

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

REFERENCE NO. 27 OF 2023

(Arising from Taxation Cause No. 62 of 2023)

SWEETBERT MATHIAS KUTAGA (Duly appointed Attorney of
Aliraza Kassamali Rajani)**APPLICANT**

VERSUS

KISHAN RAVJI VARSAN.....**RESPONDENT**

RULING

16/10/2023 to 24/11/2023

E.B. LUVANDA, J

In this Reference, this Court is invited to reverse the ruling of the Taxing Officer, dated 14/08/2023, for reason that: One, the Taxing Officer had no jurisdiction to entertain the Respondent for account of pending notice of appeal filed on 17/02/2023 to challenge the decision of this Court inclusive of the costs awarded by this Court.

Two, the Respondent supported the Applicant in Land Case No. 117/2022 and filed notice of Non Contendence on 06/06/2022; Three, the Taxing Officer decided the taxation cause in total disregard of the legal principles guiding hearing of taxation cause.

In the counter affidavit, the Respondent stated that there is no law which bars the Decree Holder from filing bill of costs after completion of proceedings, adding that a mere filing of the notice of intention to appeal (sic, notice of appeal) to the Court of Appeal is not a bar to taxation; that the Taxing Officer discharged her obligation as provided for under the Advocates Remuneration Order of 2015.

Ms. Irene R. Mchau learned Counsel for Applicant submitted that there are two schools of thought, of this Court regarding the legal effects of filing a notice of appeal to the Court of Appeal vis – a – vis taxation proceedings. The first school they hold a view that once a notice of appeal is filed, the Taxing Master is not seized with jurisdiction to proceed with taxation, citing **Noman – Mahboub t/a Noman Al Mahbous General Trading Corporation vs. Milcefe**, Commercial Case No. 41/2003 HC Dar es Salaam (by Hon. Kimaro, J as she then was); **Matsushita Electric Co. (EA) Limited vs. Charels George t/a G.G Traders**, Civil Appeal No. 71/2011 (Hon. Kimaro, J (as she then was); Hon. Tiganga, J and Hon. Mwaseba, J followed suit in **Dominic Ishengoma vs. Managing Director Geita Gold Mining**, Reference No. 37/2019 Labour Division Mwanza and **Calist Aloyce Massawe & Another vs. Kijenge Sacos & Two Others**, Civil Reference No. 1/2022. The learned Counsel submitted that the second school of thought is diametrically opposite of the position held

by the first school of thought. She cited **Rose Mkeku (the Administratrix of the Late Simon Mkeku) vs. Pames Shabbirdin**, Misc. Land Application No. 89/2021, Hon. Kahyoza, J held the view among other that there is no law which bars hearing of the taxation proceedings even when notice of appeal is filed to challenge the merits of the appeal including award to costs. The learned Counsel argued that **Rose Mkeku** (supra) is not a good law and asked this Court to be impressed and adopt the first school of thought being the correct stance and logical.

On the second ground, the learned Counsel submitted that the award of Tshs 3,000,000/= as instruction fees is on the higher side because the Respondent did not dispute and filed a notice of non contenance in Misc. Land Application No. 237/2022 (emanated from Land Case No. 117/2022). She submitted that it shows vividly how the Respondent supported the prayers made by the Applicant as she knew if granted she could highly benefit from all reliefs sought in Land Case No. 117/2022 (sic, 117/2022), arguing the Applicant and Respondent were on the same page.

In reply, Mr. Thomas J. Massawe learned Counsel for Respondent maintained that the Court has jurisdiction to deliberate on taxation of the bill of costs for recovery of the costs incurred. He submitted that the first school of thought is

not right, argued this Court to consider the second school of thought in **Rose Mkeku** (supra) as a right one.

For ground number two, the learned Counsel submitted that the Applicant is mixing between the Land Case No. 117/2022 and Misc. Land Application No. 237/2022 of this Court. He submitted that in Land Case No. 237/2022 where costs was awarded, the written statement of defence was filed by the Respondent on 07/06/2022, arguing time was spent in studying pleadings by consultation and research before preparing the same. He defended the award Tshs 3,000,000/= to be very correct. He submitted that the Respondent has incurred costs regardless of the nature of the case. He submitted that the Respondent hired a lawyer to defend him in this Court regardless of other factors.

On my part, I find no merit on the first ground, without regard to the theory of umpteen time, that where there appear to be conflicting decision of this Court, the later or latest will prevail or apply and must be followed if the circumstances are the same. To my view **Rose Mkeku** (supra) is a good law. Indeed it distinguished **Matsushita Electric** (supra) where my Brother Tiganga, J and my Sister Hon. Mwaseba J module was derived from, for the first cluster of approach. In **Rose Mkeku** (supra) this Court speaking through Hon. Kahyoza, J propounded that,

"I am in total agreement Pervez's advocate submission that there is no law that an appeal to the Court of Appeal stays taxation of the bill of costs. Item 4 of the Advocates Remuneration Order, provide that bill of costs shall be filed within 60 days from the date of the order awarding costs. It states

"4. A decree holder may, within sixty days from the date of an order awarding costs, lodge an application for taxation by filing a bill of costs prepared in a manner provided for under Order 55"

*Once the bill of costs is filed it must be taxed unless the court resolves to await the outcome of the appeal. If the law maker wanted mandatorily to make an intention to appeal or an appeal to the Court of Appeal to stay the proceedings for taxation of costs it would have said so. I cannot fault the taxing officer for taxing the bill of costs despite the applicant's intention to appeal. I am alive of the decision of the Court of Appeal in **Matsushita Electric Co. Ltd V. Charles George t/a C.G. Travers**, Civil Appl. No. 71 of 2001 (unreported) and many others that:-*

"Once a Notice of Appeal is field under Rule 76 (now Rule 83 (1) of the Rules) then this Court is seized of the matter in exclusion of the

High Court except for applications specifically provided for, such as leave to appeal or provision of a certificate of law”

The decision in Matsushita Electric Co. Ltd does not bar a decree which by their nature are instituted after the judgment or the ruling is pronounced. Failure to file the bill of costs within 60 days renders it time barred. As stated above, I do not find any miscarriage of justice to tax the bill of costs once filed, even when there is a pending appeal to the Court of Appeal. I will add that after the bill of costs is taxed, the decree holder may go ahead and enforce the award unless the Court of Appeal stays the execution of the decree of this Court. Consequently, I dismiss Rose’s complaint that the taxing officer erred to tax the bill of costs while there was a pending appeal or intention to appeal”

Therefore, ground number one is without substance, it is dismissed.

Regarding ground number two. Essentially the learned Counsel for Respondent did not dispel a fact that his client did not contest to the Land Case No. 117/2022 subject matter of the impugned taxation, including a fact that the Respondent filed notice of non – contenance in Misc. Land Application No. 237/2022 which emanate from Land Case No. 117/2022.

Arguably, Land Case No. 117/2022 was disposed at the early stage by way of preliminary hearing. However, I am not in agreement with a proposition by the Taxing Officer, that the same it involved time, energy and research deployed on the part of the Respondent herein. This is because at page five last paragraph from the bottom of a ruling in Land Case No. 117/2022 it was made clear that Mr. Massawe who was representing the Fifth Defendant therein (Respondent herein) did not have anything to submit on the objection raised. Meaning there was no any work done on his part. To my view filing pleadings for admission to the claim including a notice of non - contenance, and having no submission to make on the preliminary objection cannot be said it involved any research, time or energy whatsoever.

Therefore it was wrong for the Taxing Officer to tax a sum of Tshs 3,000,000/= as instructions fees under a ground that more time, research and energy was involved. In fact it was in the opposite. To my view a sum of Tshs 1,000,000/= could suffices to meet the end of justice. My undertaking is grounded on a fact that, the Respondent did not dispel an argument that he was a potential beneficiary to the reliefs pleaded in Land Case No. 117/2022 in case could be granted.

I therefore disturb and vary the award of Tshs. 3,000,000/= as instructions fees to a less sum of Tshs. 1,000,000/=.

A reference is partly allowed. Each one to shoulder costs on her part.



E. B. LUVANDA
JUDGE
24/11/2023

Ruling delivered through virtual court attended by Ms. Regina Kiumba learned Counsel for the Applicant and Mr. Thomas Massawe learned Counsel for Respondent.



E. B. LUVANDA
JUDGE
24/11/2023