IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SHINYANGA SUB REGISTRY

AT SHINYANGA

TAXATION REFENCE NO. 09 OF 2023

(Arising from TAXATION CAUSE NO. 2/2023 SHINYANGA HIGH COURT FROM MISC. LAND APPLICATION NO. 37 OF 2021)

BOAZI MWAIPOPO ..... APPLICANT

VERSUS

DOTTO PAMELA ZAKARIA ..... RESPONDENT

RULING

08th & 25th April 2024

F.H. MAHIMBALI, J

Vide Misc. Land Application No. 37 of 2021, on 21st April 2023 this Court (Kulita, J), dismissed with costs the application for extension of time to file leave to appeal to the Court of Appeal. Following this verdict of dismissal with costs of the said application, the respondent filed Taxation application before the High Court in which the Deputy Registrar of this Court dully taxed it at an amount of TZS 1,110,000/= while the applicant had lodged his notice of appeal before the Court of Appeal against the dismissal order.

During the hearing of the said bill of costs, the Deputy Registrar of this Court dismissed the said legal objection on ground that it was too remote to warrant its stay as the execution of the said amount to be taxed would stay pending the determination of the said appeal before the Court of Appeal but at the option of the Applicant.

The applicant was then aggrieved by the said order thus the basis of this reference application. His points of reference are mainly two:

i. **That an instruction fees of 1,000,000/= taxed by the DR is unmaintainable as the respondent was unrepresented before the High Court.**

ii. **That it was pre-mature for the DR to determine the said application while there is an appeal pending before the Court of Appeal in respect of the dismissal order amongst other things giving rise the said costs.**

The respondent resisted the said application.

During the hearing of the application, parties appeared in person, unrepresented. Each party prayed this court to adopt his affidavit in support and opposition of the application respectively.

In digest to the first ground of reference, it is undisputed that the hearing of the said application did not involve advocates. Thus, the award of 1,000,000/= as costs for the legal representation is legally unjustified. That right is only reserved to advocates representing the parties before a court of law and does not extend to parties themselves. Thus, that amount is liable to be expunged as it was not ought to be included in the costs and taxed so. I say so, on the basis that the GN 264 of 2025 from which the said bill of costs is founded, the same emanates from section 49(3) of the Advocates Act, Cap 341. In essence, as per its application, the GN 264 of 2015 applies to the matters concerning **remuneration of an advocate** by a client in contentious and non-contentious matters, for taxation thereof and the taxation of costs between a party another party in matters in the High Court, and courts subordinate to the High Court, arbitral tribunals and tribunals whose appeals lie to the Court of Appeal. The 1,000,000/= being an instruction fees to an advocate as scaled under item 1 (a) of the 11th Schedule to the GN 264 of 2015 to defended application is a remuneration legally provided to a hired advocate and not to an individual party.

As regards to the second ground of reference that the said application ought not to have been filed in place of the notice of appeal against the

ruling of this court in which the said order for costs emanate it is my considered view that stay of execution of the court's order is not automatic. It is subject to a stay order by the appropriate Court. An application for bill of costs is in my considered view, part of execution process of the trial court's order. In the case of **Mitsushita Electric Co. Ltd versus 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 filed, this court is seized of the matter in exclusion of the High court except for applications specifically provided for. Such as leave to appeal, provision of the certificate of a point of law or execution where there is no order of stay of execution from this court".*

From the above position it is apparent that, the general rule is that once Notice of Appeal has been duly lodged to the Court of Appeal, the High Court ceases to have jurisdiction over the matter. Basically, every general rule has its exception. In our situation, the exceptions to the general rule were stated in the case of Matsushita (supra) that irrespective that appeal process to the Court of Appeal has already been initiated by the Notice of Appeal, reserves some powers in respect of

certain matters in relation to the same matter being appealed before the Court of Appeal, which are:

(a) Application for leave to Appeal to the Court of Appeal.

(b) Application for certificate on point of law.

(c) Application for execution where there is no order of stay of execution issued by the Court of Appeal.

As of now, I know of no further authority of the Court of Appeal which has ever reviewed its decision in the case of **Matsushita** on the ground that it was decided per in curium; therefore, it is still good law. In that vein, I subscribe to the holding of my senior brother Hon. Mruma, J in the case of **JawingaC.Ltd. Versus Aristeprol Investment Co. Ltd, Commercial Case No. 103 of 2012** that itis not automatic that whenever a notice of Appeal is filed, execution process should be stayed.

It should be noted that execution is the process of enforcing or giving effect to the decree or award of the court as the case may be. In that premise, it is clear to me and to the parties that Taxation of Bill of costs is part of the execution process.

In the matter at hand, there is no evidence that the respondent ever filed an application for stay of execution before the Court of Appeal an and obtained an order of stay or that there is an application for stay in the Court of Appeal, or that there is a pending Appeal before the Court of Appeal. Since a Notice of appeal is a sufficient expression of an intention to file an appeal, and that such an action is sufficient to find the basis for grant of orders of stay in appropriate cases, the respondent ought to have done so. See **Attorney General of the Republic of Uganda versus the East African Law Society & Another,** EACA Application No. 1 of 2013. In that premise, I agree with the respondent and the Taxing Officer that this court had jurisdiction to entertain Taxation Cause No. 2 of 2023.

Despite the fact that the High Court has jurisdiction to entertain application for execution or Bill of costs where there is no order of stay, borrowing the caution by the Court of Appeal given in the case of **Serenity on the v Lake Ltd versus Dorcus Martin Nyanda,** Civil Revision No. 1 of2019(CAT) that the officer who carries the execution must be extra-careful not to carry out the execution or deal with the matter to the extent that may interfere or prejudice the proceedings in relation to the judgment or order resulting into the said costs being challenged in the Higher Court (See the

wisdom of this Court by my brother Ngigwana, J in **Walii Hassan Miyonga vs Aaron Kabunga** (Civil Reference 5 of 2021) [2022] TZHC 9598 (13May2022).

To avoid unnecessary and unexpected chaos in the administration of justice, it is my considered view that where there a Notice of Appeal lodged in the Court of Appeal and no order of stay has been issued by the Court of Appeal, the best practice is for the applicant to ask for the withdrawal of the application with leave to re-file after the determination of the intended appeal or after the withdrawal or dismissal the Notice of Appeal. I say so on the basis that once the Court of Appeal determines the matter, in its merit, it being the highest Court, it is which will then determine an order for costs. By the way it be noted that costs are determined by the highest court determining the matter while execution is carried out by the court giving the decree.

What should this Court order then in the circumstances of this case where there is an intended appeal before the Court of appeal? I hesitate to borrow the position taken by brother Ngigwana J in **Walii Hassan Miyonga vs Aaron Kabunga** (Civil Reference 5 of 2021) [2022] TZHC 9598 (13 May 2022) that the proceedings should stay. Instead thereof, mindful of the fact

normally where one initiates an appeal to the Court of appeal, unlike execution proceeding which is done by the court of first instance, where there is an appeal, costs are determinable by that higher or highest court depending on where it is finalized, thus there can result to an interference or prejudice of the proceedings in relation to the judgment or order resulting into the said costs being challenged in the Higher Court (Court of Appeal) if is left to proceed as it is in the present case. Thus, as a matter of prudence and logic, an application of costs ought not to be commenced and/or proceeded where there is a proof of an initiation of the appeal process against the impugned judgment/ruling awarding costs before a higher court. That said, the reference application is hereby allowed. The bill of costs filed is hereby ordered struck out. Depending on the outcome of the case by the Court of Appeal, costs will be filed thereafter.

DATED at Shinyanga this 25th day of April, 2024.

F.H. Mahimbali

Judge