

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL REFERENCE NO. 24 OF 2022

(Originating from Taxation Cause No. 134 of 2022)

KCB BANK TANZANIA LIMITED 1ST APPLICANT

KCB BANK KENYA LIMITED 2ND APPLICANT

VERSUS

DELINA GENERAL ENTERPRISES LIMITED RESPONDENT

RULING

Date of last order: 14/12/2022

Date of ruling: 03/03/2023

AGATHO, J.:

The Applicants brought this taxation reference in which they are inviting the Court to vary the decision of taxing officer Hon. Minde Deputy Registrar in Taxation Cause No. 134 of 2022 on five grounds below:

- (i) That the trial taxing officer had no jurisdiction to entertain the Respondent on account of pending notice of appeal filed to challenge the decision of the High Court inclusive of the costs awarded by the Court.
- (ii) The Applicants were not given a right to be heard on the matter.

- (iii) The decision of the taxing officer is not supported by any materials to justify the award of the taxed sums.
- (iv) The taxing officer decided the Taxation cause in total disregard of the laid down legal principles guiding of hearing of taxation matters.
- (v) That items 5,6,9,10,11,12,13, 19, 20, 21, 22, 23, 24, 25, 27 and 28 and fees for hearing taxation cause in the extent of TZS 1,050,000/= were arbitrary awarded without regard to the laid down legal principles guiding taxation hearings.

Before I venture unto the reference, it suffices to mention that the parties were under legal representation. Whereas the Applicants were represented by Regina Anthony Kiumba, advocate from Trustmark Attorneys, the Respondent enjoyed the services of Juventus Katikiro, learned counsel from Apex Attorneys Advocates. It was by consensus that the taxation reference be disposed by way of written submissions. The schedule was drawn, and appreciatively the parties filed their submissions timely.

A backdrop of the reference is that the Applicants are judgment debtors in a Commercial Case No.16 of 2022 before the HCCD, and the Respondents are decree holders. After emeraina victorious in the suit.

the Respondents were awarded costs. According to paragraph 5.0 of an affidavit in support of the reference, the Respondents proceeded to file their Bill of Costs to the tune of TZS 501,901,620.03 in Taxation Cause No. 134 of 2022 dated 18/10/2022 whose ruling was delivered on 28/10/2022. No sooner than the ruling was delivered there was notice of appeal to the CAT filed against the judgment and decree of Commercial Case No. 16 of 2022. To be precise the notice of appeal was filed on 27/09/2022. That is four days from the date on which the judgment in Commercial Case No. 16 of 2022 was delivered. The judgement was delivered on 27/09/2022. As per paragraph 4.0 of the affidavit in support of the reference at hand, a copy of the notice of appeal was served upon the Respondents on 29/09/2022.

The issues that the Court have been asked to resolve are:

- (i) Whether the trial taxing officer had no jurisdiction to entertain the Respondent on account of pending notice of appeal filed to challenge the decision of the High Court inclusive of the costs awarded by the Court.
- (ii) Whether the Applicants were not given a right to be heard on the matter.

- (iii) Whether the decision of the taxing officer is not supported by any materials to justify the award of the taxed sums.
- (iv) Whether the taxing officer decided the Taxation cause in total disregard of the laid down legal principles guiding of hearing of taxation matters; and
- (v) Whether the items 5,6,9,10,11,12,13, 19, 20, 21, 22, 23, 24, 25, 27 and 28 and fees for hearing taxation cause in the extent of TZS 1,050,000/= were arbitrary awarded without regard to the laid down legal principles guiding taxation hearings.

The first and second issues above stated are fundamental once we resolve either of them the matter is disposed of. I will examine them first.

To begin with, we examine the issue (i) Whether the trial taxing officer had no jurisdiction to entertain the Respondent on account of pending notice of appeal filed to challenge the decision of the High Court inclusive of the costs awarded by the Court. Jurisdiction is a power of the court to entertain a particular matter brought before it. If a Court proceeds to entertain a matter without jurisdiction the proceedings and decisions are nullity. See the case of **M/S Tanzania China Friendship**

Textile Co. Ltd v Our Lady of the Usambara Sisters [2006] TLR 70.

Now turning to the case at hand we ask whether filing of notice of appeal to the CAT deprives this Court its jurisdiction to determine taxation cause? This seems to be view taken by the Applicants and substantiated by some case laws **Matsushita Electric Company (E.A) LTD v Charles George t/a G.G. Traders, Civil Application No. 71 of 2001 CAT; Mohamed Enterprises Tanzania Limited v The Chief Harbour Master and the Tanzania Ports Authority CAT; HCT decisions in Norman – Mehboub (T/A Noman Al Mahboub General Trading Corporation) v Milcafe Limited, Commercial Case No. 41 Of 2003 HCT Commercial Division at Dar es salaam; Dominic Ishengoma v Managing Director Geita Gold Mining, Civil Reference No. 37 of 2019, HCT Labour Division at Mwanza (dated 21/07/2021); and quite recently Calist Aloyce Massawe and Another v Kijenge Saccos and Two Others, Civil Reference No. 01 of 2022 HCT at Arusha (decided on 08/09/2022).**

Is the awarding of costs among the reliefs that can be appealed to the CAT? Say the HCT has awarded costs and the judgment debtor appeal to the CAT can it reverse the costs awarded? It is the law that the

Appellant cannot appeal to the CAT against an order of the HCT awarding of costs to a party, which was at the discretion of the Court unless the HCT grants leave to appeal to the CAT. See Section 5(2)(a)(ii) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019]. What is the import from this provision is that costs are not appealable as of a right. It also means that if a party decides to appeal against judgment and decree of the HCT and equally dissatisfied with awarding of costs he ought to seek leave of the HCT to appeal to the CAT. From the foregoing, what one grasps is that where the Taxation proceedings ensued it does not have any bearing on the appeal against judgment and decree.

My take on the Applicants' view and in lieu of the authorities they have cited is that the Bill of Costs proceedings will be automatically barred or stayed once there is a notice of appeal to the CAT but execution will be allowed to proceed unless there is stay of the same by the CAT. In my view such reading and application of law will be wanting. There are two reasons I can think of now, first, hardship and second, Court's discretion. In comparison, the execution of decree will pose more hardship on the Applicants (prospective Appellants) than bill of costs (taxation) proceedings because, first, the Court cannot award costs higher than the decretal sum. Second, it is trite that awarding of costs is often

an exercise of judicial discretion that is not appealable unless leave is granted.

Reading **Matsushita** and **Norman Mehboub cases**, it seems to me that the matters specifically provided for are not exhaustive. I am saying so because a word used is **such as** followed by a few matters mentioned therein. Let me reproduce the quote in the **Matsushita's case**:

*"Once a Notice of Appeal is filed under Rule 76 (now rule 83(1) of the Rules) then the Court is seized with the matter in exclusion of the High Court, except for applications specially provided for **such as** leave to appeal or provision of a certificate of point of law or execution where there is no order of stay of execution from this Court."* (Bold is mine).

In my settled view, the use of a phrase "*such as*" connotes that what is mentioned is not exhaustive, they are just examples. The list may go on and on. We are invited to look at other items beyond those mentioned. For that reason, to regard bill of costs proceedings as one such item not mentioned but included is not far-fetched. I thus find **Rose Mkeku's case** to be justifiably convincing. In the latter case the judge focused *inter alia* on the sixty days' time limit set for the Bill of Costs to be filed in the Court, otherwise the taxation cause will be time barred as

provided for under Order 4 of the Advocates Remuneration Order, G.N. 263 of 2015.

Even the scenario contemplated by the Applicants (at page seven of their submissions) that the decree holder files bill of costs that is heard and taxed and the awarded costs are executed and subsequently the appeal against judgment and decree is heard by the CAT which overturns the HCT decision and orders the Respondent (decree holder at HCT) to pay costs both in the CAT and those in the HCT is in my view unthinkable. I am holding so because costs are discretionary and once awarded at the HCT they can only be appealed against if leave is sought. See Section 5(2) (ii) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019].

The decisions cited by the Applicants to support their stance that the taxation officer had no jurisdiction are worth examining. Majority of HCT decisions have shown that once there is notice of appeal to the CAT the HCT ceases to have jurisdiction except for matters listed under Section 11(1) of Appellate Jurisdiction Act [Cap 141 R.E. 2019]. The items include application for leave to appeal to CAT or application for certificate on point of law; matters specifically stated under Section 5(1)(c), (2)(a) (i), (ii), (b), and (c) of the Appellate Jurisdiction Act [Cap

141 R.E. 2019], and application for execution unless an order for stay of execution is given. The latter has also been held in the case of **Aero Helicopter (T) Limited v F.N. Jansen [1990] TLR 142.**

Whether the analogy drawn by the Applicants' counsel in the *obiter dictum* in **Attorney General v Amos Shavu** by His Lordship Lugakingira J.A is binding upon this Court.

His Lordship gave obiter dictum that:

"Before I conclude I desire to address briefly one or two things which cropped up. One Mr Kamba argued that the taxing officer erred in proceedings with the taxation while there was a pending appeal. I don't think so. The taxation had nothing to do with the decision of the High Court against which an appeal was pending. It was a taxation in a distinct application which terminated with a decision of a Single Judge."

My reading of the excerpt does not tell me that it is conclusive that His Lordship Lugakingira J.A (as he then was) meant that even if the taxation related with the decision of the High Court against which the appeal was pending then he would conclude that the High Court lacked jurisdiction or was barred from entertaining the taxation proceedings. That is a mere speculation which the Court cannot heed to.

At this point needless to repeat that several HCT decisions have held that notice of appeal is a bar to taxation proceedings. Among them are: **Dominic Ishengoma v Managing Director Geita Gold Mining, Civil Reference No. 37 of 2019, HCT Labour Division at Mwanza**, (per Tiganga, J. delivered on 23rd July 2021), and **Calist Aloyce Massawe and Anor v Kijenge Saccos and 2 Others, Civil Reference No. 01 of 2022 HCT Arusha** at page 5 (per Lady Justice Mwaseba, J. ruling of 8th September 2022) both held that the HCT lacked jurisdiction to deal with taxation when there is notice of appeal. The Respondent's counsel with respect thought **Rose Mkeku's decision** (delivered on 05/05/2022) is the most recent. And he thus extended his energy to convince the Court that it should follow its recent decision. I will not spill ink over this issue. Plainly, the most recent HCT decision is **Calist Aloyce Massawe's case** (supra) pronounced on 08/09/2022. The latter is the recent Court decision worth following if we are to follow the views of the Respondent's counsel. But as already hinted that specific matters contemplated in law are not exclusive to those mentioned in **Matsushita** and **Mehboub cases** (supra). These decisions are therefore not a bar to the Court's entertaining of taxation proceedings as held in **Rose Mkeku's case** (supra).

Much earlier in **Norman-Mahboub (t/a Noman Al Mahboub General Trading Corporation v Milcafe Limited**, Lady Justice Kimaro, J. she held that the HCT was not allowed to proceed determining the application for bill of costs while there was a Notice of Appeal filed at the CAT.

The CAT also in **Matsushita's case** (supra) held that a notice appeal precluded the High Court to deal with the case except for applications specifically provided for such as leave to appeal or provision of a certificate of point of law.

It is uncontroversial that the application for Taxation is filed after determination of a main case in which judgment is pronounced or ruling is delivered, and hence the decree or drawn orders is issued. As per Order 4 of the Advocates Remuneration Order, G.N. 263 of 2015, a decree holder may file application for taxation within sixty days from the date of awarding the costs. Be as it may the Applicant argued that the use of a word may connote non-obligatory.

Kahyoza, J. in **Rose Mkeku (the administratrix of the estate of the late Simon Mkeku v Pervez Shabbirdin, Misc. Land Application Case No. 89 of 2021, HCTsub-registry of Mwanza** (ruling of 5th May 2022) had a different view which I subscribe to as already

articulated herein above. The Judge's perspective in **Rose Mkeku's case** (supra) is that the Notice of Appeal is not a bar to determination of taxation application.

To conclude on the first point that the taxing officer had no jurisdiction to deal with taxation proceedings when there is a notice of appeal to the CAT as per what have been stated herein above I hold that the Court had jurisdiction. The taxing officer was therefore correct to determine it.

Having disposed the first ground, let us turn to the abridged grounds (2nd, 3rd and 4th) that the Applicants were denied the right to be heard; no supporting materials and violation of principles governing taxation. Determination of what would be reasonable instruction fee in the circumstance of the case depends on whether the matter was contentious or non-contentious. But before dealing with that, we should determine the issue of denial of right to be heard as that is equally fundamental. See Article 13(6) of the United Republic of Tanzania Constitution, 1977 as amended.

It is surprising that the Applicants' submissions on page 10 claim lack of fair hearing, that taxation proceedings were conducted in a strange manner. These are not only statements from the bar unfounded in the affidavit but also, they are alleging procedural irregularities that the

Court was not supplied with any materials to enable the Applicants to contradict before the taxation amount was reached. If this is true then in my view it is an afterthought. The Applicants had an opportunity to probe all these at the hearing of the taxation cause. They did not do so. I had thought when one alleges denial of right to be heard he or she should prove that there was no summons sent to him or her, and the proceedings were conducted in his absence, or the proceedings were conducted in a language that he did not understand. In my view, if a party was served with summons for hearing of the taxation, or he was present but failed to cross examine on issues that were material then he cannot afterward complain of infringement of the right to be heard.

As per order 12 of G.N. 263 of 2015, the taxing officer has discretionary powers in determining taxation. But such discretion has to be exercised judiciously. Truly, this Court can rarely interfere with the decision of taxing officer. See the case of **George Mbuguzi and Another v A. S. Maskini [1980] TLR 53**. The Court can interfere where there is misdirection, non-direction, or wrong application of taxation principle. I find no such problem in the taxing officer's handling of the taxation proceedings that would have warranted the Court's interference with her

decision. I am not moved by the allegation that the Applicants' right to be heard was infringed upon because it lacks substance.

I have also noted that the taxing officer decision to tax as she did was supported by the evidence brought before her. It should be remembered that the amount taxed TZS 23,582,865/= is lower than what the Respondent presented in her Bill of costs, that is TZS 501,901,620.03. It means the taxing officer taxed off some amount in relation to certain items such as. Therefore, it is not true that the taxing officer decided the taxation application without any material or evidence. It means order 58 (1)-(3) of the G.N. 263 of 2015 requiring vouchers, documents, and other evidence to be produced if required by the taxing officer was complied with. That was equally consistent with the CAT decision in **Elifazi Nyatenga and Three Others v Caspian Mining Limited, Civil Application No. 44/08 of 2017 CAT at Mwanza** (unreported).

The last issue (5th ground) that the proceedings were in contravention of the principles governing taxation proceedings, that is Advocates Remuneration Order, G.N. No. 263 of 2015. I will treat it briefly. If there is a provision in the legislation be it principal or subsidiary the Court ought to follow it. It is common ground that this matter was contentious one. Hence the ninth schedule to the Advocates Remuneration Order

G.N. No. 263 of 2015 dealing with scales of fees for contentious matters for liquidated sum applies. Despite that I am not in accord with the Applicants' view that instruction fee and Court attendance are to be charged together. This case is distinguished from what was held in **FBME Bank Company Limited v Lupembe Tea Estate Company Limited & Two Others, Commercial Case No. 59 of 2012 HCCD.** And the case of **CAMFED v CRDB PLC, Commercial Case No. 141 of 2012 HCCD.**

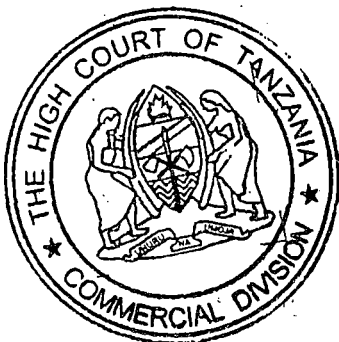
It is my considered view that Court attendance is to be charged separately from the instruction fee. It will be improper to combine them. The ninth schedule applies to fees for contentious matters. But where the fee claimed is not provided for under that schedule such as Court attendance charges then one is inclined to look at the eighth schedule to the Advocates Remuneration Order, G.N. 263 of 2015 which provides for scales of fees in respect of business the remuneration for which is not otherwise prescribed. I should state that looking at the ninth schedule of the Advocates Remuneration Order, G.N. 263 of 2015 (it is clear that nothing in that schedule forbids a party from claiming fees that are otherwise not prescribed as per the eighth schedule of the same Order. The ninth schedule is exclusive to fees for contentious proceedings for

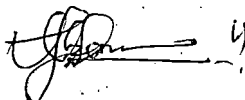
liquidated sum in original and appellate jurisdiction. Consequently, I find the Applicants prayer that all costs claimed in items No. 5,6,9, 10, 11, 12 13, 19, 20, 24, 25, 27 and 28 are the ones should have been taxed, the rest ought to have been taxed off to be without merit. I have already pointed out that the **FBME case** is distinguished with the case at hand. And I have considered the differences from what has been prescribed in the ninth schedule and the items covered in the eighth schedule of G.N. No. 263 of 2015. They are dissimilar and they should be charged separately.

In lieu of the foregoing I find the application at hand lacking the requisite merit to warrant the Court to revise, quash or vary the taxation proceedings and taxation officer's ruling. It is therefore dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 3rd day of March, 2023.




U. J. AGATHO
JUDGE
03/03/2023

Date: 03/03/2023

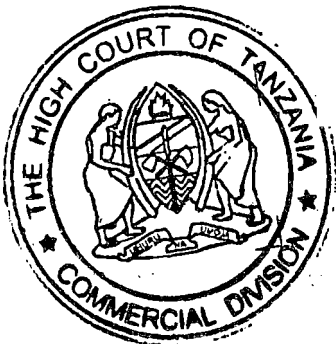
Coram: Hon. U. J. Agatho, J.

For Applicants: Irene Mchau, Advocate

For Respondent: Kelvin Ngeleja, Advocate.

C/Clerk: Beatrice

Court: Ruling delivered in Chambers, today, this 3rd March, 2023 in the presence of Irene Mchau, learned counsel for the Applicants, and Kelvin Ngeleja, learned counsel for the Respondent.



A handwritten signature in black ink, appearing to be "U. J. Agatho", written over a horizontal line.

**U. J. AGATHO
JUDGE
03/03/2023**