

**IN THE HIGH COURT OF TANZANIA**  
**(SUMBAWANGA DISTRICT REGISTRY)**  
**AT SUMBAWANGA**

**CIVIL REFERENCE NO. 01 OF 2023**

*(Arising from Misc. Civil Application No. 9 of 2022 of the High Court of Tanzania at  
Sumbawanga and originated from the District Court of Sumbawanga at Sumbawanga in  
Taxation Cause No. 9 of 2021 before Hon. J.O. Ndira-Taxing Master)*

**MIGO CIVIL AND BUILDERS CONTRACTORS CO. LTD .....1<sup>ST</sup> APPLICANT**

**AYUBU NYAULINGO .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**MNANGE GENERAL STORE COMPANY LTD .....RESPONDENT**

**RULING**

*28<sup>th</sup> September & 02<sup>nd</sup> October, 2023*

**MRISHA, J.**

This application has been preferred under Rule 7(1) and Rule 7(2) of the Advocates Remuneration Order, 2015. The Applicants are moving the Court to grant the following orders: -

- i. This honorable court be pleased to quash and set aside the decision of taxing Master Hon. J.O Ndira in Application for Bill of Costs No. 9 of 2021 decided by Sumbawanga District Court on 29.07.2021 for being arrived in contravention of the legal principles.
- ii. This honorable court be pleased to re-asses the costs awarded to the Respondent for being arrived at without legal justification.
- iii. Costs be borne by the Respondent.

The Application is by way of chamber summons supported by the affidavit deposed by Ayubu Nyaulingo, the second applicant and the Director of the first applicant who is authorized to depone on behalf of the first applicant. The Respondent contested the application by filling a counter affidavit along with the notice of preliminary objection on a point of law.

The brief facts leading to this application as gathered from the affidavit of the 2<sup>nd</sup> Applicant and records available, can be summarized as follows: the Applicant preferred Civil Case No. 12 of 2019 and its judgment was delivered in favour of the respondent on 08.10.2020. The Respondent filed a Bill of Costs Application No. 9 of 2021 before the Taxing Master Hon. J.O Ndira claiming to be paid Tshs. 9,640,000/= as the cost of demand notice,

consultation and instruction fees to prosecute the main suit, miscellaneous application, preliminary objection and other costs.

In his ruling delivered on 29.07.2021, the Taxing Master awarded the Respondent costs to the tune of Tshs. 9,640,000/= for cost of demand notice, consultation and instruction to prosecute the main suit, miscellaneous application, preliminary objection and other costs.

The applicants were dissatisfied, hence filed the instant reference seeking to challenge the decision of the Taxing Master and moving the court to examine the legality and fairness of the Bill of Costs as presented. However, before hearing of such reference took off, the respondent filed a notice of preliminary objection and timely served a copy of it to the adverse party. The preliminary objection contained two points of law namely:

1. That the reference application filed by the applicants on 22.06.2023 and served to the respondent on 12.07.2023, be struck out for being incompetent as it contravenes Order 7(3) of the Advocates Remuneration Orders, GN. No. 263 of 2015 which mandatorily

requires a copy of reference to be served to the respondent within the prescribed period of seven (7) days.

2. The Applicants' supporting affidavit is bad in law for containing argumentations and conclusions.

On 28.08.2023, when preliminary objection was called on for hearing, the applicants were represented by Laurence John, learned Advocate, while the respondent was represented by Simon Suwi, also learned Advocate. Before starting to submit on the preliminary objection, Mr. Suwi prayed to withdraw the second ground of objection and this court granted the prayer. Thus, the second ground of objection was marked withdrawn.

Submitting in support of the remaining ground of preliminary objection, Mr. Suwi began by arguing that this reference was filed with this court on 22.06.2023 and its copy served to the respondent on 12.07.2023. The respondent's counsel revealed that the document was served contrary to the required law because he received Civil Reference No. 1 of 2023 on 12.07.2023 while the applicant filed and registered the said application on 22.06.2023. Thus, it was his submission that the reference application

ought to be served to the adverse parties within seven (7) days from the date of filing.

He added that counting the day from the date this reference was filed to the date respondent was served with documents, it is out of seven days prescribed by law under Order 7(3) of the Advocates Remuneration Order No. 263 of 2015 (the Advocates Remuneration Order).

He further argued that the law is coached in a mandatory term, which means its compliance is a must. He referred Order 7(4) of the Advocates Remuneration Order which clearly shows the purpose of the service under sub-rule 3 of the said Order; that it is sufficient if the chamber summons has been endorsed and stamped by the Registry office.

The respondent's counsel maintained that law makers of the said Order did not intend the readiness of the summons so that the respondent to be served. He therefore urged this court to strike out the present application for failure to comply with the above stated statutory requirement. To fortify the above position, he cited the case of **Migo Civil and Builders Construction Ltd and Ayubu Nyaulingo vs Mnange General Stores Company LTD**, Civil Reference No. 1 of 2021.

Also, Mr. Suwi cited the case of **Alex Msama Mwita vs Emmanuel Nasuzwa Kitundu and Another**, Civil Application No. 538/17 of 2020, where the Court of Appeal discussed the issue of delay of service when dealing with Rule 55(1) of the Court of Appeal Rules, and where it was argued that the purpose of Rule 55(1) of the Court of Appeal is the same to Order 7(3) of the Advocate Remuneration Order. The Court of Appeal held that, failure to serve within time is fatal.

In the end, Mr. Suwi argued that the advent of the overriding objective principle is intended to cure the defect, however, he argued that in the instant application, such principle of law cannot not cure the defect of the case at hand, and he referred the case of **Alex Msama Mwita** (supra) to back up his proposition.

In reply, Mr. Laurence argued by making a statement that the point which was baptized by the respondent's counsel as a preliminary objection, does not qualify to be a preliminary objection because the said objection requires facts and evidence to prove it. He cited the case of **Mukisa Biscuites Manufacture Company v. Westend Distributors Ltd**

[1969] EA 969 in which it was maintained that the preliminary objection must be in pure point of law.

He made reference to the case of **Jackline Hamson Ghikas v. Millatie Richie Assey**, Civil Application No.656/01 of 2021; CAT Dar es Salaam, and categorically argued that the issue of service needs evidence to prove.

Additionally, the applicants' counsel argued that facts are needed to sustain the said objection. For instance, he submitted that the court summons issued on 12.07.2023 was served to one Flora Mhagama who is not the respondent, but endorsed on it.

The respondent's counsel also contended that the summons alleged to be served to the respondent does not bear the official stamp of the respondent's company, as well as the seal of the respondent's company, and the one who endorsed it did not state her capacity in that summons, thus making the preliminary objection to lack a pure point of law.

In distinguishing the case of **Migo Civil and Builders Construction Ltd** (supra), Mr. Laurence submitted that in that case the respondent used delaying tactics for two years in order to prevent the applicant from

challenging the ruling of the Taxing Master vide Taxation Cause No. 9/2021, which was against justice.

He further asserted that the respondent did not state how he was prejudiced by that irregularity; he filed his counter affidavit in accordance with the law. A case of **Mussa Ally Onyango v. Republic**, Criminal Appeal No.75 of 2016 CAT Arusha (unreported), was cited by the appellants' counsel to support his stance.

Mr. Laurence went on by distinguishing the case of **Alex Msama** (supra) with the case at hand arguing that the said case dealt with the Court of Appeal Rules while the present one deals with a reference to the High Court.

On the claim that Order 7(3) of the Orders was not complied with, Mr. Laurance denied that allegation and responded by submitting that process of filing a case and issuance of summons are two distinct processes. He further submitted that the instant case was filed through JSDS (Judiciary Statistical Dashboard System) whereby a control number was issued through that system and the Court fees were paid on 22.06.2023. Then,



the document was returned to the applicant on 12.07.2023 along with summons.

Basing on the above proposition, the applicants' counsel submitted that the preliminary objection raised by the respondent through his counsel has no merit, and continued to pray to this court to strike it out with costs and fix the date for hearing on merit.

I have seriously considered the preliminary objection on especially on the first point of law. I have also keenly gone through the case laws and the provisions of laws referred thereto by counsel for both parties. I am thankful to both counsels for their powerful submissions.

I will start my discussion by referring to Order 7 of the Advocates Remuneration Order as follows: -

*"7(1) Any party aggrieved by a decision of the Taxing officer, may file reference to a judge of 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 decision.*

*(3) The applicant shall within seven clear days of filing reference serve copies to all parties entitled to appear on such taxation.*

*(4) For purpose of service under order (3), it shall be sufficient if the chamber summons has been endorsed and stamped by the Registry Officer.*

The above referred section provides for the procedure of filing reference to the High Court when the party to the case is aggrieved by the decision of the Taxing officer. The law mandates that the applicant shall within seven days of filing reference, serve copies to all parties to the case and that the chamber summons will be sufficient to be served to the parties if it is endorsed and stamped by the Registry officer.

Going through of the records, it is clearly shown in the chamber summons and the supporting affidavit of the applicants, that such documents were endorsed by the Deputy Registrar of the High Court on 22.06.2023 and the applicants served the summons to Ms. Flora M. Mhagama on behalf of the respondent on 12.07.2023.

The document/reference was served to the respondent almost twenty (20) days after its endorsement by the Deputy Registrar which is contrary to the

requirement of Order 7(3) of the Advocates Remuneration Order which is couched in mandatory term due to the use of the word "*shall*". Absolutely, the applicant was duty bound to effect service of the copy of application of reference to the respondent within seven days from the date of its filing.

Likewise, the law provides an option to the applicant to serve a chamber summons to the parties entitled to appear in court where the chamber summons had been endorsed and stamped by Registry officer; this is provided under Order 7(4) of the Advocates Remuneration Order. Hence, due to the reasons advanced above, I agree with the submission of the counsel for the respondent that the law maker of the said Orders did not intend the readiness of the summons so that the respondent to be served.

My reading of the record reveals that the applicant served summons to one Flora M. Mhagama on 12.07.2023 at 01.03 PM. Following such service, the respondent filed a counter affidavit and notice of preliminary objection calling upon this court to hear it.

Thus, arguing that summons was endorsed, but the person endorsing the summons did not state her capacity and that no stamp and seal of the respondent's company was stamped on the summons, this argument does

not hold water. The proof of service is by endorsement acknowledging reception of the summons by the recipient.

Moreover, guided by the position that service is by endorsement of summons by the recipient, I am of the considered opinion that service of summons annexed with relevant copies to the respondent, was duly effected.

Counting from the date the Deputy registrar endorsed the chamber summons to the date the said summons was served and endorsed by Ms. Flora M. Mhagama, it is more than seven days prescribed by law and therefore, I find a considerable merit in Mr. Suwi's proposition that the applicant violated Order 7(3) of the Advocate Remuneration Orders which provides a mandatory procedural requirement in respect of serving the respondent with copies of the reference.

In the circumstances, the remedy here is to stuck out application; See **Migo Civil and Builders Contractors Ltd and Ayubu Nyaulingo v Mnange Gneral Stores Company Ltd** (supra).

In that case my learned brother Honourable Nkwabi, J. held at page 7 of the ruling that:

*"...as the applicants violated the law of limitation in respect of serving the respondent with copies of reference, the application is to be struck out for being incompetent before this court."*

Since failure to comply with the requirement of serving summons to the respondent within the prescribed period of seven (7) days renders the reference to be incompetent as stated by this court in the above case, I am persuaded to apply the above principle in the present case.

I am of that considered opinion because it is apparent that the applicants in the instant application failed to comply with the mandatory requirement of the law which require them to serve the same to the adverse party within seven (7) days from the date of filing of the reference with the High Court.

This court therefore cannot act blindly where the above stated provision of the law clearly stipulates the procedure to be complied with by the applicant. This position has been stated in numerous decisions of the Apex court in respect of the extent in which rule of overriding objective can be invoked; that it should not be applied blindly in disregard of the rules of procedure which are couched in mandatory terms; See **Mondorosi**

**Village Council and 2 others v Tanzania Breweries Limited and others**, Civil Appeal No. 66 of 2017 CAT Arusha (unreported).

In that case the Court of Appeal had the following to say regarding application of the principle of overriding objective: -

*"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case."*

Also see the case of **Martin Kumaliya and 17 Others vs Iron and Steel Ltd**, Civil Application No. 70/18 of 2018 CAT DSM and **SGS Societe Generale De Surveillance SA and Another vs VIP Engineering and Marketing Ltd and Another**, Civil Appeal No. 124 of 2017 CAT DSM (both unreported).

In the latter case, the Court of Appeal stated that:

*"The amendment by Act No. 8 of 2018 was not meant to enable parties to circumvent the mandatory rules of the Court or to turn*

*blind to the mandatory provisions of the procedural law which go to the foundation of the case.”*

Thus, basing on the reasons provided above as well as the applicable principles of law stated hereinabove, it is my finding that the first limb of respondent's preliminary objection is meritorious. In consequence thereof, the present application is struck out with costs.

It is so ordered.

  
**A.A. MRISHA**  
**JUDGE**  
**02.10.2023**

**DATED** at **SUMBAWANGA** this 02<sup>nd</sup> Day of October, 2023.



  
**A.A. MRISHA**  
**JUDGE**  
**02.10.2023**