

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

AT DAR ES SALAAM

CIVIL REFERENCE NO. 25916 OF 2024

**(Arising from Ruling and Drawn Order in Taxation of Bill of Costs No. 131 of 2023
before Hon. J. D. Luambano, DR dated 25th October, 2023)**

ECOBANK T LIMITED.....APPLICANT

VERSUS

DOUBLE A COMPANY LIMITED.....1ST RESPONDENT

A.A. TRANS LIMITED.....2ND RESPONDENT

AKBER BASHI VERSI.....3RD RESPONDENT

ASGHER BASHIR VERSI.....4TH RESPONDENT

RULING

4th & 19th June, 2024

DYANSOBERA, J.:

The applicant has filed this Reference against the decision of the Taxing Officer in the Bill of Costs No. 131 of 2023 dated 25/10/2023. The Reference was instituted by way of chamber summons under O. VII (1) and (2) of the Advocates Remuneration Order, 2015 and it was taken at the instance of SAFARI AFRICA ARBITRATION and supported by an affidavit deponed by Advocate Inviolata Wangoma. The respondents upon filing a counter affidavit raised two points of preliminary objection thus;

- 1. That, the application is fatal incompetent as it violates the laws under Order VII of the Advocates Remuneration Order for being brought hopelessly out of time before this court.*
- 2. That, the application has been un-procedurally filed before this court.*

The preliminary objection was heard orally. Mr. Moses Mvungi & Ms. Judith Ulomi appeared for the Applicant while Mr. Dismas Raphael stood for Respondents.

Arguing in support of the preliminary objection, Mr. Dismas Raphael submitted that the applicant challenges the ruling of Taxation of Costs made 25.10.2023, that the law requires the reference to be filed within 21 days of the date of the decision, he contended that the applicant filed the application on 22.11.2023, that this was in clear contravention of Order VII.

Mr. Dismas further submitted that the electronic filing Rules, 2018, Rule 8 in particular require all pleadings, petitions, applications, appeals and any document to be filed electronically. It is his contention that Rule 21 states that a document shall be considered to have been filed if it is submitted through electronic filing system before midnight East African Time on the date it is submitted.

Counsel for the respondent concluded that as the application for reference was filed out of time and the applicant has failed to file an application for extension of time, he therefore prayed that the application be dismissed with costs. He referred this court to the case of Civil Reference No. 12 of 2022, **CRDB Bank PLC v. Deemay Sikay Deemay**.

In reply Mr. Moses Mvungi submitted that the application was filed within time as it can clearly be evidenced by written notice issued by the Deputy Registrar indicating that the date of submission was on 15th November 2023 it was signed and court seal indicating to have come from the Deputy Registrar, the reasons being that the applicant had preferred to file this application in time but it is the system which was not yet activated by the time of filing.

It is the applicant's contention that the application for reference has been filed in time as it shows exactly when this application was submitted. He stated that the raised objection is of no sound and should be dismissed with costs.

Ms. Ulomi also argued that this PO has no merit as the alleged delay was caused administratively and its cure was done administratively, the reason being a system failure. That the note from the DR supports this.

In his rejoinder Mr. Dismas reiterated his submission in chief and added that the application is not for extension of time where the applicant counsel shows the reasons for the delay so that she is given an extension of time. He added that after the applicant found herself to be out of time, she was supposed to invoke Order VIII of the Order – to apply for extension of time. Hence prayed this application to be dismissed with costs.

I have considered the learned counsels' rival submissions. The issue calling for determination is whether the preliminary objection is a true and pure point of law and, therefore, has merits. The answer must be in the negative.

It is trite and I need not cite any authority that a preliminary objection in raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of the judicial discretion. It is a point of law apparent out of the pleadings and *must meet certain criteria to pass as such.*

The Court of Appeal in the case of **Hezron M. Nyachiya versus Tanzania Union of Industrial and Commercial Workers and Organization of Tanzania Workers Union**, Civil Appeal No. 79 of 2001 (unreported), that there can be no pure point of law where there are facts that require proof by evidence. Proof by evidence was still needed before the trial court could definitely conclude that

Indeed, the above propositions termed by the 1st and 3rd respondents as preliminary objections do not encapsulate a precise point of law but are predicated on unascertained facts.

With regard to the first point of preliminary objection, both counsel for the parties hold divergent views on the fact that the application was filed in time. While counsel for the respondent on one hand contends that the impugned ruling was delivered on 25th October, 2023 but the reference in question was filed on 22nd November, 2023 which is beyond the period of 21 days prescribed by law, counsel for the applicant, on the other hand, maintains that the reference was filed within time, it having been submitted to court on 15th November 2023 then signed and sealed by the court seal. In support of his argument, counsel for the applicant made reference to the written notice issued by the Deputy Registrar indicating what the date of submission was. He stressed that the applicant had filed this reference in time but it is the system which was not yet activated by the time of filing.

Besides, counsel for the parties are not at one when a document is properly filed in court. Is it when it is submitted or when the court fees are paid. They are in a clash of facts.

These being **matters of evidence** and **substantive arguments**, are unfit for consideration as preliminary objections.

Indisputably, a preliminary objection would, if appropriate and well-presented and argued, come in to dispose of the suit at a preliminary stage of the proceedings. That is why its application must be rigorously thrashed to obviate situations whereby litigants would be estopped from pursuing their matters in unclear and uncertain circumstances.

However, if it is improperly applied, it can be a dangerous tool of oppression. It would lock out the deserving litigants out of their causes. On the other hand, it could condemn deserving respondents to undue pressure and costs in pursuing litigation. This is a delicate balancing act under all circumstances.

In upshot and for the stated reasons, I find both the two limbs of the raised preliminary objection raised to be not true and pure points of law. Accordingly, they are overruled and dismissed with costs.

The reference shall be heard on merit.



W.P.Dyansobera

JUDGE

19.6.2024

This ruling is delivered under my hand and the seal of this Court on this 19th day of June, 2024 in the presence of Mr. Moses Mvungi, learned Advocate for the applicant and also holding brief for Mr. Dismas Raphael, learned counsel for the respondents.



W.P.Dyansobera

JUDGE

19.6.2024