

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

**AT DAR ES SALAAM**

**COMMERCIAL REFERENCE NO. 2 OF 2023**

**(Originating from Taxation Cause No. 3 of 2023)**

**FAITH MEDICAL TANZANIA CLINICS .....1<sup>ST</sup> APPLICANT**

**JOYCE THOMAS MUZUMA .....2<sup>ND</sup> APPLICANT**

**MARTIN MUNG'ONGO .....3<sup>RD</sup> APPLICANT**

**JOSEPH THOMAS .....4<sup>TH</sup> APPLICANT**

**VERSUS**

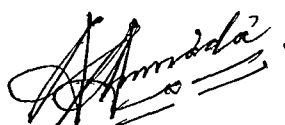
**MAENDELEO BANK PLC .....RESPONDENT**

**RULING**

**A.A MBAGWA, J.**

This is an application for reference against the decision of the taxing officer in Taxation Cause No. 3 of 2023. The applicants herein have brought this application by way of chamber summons made under Rule 7 (1) and (2) of the Advocates Remuneration Order GN. No.263 of 2015 praying for the following orders: -

- (i) That the Honourable Court be pleased to interfere and reverse the ruling and order of taxing master in Taxation Cause No.3 of 2023 delivered on 23<sup>rd</sup> day of January 2023 by disregarding the guiding principles of conducting application for bill of costs when there is existing notice of appeal.
- (ii) Costs of this application be provided for by the respondent.



- (iii) Any other and further orders as this Honourable Court deems just and equitable to grant.

The application is supported by an affidavit sworn by Kelvin Ngeleja, the applicants' learned counsel. On the adversary, the application was contested by the respondent through a counter affidavit sworn by Josephat Ndelembi, the respondent's learned counsel.

The brief facts of the application as gleaned from the depositions may be recounted as follows; The respondent, Maendeleo Bank PLC successfully sued the applicants in Commercial Case No. 92 of 2021. Consequently, the respondent filed a bill of costs through Taxation Cause No. 3 of 2023 seeking for reimbursement of Tshs. 4,964,521. Upon hearing the parties, the taxing officer taxed the whole bill of costs at Tshs. 5, 464,521/= in the following breakdown;

1. Attendance and transport costs Tshs 1,300,000/=
2. Disbursements Tshs 2, 907,221/=.
3. Costs for bill of costs Tshs 500,000/=.

Aggrieved, the applicants have instituted the instant reference contending that the decision is tainted with material irregularities. As such, the applicants are moving this Court to determine the following aspects;

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- i) Whether it was correct for the taxing master to proceed with taxation of the bill of costs while there was an existing notice of appeal against the decision in Commercial Case No. 92 of 2021.
- ii) Whether the taxing officer is vested with exclusive jurisdiction to alter and award costs more than the claimed ones.
- iii) Whether it was correct to award costs and charging the awarded costs with VAT taxes.

In the supporting affidavit, the applicants contend that on 29<sup>th</sup> day of December, 2022 lodged a notice of appeal to challenge the judgment and decree in Commercial Case No. 92 of 2021 and the same was served to the respondent on 30<sup>th</sup> day of December, 2023. Nonetheless, on 23<sup>rd</sup> day of January, 2023 when the bill of costs was scheduled for hearing, the taxing officer proceeded with matter despite the existence of the notice of appeal. Further, the applicants state that the respondent/decreed holder claimed reimbursement of Tshs. 4,964,521/= but in the end, the taxing master awarded her a total sum of Tshs. 5,464,521 which is above the claimed amount.

In contrast, the respondent disputed the applicants' contentions. The respondent stated that the taxing officer was not notified on the existence of the notice of appeal nor did they produce it during hearing of the

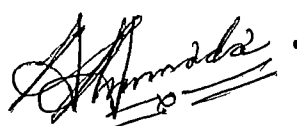
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taxation. Furthermore, the respondent contended that neither a notice of appeal nor an appeal to the Court of Appeal bars the hearing and taxation of bill of costs. Moreso, it was averred that the taxing officer taxed the bill of costs in accordance with the provisions of the Advocates Remuneration Order as such, the ruling and drawn order are free from irregularities.

When this reference was called on for hearing, Mr. Juventus Katikiro, learned advocate appeared for the applicants whilst the respondent was represented by Mr. Josephat Ndelembi, learned advocate.

Submitting in support of the application, Mr. Juventus Katikiro, at the outset adopted the affidavit sworn by Kelvin Ngeleja in support of the application.

With regard to the 1<sup>st</sup> ground on whether it was proper for the taxing officer to proceed with taxation while there is a notice of appeal in Commercial Case No. 92 of 2021, Mr. Katikiro expounded that the ruling sought to be impugned was delivered while the applicant had already filed the notice of appeal on 19<sup>th</sup> December, 2022 and served the same upon the respondent on 30<sup>th</sup> December, 2022. He elaborated that once a notice of appeal has been filed, the High Court ceases to have jurisdiction over that matter. To fathom his assertion, Mr. Katikiro relied on the decision of this Court in the case of **International Commercial Bank (T) Limited**

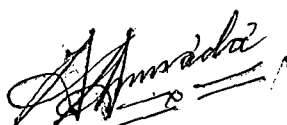


**and Another vs Primi Aloyce Mushi**, Civil Reference No. 10 of 2019, HC Land Division at Dar es Salaam in particular at page 3.

The learned counsel combined the 2<sup>nd</sup> and 3<sup>rd</sup> grounds on whether the taxing officer had jurisdiction to award more than what was presented, and argued them conjointly. Mr. Katikiro argued that the decree holder/respondent presented a bill for reimbursement of Tshs. 4,964.521 but to his dismay, the taxing officer taxed the whole bill at Tshs. 5,464, 521. It was the counsel's submission that since the awarded costs are more than what was claimed by the decree holder that is an ailment which is contrary to Order 68 of the Advocates Remuneration Order.

In the end, Mr. Katikiro, implored the Court to find the application meritorious and consequently allow it along with the reliefs sought.

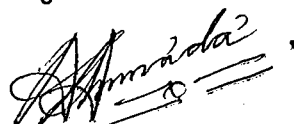
In rebuttal, Mr. Josephat Ndelembi, like his counterpart, started by adopting the counter affidavit filed in contest of the application. He then remarked that the reference has no merits. Mr. Ndelembi had it that it is a general rule that bill of costs has to be filed within 60 days from the date of the decision. As such, the respondent lodged the same within the prescribed time. The counsel continued that there is no law that bars the hearing of taxation cause unless there is an order to stay execution. He added that, there is no law which requires the taxing officer to refrain from hearing and determining the bill of costs on the ground that there



exists a notice of appeal. Mr. Ndelembi argued that failure to file the application for the bill of costs within 60 days is an impediment to the decree holder and for that reason the respondent had no other option than complying with the law. On this, he banked on the decision of this Court in case of **Muhoni Kitege vs The Principal Secretary Ministry of Energy and another**, Misc. Land Application Case No. 123 of 2021, HC at Mwanza at page 7. He clarified that the same position was restated in the case of **Mohamed Athumani vs the Registered Trustees of Baraza Kuu la Waislam (Bakwata) and two others**, Civil Reference No. 02 of 2021, HC at Dodoma at page 10.

Regarding the 2<sup>nd</sup> and 3<sup>rd</sup> grounds on the awarded amount, the respondent's counsel submitted that the complaint is misconceived in that the taxing officer included the costs for taxation proceedings which, according to law, are not included in folio. Thus, he concluded that the amount awarded was correct.

Lastly, Mr. Ndelembi submitted that, the applicants' counsel cited Order 68 of Advocates Remuneration Order but the said order has nothing relevant to his submission. He commented that Order 68 is about discretion powers of the taxing officer to proceed *ex parte* or extend the limits of adjournment.

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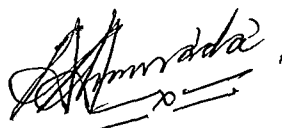
In fine, the respondent's counsel urged the Court to dismiss the application with costs.

In rejoinder, Mr. Katikiro said that the case of **Mohamed Athumani** (supra) is distinguishable without elaborating more. He then reiterated his submissions in chief.

Having canvassed the submissions from either party and upon appraising the depositions, it is now high time to determine the grounds raised by the applicants.

To start with 1<sup>st</sup> ground on whether the existence of a notice of appeal bars the hearing and determination of taxation proceedings, it is the position of law that when a notice of appeal is duly filed in the Court of Appeal, the High Court jurisdiction ceases over the matter. In the case of **Tanzania Electric Supply Company Ltd vs Dowans Holdings and Another**, Civil Application No. 142 of 2012 (unreported), the Court of Appeal had this to say;

*"It is settled law in our jurisprudence which is not disputed by the counsel for the applicant, that the lodging of a Notice of Appeal in this court against an appealable decree or order of the High Court commences proceedings in the court. We are equally convinced that it has been established that once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter.*



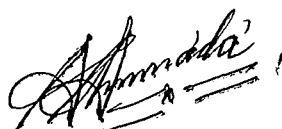
However, the above case has to be read *in tandem* with the decision of the Court in **Mitsushita Electric Co. Ltd vs Charles George t/a G.G. Traders**, Civil Appeal No. 71 of 2001 where the Court of Appeal had this to say;

*"...Once a notice of appeal is filed, this court is seized of the matter in exclusion of the High court except for applications specifically provided for such as leave to appeal, provision of the certificate on a point of law or execution where there is no order of stay of execution from this court..."*

Similarly, the same position was restated by the Court in **Awinie Mtui and Three Others vs Stanley Ephata Kimambo (Attorney for Ephata Mathayo Kimbambo)**, Civil Application No. 19 of 2014, CAT at Arusha.

Based on the above guidance, this Court in the cases of **Muhoni Kitege (supra)** and **International Commercial Bank (T) Limited (supra)** held that taxation proceedings are not among the matters in which the jurisdiction of the High is ousted by filing a notice of appeal. This Court held that bill of costs is part and parcel of decree in that it is what makes the decree complete.

Indeed, one would not completely execute a decree unless the costs awarded in the decree are determined through taxation proceedings. Thus, it goes without saying that if the notice of appeal does not bar

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execution of decree unless it is stayed, the same cannot prevent the taxing officer from hearing and taxing the bill of costs.

In light of the above deliberations, it is my considered findings that the 1<sup>st</sup> ground is devoid of merits.

Coming to the 2<sup>nd</sup> and 3<sup>rd</sup> grounds which were combined and argued as one ground, the applicants are faulting the taxing officer for awarding the bigger amount than what was claimed in the folio. It is true that the respondent prayed for reimbursement of Tsh. 4,964,521/= and in the end, the taxing officer awarded her Tsh. 5,464,521/=. However, the said figure was increased and arrived at after the taxing officer had taxed the costs for taxation proceedings at Tshs. 500,000/= which was not included in the folio. Non-inclusion of the fee for taxation proceedings is a requirement of law under Order 55(3) of the Advocates Remuneration Order which provides;

*'Fees for attending taxation shall not be included in the body of the bill, but the item shall appear at the end, and the amount left blank for completion by the taxing officer'*

I have glanced at the folio which was filed in Taxation Cause No. 3 of 2023 and found that the fee for taxation proceedings was left blank as required by the above order. Thus, it is common cause that the amount in respect of taxation fee is left blank in order to be completed by the



taxing officer. At page 3 of the impugned ruling, the taxing officer clearly indicated that the costs for bill of costs was taxed at 500,000/= which brought up a total sum of Tshs. 5, 464,521/=. The taxing officer was thus justified to award Tshs. 500,000/= as costs for prosecuting taxation proceedings which was not included in the folio for that is what the law requires. In the case of **Haji Athumani Issa vs. Rweitaba Mutatu (1992) TLR 372** it was insisted that interference is justifiable only if taxing officer clearly acted injudiciously. At any rate, in the matter at hand, the taxing officer cannot be said to have acted injudiciously by charging the costs for prosecuting a bill of costs. I therefore find no merits in the 2<sup>nd</sup> and 3<sup>rd</sup> grounds.

All the above considered, this reference is without merits and consequently I dismiss it. However, I order no costs in order to bring the dispute to an end.

It is so ordered.



  
**A.A. Mbagwa**

**JUDGE**

**28/07/2023**