

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

CIVIL REFERENCE NO. 2 OF 2023

(Based on Taxation Cause No. 7 of 2022 in the Resident Magistrate Court of Arusha which originated from the Execution of Civil Case No. 46 of 2001 in the Arusha Resident Magistrates Court)

JULIUS CLEOPA (Administrator of Estate of

CLEOPA KIRIKENGORI 1ST APPLICANT
MR. ALFAYO KIKIKENGORI 2ND APPLICANT
MR. SAMWEL MEYANI 3RD APPLICANT
MR. GODSON MEYANI 4TH APPLICANT

VERSUS

JOSIA LENGUY SADEMAKI RESPONDENT

RULING

11th October & 10th November, 2023

TIGANGA, J.

This ruling emanates from the decision on Taxation Cause No. 07 of 2022 filed at The Residents' Magistrates Court of Arusha at Arusha (F.Y. Mbelwa, SRM, the Taxing Master) dated 25th May 2023.

In the impugned decision, the respondent herein was awarded Tshs. 2,900,000/= taxed from Tshs. 21,300,000/= which he claimed as a Bill of Cost for executing Civil Case No. 46 of 2001.

Aggrieved by the decision, the applicant preferred this reference made under Order 7 (1) and (2) of the **Advocates Remuneration Order, 2015** (Advocates Remuneration Order) by way of chamber summons supported by affidavit of Lengai Sarunga Loitha, applicants' Advocate. In his affidavit, Mr. Lengai deponed that, in the application subject to this Reference, the Taxing Master refused to stay the proceedings on the ground that, there is a Notice of Appeal already filed in the Court of Appeal. Also the same was time-barred and an omnibus application.

Opposing the application, the respondent filed a counter affidavit contesting any presence of points of law that need to be looked afresh by this Court. He also challenged the Notice of Appeal filed on the ground that, the names of the judge in the impugned decision differ from the one seen in the said notice. He also stated that the application of a Bill of Cost subject to this Reference was neither time-barred nor an omnibus one.

During the hearing the applicants were jointly represented by Mr. Lengai Loitha whereas the respondent was represented by Dr. R. Mchami both learned Advocates.

Supporting the application, Mr. Lengai submitted that, the applicants have raised three issues that, the taxation officer erred in law as he refused

to stay taxation cause No.07/2022, which arose from Execution No. 26/2001 and related to Civil Revision No. 03 of 2022 filed in this Court. It is from the latter application that the Applicants lodged the Notice of Appeal to the Court of Appeal of Tanzania. The second point is that Taxation Cause No. 07 of 2022 was time barred and the third ground is the fact that the same was Omnibus.

On the first ground, learned counsel submitted that this Court, Barthy, J. delivered the decision on Civil Revision No. 03 of 2022 originating from Execution Case No. 26 of 2001 of Arusha RM's Court, Civil Case No. 46 of 2001 and Taxation Cause No. 07 of 2022. In the said decision, the applicants herein were aggrieved hence, on 05th December 2022, they filed a Notice of Appeal to appeal to the Court of Appeal. He argued that, following such Notice, all lower courts cease to have jurisdiction as held in the case of **Serenity on the Lake Ltd vs. Dorcus Martin Nyanda**, Civil Revision No. 01 of 2019 where the Court of Appeal of Tanzania at Mwanza that the Deputy Registrar had no locus stand to issue or refuse execution process after the Notice of Appeal has been filed to the Court of Appeal.

On the second point, Mr. Lengai submitted that Taxation Cause No. 07 of 2022, is out of time pursuant to Order 4 of the Advocates Remuneration

Order. According to him, the Bill of Cost should be filed within 60 days from the date of the order awarding costs, and the decision on Civil Case No. 46 of 2001 was made on 15th December 2021 while the decree-holder filed this Application on May 2022 which was after six months. To cement his stance, he cited the case of **Rose Mkeku (the administratrix of the estate of the late Simon Mkeku) vs. Parves Shabbirdin**, Misc. Land Application Case No. 89 of 2021, HCTZ at Mwanza.

On the third and last point, the learned counsel submitted that the Bill of Costs is Omnibus as the same has two decisions, one out of time and the other one in time. There was a decision issued on 15th December 2021 (Mahumbuga, SRM) which was time-barred, and the other one on 16th May 2022 (Mbelwa, SRM). Therefore, it will be hard to maintain the Bill of Costs which has a different time as held in the case of **Andrea Logilaki vs. Charles Ngilorit**, Misc. Civil Application No. 236 of 2015 HCTZ at Arusha, where this Court emphasized the compliance of the law to consolidate applications that are only related. He prayed that the application be allowed with costs and the decision of Taxation No. 07/2022 be quashed.

In reply, Dr. Mchami submitted that Civil Reference No. 02 of 2023 filed by the applicants was frivolous and devoid of merits thus it is dismissed

with costs on the ground that, the applicants' counsel is lying under oath. He averred that, under paragraph 3 of the affidavit, the Notice of Appeal filed is against the decision delivered by Gladness B.Y., and in paragraph 7 it is seen that ruling on Civil Reference No. 03/2023 was delivered by Hon. G. N. Barthy. Not Gladness J. as averred under oath. In that regard, there is no valid Notice of Appeal filed in court against the decision of G. N. Barthy, J. the same should be disregarded.

The learned counsel also claimed that the applicants' counsel further lied as he claimed to be aggrieved by Civil Case No. 46 of 2001 and Civil Reference No. 03 of 2021. However, throughout his submission, he was against Taxation Cause No. 07 of 2022 and said nothing about Execution Cause No. 46 of 2001 even though he mentioned Civil Reference No. 03 of 2022.

Further to that, on 15th March 2023, the applicant's counsel seemed to concede with the hearing of the Taxation Cause before Mbelwa RM because in the said case of **Rose Mkeku**, Kahyoza, J. ruled that, the presence of Notice of Appeal does not bar or stay the application for taxation. He contended that the applicants should have not conceded with the hearing rather, they should have raised the same before Mbelwa, SRM.

Dr. Mchami further challenged the decision of **Serenity on the Lake** (supra) and argued that the same is distinguished from the matter at hand because it dealt with execution while the one at hand was about Taxation. Regarding the issue of time, he argued that the Bill of Costs was based on the Ruling delivered on 16th May 2023 and it was filed within 60 days from the date it was delivered. Also, the application is not omnibus as the claim is against costs awarded by the Court hence the cited case of **Logilaki** (supra) is distinguishable because there are no two applications. He prayed that the application be dismissed for being devoid of merit.

In his rejoinder, Mr. Lengai submitted that the names of the judge in the impugned decision are of the same Judge. According to him, her first name is Gladness B. which is similar to G. Barthy. Also, this application is in respect to Taxation Cause No. 7 of 2022 but the respondent claimed costs of the matter from 26th January 2022 to 08th July 2023 when Mbelwa, SRM took over from Mahumbuga, SRM. According to him, all the above were not supposed to be lumped together as they were supposed to be claimed separately. He prayed for this court to call the original record and find that the same was omnibus and the decision was also omnibus.

Having gone through rival submissions from each party, this Court is now tasked with one issue for determining which is whether the application has merit. Starting with the 1st point of determination the applicants claim that, in the application subject to this Reference, they had already filed a Notice of Appeal to the Court of Appeal hence the Taxing Master erred in proceeding to determine the same as it lacked jurisdiction.

Generally, taxation of bills of costs is governed by the **Advocates Remuneration Order, 2015**. The rationale behind awarding costs is to refund the decree-holder the costs incurred 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 exercised judiciously.

In the application at hand, as hinted earlier, the respondent filed for a Bill of Costs for executing Civil Case No. 46 of 2001. He prayed for Tshs. 21,340,000/= but the Taxing Master only awarded Tshs. 2,900,000/=. The applicants challenged the Taxing master's decision to proceed with determining the Bill of Cost while they had already filed the Notice of Appeal prior to the application of the Bill of Cost filed by the respondent. I am aware

of a number of Court of Appeal decisions regarding Subordinate Courts halting 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 (supra)** as cited by both parties to this application, 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)*

(See also; **Awiniel 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, all 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 has been well expounded in the case of **Yohana John Kavishe vs. Registered Trustees of ELCT North Central Diocese,** Civil Revision No. 6 of 2021, where the Court of Appeal quoted with approval the case of **CRDB Bank Plc vs. Finn W. Petersen and 3 Others,** Civil Application No. 367/17 of 2017 where it held *inter-alia* that;

"... when the notice of appeal is filed to the Court of Appeal, the High Court and subordinate court do not cease their jurisdiction to all matters, there are some matters which the High Court and the subordinate court retains their jurisdiction to handle, this includes execution proceedings as per rule 11(2) of the Court of appeal rules, G.N No. 344 of 2019."

Applying the principle in these authorities in the application at hand, the records show that, the applicants' learned counsel herein made a prayer

before the Taxing Master that, the Application for Bill of Cost has stayed pending the determination of the appeal to the Court of Appeal of Tanzania but the Taxing master overruled such objection.

Considering the fact that, the Application for the Bill of Cost is not among the above listed three applications that can proceed even if there is a notice of appeal filed, it is my considered opinion that, the Taxing Master erred in proceeding with the determination of the Bill of Cost. I however take Judicial Notice of the fact that, following the impugned notice, the applicants herein filed Misc. Civil Application No. 175 of 2022 before this Court, Mwaseba, J. praying for leave to appeal to the Court of Appeal. The same was dismissed for want of merit on 22nd August 2023.

In light of the above, the only remedy would be to nullify all the proceedings and consequential orders made thereto in respect of the impugned Application for Bill of Cost from the day the objection regarding jurisdiction was raised. I however refrain from doing so as the same will save no purpose but a mere repetition of the proceeding. I hold so considering the fact that, this case has almost 22 years in our courts of law. As the famous legal adage goes, justice delayed is justice denied, I am of the considered opinion that, in the interest of justice the respondent finally gets

what is due to him instead of entertaining technicalities. That being said, this ground fails.

Another issue challenged by the applicants is the fact that the application was time-barred and filed out of 60 days under Order 4 of the Advocates Remuneration Order. 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."

Going through the record, it is clear that, the impugned Bill of Cost emanated from the Execution Case No. 46 of 2001 which Mbelwa, SRM delivered its decision on 16th May, 2023. This application was filed on 05th June 2023, twenty (20) days later which was within 60 days as required by the law. This ground also fails and the same is dismissed.

On the last ground, the applicants claimed that the application subject to this Reference is an omnibus one. According to him, the Taxing Master erred in accommodating the costs from when Mahumbuga, SRM determined the preliminary objection to when the Mbelwa, SRM proceeded with the determination of the execution. It has to be noted that, these all transpired in the same Execution Case No. 40 of 2001, the only difference was that,

Mahumbuga, SRM was transferred hence Mbelwa, SRM being the successor in office, proceeded from where his predecessor ended. In the circumstances, considering the fact that, this emanated from the same proceeding, it cannot be termed as an omnibus application. The Bill of Cost filed was in respect of the Execution Case No. 46 of 2001 only. There was no other application lumped in the said execution as argued by the applicants. This ground also fails.

That said, I find that this application for Reference is devoid of merits and I proceed to dismiss it with costs.

It is so ordered.

DATED and Delivered at **ARUSHA**, this 10th Day of November 2023.




J. C. TIGANGA
JUDGE