

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

AT ARUSHA

TAXATION CAUSE NO. 10 OF 2022

(Arising from Misc. Commercial Application No. 12 of 2021)

BETWEEN

MOGAS TANZANIA LIMITED.....DECREE HOLDER

VERSUS

PANONE AND COMPANY LIMITED.....JUDGEMENT DEBTOR

RULING

Date of Last Order: 13th May, 2024

Date of Ruling: 17th May, 2024

GONZI, J.

The titling of the Case by the Decree Holder appears to be misleading as it suggests that this is a "Taxation of Costs Cause". To the contrary, it is actually an application for execution of a decree of this court. The practice of the Commercial Division of the High Court is that its decrees and orders are executed by the Honourable Judge In-charge or another Judge as may be assigned by the Hon. Judge In-charge. The present application is for execution of a Certificate of Taxation emanating from the Ruling of the Hon. Taxing Officer of this Court in Taxation Cause No.10/2022 between the parties herein. The Decree Holder instituted

the application for execution vide Form No. F/5 of the Civil Procedure (Approved Forms) Notice, 2017, GN No. 388 of 2017. The application was brought under Order XXI Rule 11 of the Civil Procedure Code [Cap 33 R:E 2019]. The Decree Holder is seeking execution of the Orders comprised in the Certificate of Taxation emanating from Taxation Cause No.10/2022 which emanated from the Ruling and Drawn Order in Commercial in Misc. Commercial Application No.12 of 2021 that was incidental to Commercial Case No.13 of 2021 between the same parties herein. In Misc. Commercial Application No.12 of 2021, the Decree Holder herein was awarded Costs. The Decree Holder instituted a Bill of costs and claimed the awarded costs vide Taxation Cause No.10/2022. After hearing the parties in the Taxation Cause No.10/2022, the Taxing Officer awarded the Decree Holder costs of the Misc. Commercial Application No.12 of 2021 at the tune of Tshs. 5,700,000.00. As the awarded costs have not been paid by the Judgment Debtor to the Decree Holder, the Decree Holder has initiated the present Execution Application seeking an order for attachment and sale of Judgment Debtors' properties namely:

- 1. Fuel pumps for respondent service station located at Shamsi, Njia ya Ngombe on Arusha-Babati road, within Arusha Municipality.**
- 2. Fuel pumps for respondent's service station located at King'ori, Moshi-Arusha Road, within Arusha District.**
- 3. Generator located at respondent service station at King'ori, Moshi-Arusha Road within Arusha District.**

The Judgment Debtor was notified of the application so as to appear and show cause why the decree in Taxation Cause of Costs No. 10/2022 should not be executed against her as prayed. The Judgment Debtor resisted execution by alleging that particulars of the listed properties sought to be attached and sold are not sufficiently described as to leave no doubt that they belong to the Judgment Debtor and not any other person.

The parties were ordered by the court to proceed with the hearing of the application by way of written submissions. Mr. Wilbard John Massawe, learned counsel, represented the Decree Holder and Mr. Engelbert Boniface, learned counsel, represented the judgement debtor.

In the course of composing its Ruling, the Court noticed an anomaly in the Certificate of Taxation issued by the Taxing Officer which constitutes the Order/Decree emanating from Taxation Cause No.10/2022 and whose orders are sought to be executed in this application. The Ruling of the Honourable Taxing Officer in Taxation Cause No.10/2022 is dated 30th March 2023 whereas the Certificate of Taxation extracted by the Taxing Officer from that Ruling is dated 29th March 2023. In this case, the Certificate of Taxation gives the wrong impression as if it had been extracted a day before the Ruling in Taxation Cause No.10/2022, out of which it emanates, was pronounced. I entertained serious doubts as to the competence of the present application for execution which seeks to execute a Certificate of Taxation that appears to be defective. As this newly discovered anomaly was discovered by the court in the course of composing the Ruling and the parties' counsel had not been heard on it, I withheld delivery of the Ruling and called both counsel to address me of the legal implications, if any, of this anomaly.

Ms. Colletha Nko, learned advocate appeared in court holding brief for Mr. Wilbard Massawe learned advocate for decree holder while the learned counsel for the Judgment Debtor defaulted appearance without notification to court. This being a special clearance session case and

being aware that the learned counsel for the Judgment Debtor was duly notified and that he actually sent an advocate to hold his brief 4 days earlier in this case when the next date was communicated to both parties, I proceeded to receive the views of Ms. Colletha Nko, learned advocate for the Decree Holder. She addressed the court that indeed the Certificate of Taxation does not correspond to the Ruling from which it emanates. She argued that the Court in the circumstances be pleased to allow the Decree holder to initiate a process for rectification of the Certificate of Taxation so that the Decree holder can be able to refile the execution application attaching the proper certificate of taxation. Having heard the learned counsel for the Decree holder on the issue raised by the Court suo mottu in the course of composing its Ruling, I proceeded with composing and delivery of the Ruling in this application.

On my part, like I have alluded to above, I take it that a Certificate of taxation is to be treated in the same way like a Decree or Drawn Order of the court. In this application for execution, the Decree Holder is seeking to execute the Certificate of Taxation in the same way a decree holder executes a Decree or Drawn Order.

The Advocates Act [CAP. 341 R.E 2019 provides under section 64(2) as follows:

64.- (2) The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the High Court, be final as to the amount of the costs covered thereby, and the High Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.

From the wording of section 64(2) of The Advocates Act [CAP. 341 R.E 2019, it is obvious that the Certificate of Taxation is the end product of the Taxation process like a decree is to a judgment after a trial. The certificate of taxation is the one that stipulates the sums of money ultimately awarded as costs after the taxation exercise for the different headings of claims in the Bill of costs. The Certificate of taxation is enforced or executed in the same way like a Decree or Drawn Order that carries the dispositive orders of the Judgment or a Drawn Order is executed. For purposes of execution, a certificate of Taxation emanating from the Taxation of Costs Cause, therefore, attracts no differential

treatment from that of a Decree/Drawn Order emanating from a judgment or ruling respectively.

As to the similarity of treatment between a certificate of taxation in Taxation of Costs Cause and a decree or Order in a Judgment or Ruling respectively, I borrow leaf from the words of Hon. W. A. Okwany,J., of the High Court of Kenya in the case of **Miller & Company Advocates v China Roads & Bridge Corporation** [2021] KEHC 408 (KLR) where, he stated that:

“Taxation of costs is part and parcel of the execution process, complete with its provisions for stay of execution, under the Civil Procedure Rules.”

Having found that the certificate of taxation is akin to a decree in a suit or Drawn Order in a Ruling, the next question is whether a decree or Drawn Order can bear a different date from that of the Judgment or Ruling from which it emanates?

The Civil Procedure Code Cap 33 provides under **Order XX Rule 6(1)** as follows:

6.-(1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties and particulars of the claim and shall specify clearly the relief granted or other determination of the suit.

It follows therefore that the certificate of taxation in this application has violated the rule against variance to the Ruling from which it emanates. The pertinent question is what happens when the decree is at variance with the Judgment? In **Alexander Mundebe versus Tanzania Brush Products Limited**, Civil Appeal NO. 245 OF 2018 (High Court of Tanzania at Dar es Salaam) at page 5, Hon. Kakolaki,J observed that :

“Now coming to the issue as to whether the decree is defective or not as alluded herein above there is no dispute that the same is at variance with the judgment. It is therefore defective in its content.”

Having found that the certificate of taxation sought to be executed in this application for execution is defective, on my part, I extend to it the same consequences of a decree that is at variance with the judgment. Therefore, in the present case the Certificate of Taxation which is at

variance with the Ruling in the Taxation of Costs Cause from which it is extracted is also defective in its contents. I declare that the Certificate of Taxation dated 29th March 2023 in Taxation Cause No.10 of 2022 whose Ruling was delivered on 30th March 2023 is defective for being at variance with the Ruling from which it is extracted.

As it is a legal requirement for the Decree Holder to attach in his application for execution a certified copy of the decree sought to be executed; and as the attached Certificate of Taxation in the present application is defective, the question is whether the present application for execution is competently before the court? My answer is in the negative. The present application for execution is fatally defective for failure to attach with it the requisite valid Certificate of Taxation containing the Orders which the Decree holder is seeking to execute against the Judgment Debtor. What is the fate of an incompetent application? An incompetent application deserves no other fate than being struck-out. Therefore, I hereby proceed to strike out this application for execution of a certificate of taxation emanating from Taxation of Costs Cause for being incompetent as it is accompanied with a defective Certificate of Taxation. As the defect was raised by the Court suo mottu, I make no order as to costs. It is so ordered.

A handwritten signature in black ink, appearing to be "A.H. Gonzi".
A.H. GONZI

JUDGE

17/05/2024

Ruling is delivered in Court this 17th day of May 2024 in the presence of Ms. Colletha Nko learned advocate, holding brief for Mr. Wilbard Massawe, learned advocate for the Decree Holder; and in the absence of Mr. Engelbert Boniface, learned advocate for the Judgment Debtor who is aware of the date of delivery of this Ruling for having participated in the previous proceedings where the date of Ruling was fixed 5 days ago.

A handwritten signature in black ink, appearing to be "A.H. Gonzi".
A. H. GONZI

JUDGE

17/05/2024