IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 509 OF 2020

(Arising from Misc. Land Appeal No. 13 of 2019)

CONRADINA UNDOLE .....APPLICANT

VERSUS

JULIETH KOMBE.....1ST RESPONDENT

ZENE MILALA HUSSEIN *(The administrator of the*

Estate of the late AGNES KOMBE).....**2ND RESPONDENT**

RULING

Dated: 24th & 30th June, 2021

J.M. KARAYEMAHA, J.

This Court is moved under Order 7(1) and (2) of the Advocates Remuneration Order, 2015 G.N No. 264 of 2015 for orders that:

1. That this Honourable Court be pleased to find the ruling and order in respect of Misc. Application No. 744 of 2019 void ab initio as the respondent is not entitled to costs awarded to him;
2. Costs of the application; and
3. Any other relief this Honourable Court deem fit and just to grant.

The application is made by way of a Chamber Summons supported with an affidavit sworn by Conradina Undole which together with other records

give the background thereof as hereunder. In the counter affidavit sworn by Charles Lyakula Madirisha Lugola, the respondents resisted the application on account that the applicant was not aggrieved by the ruling and order in Misc. Land Application No. 275 of 2018 by the District Land and House Tribunal. They averred further that it was un procedural for applicant challenging a ruling in Misc. Land Application No. 275 of 2018 via the current reference to which she was not aggrieved to.

When parties were invited to submit on this point, Ms. Joram stated that primarily respondents lodged the bill of costs No. 744 of 2019 in the DLHT. After noting and satisfied that the same contravened Order 55 (2) and (3) of the Advocates Remuneration Order, the DLHT struck it out with a leave to refile it within 14 days. Ms. Joram is distressed. She thinks, the DLHT had to dismiss it. In my humble opinion she is wrong. I share Mr. Lugola's position that the DLHT was mandated to strike out the application whose anomaly was uncontested.

As to what entails "struck out" our laws have not given clear/definite definition of what constitutes "striking out", "struck out" or "strike out".

However, the Court Appeal of Tanzania in the case of **Juma Nhandi v. Republic,** Criminal Appeal No. 289 of 2012 (unreported) has endeavoured or attempted to give explanation of the term "strike out" when making a distinction between "striking out" and "dismissing". While citing with approval the case of **Ngoni - Matengo Cooperative Marketing Union Ltd v. Ali Mohamed Osman** [1959 E.A. 577, in which the erstwhile Court of Appeal for East Africa discussed the distinction between "striking

out" and "dismissing" an appeal, the Court of Appeal had this to say in relation to "striking out":

> *"This Court accordingly,* ***had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at ali. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent,*** *rather than to have "dismissed" it- for the latter implies that a competent appeal has been disposed of,* ***while the former phrase implies that there was no proper appeal capable of being disposed of****. But it is the substance of the matter that must be looked at rather than the words used..."* [Emphasis added]

Similarly, in the case of **Emmanuel Luoga v. Republic,** Criminal Appeal No. 281 of 2013 (unreported) where the Court of Appeal of Tanzania had an occasion of dealing with the issue whether it was proper for the first appellate court to dismiss the appeal which was incompetent, it was stated as follows:

> *"We are of the view that upon being satisfied that the appeal was incompetent for reason it had assigned, it ought to struck out the appeal instead of dismissing it. The reason is clear that by dismissing the appeal it implies that there was a competent appeal before it which was heard and determined on merit which is not the case. "*

Also, in the case of **Amon Malewo v. Diocese of Mbeya (R.C),** Civil Appeal No. 22 of 2013 (unreported), the Court refused to adjourn and struck out the appeal which was incompetent before it. It is stated as follows:

> *"After all it is trite law that any court of law cannot adjourn what is not competently before it. All said and done we hold this appeal to be incompetent. We strike it out with no order as to costs."*

I have cited all these authorities so as to emphasis that ordinarily, the remedy of a matter which is incompetent before the Court is to be struck out. The reason for striking it out is that such matter is abortive or rather is incapable of being heard or even to be adjourned. In other words, it carries the implication that there is no matter at all before the Court.

In this case, therefore, what was before the DLHT was an application which was incompetent of being heard or even to adjourned for offending the instructive provisions of Order 55 (2) and (3) of G.N. No. 264 of 2015. I am therefore inclined to agree with Mr. Lugola's arguments.

Regarding the aspect that the DLHT had no jurisdiction to entertain Bill of costs No. 744 of 2019 because it was time barred, I again don't see merits in it. By striking out Misc. Application No. 275 of 2018 had time limit implications. In order to keep the respondents' right of access to the Tribunal maintained and not delayed through application for extension of time, the Chairman allowed them to file another application for bill of costs within 14 days. This was the order of the tribunal which was binding on both parties. If the applicants lodged application No 774 of 2019 out of 14 days, in my

considered opinion, they could have not complied with the court's order hence time barred. In this matter the trial chairman did it purposely to extend time knowing that the first bill of costs was filed within 60 days in compliance with Order 68 of GN No. 264 of 2015. In those circumstances, the DLHT had jurisdiction to hear and determine Bill of Costs No. 774 of 2019.

Let me now turn to the 2nd complaint. Ms. Joram emphatical submitted the trial chairman in his ruling simply stated that the taxed amount was Tshs. 5,015,000/=. She complained that the Chairman did not give reasons or clarify his order. The learned counsel observed that apart from the taxing master being endowed with discretionary powers but he had to give a reasoned decision and be clear on orders given. To strengthen her submission, she relied on the decision of the High Court in the case of **National Bank of Commerce Ltd v Silas Lucas Isangi others**, Commercial Reference No. 3 of 2019.

On his part Mr. Lugola did not see any anomaly in the ruling of the taxing master. To him, the amount awarded commensurate the period of 10 years the litigants spent in court pursuing their rights.

Ms. Joram's complaint has coerced me to go to the ruling first before deliberating on anything else. He stated in his ruling as follows:

> *"Having gone through the submission by both counsels for this bill of costs which originates from the award issued by this court in favour of the applicants, I came to notes that the main dispute was over the instruction fees which is claimed to be too exaggerated, mean while they*

both agree upon the formula of the calculations used on how to charge the instruction fees. They both agreed by 3% formula. That being the case, the entire estimated costs taxed off, will be 5,015,000/= out of the total claimed 9,445,000/=."

I share Ms. Joram's concern that the ruling by the taxing master is vague. After comparing the contents of the Bill of costs with the order purporting to tax Tshs. 5,015,000/ from 9,445,000/= it is concerning me that the taxing master failed to make a formal determination by covering items in the application for bill of costs and clearly demonstrate what amount was charged per each item. He had to demonstrate what amount was granted each item and what was slashed out and give reasons thereto. The order of the taxing master is problematic inasmuch as it has failed to indicate the reasons for taxing off Tshs. 4,430,000/= and reasons leading to this order. Consolidation of items of the bill of costs is not sin and is allowed but it is very important to state the amounts for each item in order for clarity to prevail. In this view the words of Madam Justice Fikiri, J (as she then was) are of great assistance as extracted from the case of **National Bank of Commerce v Silasi Lucas Isangi** (supra) that:

Consolidation as pointed out above is not challenged but the amounts for each part were important to be stated to show how the final amount of Tzs. 595, 869,200/= was arrived at from Tzs. 807y,821,800/=. This is pointed out considering the importance of clarity in the decision and

reasons in order to show that the one exercising discretion did so judiciously and not arbitrarily or unjustly."

I have also studied the ruling and I think it does not look like one. It is expected that the ruling should at least contain brief facts, finding on the issues, for instance, whether the amount charged is grantable or not, a decision and reasons for the decision. A ruling with these elements will be a legally sounding ruling. The ruling in the record falls short of these qualifications.

For these reasons, I find it imperative to interfere the decision of the taxing master for applying wrong considerations in arriving at his decision. The upshot, I find the application with merit and proceed to declare the taxing master ruling void and order a legally accepted ruling with reasons to be composed within 14 days from the date of receiving this order. I further order an immediate transmission of this ruling for prompt compliance.

It is so ordered.

Dated at Dar es Salaam this 30th day of June, 2021

J. M. Karayemaha
JUDGE