

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL REFERENCE NO. 2 OF 2022
(Arising from Taxation Cause No. 12 of 2016)**

BETWEEN

COSMOS PROPERTIES LTD.....APPLICANT

AND

**SHANGHAI MITSU
ELEVATOR CO. LTD.....1ST RESPONDENT
S.E (EAST AFRICAN) CO.LTD.....2ND RESPONDENT**

Last order: 16th June, 2022
Date of Ruling: 29th July, 2022

RULING

NANGELA, J.

This Reference application arises from the ruling and order of Hon. Mushi, DR, in Taxation Cause No. 12 of 2016. It was brought before this court by way of a Chamber summons filed under Order 7 (1) & (2) of the Advocates Remuneration Order, of 2015, [G.N No. 264 of 2015] and was supported by an affidavit of Mr. Erick Gebehard Mhimba, Advocate for the Applicant.

Before going the nitty-gritty of this reference application, let me set out its brief facts. On the 17th August 2021, a ruling was issued by the Taxing officer, Hon. Mushi DR, in a taxation cause No.12 of 2015. In his ruling, the Taxing Master awarded TZS. 10,000,000/= as statutory filing fees for the counter-claim.

Unsatisfied, the Applicant seeks to contest the award and filed this reference application seeking for the following orders:

1. That this Honourable Court may be pleased to quash and nullify the decision in Taxation Cause No. 12 of 2016 dated 17th August 2021 on the ground that the said Taxation Cause was filed out of time.
2. In alternative to the above, This Honourable Court may be please to set aside and/ or revise part of the decision in Taxation Cause No. 12 of 2016 dated 17th August 2021 insofar as the Taxing Officer wrongly awarded Tanzanian Shillings Ten Million as Statutory filing fees of the counter-claim while the said claim was abandoned and never prosecuted by the Respondents after dismissal of the Applicant's suit in Commercial Case No. 89 of 2015.
3. That this Honourable court may be pleased to tax off the amounts awarded by the Taxing Officer in items 8, 9, 10, 11, 12, 13 and 15 as they were wrongly taxed in Taxation Cause No. 12 of 2016 while the said items do not form part of the proceedings in the Commercial Case No. 89 of 2015.
4. Costs be provided for; and
5. Any other orders or reliefs as the Court may deem fit to grant.

The Respondents have contested the application and, their advocate, Mr. Khalfan Hamisi Msumi, filed a joint counter affidavit to that effect. On 16th June 2022, the parties appeared before this Court for the hearing of the application. On that material date, the Applicant enjoyed the service of Mr. Lusiu Peter, learned advocate, while Mr. Khalfani Msumi appeared for the Respondents.

Submitting in support of the prayers sought, Mr. Lusiu prayed to adopt the affidavit supporting the application as well as the skeleton argument to form part of his submission. Submitting on the first prayer, he said that, the Taxation cause No.12 of 2016 was, in the first place, time barred. He contended that, if one looks at the Taxation application, it was clear that, it arose from Commercial Case No. 89 of 2015.

Mr Lusiu submitted further that, the Commercial Case No. 89 of 2015 was dismissed on 5th April 2016 due to non appearance of the Applicant/Plaintiff and her advocate during the mediation proceedings and, an order of dismissal of the matter was made with cost. He maintained, therefore, that, in that respect, the Respondents had, until 03rd of June 2016, time to file the Bill of Costs, because, that was the last date for the allowable 60 days from the date of the order, as per Order 4 of the GN. No. 264 of 2015.

Mr. Lusiu submitted that, the Bill of Costs was, however, filed on 19th September, 2016, which was far beyond the 60 days period of limitation as prescribed by the law. It is on that ground he contests its Ruling and orders delivered in respect of that Bill of Costs as it was filed out of time and, since it was a

matter of law, he was of the view that, it can be raised at any time.

Mr. Lusiu submitted in alternative, that, the Applicant is also seeking the Court interference in order to tax off the amount of 10 million awarded as court fee for filling the counter claim in Commercial Case No. 89 of 2015. He contended that, the rationale for all that is based on the fact that, the Respondents did not prosecute the said counter claim and, also, there was no costs awarded in respect of that counter-claim in Commercial Case No. 89 of 2015. He contended, therefore, that, it was erroneous to award such costs.

Submitting on the last prayer to their chamber summons, he submitted that, the Applicant is seeking for the Court's indulgence to tax off item No. 8, 9, 10, 11, 12, 13 and 15 of the Bill of Costs for the reason that such do not form part of the Commercial Case No. 89 of 2015.

According to Mr Lusiu, the Applicant hold such a view because, as indicated earlier, the Applicant's claim was dismissed on 5/4/2016 and, looking at the Bill of costs, those items came after 5/4/2016, and Commercial Case No. 89 of 2015 had already been dismissed and costs awarded. He contended further that, those items were in respect of costs for perusal of the files and filing of the Chamber application which were activities post the Commercial Case No. 89 of 2015 and, hence, should be taxed off. He, thus, urged this Court to allow this application and set aside the decision in Taxation Cause No. 12 of 2016 with costs.

For his part, Mr. Khalfan Msumi, learned counsel for the Respondents, opposed the prayers and submissions made by Mr. Lusiu. To begin with, he adopted the contents of the counter affidavit as forming part of his submissions. He submitted that, the Application for Taxation Cause No. 12 of 2016 was decided in favour of the Respondents. Replying on the issue of time, Mr. Msumi submitted that, the issue of time was not raised by the applicant nor discussed during the hearing of the Bill of Costs.

He further submitted that, an application for Reference being akin to a second bite as appeal, no new issue can be raised at that stage. To buttress his submission he pointed out the case of **Hassan Bundele Swaga vs. R**, Crim. Appeal No. 416 of 2014 (unreported), and the case **of Mahebe Nyamhanga vs. Resera Cheche Matiko**, Land Appeal No. 48 of 2019 (unreported).

He also relied on the decision of this Court in the case of **Harrison Mandali & 9 others vs The Registered Trustees of Archdiocese of Dar es Salaam** Civil Reference No. 4 of 2019 (unreported). He submitted, therefore, that, since this is a second bite, the issue not raised before the Taxing officer cannot be raised at this stage.

Mr Msumi submitted further on the prayer to set aside the award of the TZS 10 million or having it revised. He submitted that, this was also a new issue because it was not raised before the Taxing master. Similar view was expressed in relation to the submissions seeking to tax off items 8, 9, 12, 13 and 15 contending that this was also a new issue not raised before the

Taxing master. Finally, he urged this Court to dismiss the application with costs as it was based on new issues not raised during the hearing of the Bill of costs.

In a brief rejoinder, Mr. Lusiu briefly rejoined arguing, as regards the issue of limitation not being raised before, that, since this is a point of law, the same can be raised at any time. He contended so because it goes to the root of the matter, and, hence, can be raised even at the Appeal stage. In view of that fact, he readily distinguished the decisions relied upon as not reflecting on what the current application is all about.

Regarding the contention that the Applicant has raised and relies on new issues, Mr. Lusiu was of the view that, the decisions relied on are not binding on this Court and not they are not of the Court of Appeal. He submitted that, the Applicant did challenge the instruction fee and, that, such a position can be seen on page 2 of the Taxing Master's Ruling, hence, there is nothing like raising of a new matter as argued.

He contended, likewise; that, as regards to items 8, 11, 12, 13, the same were raised and discussed on page 3 of the Ruling and, therefore, it cannot be argued that raising them here constitute raising a new issue not dealt with by the Taxing master in his ruling on Taxation cause No. 12 of 2016. In view of that, it was his rejoinder that, the cases relied upon by Mr Msumi were all distinguishable. He, consequently, reiterated his prayers made in his submission in chief.

I have carefully considered the rival submissions by both parties as summarized here above. The issue that needs my attention is whether the prayers on chamber summons can be

granted or not. As it may be gathered in the submissions, one of the issues raised by the applicant is that, the Bill of Cost was filed at a time when the same was already time barred. Reliance was placed on Order 4 of GN. No. 264 of 2015. The respective order 4 reads as follows:

"A decree holder may, **within sixty days from the date an Order awarding costs**, lodge an application for taxation by filing a bill of costs prepared in a manner provided for under Order 55." (**Emphasis added**).

As it may be noted here above, the time limitation to bring application for taxation is sixty days. The question that follows, therefore, is whether the Bill of Costs was filed way out of time, and if so, is it proper to raise the issue of limitation at this stage? To respond to this issue, one has to first and foremost, track the record of the orders of the Court which awarded costs to the Respondent.

The record of this Court does show that, on the 05th day of April 2016 this Court dismissed with costs **Commercial Case No.89 of 2015** due to failure on the part of the Plaintiff to appear for mediation on a scheduled date. The dismissal was with costs. After the dismissal, the Applicant filed an application seeking to restore the mediation process but the Application was also dismissed on the 20th July 2016. On the 19th September 2016, the Respondent filed a Taxation Cause No. 12 of 2016 for Bill of Costs, following the dismissal orders issued in **Commercial Case No.89 of 2015**.

The filing of the Taxation Cause No.12 of 2016 on the 19th September 2016 is what makes the Applicant to contend that, same was done way outside the prescribed time and without there being an order for extension of time.

In my view, and irrespective of the fact that there were attempts to restore the suit, looking at the record as it stands, there is no doubt that, from the date of the order awarding costs to the time when the Taxation Cause No.12 of 2016 was filed, that was way beyond the 60 days prescribed under Order 4 of GN. No.264 of 2015 and, worse still, there was no order granting extension of time. Wisdom would have dictated that, an order for extension of time ought to have been sought before filing the Taxation Cause No.12 of 2016.

That being said, it has been contended that, the issue of time limitation was not raised before the Taxing Master and, consequently, it cannot be raised in this reference application. In the case of **DP Shapriya & Co. Ltd vs. Sinoma International Engineering Co. Ltd (Tanzania)**, Misc. Civil Appl.No.4 of 2015, this Court stated that:

“..in certain cases, such as those touching upon the jurisdiction of the court or **limitation of time, objection may be raised at any stage**, provided that the other party is given an opportunity to respond thereto.”

I do fully subscribe to the position held by this Court in the above cited case. It follows, therefore, the issue of limitation of time in respect of the Taxation Cause No.12 of

2016, which was raised in this reference Application, was properly raised and the Respondent cannot challenge it on the ground that it was not raised before the Taxing Master.

In view of the above findings, it is my considered view that, the ruling and orders made by the Taxing Officer in Taxation Cause No.12 of 2016 while the said Taxation Cause No.12 of 2016 was filed out of time and without there being an order for extension of time cannot stand. It deserves to be nullified and the orders made set aside on that basis.

It follows; therefore, since this ground alone suffices to dispose of this reference application, I see no reason why I should address the rest of the grounds raised by the Applicant. In the upshot of the foregoing, this Court settles for the following orders, that:

1. this Reference Application is hereby granted.
2. That, since Taxation Cause No.12 of 2016 was filed out of time, the ruling based on it is hereby quashed, nullified and its accompanying orders are hereby set aside.
3. Costs to follow the event.

It is so ordered

DATED AT DAR-ES-SALAAM, ON THIS 29TH DAY OF
JULY 2022



HON. DEO JOHN NANGELA
JUDGE