

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

AT DAR ES SALAAM

COMMERCIAL REFERENCE NO.17 OF 2023

(Arising from Taxation Cause No.110 of 2023)

KAS FREIGHT LIMITED..... APPLICANT

VERSUS

PAN AFRICA EQUIPMENT TANZANIA LIMITED..... RESPONDENT

RULING

Date of last order: 06/03/2024

Date of Ruling: 11/03/2024

GONZI, J.

In Commercial case No. 116/2021, the Respondent herein as the plaintiff, successfully sued the Applicant for breach of contract between them. In the Judgment delivered on 25th August 2023 (as per Hon. A. A. Mbagwa, J.), the court, inter alia, awarded the Respondent costs of the suit. The Respondent then presented before the Taxing Officer in this court her Bill of costs claiming Tshs. 41,280,000. That application was heard as Taxation Cause No. 110 of 2023 between the parties herein. At the end of the taxation proceedings before the Taxing Officer, the Bill of costs was taxed at Tshs. 32,320,000/=. The Applicant was not happy with the amount awarded as costs to the Respondent and therefore instituted the present application for reference seeking to challenge the order of the

Taxing Officer in respect of the awarded costs. On 6th March 2024 when the application came for hearing, Mr. Oscar Millanzi, learned advocate appeared for the Applicant while Mr. Robert Mosi, learned advocate, appeared for the Respondent. Before the hearing on the merits of the application could commence, Mr. Mosi, learned advocate raised an issue which he submitted that it required attention of the court before proceeding to the hearing of the application. He stated that the Applicant in this matter has already filed a Notice of Appeal to the Court of Appeal of Tanzania challenging the Judgment of this Court from which the order of costs emanates, namely Commercial Case No.116 of 2021. Mr. Mosi argued that since there is a pending Notice of appeal in the Court of Appeal, this court ceases to have jurisdiction over the matter except where there is an application for certification of a point of law, an application for leave to appeal or execution of the decree in absence of a stay of execution order. Mr. Mosi therefore argued that the hearing of the present application should be stayed to await the final determination of the appeal. Alternatively, he argued, the Applicant may wish withdraw the present application with liberty to re-institute the same once the appeal is over, and in case it will be necessary to do so. Mr. Mosi undertook to furnish this court by the closure of business on 8th March 2024, authorities

supporting what he had argued. On 7th March 2024, Mr. Mosi, learned advocate lived to his promise and performed his duty to the court whereby he supplied the court with two authorities to support his arguments. The first authority is **International Commercial Bank (T) Limited and Yono Auction Mart & Company Limited versus Primi Aloyce Mushi**, Civil Reference No.10 of 2019, decided by the High Court of Tanzania , Land Division, Dar es Salaam on 18th May 2020 as per Hon. V. L. Makani, J. The second authority submitted by Mr. Mosi is **Matsushita Electric Co. (E.A.) Limited versus Charles George t/a C. G. Traders**, Civil Application No.71 of 2001 decided by the Court of appeal of Tanzania, at Dar es Salaam. The Court of Appeal was dealing with an application for stay of execution of the decree of the High Court in respect of which execution process had started at the High Court to the extent of a garnishee nisi being issued. The Respondent's Counsel in resisting the application for stay of execution in the Court of Appeal, argued that the application ought to have been made in the High Court as the executing court in terms of section 38 of the Civil Procedure Code, rather than in the Court of Appeal of Tanzania as it had been made in that case. The Court of Appeal after hearing both sides held at page 4 of the Ruling that:

"I am of the considered opinion that once a notice of appeal is filed under Rule 76, then 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 a certificate of point of law or execution where there is no order of stay of execution from this court".

In the case of **International Commercial Bank (T) Limited and Yono Auction Mart & Company Limited versus Primi Aloyce Mushi**, the High Court relied on the case of **Matsushita Electric Co. (E.A.) Limited versus Charles George t/a C. G. Traders** and stayed the proceedings in the application for reference challenging the taxation of costs where a Notice of Appeal had been lodged in the Court of Appeal by the Applicant who was challenging the order of the High Court that had dismissed the Applicant's application to set aside an exparte Judgment that had been entered against the applicant with costs. The High Court held that:

"It is apparent from the above cases that Mr. Ishengoma's argument would not stand because there is a notice of appeal, it does not matter whether or not the matter emanates from the CPC or any other law, this court is seized (sic) with

jurisdiction to entertain the matter save for the listed type of applications. In other words, it is only those applications which have been mentioned in the said case of Matsushita Electric Co. (E.A.) Limited(supra) which can be entertained by the High Court irrespective that the appeal process to the Court of Appeal has already been initiated.”

In response, Mr. Oscar Millanzi, learned advocate for the applicant, briefly submitted that the pending appeal in the Court of Appeal has nothing to do with the present application for reference. He argued that the application is against Taxation Cause No. 110 of 2023 and not against Commercial Case No. 116/2021. He reasoned that the Respondent may at anytime execute the Order of costs while the appeal in respect of Commercial Case No.116/2021 is pending in the Court of Appeal.

By rejoinder, Mr. Mosi reiterated his earlier position. I have carefully gone through the rival arguments by the learned counsel as well as the relevant authorities supplied by Mr. Robert Mosi, Learned Advocate for the Respondent. The perspective of the current situation must be set clear at the outset. There are three cases in the prevailing context. The first one is Commercial Case No. 116/2021. This is the main case. It was decided

by this Court on 25th August 2023 (as per Hon. A. A. Mbagwa, J.), and the court granted the substantive prayers of damages for breach of contract. In addition, the court also awarded the Respondent costs of the suit. The Applicant, who was the Defendant in the said Commercial Case No. 116/2021, lodged notice of appeal to the Court of Appeal of Tanzania challenging the Judgment and Decree in Commercial Case No. 116/2021.

The second case is the Taxation Cause No. 110/2023 which was filed in Court on 17th day of October 2023. This application was arising from Commercial Case No. 116/2021 that is the main case above. The Taxation Cause No. 110/2023 proceeded to hearing before the Hon. Deputy Registrar as the Taxing Officer despite the pendency of the Notice of Appeal to the Court of Appeal against judgment and Decree in respect of the Commercial Case No.116/2021. The Ruling in Taxation Cause No.110/2023 was delivered on 31st October 2023 by the Taxing Officer who awarded the Respondent Tshs. 32,320,000/= as the costs of the case in Commercial Case No.116/2021.

The third case is the present application, that is Civil Reference No. 17/2023 arising out of the Taxation Cause No. 110/2023 which was filed by the Applicant challenging the Ruling of the Taxing Officer in Taxation

Cause No. 110/2023 that awarded Tshs. 32,320,000/= to the Respondent as costs.

Mr. Mosi, learned advocate is now trying to persuade me to stay the proceedings of the present application for reference to await the outcome of the pending appeal in the Court of appeal which appeal is respect of Commercial Case No.116/2021. I asked myself whether the decision in respect of which the present application is made, is the subject of the pending appeal in the court of appeal and thus the Court of Appeal is seized of it? My answer is in the negative. The present proceedings are challenging the Ruling and Drawn Order of the Taxing Officer in Taxation Cause No.110/2023 which awarded costs to the Respondent. The pending notice of appeal is not in respect of the Ruling of the Taxing Officer in Taxation Cause No.110/2023 dated 31st October 2023 in Taxation Cause No.110/2023. The Court of Appeal is not seized of Taxation Cause No.110/2023. Actually the hearing and determination of the Taxation Cause No.110/2023 took place before the Hon. Taxing Officer whereby the application for costs was decided in favour of the Respondent, despite the fact that by that time when Taxation Cause No.110/2023 was being entertained by this Court before the Taxing Officer, there was already a Notice of Appeal pending in the Court of Appeal against the Judgment

and Decree in Commercial Case No.116/2021 that had granted the order of costs. In short the taxation Cause No.110/2023 and the present application for reference seeking to challenge the awarded costs, have nothing to do with the pending appeal in the Court of Appeal which is against the Judgment and Decree in Commercial Case No. 116/2021.

Like there was no obstacle for the Taxing Officer to hear and determine the Bill of costs in Taxation No. 110/2023 despite the pendency notice of appeal, equally there is no obstacle for the Court now to entertain the application for reference against the Ruling in Taxation Cause No.110/2023. My understanding of the principle in the decision of the Court of Appeal in the Matsushita Electricity Co. E. A Ltd case (supra) is that where a Notice of appeal is lodged in the Court of Appeal against the decision of the High Court, the High Court ceases to have jurisdiction in respect of that matter save for the incidental proceedings connected to the appeal process or proceedings in respect execution of the decree of the High Court, in case there is no order for stay of execution by the Court of Appeal. The rationale of that holding is not far to see. It would be not only disrespectful but also a mockery of justice if the same matter in issue were to be dealt with simultaneously in two different fora. The rule in Matsushita Electricity Company (E. A) Ltd case would apply to the present

application if the application at hand was anyhow seeking to deal with any aspect in the Commercial Case No.116/2021 while that matter is no longer at the High Court level but is rather pending in the Court of Appeal. The matter before me is not challenging anything in connection with the Commercial Case No. 116/2021. There can be no orders which can be issued in the present application which can have any connection to Commercial Case No. 116/2021.

One may ask as to whether it was proper for the Respondent herein to file the Taxation Cause No.110/2023 claiming her costs awarded in Commercial Case No. 116/2021 while there was a notice of appeal against Commercial Case No.116/2021 to the court of appeal which was pending in the court of appeal at that time? That question was not asked by the parties herein when Taxation Cause No.110/2023 was continuing. At that stage it would have been a relevant question and would have been determined by the presiding officer as the law in that aspect is well settled. At this stage, Mr. Mosi, learned Advocate, by way of afterthought appears to have spun backwards the hands of the clock to the proceedings in Taxation Cause No.110/2023. We are beyond that stage.

All in all, I find no merit in the points of objection raised by Mr. Mosi, learned advocate for the Respondent. I dismiss them. This Court is seized

with the requisite jurisdiction under Order 7(i) of the Advocates Remuneration Order, 2015 to entertain the application for reference against the Ruling of the Taxing Officer in Taxation Cause No.110/2023.

I make no order as to costs. It is so ordered.



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A. H. GONZI
JUDGE
11/03/2024

Ruling is delivered in Court this 11th day of March 2024 in the absence of Mr. Oscar Millanzi learned advocate for the Applicant who was duly notified and in the presence Mr. Robert Mosi, learned advocate for the Respondent.



A handwritten signature in black ink, appearing to be "A. H. Gonzi", written over a horizontal line.

A. H. GONZI
JUDGE
11/03/2024