

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**REFERENCE NO. 14 OF 2022**

**(Arising from Taxation Cause No. 35 of 2022)**

**SHaidu ADAM KIBILA** (Administrator of the estate

of the late ADAM SADICK NSHORO) ..... **1<sup>st</sup> APPLICANT**

**RIMINA AUCTION MART & CO LTD** ..... **2<sup>ND</sup> APPLICANT**

**VERSUS**

**YUSUFU SADIKI KIBIRA** ..... **RESPONDENT**

**RULING**

*Date of last Order: 06.10.2022*

*Date of Ruling: 12.10.2022*

**A.Z.MGEYEKWA, J**

This is a reference that emerged from a ruling of a Taxing Master. The application is made under Order 7 (1) and (2) of the Advocates Remuneration Order GN.264 of 2015. The application is supported by an affidavit deposed by Mr. Samson Edward Mbamba, counsel for the

applicants. The respondent filed his counter-affidavit deposed by Yusuf Sadiki Kibira, the respondent.

When the matter was called for hearing on 26<sup>th</sup> September, 2022 the applicants enjoyed the legal service of Mr. Madibi holding brief for Mr. Samson, counsel whereas the respondents had the legal service of Mohamed Tibanyendera, counsel. The applicants in his Chamber Summons prayed for the following orders:-

- (i) *That, this Honourable Court be pleased to determine this reference in respect of the correctness, legality, and validity of the decision of the Taxing Master dated 29<sup>th</sup> July, 2022 in Taxation Cause No. 35 of 2022 arising from Land Case No. 155 of 2019 to satisfy itself on the proper exercise of discretion.*
- (ii) *Costs of this application be provided for.*
- (iii) *Any other Oder(s) as this Honourable Court may deem fit and just grant.*

On the parties' concurrence, hearing of the matter was through written submissions. Pursuant thereto, a schedule for filing the submissions was duly conformed to save for the applicant who waived her right to file a rejoinder.

The applicant's counsel for the applicant started by submitting that the applicant is challenging the decision of a Taxing Master dated 29<sup>th</sup> July, 2022 which taxed the bill of costs of Tshs. 9, 230, 000/=.

Ms. Msangi contended that the issue of jurisdiction can be raised at any stage including. To bolster his submission he cited the cases of Tanzania **Pharmaceutical Industries Limited v Dr. Ephraim Njau** (1999) TLR 299, **Richard Julius Rukambura v Isaack Ntwa Mwakajila and Tanzania Railways Corporation**, Civil Appeal No. 2 of 1998. **Slyvester Lwegira Bandia & Another v NBC Ltd**, Civil Appeal No. 29 of 2010. Ms. Msangi argued that the Court of Appeal nullified the proceedings and decision reached while the Notice of Appeal was in existence.

She went on to submit that in the present case, the time when the taxation proceedings were conducted there was already in existence of Civil Application No. 165 of 2022 for a stay of execution pending the appeal from this Court in Land Case No. 155 of 2019.

Submitting on the application, Ms. Msangi simply argued that the applicant is aggrieved by the decision of the Taxing Master. She contended that the Taxing Master improperly exercised her discretion, for not taking into account necessary principles enunciated by case law and hence leading to a huge sum of the awarded costs. The learned counsel for the

applicant lamented that the Taxing Master did not exercise his power judiciously because she did not take into account the fact that there was no complexity issues involved in the suit which would entitled the respondent to be awarded Tshs. 9,230,000/=.

In response, Mr. Tibanyendera, counsel for the respondent started to address the point of law raised by Ms. Msangi. He argued that the counsel has raised the said point of law without leave of the Court. He argued that the applicants ought to have raised the same as a ground of Reference he insisted that raising a point of law can be any time but the same should be done according to the procedural rules. Mr. Tibanyendera distinguished the **Pharmaceutical's** case from the matter at hand that the cited case does not refer to circumstances where an aggrieved party files an application for reference or an appeal.

The counsel for the respondent asserted that the case of **Sylvester** (supra) is irrelevant to the case at hand since the same is in respect to dismissal orders where there was a counter claim which was allowed to proceed and in **Arcodo's** case (supra) the court was dealing with the situation where the trial court entertained the case while there was a Notice of Appeal. He went on to submit that in the case at hand, taxation is not an application that was envisaged in **Arcado's** case. He insisted that this is

not an interlocutory application. He contended that the same is equivalent to the execution of a court decree since the costs taxed are already ordered in the decree. He insisted that nothing prevent this Court from determining the taxation cause.

Regarding the ground of stay of execution and Notice of Appeal, Mr. Tibanyendera contended that this court on the procedure in applying stay of execution at the Court of Appeal of Tanzania and cited Rule 11 (3) of the Tanzania Court of Appeal Rules, 2009. He contended that the applicant applied for a stay of execution prior to the determination of the Taxation Cause No. 35 of 2022. The learned counsel for the respondent valiantly argued that a Notice of Appeal cannot be used to halt the proceedings in this court in absence of any specific order for stay as stipulated by the Court of Appeals Rules. He insisted that there was no any illegality in the eyes of the law. The Taxing Master was correct to entertain the application and tax the same accordingly.

Back to the reference at hand, Mr. Tibanyendera contended that there is no any illegality as alleged by the applicant's counsel. He went on to submit that the counsel for the applicants termed the taxed sum of Tshs. 9, 230,000/= as a huge amount, however, he has not addressed any principle of taxation so far breached by the Taxing Master. Mr. Tibanyendera argue

that the applicants' counsel only alleged that there was no complexity in the case. He spiritedly argued that the applicants' counsel submission was not supported by any proof. The counsel for the respondent contended that the estimated value of the subject matter was Tshs. 843,000,000/= and the said sum was taxed to a tune of Tshs. 25, 290,000/= being 3% of the subject matter which is a minimum charge entitled to an advocate where the value of the subject matter exceeds Tshs. 400,000,000/= and the Taxing master taxed in Tshs. 7,000,000/= which is quite below 30% of the allowed instruction fee by the law. The counsel for the respondent added that in case the reference is successful, the instruction fee needs to be taxed upward and restore the billing costs of Tshs. 25, 290, 000/= as claimed in the Bill of Tax. He added that the applicants in their affidavit have not stated any reasons for reference.

On the strength of the above submission, the learned counsel for the respondent urged this court not to decide in favour of the applicants instead the taxed amount be increased to instruction fees which were charged at the tune of Tshs. 25,290,000/= instead of Tshs, 7,000,000/=.

Having considered the arguments for and against the application, I remain with one central issue for determination, and that is none other than ***whether or not the present application is meritorious.***

Before I review the parties' submissions on the appeal, there is one nagging issue that was brought up in the course of the hearing by Ms, Aziza Msangi, counsel for the applicants. Therefore, I find it apposite to respond to the point raised by the applicant's counsel regarding whether there is a stay of execution issued by the Court of Appeal and whether the applicant has lodged a Notice of Appeal. Ms. Msangi submitted that this Court lacks jurisdiction to execute the order of this Court in Land Case No. 155 of 2019. In her submission, she claimed that there is a Civil Application No. 165 of 2022 for a stay of execution pending the determination of an appeal against the decision of this Court in Land Case No. 155 of 2019.

The records reveal that the Court of Appeal of Tanzania in Civil Application No. 165 /17/2022 has issued a stay of execution pending the determination of an appeal from the Judgment and Decree of this Court in Land Case No. 155 of 2019 sated 21<sup>st</sup> December, 2021. The record also show that the applicant has filed a Notice of Appeal dated 17<sup>th</sup> January, 2022.

I fully subscribe to the submission of the learned counsel for the respondent that the issue of point of law was supposed to be raised before hearing an application on merit. However, as long as the same

is a point of law, then, it can be raised at any time even during an appeal. In the case of **Adelina Koku Anifa & Another v Byarugaba Alex**, Civil Appeal No. 46 of 2019 (unreported). This court could even in the absence of the grounds of appeal be obliged to address the point of law on jurisdiction.

Similarly in the case of **Marwa Mahende v Republic** (1998) TLR 249 the court is reminded of its duty to ensure the proper application of the laws by the courts below. The Court of Appeal of Tanzania in the case of **Adelina Koku Anifa** (supra) went on to state that:-

*“ ... the court cannot justifiably close its eyes on such glaring illegality because it is his duty to ensure proper application of the laws by the subordinate courts and/or tribunals.”*

Based on the above authorities, and as the practice of the Court, it is forethought for this court to determine the issue of point of law first before embarking on the grounds for execution. The main issue for determination is *whether this court is clothed with jurisdiction to entertain this application at the pendency of the stay of execution and Notice of Appeal to the Court of Appeal of Tanzania.*

The Court of Appeal of Tanzania made in the case of **Serenity on the Lake Ltd v Dorcus Martin Nyanda**, Civil Revision No.1 of 2019



(unreported) in which the Court of Appeal was referring to the case of **Tanzania Electric Supply Company Limited v Dowans Holdings S.A (Costa Rica) and Dowans Tanzania Limited (T)**, Civil Application No.142 of 2012 it held that:-

*“Once a Notice of Appeal to the Court of Appeal has been lodged, then this court’s jurisdiction over the matter ceases.”*

Moreover, it is trite law that once a stay of execution is granted by the Court of Appeal then all proceedings before the High Court are put to hold. See the case of **Aero Helicopter (T) Ltd v F. N Jensen** (1990) TLR 142, the Court of Appeal held that:-

*“ However since this matter is before the Court of Appeal and the Applicant herein proves there is a notice of appeal to the court of appeal, this Honourable court remains functus officio as once notice of appeal has been lodged ceases the High Court, hence the High Court becomes functus officio.”*

See also the cases of **Arcado Ntagazwa v Buyogera Julius Bunyango** (1997) TLR 242 and **Awiniel Mtui and 3 others v Stanley Ephata Kimambo, (Attorney for Ephata Mathayo Kimambo)**, Civil Application No. 19 of 2014.

I fully subscribe to the submission of the learned counsel for the respondent that the applicant obtained an order for stay of execution prior to the determination of the Taxation Cause No. 35 of 2022 dated 18<sup>th</sup> February, 2022. The Taxation Cause was determined on 29<sup>th</sup> July, 2022 and the order of stay of execution was issued on 29<sup>th</sup> April, 2022. However, the same does not give this Court right to proceed with determining this application in instead the respondent can raise his concern at the Court of Appeal of Tanzania.

For the aforesaid reasons, I find that this court lacks jurisdiction to entertain this matter since there is a pending Notice of Appeal to the Court of Appeal of Tanzania and an order of stay of execution issued by the Court of Appeal of Tanzania.

In the upshot, I proceed to nullify the Taxation Cause No. 35 of 2022.  
No order as to costs.

Order accordingly.

DATED at Dar es Salaam this 12<sup>th</sup> October, 2022.



A.Z.MGEYEKWA

JUDGE

12.10.2022

Ruling delivered on 12<sup>th</sup> October, 2022 via video conferencing whereby Mr. Hassan Lasuli, counsel was holding for Mr. Samson Mbamba, counsel for the applicant and Mr. Mohamed Tibanyendera, counsel for the respondent.

