

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

REFERENCE NO. 7 OF 2021

(Arising from Taxation Cause No. 35 of 2021)

BETWEEN

SALUMU SULEIMAN ALLY APPLICANT

VERSUS

DIAMOND TRUST BANK TANZANIA LTD RESPONDENT

Date of Last Order: 19th April, 2022

Date of Ruling: 22nd April, 2022

RULING

MKEHA, J:

The applicant in the present application is moving the court to set aside the decision and orders of the Honourable Deputy Registrar dated the 11th day of October, 2021 in Taxation Cause No. 35 of 2021. The applicant is also asking the court to allow costs charged and expenses as raised by the Applicant in the bill of costs proceedings (sic). The application is in the nature of a reference. The same is made under

Order 7 (1) of the Advocates Remuneration Order, 2015 GN No. 363 of 2015.

The application aims at challenging the Deputy Registrar's dismissal order whereby a Taxation Cause was dismissed without being taxed at all.

Filing of this application was prompted by the Deputy Registrar's order which dismissed the entire bill of costs for want of prosecution, dated the 11th day of October 2021. The application is resisted through the counter affidavit affirmed by Ms. Jasbir Kaur Mancoo, the respondent's advocate. Mr. Roman Selasini Lamwai represented the applicant.

On 19th April, 2022 the learned counsel for the parties appeared in court for hearing of preliminary points of objection raised at the respondent's instance. Before commencement of the said hearing, the court directed the counsel for the parties, to as well address the court on maintainability of the application for reference of a Taxation matter that was dismissed by the Taxing Master without being taxed.

Ms. Jasbir Mancoo learned advocate for the respondent submitted that the application for reference was unmaintainable. She cited the decision in **BENJAMIN MWAKYALA VS GEOFREY A. NDALANDA, LAND**

REFERENCE NO 6 OF 2020 (HC) AT MBEYA. In that case, her Ladyship (Ebrahim, J) borrowed a leaf from the Civil Procedure Code and held that, the applicant ought to have applied for a restoration of the Bill of Costs as the Taxing Master had not decided anything yet in respect of Taxation of Costs as per the contextual meaning of Order 7 (1) of the Advocates Remuneration Order. Her Ladyship sustained an objection that, the application before her that had been preferred in respect of a dismissal order was unmaintainable.

The learned advocate went on to submit in respect of the first point of preliminary objection that, the application was bad for being supported with an affidavit that was incurably defective, having been sworn by the advocate for the applicant who made reference to utterances by Ms. Lamwai. In view of the learned advocate, Ms. Lamwai's affidavit ought to be there.

The learned advocate submitted in respect of the second point of objection that, the application for reference was time barred. According to her, whereas the Taxation Cause was dismissed on 11th October 2021, the application was filed on 2nd November 2021 being out of time for a single day. The learned advocate pressed for dismissal of the application.

Mr. Lamwai learned advocate for the applicant submitted in reply that the application had been filed in time. He made reference to the electronic receipt for payments made in filing the application. The same is dated 1st November, 2021.

The learned advocate went on to submit that he was present in the court premises when the Taxation Cause was dismissed. That, he therefore obtained the information personally. He asked the court to expunge the offensive paragraphs of the applicant's affidavit in the event the court finds that the affidavit is really defective.

As to maintainability of the application, the learned advocate submitted that, the same was properly before the court. The learned advocate insisted that, the only remedy for an aggrieved party under the Advocates Remuneration Order is to make reference and that, in no other way can a party challenge a decision of the Taxing officer. The learned advocate submitted further that, the Deputy Registrar had no powers to dismiss the application for taxation. In view of the learned advocate, appearance of the term "**set aside**" in the definition of "**Taxation Proceedings**" was by mistake.

When Ms. Mancoo rose to rejoin, she abandoned the point of objection regarding time limitation. That was because of the fact that, indeed the

applicant's receipt for filing the present application indicates that the application, was filed on the 21st day since the date of dismissal order, which was within the time allowed to file an application for reference. The rest part of the rejoinder was reiteration of what had been submitted in chief.

The issue is **whether the only way to challenge the Taxing Officer's dismissal order is to prefer a reference to a Judge.** The learned advocate for the applicant submitted that, under the Advocates Remuneration Order, the only remedy for an aggrieved party is to prefer a reference before the High Court Judge and that, appearance of the term "**set aside**" in the definition of "**taxation proceedings**" is by mistake. I respectfully disagree. The learned advocate held a position that, a proper way to challenge the Deputy Registrar's dismissal order is to file a reference before a Judge and that the Judge sitting on reference can proceed to tax a bill of costs that was dismissed without being taxed by the Deputy Registrar. I hold a different view.

Under Order 3 of the Advocates Remuneration Order the term "**taxation proceedings**" is defined to mean an application for taxation of a bill of costs or an application to enforce, **set aside** or determine any question as to validity or effect. There is no denial that taxation

proceedings normally proceed before Taxing Officers. In terms of the governing law the list of Taxing officers includes Deputy Registrars. Therefore, it cannot be rightly argued that the remedy of setting aside the Deputy Registrar's dismissal order was not contemplated by the drafters of the Advocates Remuneration Order. In the case of **BENJAMIN MWAKYALA Vs GEOFREY A. NDALANDA** (supra) my learned sister (Ebrahim J.) held in a matter akin to the present application that, the applicant ought to have applied for restoration of the Bill of Costs as the Taxing Master had not decided anything in respect of which a reference could be preferred. I choose to travel in my sister's path. I also hold that, the application for reference in respect of a Taxation Cause that was dismissed without having been taxed in the manner explained hereinabove is unmaintainable.

I am mindful that in Taxation Causes the Taxing Officer can proceed to tax a bill of costs even in the absence of both parties (Paragraph 68 of the Advocates Remuneration Order). As such, and in terms of the submissions by Mr. Lamwai for the applicant, when a Taxation Cause is struck out or dismissed for want of prosecution, it becomes a matter of breach of taxation principles for which a reference can be preferred. I agree. However, in this case, the applicant is moving the court by way

of a reference to do what ought to have been done at first instance, by the Taxing officer. To determine the quantum of the costs awardable to the applicant before the Taxing officer exercises his original jurisdiction on that aspect. That would amount to contravention of taxation principles.

The applicant pressed the court to allow costs charged and expenses as raised by the applicant in the bill of costs proceedings. I respectfully insist, the prayer is unmaintainable. In the case of **HAJI ATHUMANI ISSA Vs RWEITAMA MATATU (1992) TLR 372** it was held that Judges will in most cases not interfere with questions of quantum because these are regarded as matters with which the taxing master is particularly fitted to deal with. But and that is a big "but", the court could interfere if the taxing master clearly acted unjudicially. For the High Court Judge to be able to fault the Taxing officer on issues of quantum, the Taxing Officer should have taxed the Bill of Costs. That is when the High Court Judge can be able to ascertain the actual taxation principle breached by the Taxing officer, attracting his intervention by way of reference. Not before the taxation exercise.

It is for the foregoing reasons, I hold the present application to be incompetent. Since the aspect of maintainability of the application

suffices to dispose of the matter, I shall not proceed determining the points of preliminary objection raised by the learned advocate for the respondent. The application is struck out without costs for the reasons of incompetence. It is so held.

DATED at DAR ES SALAAM this 22nd day of April, 2022.




C. P MKEHA

JUDGE

22/04/2022

Court: Ruling is delivered in the presence of Mr. Isihaka Juma (Legal Officer) from the office of the applicant's advocate.




C.P. MKEHA

JUDGE

22/04/2022