

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

CIVIL REFERENCE NO. 04 OF 2023

*(C/F Misc. Civil Application No. 26 of 2022 and Taxation Cause of 55 of 2022 in
the High Court of Tanzania-Moshi Sub-Registry)*

JOHN BALBALA APPLICANT

VERSUS

EVELINE JOHN.....RESPONDENT

EX-PARTE RULING

Date of Last Order: 29.08.2023

Date of Ruling : 29.09.2023

MONGELLA, J.

The applicant herein has preferred this application under section 77 and Order XLI Rule 1 of the Civil Procedure Code, Cap 33 R.E. 2019 seeking for this court to revise and set aside the ruling delivered by the Deputy Registrar (Hon. DR, hereinafter) in Misc. Civil Application No. 26 of 2022; costs for the suit and any orders the court may deem fit and just to grant.

His application is supported by his sworn affidavit in which he disclosed that; he was the respondent in Taxation Cause No. 05 of 2022. He applied for stay of the said cause vide Misc. Application No. 26 of 2022 as there stood an appeal before the Court of Appeal

on the subject matter. That, the application was dismissed by the Hon. DR for being preferred in this court instead of the Court of Appeal and for the same lacking case number. He also stated that the taxation cause was finalized and he was condemned to pay the decreed amount.

His application was uncontested as the respondent never filed her counter affidavit. The court herein fixed a schedule for both parties to file their written submissions whereby the respondent was confined to address the court on legal issues only. The respondent however, never filed her reply submission and thus the ruling herein proceeds *ex parte* against her.

The applicant averred that the Deputy Registrar erred in dismissing the application on account that the application did not indicate the case number on the attached notice of motion to the Court of Appeal and that the same should have been filed before the Court of Appeal. He contended that the notice of motion was endorsed by the Hon. DR and dated by registry officials. Regarding the assignment of case number, he contended that the same was the duty of the registry staff. He averred that he attached the said notice of motion in his affidavit in Misc. Civil Application No. 26 of 2022.

He further argued that the failure to stay the Bill of Costs is that the applicant will suffer irreparable damage since execution proceedings will commence. He defined the word stay according

to black's law dictionary and the case of **Mulli Brother Ltd. vs. Malawi Savings Bank Ltd.** 8 of 2014 [2015] MWSC, in which the Supreme Court of Malawi defined the word "stay" to mean the act of temporarily stopping a judicial proceeding through a court order. He thus insisted that Misc. Civil Application No. 26 of 2022 was properly before the Hon. DR and he had the requisite jurisdiction to entertain the same and not the Court of Appeal.

I have considered the pleadings and submission by the applicant and gone through the challenged decision by the Hon. DR. What I have discerned from the Ruling of the Hon. DR in Misc. Application No. 26 of 2022 is that the application was dismissed for three reasons being; one, the same was preferred under an incorrect provision of the law and thus the court was improperly moved in the application; two, this court was not vested with jurisdiction to determine the application as there was a pending appeal before the Court of Appeal and; three, the applicant failed to prove that there was a pending appeal before the Court of Appeal.

Prior to resolving this application, I wish to note that it has come to my attention that the applicant preferred this application under a wrong provision. He cited **section 77** and **Order XLI Rule 1 of the Civil Procedure Code**. These provisions read:

S. 77. Subject to such conditions and limitations as may be prescribed, any court may state a case and refer the same for the opinion of the High Court and the High

Court may make such order thereon as it thinks fit.

Order XLI Rule 1

“Where, before or on the hearing of a suit in which the decree is not subject to appeal or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained and refer such statement with its own opinion on the point for the decision of the High Court.”

The application at hand originated from the decision of the Taxing Master, the Hon. DR in Misc. Civil Application No. 26 of 2022 in which the applicant sought for stay of Taxation Cause No. 05 of 2022. The relevant provision was thus **Oder 7(1) of the Advocates Remuneration Order G.N. No. 263 of 2015** which reads:

“Any party aggrieved by a decision of the Taxing officer, may file reference to a judge of the High Court”

However, the said error does not prejudice the respondent and is accommodated under the overriding objective. The proceedings will thus not be vitiated for this reason alone.

It is clear that the application before the Hon. DR was preferred under Order XXXIX Rule 5(1) of the Civil Procedure Code, which

deals with stay of execution and thus, the applicant had improperly moved the Taxing Master. However, this error was minor whereby it should have been cured under the overriding objective principle enshrined in our laws currently. See: **Section 3A of the Civil Procedure Code.**

With regard to the existence of the alleged pending appeal before the Court of Appeal; the same appears to be an application, however as observed by the Hon. DR the alleged matter bears no case number though stamped by the stamp of the Court of Appeal sub-registry of Moshi indicating the date of filing as being 17.01.2022. This is rather strange and creates doubts as to whether the same was filed before the Court of Appeal. However, with the endorsement of the Hon. DR and the stamp by the registry office I rest my doubts. The omission seems to have been occasioned by the registry office and thus, the applicant should not have been condemned for it.

To this juncture, the nagging question is whether the existence of the application before the Court of Appeal stripped off the Taxing Master the jurisdiction to entertain Taxation Cause No. 05 of 2022. There is a plethora of authorities providing for the position that once a notice of appeal is filed in the Court of Appeal, the High Court is rendered with no jurisdiction to determine any matter related to the pending appeal. See; **Exaud Gabriel Mmari vs. Yona Seti Akyo & Others** (Civil Appeal 91 of 2019) [2021] TZCA 726; **Attorney General vs. Tanzania Ports Authority & Another** (Civil Application 467 of 2016)

[2020] TZCA 380; **Mohamed Enterprises T. Ltd. vs. The Chief Harbour Master & Another** (Civil Appeal 24 of 2015) [2018] TZCA 280; **Tanzania Electric Supply Company Limited vs. Dowans Holdings (Costa Rica) & Another** (Civil Application 142 of 2012) [2013] TZCA 437 all from TANZLII. See also, **Matsushita Electric Co. Ltd. vs. Charles George t/a CG Travers**, Civil Application No. 71 of 2001.

Nevertheless, there are exceptions to this requirement. Some of the exceptions were stated in **Matsushita Electric Co. Ltd Vs Charles George t/a CG Travers** (supra) in which the Court of Appeal stated:

"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 applications specifically provided for, such as leave to appeal or provision of a certificate of law. "

The matter instituted in the Court of appeal is not on the Bill of Cost, rather it was an application for leave to appeal. Thus, the same was not related to the pending Bill of Costs. In that respect, I am of the view that the Hon. DR's jurisdiction to entertain the matter never ceased to exist with the filing of the said application before the Court of Appeal. The Hon. DR was endowed with jurisdiction to grant stay of the Taxation Cause.

However, while it is evident that the Hon. DR erroneously dismissed Misc. Application No. 26 of 2020 for lacking jurisdiction over the same on the ground that there stood an appeal before the Court

of Appeal, I cannot grant the relief sought by the applicant. This is because he deponed under paragraph 6 of his affidavit that the Taxation Cause has already been determined. The application for stay of the taxation cause has already been overtaken by events rendering this application meaningless. I therefore dismiss this application. Considering the circumstances herein, I make no orders as to costs.

Dated and delivered at Moshi on this 29th day of September 2023.



X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA