

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**THE SUB-REGISTRY OF MWANZA**  
**AT MWANZA**

**MISC. CIVIL APPLICATION NO. 91 OF 2023**

*(Arising from Taxation Cause No. 8 of 2023, original Misc. Civil Application No. 48 of 2022)*

**JOSEPH MAGESA CHILAYE ..... APPLICANT**

**VERSUS**

**ACCESS BANK OF TANZANIA LTD ..... RESPONDENT**

**RULING**

*18<sup>th</sup> October & 12<sup>th</sup> December, 2023*

**ITEMBA, J**

The applicant being aggrieved by the decision of taxing master in Taxation Cause No. 8 of 2023 preferred this reference under order 7 (1) of **the Advocates Remuneration Order**, GN. No. 264 of 2015 (elsewhere the Order). He is challenging the award of Tshs. 2,280,000/- by the taxing master for two reasons. **One**, the court had no jurisdiction after notice of appeal to the court of appeal being lodged; and **two**, the tabled bill was only Tshs. 1,890,000/=.

I ordered the application be disposed by way of written submissions following a prayer made by the applicant and conceded by the respondent. The scheduling order was complied with accordingly. The parties'

submissions were drawn by Advocates Emmanuel Elinami Rasiel and Happiness Mangowi for the applicant and respondent respectively.

For the application it was submitted that the Deputy Registrar (DR) erred condemning the applicant to pay costs of Tshs. 2,280,000/= in favor of the respondent while the later prayed for Tshs. 1,890,000/=. That the bill of cost emanates from the decision of this court in Misc. Civil Application No. 48 of 2022. The applicant has already filed a notice of appeal to court of appeal against that decision therefore the Taxing master lacks jurisdiction. Reference was made to the case of **Ferrant Processing Limited vs Labour Commission and Nyarugusu Mining Co. Ltd**, Misc. Civil Application No. 121 of 202020 (unreported).

In reply, it was submitted that the Deputy Registrar was correct to award Tshs. 2,280,000/= because order 55(3) of the Order, direct the item for costs incurred to attend for the bill of cost to be left blank for completion by Taxing Master. That the respondent claimed under item 16 for the costs of advocate fee, filling, attendance and defending the bill of cost and left the amount blank for it to be completed by the taxing master.

That, the Taxing Master enjoyed discretional powers under order 12 (1) of the Order, to allow costs, charges and expenses as authorized in the Order or appear to him to be necessary or proper for the attainment of justice. On that account, Further reference was made to the case of

**Jubilee Insurance Company Tanzania Ltd vs Vodacom Tanzania Public Ltd Company**, Consolidated Taxation Reference No. 2 and 3 of 2020 (unreported).

Regarding the notice of appeal to the court of appeal it was submitted that there was no pending notice of appeal to the court of appeal as the same was never served upon the respondent herein. And, it was not attached in the affidavit supporting this application. In alternative, assuming that the notice of appeal was filed, it was argued for the respondent that there is no law in place which bars taxation of bill of costs after notice of appeal. I was referred to the case of **Mnuhoni Kitege vs the Principal Secretary Ministry of Energy and Minerals and another**, Misc. Land Application No. 123 of 2021 (unreported). In rejoinder, it was maintained that the court can only grant reliefs which has been prayed for.

I have considered the rival submissions for the parties. I will firstly consider jurisdiction of the taxing officer after the notice of appeal being lodged. In law, notice of appeal to the court of appeal initiates the appeal. See, for instance, **Mwanaasha Seheye v Tanzania Ports Corporation**, CoA Civil Appeal No. 37 of 2003; **David Malili v Mwajuma Ramadhani**, CoA Civil Appeal No. 119 of 2016 (both unreported); and rule 68 (1) of the Court of Appeal Rules, 2009.

Further, it is cardinal law that, once the Notice of Appeal being filed, this court lacks jurisdiction to adjudicated on the same matter. I make reference to the case of **Exaud Gabriel Mmari v Yona Seti Ayo & 9 Others**, Civil Appeal No. 91 of 2019; and **Serenity on the Lake Ltd v Dorcus Martin Nyanda**, Civil Revision No.1 of 2019 (all unreported).

This position notwithstanding, there are statutory mandates reserved for the High Court even in the presence of the Notice of Appeal. Such powers include, determining applications for leave to appeal to the Court of Appeal; certification as to the point of law; issuance of certificate of delay; enlargement of time for a party to seek leave or certificate on a point of law; and execution (where no stay of execution). I will now consider whether bill of cost may be entertained after the notice of appeal.

I am aware of two schools of thoughts regarding this issue. The first is of the view that the taxing master lacks jurisdiction to determine bill of cost while the appeal to the court of appeal is still pending. See the case of **Walli Hassan Miyonga vs Aaron Kabunga**, Civil Reference No. 5 of 2021; **Arch Diocese of Arusha vs Nestory Msofe, and 6 others**, Land Reference No. 3 of 2018; **Dominic Ishengoma vs Managing Director Geita Gold Mining**, Civil Reference No. 11 of 2020; and **Noman-Mahboub T/A Noman al Mahboub General Trading Corporation vs. Milcafe Limited**, Commercial Case No. 41 of 2003 (all unreported)

The second school of thought is of the view that notice of appeal does not bar taxation cause. See for example the case of **Rose Mkeku (Administratrix of the estates of Simon Mkeku) vs Parvez Shabbirdin**, Misc. Land Application Case No. 89 of 2021 (unreported); **Muhoni Kitege vs The Principal Secretary Ministry of Energy and Minerals** (supra).

Before picking my preference, I will first consider some facts in relation to this matter at hand. **One**; there is no particular law in place which specifically bars application for bill of cost after the notice of appeal; **two**; the law is specific under order XXXIX Rule 5 (1) of the Civil Procedure Code, Cap 33 R.E 2019, that an appeal is not a bar to execution. In my view, filling bill of cost simply means executing court's order awarding the cost. An appeal cannot automatically stay execution of court orders. **Three**; no notice of appeal was attached to this application. Under paragraph 5 of the counter affidavit, the respondent denied to have been served with the notice of appeal and grieved that the same was not attached in the following words;

*5. That in response to the contents of paragraph 6 of the Applicant's affidavit, the Respondent states that, there is no any pending Appeal or Notice of Appeal being (sic) Lodged to the Court of Appeal of*

*Tanzania as he alleges. Worse enough, the Applicant has failed to append the said Notice of Appeal to evidence the said allegation..."*

The applicant filed a reply to counter affidavit. In response to paragraph 6 of the counter affidavit it was stated;

*"3. That Contents of paragraph 5 of the Counter Affidavit are disputed. The applicant reiterates the averments of paragraph 6 of the affidavit that the deputy Registrar erred both in law and fact, in taxing the applicant to pay the respondent Tshs. 1,890,000/=."*

It is cardinal law that, matters of facts under oath need be contradicted under oath. The applicant aversively denied the contents of paragraph 5 of the counter affidavit. He also opted not to attach the notice of appeal in his reply for the court at least to take judicial notice.

**Four;** in Misc. Civil Application No. 48 of 2022 which resulted to Taxation Cause No. 8 of 2023, subject of this reference, the applicant was applying for extension of time to file notice of appeal to the court of appeal. His application was refused. It is out of place to state in his affidavit that he has filed notice of appeal against that decision. I have reason. Under Rule 45A (1) (a) of court of Tanzania Court of Appeal Rules, 2009; when the application for extension of time to file notice of appeal is

refused the remedy is not to appeal but to apply for the second bite to the court of appeal. The provision reads;

*45A.-(1) Where an application for extension of time to:-*

*(a) lodge a notice of appeal;*

*(b) N/A*

*(c) N/A*

*is refused by the High Court, the applicant may within fourteen days of such decision apply to the Court for extension of time.*

Therefore, in this matter at hand I am inclined to follow the second school of thought that the alleged notice of appeal (if any) does not act as a bar for determination of the bill of cost. Hence the Taxing Master had requisite jurisdiction to determine the matter.

I will now consider the other limb of this application that the Deputy Registrar was not justified to tax the amount of the bill which was not prayed for. It is a cardinal principle of law that, discretionary powers of taxing master are only interfered under exceptional circumstances. See the case of **Gautam Jayram Chavda v Covell Mathews Partnership**, Taxation Reference No. 21 of 2004 (unreported). Factors to be considered in rejecting or reducing the taxed amount, in accordance with, **Southern Highland Earthworks Company Ltd v UAP Insurance Ltd**, Taxation Reference No. 01 of 2021 (unreported) include, suit amount; nature of

the subject matter; its complexity; time taken for hearing and extent of research involved; parties' general behavior and facilitation of expeditious disposal of case; public policy of affordability in litigation; and maintenance of consistency in allowable quantum of costs.

Impugning the taxed amount, the applicant had a sole reason that the respondent claimed for Tshs. 1,890,000/= therefore to him, the taxing master was not justified in law to condemn the applicant to pay Tshs. 2,280,000/=. I agree with the applicant that the court is not your mother to grant what you have not specifically prayed for. See the case of **Dr. Abraham Isael Shuma Muro v National Institute for Medical Research**, Civil Appeal No. 68/2020 (unreported). However, the application for bill of cost is exceptional. The law, under order 55(3) of the Order directs the item for costs incurred to attend for the bill of cost to be left blank for completion by Taxing Master. Therefore, the taxing master was justified to grant Tshs. 600,000/= as costs incurred on prosecuting the bill of cost before him. Without faulting the taxing master on how he erred on exercising his discretion under this section, I am legally not justified to question his decision. The second limb of this application also lacks merit.

In upshot the application is devoid of merit. I dismiss it with cost.



It is so ordered.

DATED at **MWANZA** this 12<sup>th</sup> Day of December, 2023.



**L. J. ITEMBA**

**JUDGE**

Ruling delivered in chambers this 12<sup>th</sup> Day of December 2023, and sealed my hands with the seal of this court, in the presence of the Applicant in person, Advocate Patric Suluba for the Respondent and Ms. Gladys Mnjari RMA.

**L. J. ITEMBA**

**JUDGE**