

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM SUB-REGISTRY**

CIVIL REFERENCE No. 21 OF 2023
(C/f the Bill Cost No. 57 of 2023)

WAHID ABDALLAH ALLY.....APPLICANT

VERSUS

ACCESS BANK OF TANZANIA LIMITED RESPONDENT

RULING

Date of last order: 23-11-2023
Date of Ruling: 8-2-2024

B.K.PHILLIP,J

Aggrieved by the Ruling of the Taxing Officer in Bill of Cost No. 57 of 2022, the applicant herein, lodged this application under Order 7 Rule 1 and 2 of the Advocates Remuneration Order, GN No. 263 of 2015, praying for the following orders;

- i) May the Honourable Court be pleased to examine and interfere with the decision of the Taxing Officer dated 11th July 2023 in Bill of Cost No. 57 of 2022 and set aside.*
- ii) The cost of this application be provided for.*
- iii) Any other or further order(s) which the honorable Court shall deem fit to grant in favor of the applicant.*

The application is supported by an affidavit sworn by learned advocate **Loveness Denis**. A brief background to this application is as follows; on 5th October 2022, the Resident Magistrate's Court of Dar es Salaam at Kisutu, delivered a judgment in favor of the plaintiff, (the applicant herein) and ordered the defendant (the respondent herein) to pay to the applicant Tshs. 65,000,000/= as specific damages, Tshs. 10,000,000/= general damages, interests at the court's rate of 7 % per annum from the date of judgment to the date of final payment and to pay costs for the suit. Thereafter, the applicant filed Bill of Costs No. 57 of 2022 claiming for payment of Tshs. 43,970,000/= being the costs of the suit. The bill of costs aforesaid was ordered to be heard by way of written submission. The court's records show that the counsel for the applicant filed his written submission which indicated that it was in respect of Miscellaneous Application No.140 of 2022 instead of Bill of Costs No.57 of 2022. The Taxing Officer dismissed the Bill of Costs No. 57 of 2022 for want of prosecution. The applicant was dissatisfied with the dismissal order and hence lodged this reference.

This application was disposed of by way of written submission. The learned Advocate Daimu Halfani, appeared for the applicant whereas, the respondent was represented by the learned Advocate Amon Meja.

Submitting in support of the application, Mr. Halfan pointed out that in his Ruling the Taxing officer acknowledged that although the applicant's written submission indicated that it was in respect of Miscellaneous Application No. 140 of 2022 instead of Bill of Costs No. 57 of 2022, all of its contents were about the Bill of Costs No. 57 of 2022. He contended that

the Taxing Officer erroneously proceeded to dismiss the Bill of Costs for want of prosecution. The applicant inadvertently cited an incorrect case number, that is Miscellaneous Application No. 140 of 2022 which also arose from Civil Case No. 186 of 2019, instead of Bill of Costs No. 57 of 2022.

Furthermore, Mr. Daimu argued that even the Advocate for the respondent was not prejudiced by the aforesaid error in the case number since he filed his reply submission on the merit of Bill of Costs No.57 of 2022 as the same was just a typing error. He insisted that the said error did not occasion any failure of justice. He faulted the Taxing officer's order for dismissal of the Bill of Costs on the ground that there was a failure of prosecution while there was a written submission filed in court by the applicant in support of the application and placed in the case file though it had a wrong case number, and its contents were about the Bill of Costs in question.

Mr. Daimu went on to submit that it was erroneous for the Taxing Officer to expunge the written submission filed by the applicant in support of the Bill of Costs instead of providing an appropriate legal remedy to cure the error on the case number indicated in the applicant's written submission. He contended that the taxing officer was supposed to order the correct case number to be inserted in the applicant's written submissions and the wrong number to be deleted. He was emphatic that the Taxing officer was supposed to be guided by the principle overriding objective and order the correction of the case number so that the Bill of Costs could be determined on merit instead of dismissing it. He cited the case of **Engen Petroleum**

(T) Ltd versus Kobil (T) Ltd, Civil Application No. 110 of 2003 c/f No. 102 Of 2003, Ally Abdallah Mkufu Vs Ngulilepi Said Mkufu, Civil Application No. 123 of 2007, Ezekiel Tom Oluoch Vs Chama cha Walimu Tanzania, Labour Revision No. 11 of 2021, Thomas Kimambo Vs Clement Leonard Kasudya (as an administrator of the estate of the late Leonard Kasudya) & another, Civil Application No. 477 of 2018 and Richard Osia Mwandemele Vs Lwitiko Osia Mwandemele, Misc Application No. 76 of 2021, (all unreported).

In rebuttal, Mr. Amon Meja's submission was to the effect that since the applicant's Bill of Costs was dismissed, the applicant was supposed to apply to set aside the dismissal order and not a Reference as he did. He contended that an application for reference ought to be filed only when the taxation of the Bill of Costs has been decided and a party is not satisfied with the Taxing Officer's decision. To cement his argument he referred this court to Order 7 (1) of the Advocates Remuneration Order, 2015, and the case of **Benjamini Mwakyala Vs Geoffrey A. Ndalanda, Land Reference No. 6 of 2020**,(unreported).

On the merit of the Bill of Costs, Mr. Meja argued that the applicant submitted that he failed to file the submissions in respect of Bill of Costs No. 57 of 2022 as he was ordered by the court, instead, he filed a written submission in respect of Miscellaneous Application No. 140 2022. He was emphatic that the Bill of Costs No. 57 of 2022 and the Misc. Application No. 140 of 2022 are two different cases one being a taxation of cost while the other is a Miscellaneous Application with different case numbers. He was of

the view that the case laws relied upon by Mr. Daimu in his submission are distinguishable from the case in hand on the reason that in those cases the errors were clerical errors and curable under the principle of overriding objective. Expounding on that point, Mr. Meja pointed out that in the case of **Engen Petroleum (T) Limited**, (supra) the clerical error was in the citation of the case number. Instead of indicating case number 250 of 2003 the applicant indicated case No. 250 of 2002, so the error involved a single digit "2" ". Likewise in the case of **Ezekiah Tom Oluoch Vs Chama cha Walimu** (supra), Mr. Meja contended that the error was the omission of the year ("2020"), in which the application was filed.

Relying on the case of **Juma Busiya Vs Zonal Manager South Tanzania Postal Corporation, Civil Case No. 273 of 2020**, (unreported), Mr. Meja argued that the position of the law is that the principle of overriding objective cannot be applied blindly to cure every failure to comply with the mandatory provisions of the law.

Another concern raised by Mr. Meja is that the applicant herein failed to file his rejoinder despite being granted an extension of time to do so, thus, he cannot benefit from his mistakes. In conclusion of his submission, Mr. Meja urged this court to dismiss this application with costs.

In rejoinder, Mr. Daimu argued that the dismissal order in the present matter is not of the kind that the applicant could have applied for setting aside the same. He contended that the applicant filed his submissions titled "*Submission in support of the Bill of Costs*" timely and the same was filed in the case file for Bill of Costs No. 57 of 2022 in compliance with the order

of the Taxing Officer. However, the Taxing Officer expunged the said submission from the court's records and thereafter proceeded to dismiss the Bill of Costs. It was Mr. Daimu's stance that the Taxing Officer's order in which he ruled out that the applicant failed to file the written submission was erroneous because the applicant filed his written submission as ordered by the court. The Taxing Officer dismissed the Bill of Costs after expunging the applicant's written submission from the court's records. and After expunging the applicant's written submission from the court's records, the Taxing Officer did not order the applicant to file another written submission in support of the Bill of Costs.

Additionally, Mr, Daimu distinguished the case of **Benjamini Mwakyala** (supra) and **Monica Dickson** (supra) relied upon by Mr. Meja in his submission because those cases are concerned with the defendant's failure to file the written statement of defence, which is not the case in the matter at hand.

Responding to the arguments raised by Mr. Meja on the applicant's failure to file a rejoinder submission, Mr. Daimu argued that the applicant's failure to file the rejoinder cannot be a justification for the Taxing Officer's order expunging the applicant's written submissions in support of the Bill of Costs from the Court's records. Mr. Daimu was at one with Mr. Meja on the position of the law, that is, the principle of overriding objective cannot be applied blindly to disregard rules of procedure couched in a mandatory manner. However, he was quick to point out that the case at hand has unique elements because the applicant did not violate any mandatory provision of the law. The respondent was not prejudiced by the error in the

case number as he filed his reply submission without any complaint/problem. Thus, he maintained that this was a fit case to invoke the principle of overriding objective. He Implored this court to allow this application and order that a fresh ruling be composed.

Having dispassionately analyzed the rival arguments raised by the learned advocates appearing herein, let me proceed with the determination of the merit of this application. It is common ground that the applicant filed his written submission in support of the Bill of Costs within the time ordered by the Taxing Officer and the respondent's advocate filed his reply submission without any complaint. The applicant's written submission was in respect of Bill of Costs No. 57 of 2022, though its title indicated a wrong case number. Lucky enough the submission was filed in the case file for the Bill of Costs. The Taxing Officer while composing his Ruling noted the error in the case number and decided to expunge the said submission, and thereafter dismissed the Bill of Costs for failure of prosecution without giving the applicant the opportunity to address the court on the error on the case number. Let me point out here that, I am aware that the Taxing Officer was not duty-bound to correct the aforesaid error but he was duty-bound to invite the parties to address him on that issue before expunging the appellant's submission from the court's records something which had serious repercussion to the applicant. The fact that the Taxing officer did not accord the applicant the opportunity to be heard on the aforesaid error closed the door for the applicant to make any prayer such as leave to correct the error. The error in the case number was not fatal. It is trite law that if concerns arise in the course of composing judgment/Ruling, the

court is duty-bound to invite the parties to the case to address the court on that particular new issue. For instance in the case of **Said Mohamed Juma Vs Muhusin Amir and Muharani Juma, Civil Appeal No.110 of 2020** (unreported), the Court of Appeal held as follows:

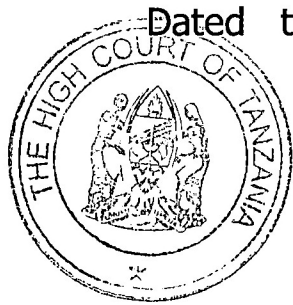
*" The more so, a trial Judge is obligated to decide the case on the basis of the issue on record. As to what should a judge do in event a new issue crops up in the due course of composing a judgment, the **settled law is to the effect that the new question or issue should be placed on record and the parties must be given the opportunity to address the court on it....**"*

(emphasis added).

Without prejudice to what is stated herein above, this application is proper before this court since the applicant had no proper legal remedy apart from filing this reference. I agree with Mr. Daimu that Mr. Meja's contention that the applicant was supposed to apply to set aside the dismissal order is misconceived since the dismissal order was issued after the Taxing officer had expunged the applicant's written submission from the court's record. So, under such circumstances, the application to set aside the dismissal order in the absence of the applicant's written submission in support of the Bill of Costs would not have been helpful to the applicant. It is by way of reference before a judge that the merit of the Taxing Officer's order in which he expunged the applicant's written submission can be dealt with.

From the foregoing, it is the finding of this court that this application has merit. Thus, I hereby set aside the Ruling of the Taxing Officer and order that the Bill of Costs shall be assigned to another Taxing Officer for determination of the same as per the law. Since the Bill of Costs was

dismissed on the grounds raised by the Taxing officer *suo motto*, each party will bear his costs.



Dated this 8th day of February, 2024


B.K.PHILLIP

JUDGE