

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

REFERENCE NO. 22 OF 2022

(Arising from the decision in Taxation Cause No. 75 of 2020 by Hon A. Chugulu, Taxing Officer)

MOHAMED KANJIAPPLICANT

VERSUS

MAC GROUP LTD.....RESPONDENT

RULING

Date of last Order: 19/05/2023

Date of Ruling: 11/08/2023

K. D. MHINA, J.

This reference arises from the decision of the Deputy Registrar sitting as a Taxing Office in Taxation Cause No. 57 of 2022, wherein she taxed the bill at TZS 13,997,000/= against the applicant.

The reference was brought by way of chamber summons made under Order 7 (1) of the Advocates Remuneration Order, G.N No 264 of 2015, supported by the affidavit duly sworn by Mr. Meswin Joseph Masinga, counsel for the applicant.

The order being sought is for this to;

- i. Examine the legality or correctness of the ruling dated 2nd December 2022, where the Taxing master heard and determined on merit the Application for Bill of Cost No. 75 of 2020, which arose from Land Case No. 197 of 2006 while there is still pending Notice of Appeal to the Court of Appeal in Tanzania*
- ii. This court be pleased to nullify the Taxation Cause No.75 of 2020*
- iii. Any other relief this court may deem fit and just to grant.*
- iv. Cost of the application.*

The reference proceeded by way of written submissions. The applicant enjoyed the services of Mr. Meswin Joseph Masinga, learned Advocate, whereas the respondent enjoyed the services of Mr. Steven Cyprian Byabato, learned Advocate.

The critical point of law that puts the parties at issue is whether or not, once a notice of appeal is filed at the Court of Appeal, the Taxing Office may proceed with the determination of the bill of costs.

In support of the reference, Mr. Masinga submitted that after delivery of the judgement in Land Case No. 197 of 2006, the Applicant filed a Notice of Appeal to the Court of Appeal. On the other hand, the respondent filed a

Bill of Costs, and the Taxing Master proceeded to determine the same in disregarding the Notice of Appeal.

From the above facts, he argued that it is a position of law that, once notice of appeal has been filed in the Court of Appeal, the High Court ceases to proceed with the matter for want of jurisdiction. To bolster his argument, he cited the decision of the Court of Appeal of **Serenity on the Lake Ltd vs. Dorcus Martin Nyanda**, Civil Revision No. 1 of 2019 (Tanzlii), where at page 3 it quoted its previous decision of **Tanzania Electric Supply Company Limited vs. Dowans Holdings S.A. (Costa Rica) and Dowans Tanzania Limited**, Civil Application No. 142 of 2012 (unreported) where it was held that;

"It is settled in our jurisprudence, which is not disputed by the counsel for the applicant, that the lodging of notice of appeal in this court against an appealable decree or order of the High Court commences proceedings in the court. We are equally convinced that it has long been established in law that once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter."

He further submitted that a similar position was held in **Arcado Ntagazwa vs. Buyogera Julius Buyango** (1997) TLR 242.

Also, he cited the case of **Aero Helicopter (T) Ltd vs. F.N.Jensen** (1990) TLR 142, where the Court of Appeal held that ;

"However, since 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."

Mr. Masinga further submitted that once the notice is filed to the Court of Appeal, the High Court can only exercise jurisdiction in applications for leave to appeal, applications for certificate of points of law or applications for execution if a stay was not granted.

On this, he cited several decisions such as **Dominic Ishengoma vs. Managing Director Geita Gold Mine**, Civil Reference No. 11 of 2020, Tazlii (HC-Mwanza), in which at page 16 it quoted the decision of the Court of Appeal in **Matsushita Electric Co Ltd vs. Charles George t/a C.G Travers**, Civil Application No. 71 of 2001 (unreported), **Calist Aloyce Massawe & Another vs. Kijenge Saccos & 2 Others**, Civil Reference No

1 of 2022, Tanzlii (HC-Arusha), which quoted the case of **Norman-Mahboub (T/A Norman Al Mahboub General Trading Corporation vs. Milcafe Limited**, Commercial Case no. 41 of 2003 (unreported)

He concluded his submission by stating that since the applicant had filed the notice of appeal to the Court of Appeal, the Taxing Officer was ousted with the jurisdiction to determine the bill of costs. On this, he cited **Shaidu Adam Kibila (Administratrix of the estate of the late Adam Sadick Nshoro) and Another vs. Yusufu Sadiki Kibila**, Reference No. 14 of 2022, Tanzlii (HC-Land Division) where this Court held that;

“For aforesaid reasons, I find that this Court lacks jurisdiction to entertain this matter since there is pending notice of appeal to the Court of Appeal of Tanzania. In the upshot I proceed to nullify the Taxation Cause No. 35 of 2022”.

In response, Mr. Byabato first acknowledged the position of law that it is a general rule that once a notice of appeal is filed to the Court of Appeal, then the High Court ceases to proceed with the matter for want of jurisdiction and can only determine applications such as an application for leave to appeal, application for the certificate on points of law or application for

execution if no stay of execution granted as per the case of **Matsushita** (Supra)

But further, he submitted that the decisions of the courts in the cited cases by the applicant's counsel of **Serenity on the Lake Ltd, Tanzania Electric Supply Company Limited, Arcado Ntagazwa and Aero Helicopter (T) Ltd (Supra)** do not bar the decree-holder from filing and prosecuting the bill of costs because **one**; the decisions are distinguishable and not applicable in this matter because they provide for general position that once a notice is filed at the Court of Appeal but not the issue of a bill of costs. **Two**, as per item 4 of The Advocates Remuneration Order, GN. No. 263 /2015, the bill of cost is supposed to be filed within 60 days from the date of the order awarding the costs.

Mr. Byabato also submitted that a bill of costs is part of the execution process where a party awarded costs or decree enforces the order of the court; therefore, he argued that the High Court had jurisdiction to entertain the application for a bill of costs since there was no evidence that there was an application for stay of execution.

He also raised an issue that appealing against the whole judgment and decree of the High Court to the Court of Appeal does not mean the appellant also appeals against the costs awarded when the High Court exercises its discretionary powers. His reason was that to appeal against costs awarded, leave is required as per Section 5 (2) of the Appellate Jurisdiction Act (Cap 141 R: E 2019)

He narrated that while the counsel for the applicant cited the cases which provide that once the notice is lodged at the Court of Appeal, the High Court then cease to have jurisdiction over the matter, but in **KCB Tanzania Limited and KCB Bank Kenya Limited vs. Delina General Enterprise Limited**, Commercial Reference No. 24 of 2022, Tanzlii (HC-Commercial Division) and in **Rose Mkeku (administratrix of the estate of the late Simon Mkeku) vs. Parves Shabbirdin**, Misc, Land Application Case No. 89 of 2021, Tanzlii (HC-Mwanza) it was held that, the notice of appeal is not a bar to the determination of the taxation application.

Therefore, he submitted that there are conflicting decisions, and the law requires that when there are conflicting decisions of the same court, the court has to apply the doctrine of precedent and follow the more recent of its conflicting decisions. This is a position in **Arcopar (O.M) S.A vs.**

Harbert Marwa and Family Investment Co. Ltd and three others,

Civil Application No. 94 of 2013 (unreported), where it was held that;

"Following the most recent decision, in our view, makes a lot of legal common sense, because it makes the law predictable and certain".

From above, he urged this Court to follow the recent decision in **KCB Tanzania Limited and KCB BANK Kenya Limited (Supra)**, where it was held that;

"The decision in Matsushita Electric Co. Ltd does not bar a decree holder to file and prosecute a Bill of costs. The bill of costs are proceeding which by their nature are instituted after the judgement or ruling is pronounced. Failure to file bill of costs within 60 days renders it time barred. As stated above I do not find any miscarriage of justice to tax a bill of costs once filed, even when there is a pending appeal to the Court of Appeal."

In rejoinder, Mr. Masinga retained his stance that once the notice of appeal is filed in the court of Appeal, the High Court can only determine applications for leave to appeal, an application for certificate on points of law or an application for execution as per **Dominic Ishengoma (Supra)**.

Further, he submitted that the applicant intended to appeal against the whole decision and not against costs alone. Therefore, leave was not a requirement.

He also argued that the submission that the bill of costs filed as part of the execution was misleading, and the respondent applicant never cited any decision or law to substantiate his claim.

That was the end of the evaluation of the submissions by the parties, but before going to the merits and demerits of the reference, it is important to give a brief background of the matter, albeit what happened in the proceedings of the Taxation Cause No. 75 of 2020.

According to the records, the matter was filed on 13 July 2020. After being served with the bill, the applicant countered it by filing the notice of preliminary objection, which was canvassed on the ground that the Taxing officer did not have jurisdiction to determine the bill of costs in view of the notice of appeal that was filed on 5 June 2020 and served to the respondent herein on 9 June 2020, barred the DR to proceed with the Taxation Cause. The taxing officer, after hearing the parties, she overruled the preliminary objection and ordered the taxation be heard on merits. Later it was heard

on merits and the bill was taxed at the tune of TZS 13,997,000/= against the applicant.

Having narrated as above and revisit the cited cases and consider the submissions by the parties the issue that has to be resolved is whether or not the taxing master was right to proceed with taxation despite the pendency of the notice of appeal at the Court of Appeal.

In my opinion, the issue should not detain me long because it is trite that the law requires the bill of costs is supposed to be filed within 60 days from the date of the judgment and ruling otherwise the decree holder would be out of time. Therefore, first all the decree holder must file the bill within time. The question is whether after filing and when there is notice to appeal the hearing should be stayed or proceed.

In my opinion the decree holder is not barred to lodge bill of costs and the Taxing officer may proceed with the hearing of the bill even if there is pendency of an appeal or not of appeal and on this I joined hands with my learned brother, Kahyoza. J, while scrutinize the cited decision of **Matsushita Electric Co Ltd** in **Rose Mkeku (Supra)**, he held that there is no miscarriage of justice to tax the bill of cost once filed even when there

is a pending appeal and the reason is even if the bill is taxed still the decree holder is supposed to enforce it by filing execution proceedings.

Further, though execution and taxation (bill of costs) are two separate and distinct actions as per the Court of Appeal in **M/S Sopa Management Ltd vs. M/S Tanzania Revenue Authority**, Civil Appeal No 25 of 2010 (unreported) where it was held that;

".....Bill of Costs filed under the Advocates Act in the High Court is an application falling under item 21 of Part III of the Schedule to the Law of Limitation Act. Its shelf life cannot therefore be the same as an application for enforcement of a court's decision"

But the two action are interrelated because a taxation decision is not self-executed, it is executed by filling execution proceedings. In that respect filing and taxing the bill of costs cannot in anyway negate the pending appeal or notice of appeal.

Flowing from above, for the foregoing reasons, the applicant has failed to move this court to interfere with the decision of the Taxing Master.

Consequently, the reference is thus dismissed for lack of merits with costs.

It is so ordered



K. D. MHINA

JUDGE

11/08/2022