IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND REVIEW NO. 331 OF 2021

(Arising from the Ruling and Order of the High Court of United Republic of Tanzania (Land Division) at Dar es Salaam delivered by Hon. S.M. Maghimbi, J dated 03rd May, 2021 in Reference No. 07 of 2020).

SALMIN MBARAK SALIM t/a

EAST AFRICAN INVESTMENT ..... APPLICANT

VERSUS

RAS INVESTMENT ..... RESPONDENT

RULING

Date of Last Order: 14/12/2021
Date of Ruling: 18/01/2022

A. MSAFIRI, J

This is an application for Review of the decision of this Court in Reference No. 07 of 2020 by Hon. S.M. Maghimbi, J delivered on 03rd May, 2021. In the said Reference matter, the current applicant was also the applicant and has filed the said Application under the provisions of Order 7 (1) and (2) of the Advocates Remuneration Order, G.N. No. 264/2015. He was praying first for the court to go through the record of proceedings pertaining in the Bill of Costs No. 186 of 2019 and find that it was filed out of time. Second, the applicant was praying for the Court to reverse and set aside the decision of the Taxing Master in Bill of Costs No. 186 of 2019 and proceed to tax the Bill of costs in accordance with the law.

On the first prayer, the court's decision was that the Bill of Costs No. 186 of 2019 was filed within the time prescribed by the law.

On the second prayer, on which the applicant was seeking for revision of Taxing Master, the Court decision was that, the respondent was right to claim for his costs, since it was the awarded by the order of the Court.

Also on the second prayer, the applicant was seeking for the Court's order that the Taxing Master award of TZS 9,000,000/= as instructions fees was too exorbitant and at the high side. The court's decision on that was that, the amount of TZS. 9,000,000/- taxed by Taxing Master was a bit higher as instruction fees. Therefore, the court went on to tax off TZS 3,000,000/= and Order that the remaining amount, i.e. TZS 6,000,000/= to be awarded to the respondent as instruction fees.

The applicant aggrieved by that decision, has filed this application seeking for review on the following grounds;

1. *The Honourable Court erred apparently on face of record in awarding the respondent TZS 6,000,000/- as instruction fees without making any remarks/reasoning on the applicant's ground and argument that in the Bill of Costs No. 186 of 2019, the respondent did not produce EFD receipt, manual receipt, or any other receipt/document which the applicant submitted to be mandatory requirement and was the main point by the applicant in objecting the award of instruction fees.*

2. *The Honourable Court erred apparently on face of record in making decision that attendance and filing fees remain intact without assigning reasons of differing from the applicant's argument and submissions on the issue.*
3. *The Honourable Court having found that the instruction fees awarded to the Respondent was exorbitant and at high side not (sic) commensurate to the work done by the respondent and proceed to tax off TZS 3,000,000/= erred apparently on face of record in awarding the Respondent TZS 6,000,000/- as instruction fees without considering that one -sixth of the total claimed amount of TZS 27,105,000/= has been taxed off.*
4. *That, the High Court made an error on the face of record in failing to declare that the respondent is entitled to no costs after one-sixth of the total claimed amount of TZS 27,105,000/- in the bill of costs has been taxed off.*

He prayed for the orders that; an application for Review be allowed, the Respondent is entitled to no costs, Costs of this application, and any other order as the Court may deem fit.

On the hearing of the Application which was by way of written submissions, the applicant was represented by Mr. R.B Shirima, advocate. He started his submissions by citing Section 78 (1) (b) and Order XLII (b) and (3) of the Civil Procedure Code Cap 33 R.E. 2019; and the case of **Chandrakant Joshubahi Patel vs. Republic** (2004) TLR 2018 at page 224.

He prayed to argue first on grounds 3 and 4 jointly, that, the Hon. Court having found that the instruction fees awarded to the respondent was at high side, did not commensurate to the work done by the respondent and proceeded to tax off TZS 3,000,000/-. That the Court erred apparently on face of record in awarding the respondent TZS 6,000,000/- as instruction fees.

In Mr. Shirima's opinion, the court erred apparently in failing to declare that the respondent is entitled to no costs. He submitted further that, the provisions of Order 48 of the Advocates Remunerations Order, GN. No. 264 of 2015 are very clear that when more than one sixth of the total bill is disallowed, the party presenting the bill for taxation shall not be entitled to costs of the taxation.

Mr. Shirima argued that, the respondent presented the claim of TZS 27,105,000/= and its one sixth is TZS 4,517,500/= where the High Court awarded TZS 8,050,000/=. Therefore, TZS 19,055,000/= was taxed off/ disallowed. He said further that, the disallowed amount of TZS 19,055,000/= is more than one sixth of the total bill of costs of TZS 27,105,000/= presented by the respondent, so the court ought to have considered the provisions of Order 48 of GN. 264 of 2015 and declare that the respondent is entitled to no costs.

On the first ground of review, Mr. Shirima submitted that, it is a settled general principle that in Appeal, Revision or Reference, the Court will only look into the matters which were decided and not new matters which were not decided by either the trial Court or Taxing Officer.

He cited the case of **Chandrakant Joshubhai Patel vs. Republic (supra)** where it was held that;

> *"Where the judgment did not effectively deal with or determine an important issue in the case, it can be reviewed* ***on the ground of error apparent on the face of the record".***

He added that, in the Bill of Costs No. 186 of 2019, the respondent did not produce EFD receipt, manual receipt, or any other receipt/document which the applicant submitted to be mandatory requirement and was the main point by the applicant in objecting the award of instruction fees. He prayed for this court to determine this ground in this application of review as it was not determined by the Court during the application for reference.

On the second ground of review, Mr. Shirima submitted that, the law is clear that the Judge or Magistrate must give reasons for the decision. He cited the case of **Hamisi Rajabu Dibagula vs Republic** (2004) TLR 183.

He argued that, in the Application for Reference, the Hon. Judge held that the attendance and filing fees remain intact without assigning reasons of differing from the applicant's arguments and submissions on the issue.

He argued further that, the Hon. Judge also did not state any reason for agreeing with the Taxing Master's decision. That, the Hon. Judge failed to consider applicant's grounds of reference and arguments advanced, therefore, it is evident that the Taxing Master erred in applying scales

which are not provided for under GN. No. 264 of 2015. He invited this Court to tax off the awarded TZS 2,050,000/- as attendance fees.

The respondent was represented by Mr. William Mang'ena, advocate. Resisting the Application, he submitted that the present Application is dismissive for being an appeal in disguise. That it is a settled position of law that an Application for Review has restricted scope to the specified grounds of Review only and cannot be re-hearing of appeal in disguise.

In summing up the submissions by the counsel for the respondent, generally, it was focused on the argument that, it was not established by the applicant that there was an error apparent on the face of record which resulted to miscarriage of justice. To support this argument, Mr. Mang'ena referred this Court to the case of **Chandrakant Joshubhai Patel (supra),** where by the Court of Appeal observed on what amounts to a manifest error on face of record.

Mr. Mang'ena averred that the applicant has a right to appeal to the Court of Appeal instead of using Review as an appeal in disguise. That the applicant is inviting this Court to re-hear the Application for Reference whilst he has a chance to appeal to the Court of Appeal against the decision.

He argued further that, looking at the applicant's grounds for Review, it is crystal clear that he is just not satisfied with the Ruling arising from the Reference Application and not that there are errors on the face of record Acts.

warranting for Review. He prayed for this Application for Review to be dismissed with costs.

Having considered the submissions of both parties, it is a principle of law that this Court is empowered to receive and entertain an application for review of its own decision. The criteria to be considered are provided under Order XLII Rule 1 of the Civil Procedure Code (supra). The criteria are that the Court may review its decision in the following scenarios;

i) When there is a discovery of new and important matter or evidence which after exercising due diligence was not within the knowledge or could not be produced by the applicant at the time when the decree was passed or order made, or
ii) On account of some mistake or error apparent on the face of record, or for any other sufficient reason, desires or order made against him, may apply for a review of judgment of Court which passed the decree or made the order.

In the current application, the applicant has based his arguments on the second criteria, which bases on error or mistake on the face of record.

The issue for determination is whether there is a mistake or an error apparent on face of record which were committed by the Hon. Judge when determining the application for reference as alleged by the applicant in his grounds for Review and his submissions.

In his submissions, the Counsel for the applicant has maintained that there is an error apparent on the face of record committed by this court in Reference No. 7 of 2020 when it failed to observe the wording of Order 48 of the Advocates Remuneration Order GN. No. 264 of 2015. That the Court having found that the instruction fees awarded to the respondent was at high side it erred in awarding the respondent TZS 6,000,000/- as instruction fees and TZS 2,050,000/- as attendance fees making a total of TZS 8,050,000/- without considering the provisions of Order 48 of GN.No. 264 of 2015 that one – sixth of total claimed amount of TZS 27,105,000/- in the bill of costs has been taxed off. That, according to Order 48, the respondent is entitled to no costs.

I have read Order 48 which provides as follows;

"48. *When more than one-sixth of the total amount of a bill of costs exclusive of Court fees is disallowed, the party presenting the bill for taxation shall not be entitled to the costs of such taxation: Provided that at the discretion of the taxing officer any instruction fee claimed, may be disregarded in the computation of the amount taxed of that fee in the computation of the one sixth.*

I have also read the Ruling of this Court on Reference No. 07 of 2020 which is the subject of this Review.

At page 12 of the impugned Ruling, the Hon. Judge observed thus;

"*On the complexity of the issue, I cannot say it was so much of a burden to the respondent herein because the main claim was against the other defendants. Therefore the work done by the respondent's*

advocate cannot be said to be of much complexity as compared to the other defendants. ***It is for that reason that I find the amount of Tshs. 9,000,000/- taxed to be a bit on the high end and instead, the amount of Tshs. 3,000,000/- is taxed off and the remaining amount is Tshs. 6,000,000/- which shall be awarded as instruction fees. The other amounts on attendance and filing fees remain intact". (emphasis added).***

Was the omission of the referencing Judge to observe the provisions of Order 48 of the Advocates Remuneration Order, an apparent mistake on face of record fit for Review?

In determining this question, I am inclined to agree with the argument by the Counsel for the Respondent that this was a case fit for an appeal and I am of the view that there is no error apparent face of on record subject for the review and the decision of the Hon. Judge is appealable.

Going through the grounds of Review, I agree that they are grounds of appeal in disguise and entertaining them will be subject of re-hearing of Reference or hearing an appeal which is not allowed in Review.

The principle that a Review is not an appeal in disguise was observed by the Court of Appeal in the case of **Rizali Rajabu vs. the Republic,** Criminal Application No. 4 of 2011, CAT at Dodoma, (unreported),
It was observed thus;
"*We are alive to a well-known principle that, a review is by no means an appeal in disguise. To put it differently, in a review the Court should not*

sit on appeal against its own judgment in the same proceedings. We are also mindful of the fact that as a matter of public policy, litigation must come to an end ....."

I am of the strong view as observed earlier that, this present application is a fit case for appeal and not Review hence the above said principle is applicable here.

Furthermore, I find that, the decision of the Hon. Judge of not considering the provisions of Order 48 as put by the counsel for the application does not amount to an error or mistake on face of record.

In the case of **African Marble Company Limited (AMC) vs. Tanzania Saruji Corporation (TSC),** Civil Application No. 132 of 2005, CAT at Dar es Salaam (unreported), the Court of Appeal when determining the circumstances of review on the reason of there being an error on face of record it held that;

"With regard to an error apparent on the face of record, Mulla, Indian Civil Procedure Code, 14th Edition Pages 2335-36, states that;

An error apparent on the face of record must be such as can be seen by one who writes and reads, ***that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinion". (emphasis supplied).***

In the present matter, I again agree with the observations by the counsel for the respondent that the wording of Order 48 of the Order needs a long

drawn process of reasoning and is capable of more than one construction or opinions.

Going through the impugned Ruling, the Hon. Judge found that the amount of TZS 9,000,000 awarded by the Taxing Master was a bit on the higher end, and she taxed off the amount of TZS. 3,000,000/- whereas TZS. 6,000,000/-remained which was awarded as instruction fees.

As per the provisions of Order 48 of the Order, when more than one – sixth of the total amount of bill of costs is disallowed, the party presenting the bill of taxation shall not be entitled to the costs of such taxation.

Reading Order 48 in regard with the present application, one can interprete that the Hon. Judge taxed off only TZS 9,000,000/- which was instruction fees and not a total amount of bill of costs. Therefore, in that case, the Hon. Judge did not commit any error as TZS 9,000,000/- was not the total amount of a bill of costs.

Basing on the circumstances analysed therein above, I am satisfied that there is no apparent error on face of Ruling in Reference No. 07 of 2020 as the purported error is subject to more than one construction or opinion.

Furthermore, it is my finding that the grounds of Review and the submissions by the applicant are subject for an appeal and not review.

I hereby dismiss the Application with costs.

It is so ordered.

A. MSAFIRI,

JUDGE

18/01/2022