

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL REFERENCE NO.04 OF 2022

(ORIGINATING FROM TAXATION CAUSE NO.3 OF 2021)

FES ENTERPRISES COMPANY LIMITED APPLICANT

VERSUS

SERENGETI BREWERIES LIMITED RESPONDENT

Date of Last Order: 05.09.2022

Date of Ruling: 21.10.2022

RULING

MAGOIGA, J.

This ruling is on reference from taxation proceedings preferred by the applicant, FES ENTERPRISES COMPANY LIMITED by chamber summons under the provisions of order 7(1) and (2) of the Advocates Remuneration Order, 2015 praying for this court to determine correctness, legality and validity of the decision of the Taxing Officer dated 29th March, 2022, costs of this application and any other order the court may deem fit to grant. The chamber summons was accompanied by the affidavit deponed by Mr.Samson Edward Mbamba, learned advocate for the applicant stating the reasons why this reference should be granted.

Upon being served, the respondent filed counter affidavit deponed by Mr. Nuhu Mkumbukwa, learned advocate stating the reasons why this reference should not be granted.

The applicant is being advocated by Mr. Samson Mbamba, learned advocate, and whereas the respondent is advocated by Mr. Nuhu Mkumbukwa, learned advocate.

Facts of this application are not complicated. The respondent in this reference obtained a default judgement against the applicant vide Commercial Case No.3 of 2021 with costs. Consequently, the respondent filed a bill of costs claiming Tshs.21,102,956.00 but which was taxed at the tune of Tshs.13,242,956.00. Aggrieved by the Taxing Officer's decision, the applicant preferred this reference contesting the taxation proceedings, ruling and order, hence, this ruling.

The application was heard by way of written submissions.

In support of the application, Mr. Mbamba argued that by the time the taxation proceedings were ongoing, the applicant had filed a notice of appeal to the Court of Appeal challenging the refusal by this court to extend time within which to file written statement of defence. It was the strong

submission of Mr. Mbamba that much as notice of appeal to Court of Appeal has been filed, not only the high Court but even the Taxing Officer had no jurisdiction to continue with the proceedings for taxation. In support of this point the learned advocate cited the cases of TANZANIA PHARMACEUTICAL INDUSTRIES LIMITED vs. DR. EPHRAIM NJAU [199] TLR 299, RICHARD JULIUS RUKAMBURA vs. ISAACK NTWA MWAKAJILA AND TANZANIA RAILWAYS CORPORATION, CIVIL APPEAL NO 2 OF 1998 CAT (UNREPORTED) both insisting on the paramount of the question of jurisdiction and that it can be raised at any stage of the proceedings.

Another case cited was that SLYVESTER LWEGIRA AND ANOTHER vs. NBC LTD, CIVIL APPEAL NO. 29 OF 2010, CAT (UNREPORTED) and NATIONAL CHICKS CORPORATION LTD AND OTHERS vs. NATIONAL BANK OF COMMERCE, MISC. COMMERCIAL CAUSE NO. 36 OF 2015 HC DSM (UNREPORTED) in which it was held that once a notice of appeal is filed the high court ceases to have jurisdiction on the matter.

Mr. Mbamba argued that, at the time when the taxation proceedings were being conducted there was already in existence of Civil Application No. 364/16 of 2020 challenging Misc. Commercial application No.135 of 2019 which



denied the applicant for extension of time to file written statement of defence subject of the decision that awarded costs to the respondent.

According to Mr. Mbamba, the notice of motion filed on 5th September, 2020 operates as bar to continue with the proceedings in the High Court.

Another reason stated is that Taxing Officer did not exercise his powers judiciously because he did not take into account that the matter was not complex to entitled the respondent Tshs.13,242,956.00 which to him was in the highest side, the judgement was default one with only one witness. In support of this point, he cited the case of HOTEL TRAVERTINE LTD vs. NATIONAL BANK OF COMMERCE, CIVIL REFERENCE NO.9 OF 2006.

On the totality of the above reasons, Mr. Mbamba asked this court to allow this reference as prayed in the chamber summons.

In response, Mr. Mkumbukwa adopted the contents of the counter affidavit and went on to argue that there is no notice of appeal or any appeal as argued by Mr. Mbamba in the Court of Appeal of Tanzania in respect of Commercial Case No.76 of 2019 subject of the taxation proceedings. On that note, Mr. Mkumbukwa invited this court to dismiss this point of jurisdiction for being devoid of any merits for reasons that, it was not stated in the affidavit



but from the bar which are inadmissible, the revision in dispute has no bearing to the consequences of Commercial Case No. 76 of 2019, revision per se do not oust the jurisdiction of the court, taxation proceedings is not a suit per se. To bolt up his points cited the case of ROSEMARY STELLA CHAMBAIRO vs. DAVID KITUNDU JAIRO, CIVIL REFERENCE NO 6 OF 2018 AND JUMA MGANGA LUKOBORA AND 7 OTHERS vs. TMDA AND 3 OTHERS, MISC. CIVIL APPLICATION NO. 642 OF 2020 (HC) DSM (UNREPORTED)

On the totality of the above reasons, Mr. Mkumbukwa strongly urged this court to dismiss this point in its face value.

On the second reason that the Taxing Officer did not exercise her discretion judiciously in awarding Tshs.13,242,956.00 it was the response of Mr. Mkumbukwa that taxation of instruction fees is within the discretion of the Taxing Officer. According to Mkumbukwa, no evidence was advanced to show which principle was offended. In support of the point he cited the cases of RAHIM HASHAM vs. ALIBHAI KADERBHAI [1938] 1 TLR (R) 676 and PREMCHAND RAICHAND AND ANOTHER vs. QUARRY SERVICES OF EAST AFRICA AND ANOTHER, [1972] E.A. 162.



Guided by the above cases, Mr. Mkumbukwa argued that under item 8 of 9th Schedule which is applicable, the respondent claimed 3% of the total claim and was to be given Tshs.17,700,000/= but upon exercising discretion, the Taxing Officer granted Tshs10,000,000/=. So, it is unheard for the learned advocate for the applicant to argue that no discretion was employed by Taxing Officer.

On the totality of the above reasons, Mr. Mkumbukwa strongly urged this court to dismiss this reference with costs.

No rejoinder was filed and this marked the end of hearing of this reference.

Having carefully considered the rivaling arguments by learned advocates for parties and the case law cited, with due respect to Mr. Mbamba advocate for the applicant, the first ground argued on jurisdiction is akin to fail in the circumstances of this reference. I will explain. **One**, as rightly argued by Mr. Mkumbukwa and rightly so in my own opinion, I noted that no notice of appeal in respect of the decision in Commercial Case No 76 of 2019 was filed in the Court of Appeal. What is before the Court of Appeal is revision proceedings which by themselves do not oust the jurisdiction of the court nor of the Taxing Officer and no decision was cited to support this line of

argument advanced by Mr. Mbamba. **Two**, while I appreciate the stance of the Court of Appeal and decisions cited by Mr. Mbamba upon notice of appeal filed to oust the jurisdiction of the court but the circumstances of this reference do not benefit to the case law cited and the line of arguments taken by Mr. Mbamba, hence, distinguishable.

Three, I agree with Mr. Mbamba that a point of law can be raised at any stage of the proceedings, and particularly, when it is on jurisdiction of the court even without following former procedure but on the same vein, I don't agree with him that having a revision is tantamount to having a notice of appeal for purposes of ousting the jurisdiction of the court.

On the foregoing reasons, I find the first ground on jurisdiction is devoid of any useful merits and is hereby dismissed in its entirety.

This takes me to consider the other point if the Taxing Officer, properly exercised her discretion judiciously in granting the amount awarded. Having seriously considered both rivaling arguments on this point and gone through the ruling of the Taxing Officer, I am inclined to find the same do not carry the order of the day on the part of the applicant. The Taxing Officer properly exercised her discretion and the amount awarded is proper in the



circumstances of this reference. The amount of Tshs.3,000,000/= suggested by the applicant counsel is on lower side much as no dispute the case was conducted by learned advocates.

On the fine, this reference is found wanting in merits and same must be and is hereby dismissed with no order as to costs to bring this matter to an end.

It is so ordered

Dated at Dar es Salaam this 21st day of October, 2022.


S. M. MAGOIGA

JUDGE

21/10/2022

