law was enacted with a proviso that invites discretionary mandate of the Taxing Officer. The proviso has also received support of this court in the Cause and Reference. In the Cause, at page 6 of the Ruling, the Taxing Officer had resolved that:

The above order [Order 48 of the Order] provides for excessive claim with exceptions for instance, at the discretion of the taxing officer, any instruction fee claims, may be disregarded in the computation of the amount taxed of that fee in the computation of the one-sixth. In exercise of such discretion, in considering circumstances of the case. I do hereby disregard computation of 1/6 (one-sixth) of the claim of instruction fee.

This thinking was supported by this court in the Reference. This court thought at page 3 and 4 of the Ruling, that:

In this case, the total amount for taxation was 6,010,000/=. The same has been taxed off/disallowed. If that was generally considered by the taxing officer, then it meant that the whole taxation would have been taxed off/disallowed. Since one-sixth of the total claim of 6,10,000/= is 1,001,666.6/= and as the amount taxed off/disallowed by the taxing officer is 4,800,000/=: then in disregard of the taxing master's discretion, the applicant would have been entitled to nothing. However, as the said law provided for the taxing

officers discretion, unless it was established that she misapprehended the law on the exercise of that discretion, she was legally justified to arrive at that decision.

The thinking of this court in the Reference had declined reasons for discretion of the Taxing Officer in the Cause, which is the complaint of Ms. Lameck in the instant application praying for this court to allow the applicant to report the matter to the Court. I am aware that Mr. Tuthuru has protested the move and cited page 3 and 4 of the Ruling of this court in the Reference, which I have already quoted in detail.

I am also aware that this court was invited to consider the precedent of **John Memose Chayo v. Stanbic Tanzania Ltd** (supra), and accordingly distinguished it with the facts in the Reference. The *ratio decidendi* of this court in the Reference in favor of the decision of the Taxing Officer in the Cause and disregard of the previous decision of this court is displayed at page 4 of the Ruling, that:

*I am alive of the decision of the case of **John Memose Cheo v. Stanbic Tanzania Ltd** (supra), in which it generally ruled that when more than one-sixth of the claimed costs is disallowed, then the applicant is entitled to nothing. However, that decision did not, in my view, abolish the taxing officer's discretion as provided under order 48.*

According to Ms. Lameck, this court has also declined to scrutinize reasons in the Cause and itself had failed to state the limits of the discretion of the Taxing Officer, whereas Mr. Tuthuru

thinks that the Taxing Officer acted according to the text of the law in Order 48 of the Order.

The law regulating leave to access the Court is pretty clear that the matters in dispute must raise issues of general importance or arguable appeal or in some cases display disturbing features as to require precedent of the Court. There is a large bundle of precedents in support of the position (see: **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016; **The Regional Manager-TANROADS Lindi v. DB Shapriya & Company Ltd**, Civil Application No. 29 of 2012; **Murtaza Mohamed Viran v. Mehboob Hassanali Versi**, Civil Application No. 168 of 2014; **Victoria Real Estate Development Limited v. Tanzania Investment Bank & Three Others**, Civil Application No. 225 of 2014; **Hamisi Mdida & Said Mbogo v. The Registered Trustees of Islamic Foundation**, Civil Appeal No. 232 of 2018; and **Joseph Kasawa Benson v. Mary Charles Thomas**, Misc. Criminal Application No. 60 of 2022).

On the same level, the available practice in the Court and this court shows that this court is restrained from resolving the raised issues in applications like the present one (see: **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority** (supra); **The Regional Manager-TANROADS Lindi v. DB Shapriya & Company Ltd** (supra) and **Joseph Kasawa Benson v. Mary Charles Thomas** (supra). The reason of declining determination of the issues is based

on declining prejudging the merit of the appeal at the Court. The duty of resolving the indicated matters is reserved to the Court (see: **Murtaza Mohamed Viran v. Mehboob Hassanali Versi**, Civil Application No. 168 of 2014 and **Victoria Real Estate Development Limited v. Tanzania Investment Bank & Three Others**, Civil Application No. 225 of 2014).

In the present application, I learned that the first raised issue reveals disturbing features on the interpretation of the Order 48 of the Order. The two (2) distinct thinking of this court in **John Memose Cheyo v. Stanbic Tanzania Ltd** (supra) and Reference, have to be resolved by our superior court, not this court. Similarly, the contest on appearances of the parties in the Application has merit as it determines amount of costs. This dispute cannot also be resolved in this court. Surely, the two (2) raised issues need to be resolved by the Court.

In my considered opinion the applicant has registered disturbing issues, which have persuaded this court to grant the application to cherish the thinking of the Court on the indicated subjects. It is a move of precedent setting which cannot be declined at this stage. In the end, I am moved to grant the application. The applicant to access the Court in accordance to the law regulating appeals from this court to the Court. I do so without costs. The reason of declining costs is obvious that the parties are still in

contest of their rights and in any case the sought interpretation of the Order is in the territory of the Court, not litigants.

It is so ordered.

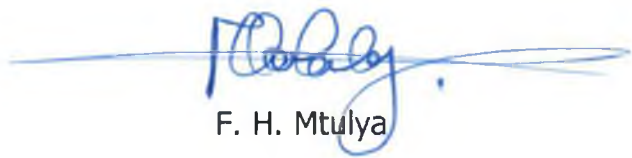



F. H. Mtulya

Judge

19.07.2023

This Ruling was delivered in Chambers under the Seal of this court in the presence of **Ms. Milembe Faith Lameck**, learned counsel for the applicant, and **Mr. Cosmas Tuthuru**, learned counsel for the respondent.


F. H. Mtulya

Judge

19.07.2023