

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(DAR ES SALAAM SUB REGISTRY)  
AT DAR ES SALAAM**

**CONSOLIDATED CIVIL REFERENCE NO. 32 & 38 OF 2023**  
*(Arising from Misc. Civil Application No. 661 of 2021 and Execution No. 35 of 2022)*

**DB SHAPRIYA & COMPANY LIMITED ..... APPLICANT**

**VERSUS**

**EL-MALICK ABOOD t/a SANTANA**

**INVESTMENT LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SOGEA SATOM COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**S.M. MAGHIMBI, J:**

Although the two applications revolve around the same controversy, they each originated from different channels. The first application, Civil Reference No. 32 of 2023 was tabled before me after the ruling of this court (Hon. Nyembele DR, as executing officer) in Execution No. 35 of 2022, in which she made a finding that it was not proper for her to continue executing the order made by her fellow Deputy Registrar (Hon. Lukuna DR) in Misc. Application No. 661/2021 (“the contested application”). Her reasoning was that Court Brokers being officers of the court, they cannot sue parties to the suit to claim for costs since under the Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) (Amendment) Rules, G.N No 363 of 2017, there is a provision on how the

executing officers can claim for costs after execution. In her ruling dated 09<sup>th</sup> March, 2023, the Hon DR held:

*"Now having analysed the legal position regarding execution of Court Brokers costs I find that it is proper to continue executing the order made by my fellow Deputy Registrar in Misc. Civil Application No. 661/2021, and since I cannot set it aside, I hereby refer the case file to Hon. Judge in charge for reference.  
Order accordingly"*

It was from the above order that the Reference No. 32 of 2023 was opened and the tabled before me. As for the reference No. 38/2023, it was lodged by a Chamber Summons supported by an affidavit of Mr. Roman S.L. Masumbuko, learned Counsel representing the Applicant. In her Chamber Summons, the applicant is moving the court for the following orders:

1. That the Honourable court be pleased to call for the record and quash the Ruling and findings of the Taxing Officer dated 28<sup>th</sup> April, 2022 in Misc. Civil Application No.661 of 2021 and appropriately, determine the bill of costs presented by the 1<sup>st</sup> Respondent;
2. Costs be provided for;

3. Any other relief this Honorable Court may deem fit to grant.

In the Reference No. 38/2023, the applicant was aggrieved by the decision of the Deputy Registrar in the contested application on what generally seems to be the act of the Deputy Registrar to entertain the Application for Bill of Costs presented contrary to the practice and procedures.

Since the concerns of Hon Nyembele, DR and that of the applicant herein revolves around the propriety of Hon. Lukuna, DR in entertaining the contested application, on the 17<sup>th</sup> day of November, 2023 when this matter came for necessary order, this court ordered that the two applications be consolidated so that they can be heard and determined together. Hearing of the consolidated applications proceeded by way of written submissions. The applicant's submission were drawn and filed by Mr. Roman Lamwai, learned Counsel while the 1<sup>st</sup> respondent's submissions were drawn and filed by Mr. Joseph Asenga, learned Counsel. On her part, the 2<sup>nd</sup> respondent never entered appearance and on the 17<sup>th</sup> day of November, 2023, it was ordered that the matter proceeds ex-parte of the 2<sup>nd</sup> respondent.

Before venturing into the determination of the consolidated application, I find it prudent that the background of the controversy at hand, al bait brief, be narrated. There was filed a Civil Case No. 166 of 2015 between the 2<sup>nd</sup>

respondent herein (then Plaintiff/Decree Holder) and the applicant herein (then Defendant/Judgment Debtor). In the decree of the court, the Judgment Debtor was ordered to pay the Decree Holder a sum of Tshs. 5,210,000/- and USD 236,590.31. It was from the decreed amount that the 1<sup>st</sup> respondent was appointed the Court Broker to execute the said decree by attaching 45 vehicles being movable property belonging to the applicant. On the 18<sup>th</sup> October, 2019, Barclays Bank who is not a party to this application, filed a Misc. Application No. 538 of 2019 objecting the said attachment. On 15<sup>th</sup> July, 2020 by virtue of the Ruling of the Executing Officer [Honourable Massam – D.R (as she then was)] in Miscellaneous Civil Application No. 538 of 2019, the 1<sup>st</sup> respondent was ordered postponement of the attachment pending investigation and objection proceedings. Subsequently, upon the court being moved by a letter from applicant herein, the Executing Court (Hon. Fovo, DR) made specific orders directing the 1<sup>st</sup> respondent to comply with the order of Hon. Massam, DR (as she then was) by reverting the said properties to the applicant unless there was a valid and lawful order which directing otherwise. Aggrieved by the said ruling, a subsequent reference was filed vide Misc. Civil Reference No. 15 of 2021. In

his ruling, this court (Hon. Mruma, Judge) upheld the decision of the Taxing Master and proceeded to dismiss the application.

Following a claim of costs that she had incurred in executing the court order, the 1<sup>st</sup> respondent presented before this court a Court Broker's Bill of Costs vide Miscellaneous Civil Application No. 661 of 2021, claiming for the costs incurred in attaching the Applicant's equipment from 13<sup>th</sup> June, 2019 to 6<sup>th</sup> July 2021. On the 21<sup>st</sup> day of March, 2022, the applicant herein, lodged a notice of preliminary objection on point of law. It is apparent that the Executing Officer did not determine the points of objection and proceeded to determine the contested application taxing the bill of costs at Tshs. 340,958,480/-.

Subsequently, the applicant lodged the Execution No. 35 of 2022 moving the court to execute the decree dated 28<sup>th</sup> April, 2022. Having had concerns about the propriety of the application before her, the Hon DR referred the matter to the Judge in Charge vide Reference No. 32 of 2023 and having been aggrieved by the decision of the Hon. DR in the contested application, the applicant lodged the Reference No. 38 of 2023.

In his submissions to support the application, Mr. Lamwai clustered his grievances in three grounds as follows:

1. That the Taxing Officer grossly erred in law by taxing the charges incurred after the Warrant of Attachment was lifted by the Order of Honourable Massam – D.R dated 15th July, 2019 in Miscellaneous Civil Application No. 538 of 2019;
2. That the Taxing Officer erred in fact and law in entertaining the Application for Bill of Costs presented contrary to the practice and procedures of the Court Brokers.
3. That the Taxing Officer erred in law in dismissing the Preliminary Objections without affording the Applicant a right to be heard on them.
4. That the Taxing Officer erred in law without paying regard to the scales provided under the Court Broker's and Process Servers (Appointment, Remuneration and Disciplinary) Rules, 2017.
5. That amount taxed by the Taxing Master is whole unreasonable, unjustifiable and contrary to the decision of this Court in Civil Reference No. 15 delivered by His Lordship Mruma, J.
6. That the Taxing Officer erred in law and fact by taxing the Court Broker's Bill of Costs without proper evidence on record.

My determination of this application will start with the 3<sup>rd</sup> ground that the in the contested application, the Taxing Officer erred in law in dismissing the

Preliminary Objections without affording the Applicant a right to be heard on them. Why it is important to start with this ground is because in this ground, the applicant is aggrieved by a denial of her fundamental right to be heard, something which I must first address before determining the other grounds which are on the reasoning of the executing officer, should the omission found not be fatal.

In his submissions to support the application, Mr. Lamwai submitted that it trite law that failure to afford right to be heard to the necessary party to a case is fatal. That it is also an abrogation of the constitutional guarantee of the basic right to be heard as enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977. He supported his submissions by citing the case of **Abbas Sherally & Another v. Abdul S.H.M. Fazalboy**, Civil Application No. 33 of 2002 which was cited at P. 6 in the case of **Danny Shasha Vs. Samson Masoro and Others**, Civil Appeal No. 298 of 2020, Court of Appeal sitting at Musoma (both unreported) where the court held:

*"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision*

*which is arrived in violation of it will be nullified., even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice”.*

He then submitted that when the Miscellaneous Civil Application No. 661 of 2021 was pending before this Court, the Applicant had written various letters complaining about the First Respondent’s misconducts and filed a Notice of Preliminary Objection. That however, the same had not been addressed arguing that it is wrong for the Taxing Office to proceed with the determination of the Bill of Costs without determining the objections raised as the same included matters of jurisdiction. That the First Respondent did obviously hide the truth in order to circumvent the pertinent issues including the jurisdiction of the Taxing Master after the Ruling in Civil Reference No. 15 of 2021 delivered by His Lordship Mruma, J. He then argued that the Taxing Officer erred in law in dismissing the Preliminary Objections without affording the Applicant to be heard on them.

In reply, Mr. Assenga started by pointing out that this is the simplest issue and need not detain us. That being a factual issue, they have addressed it very well in the Counter affidavit and affidavit of Joseph Assenga



annexed to the Counter Affidavit, pointing to Paragraph 4 of Counter Affidavit of El Malick Aboud and paragraphs 2 and 3 of affidavit of Joseph Assenga. He then emphasized that Counsel for applicant belatedly filed notice of points of objection on **21/03/2022** at a time when the court had already scheduled hearing of the application. That the notice of PO was preempting Order that was already made and Applicant could not apply to vacate Court Order for hearing as he (counsel for applicant) defaulted appearance and Taxing Officer dismissed the points of objection for want of prosecution.

He went on submitting that Hon Lukuna DR has addressed this under his Ruling at Pages 13 and 14. That the objections did not even touch issues of jurisdiction but purely factual matters which need evidential proof and indeed filed to buy time. He then argued that it is elementary principle of law that a counsel is bound to prosecute the case of a party with due diligence.

In rejoinder Mr. Lamwai first pointed out that the First Respondent's Reply Submission is well misguided and out of point, as to the legal issues raised therein. He argued that the Counsel for the First Respondent has raised irrelevant matters which do not feature the points raised by the Applicant

and has tried to mislead this Honourable Court only to circumvent the pertinent issues including the validity of the costs awarded and jurisdiction of the Taxing Officer after the Ruling in Civil Reference No. 15 of 2021 which was delivered by His Lordship Mruma, J.

He then pointed that the Counsel for the First Respondent has totally failed to reply to the submission in chief and has all along raised irrelevant issues only to mislead this Honourable Court from quashing the Ruling and findings of the Taxing Office in Miscellaneous Civil Applicant No. 661 of 2021 and appropriately determining the Bill of Costs presented by the First Respondent.

I have dispassionately considered the submissions of both parties in this issue. It is apparent on record that there were points of objection that were raised by the applicant herein in the contested application. In his ruling, the Hon DR observed that the two objections were raised after the order for hearing was already issued, he therefore termed the objections as a pre-emption of the decision of the court. How he would have been pre-empted as a court has remained a mystery because the Hon DR did not expound any further as to why and how the objections, if determined, will pre-empt the decision of the court merely because it was raised after an order of hearing

was issued. Emphasis is on the fact the objection were grounded on challenging jurisdiction of the court and the propriety of the application, same issues that were raised by Hon Nyembele DR, in Execution No. 35/2022 which led to one of the reference application herein.

On the other hand, having perused the records, the objections were raised following a decision by Hon. Mruma, Judge making orders that the 1<sup>st</sup> respondent releases the cars he was holding. Therefore according to the applicant, the situation at that time had drastically changed and he was also challenging the mode in which the application was tabled. On that note, I find that it was important for the Taxing Officer to determine the objections first in his ruling before going into the merits of the application because by failing to do so, he had denied the applicants a fundamental right to be heard. In the case of **Anthony M. Masanga vs Penina (mama Mgesi) and Another (Civil Appeal 118 of 2014) [2015] TZCA 556 (18 March 2015)** the court held at page 8:

*"It appears therefore that the respondents were not afforded the heard (audi alteram partem) on that aspect. In fact, nowadays, courts demand not only that a person should be given a right to be heard, but that he be given an "adequate*

*opportunity" to be heard so as to achieve the quest for a fair trial. See the case of The Judge i/c High Court Arusha & Another v. N.I.N. Munuo Ng'uni [2006] T.L.R. 44"*

On that note, and on a further basis of the cited case of **Danny Shasha Vs. Samson Masoro and Others**, since the basis of the objection was on jurisdiction and propriety of the application, which was triggered by the ruling of this court (Hon. Mruma, J) during the pendency of the contended application, the Hon DR had a duty to first determine the objection and afford the applicant a right to be heard. The same was observed by the Executing Court (Hon. Nyembele DR) who had a concern on the manner the application was preferred. That being the case and on that note, I find the omission to determine the objections to be fatal and consequently, I hereby allow this application lodged by the applicant DP Shapriya and the Reference by Hon. DR in Execution No. 32 of 2023.

In consequence of the above, the ruling of the Taxing Master in Misc. Civil Application 661 of 2021 is hereby quashed and set aside. The file is remitted back to the Taxing Master so that he/she can first determine the propriety and competence of the application before proceeding on the merits of the application. That being the case, the execution No. 35 of 2022 will

have no legs to stand on and it is hereby struck out with no order as to costs.  
Costs of this application shall follow cause in the outcome of Misc. Civil  
Application No. 661 of 2021.

Dated at Dar-es-salaam this 19<sup>th</sup> day of February, 2024



A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke, positioned above a dotted line.

**S.M. MAGHIMBI**  
**JUDGE**