IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

TAXATION REFERENCE NO. 21 OF 2004

BETWEEN

GAUTAM JAYRAM CHAVDA..... APPLICANT
VERSUS
COVELL MATHEWS PARTNERSHIP..... RESPONDENT

(REFERENCE from the Ruling of the taxing Officer of the Court of Appeal of Tanzania at Dar es Salaam)

(Wambura, SDR-CA)

dated the 2nd day of December, 2004
in
Civil Appeal No. 106 of 2002

R U L I N G

MROSO, J.A.:

This is a reference to this Court from a ruling of a taxing officer, Ms. Wambura, in a taxation matter which was before her. The applicant before the Court through his advocates, Marando, Mnyele and Co., had presented to the taxing officer a bill of costs amounting to TShs. 20,040,500/= for taxation. That amount was taxed at TShs. 1,040,500/= while TShs. 19,000,000/= was taxed off. Aggrieved by that ruling, a reference was made to me as a single judge of the Court.

The facts of the case which were presented to the taxing officer as I understand them can be stated briefly as follows.

The applicant presented a winding up petition to the High Court. Before the petition could be heard on its merits the advocates for the respondent, Sheikh's Chambers of Advocates, raised a preliminary objection to the effect that the applicant lacked *locus standi.* Apparently the High Court upheld the preliminary objection. The applicant felt aggrieved and successfully appealed to this Court against the ruling. The Court held that the applicant had *locus standi*. It directed that the High Court should proceed with the hearing of the petition on merits from the stage reached just before the preliminary objection was raised. It ordered costs to the applicant. Consequent to that order, the applicant filed the disputed bill of costs for taxation. It is obvious that the bill of costs related only to the appeal against the High Court ruling on whether or not the applicant had *locus standi* in the petition for winding up.

Arguments and submission before the taxing officer were by way of written submissions. The taxing officer found that the amount of TShs. 20,000,000/= as instruction fees to argue the appeal to be "very much on the high side". She taxed off TShs. 19,000,000/=. Essentially, the applicant is challenging the decision to allow only TShs. 1,000,000/= as instruction fees.

On the hearing date for this reference Ms. Sheikh,

learned advocate for the respondent, appeared but was indisposed. She requested, and Mr. Mnyele, learned advocate for the applicant conceded, that they should be allowed to file written submissions in order to avoid an indefinite adjournment of the hearing. I granted them leave to file written submissions but, I fixed a date when both counsel would appear before me for elaboration on the written submissions and to answer any questions from the Court. Both counsel obliged and appeared before me on the subsequent date fixed for hearing.

The application for reference was by way of a letter to the Registrar of the Court and no provisions of the law were cited in the letter. Ms. Sheikh took issue about that approach. She submitted that there was no proper application for reference before me first, because the application was not by way of a notice of motion, thus contravening Rule 45 (1) which requires all applications to the Court which were not made orally in the course of hearing or by consent of the parties to be by motion. Second, the application was incompetent for failure to cite the enabling provision – Rule 119, on reference to a judge from a decision of a taxing officer.

Mr. Mnyele conceded that Rule 119 of the Court Rules was not cited but contended that the failure to cite the

relevant rule would not be fatal because a taxation reference could not be made on any other rule than rule 119. Therefore, there could not be any doubt that the Court was being moved under Rule 119.

I am prepared to accept that a reference properly made to this Court on taxation could only have been made under Rule 119 of the Court Rules, but the vexing question is whether it can be assumed that I was properly moved, considering the long established practice of the Court.

It was said by the East African Court of Appeal, Duffus, Ag. V.P, in the case of **Abdul Aziz Suleman v. Nyaki Farmers Cooperative Ltd. and Another** [1966] E.A. 409, originating in Kenya, that although the rules of the East African Court of Appeal did not specifically require that a particular order or rule under which an order is sought be stated in the notice of motion, yet that was the usual practice of the Court which should be followed.

The Court of Appeal of Tanzania has taken a more explicit position. In **National Bank of Commerce v. Sadrudin Meghji,** Civil Application No. 20 of 1997 (unreported) an application for revision was made to the Court under a wrong subsection of section 4 of the Appellate Jurisdiction Act, 1979. The Court rejected the application by

declaring it incompetent because the Court had not been properly moved. A year later, in the case of **Almas Iddie Mwinyi v. National Bank of Commerce and Another,** Civil Application No. 88 of 1998 (unreported), a preliminary objection was raised to the effect that the Court in that application had not been properly moved because no provision of the law was relied on or cited. The judge hearing the application, following **Meghji,** said:-

> If a wrong citation of the law renders an application incompetent, I have no flicker of doubt on my mind that non-citation of the law is worse and equally renders an application incompetent.

The same position was consistently followed in later decisions of the Court. Ready recent examples are **Citibank Tanzania Ltd. v. Tanzania Telecommunications Co. Ltd. and 4 Others,** Civil Application No. 64 of 2003 (unreported) and **M/S. Ilabula Industries Ltd. v. Tanzania Investment Bank and Another,** Civil Application No. 159 of 2004 (unreported). The case of **Attorney General v. Amos Shavu,** Civil Reference No. 2 of 2000, (unreported) which Mr. Mnyele made available to Court as one of the case authorities he had listed, shows in its first paragraph that the reference was

made under Rule 119 (1), (2) and (3) of the Court of Appeal Rules, 1979. The reference case underscores the need to cite the enabling legal provision for the Court to hear the reference. It appears, therefore, that however obvious that the applicant must have had in mind rule 119 of the Court Rules, but did not say so in the letter to the Registrar, it will not be assumed that the Court has been enabled to grant the order or prayers sought. The string of authorities on the need to cite the enabling legal provision requires me to declare that the reference is incompetent.

If it is assumed that I am wrong on that conclusion, let me consider the other ground of objection and then the merits.

Ms. Sheikh submitted that the application for reference did not conform with the requirements of Rule 45 (1) of the Court Rules – which reads as under:-

> 45. – (1) Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, all applications to the Court shall be by motion, which shall state the grounds of the application.

Admittedly, the reference was initiated by a letter dated

10th December, 2004 which the advocates for the applicant wrote to the Registrar of the Court. The letter *inter alia* said:-

> Our client has instructed us to make a taxation reference to a single judge of the Court of Appeal on the following grounds namely;
>
> 1. The honourable taxing officer erred in law in taking into consideration the fact that an appeal was on the ruling given on preliminary objection in lower court when determining the costs payable.
>
> 2. The honourable taxing master erred in law by failing to consider properly the principles guarding (sic) the award of costs, thus awarding less costs.
>
> 3. The honourable taxing officer, having said that the appeal was complex, erred in law by refusing

to consider the same as ground for awarding costs in the court of appeal and leaving the same to the taxing master of the High Court

4. The taxing officer erred in law in awarding TShs. 1,000,000/= only as instruction fee in the circumstances of this case.

Mr. Mnyele on the other hand submitted that he had followed the usual procedure for references to the Court. The practice, he said, has always been that a letter, not a notice of motion, is written to the Registrar of the Court requesting that a reference be made to a single judge of the Court. To Substantiate his argument he sent to Court a copy of a letter to the Registrar of the Court written by Law Associates, Advocates by which a reference was sought. The letter merely cited Civil Reference No. 4 of 2002 (from Civil Appeal No. 15 of 2002) between **Bank of Tanzania** as applicants and **Devram P. Valambhia** as respondents. Presumably, that reference was heard without objection and was decided even though no notice of motion had been filed.

I must confess that to my knowledge and experience in this Court, reference cases to the Court have been initiated by a mere letter to the Registrar of the Court and not by a

notice of motion. Specifically, in a reference on taxation the language in Rule 119 suggests that a notice of motion containing an application by an aggrieved party is not necessary. Sub-rule 1 of Rule 119 reads as follows:-

> 119. – (1) Any person who is dissatisfied with a decision of the Registrar in his capacity as a taxing officer may require any matter of law or principle to be referred to a Judge for his decision and the Judge shall determine the matter as the justice of the case may require. (My emphasis).

The words “may require” which I have emphasized above, with respect, mean to my mind that once a party to taxation proceedings feels aggrieved by the decision of a taxing officer and considers that a matter of law or principle needs to be referred to a Judge of the Court for his decision, he writes to the registrar requiring him, as part of his duty, to refer the matter to the Judge of the Court. Thus, there is no application as such by the aggrieved party to the Court. The connotation is that the aggrieved party has a right to have the Registrar effect the reference to a Judge, provided the grievance falls under any of the heads in sub-rules (1) (2) and (3) of Rule 119. I hold, therefore, that the reference

did not have to be by notice of motion as argued by Ms. Sheikh.

Again, assuming I was wrong in deciding that the reference was incompetent, let me consider if it has merit.

Mr. Mnyele argued that the learned taxing officer erred in law and he cited authorities on errerors in principle. For example, the case of **Thomas James Arthur vs. Nyeri Electricity Undertaking** [1969] EA 492 Gould, J.A. is quoted to have remarked correctly, in my view:-

> Where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the court will intervene only in exceptional circumstances.

Although Mr. Mnyele criticizes the Taxing Officer, I think she was right, in assessing costs, to consider that the appeal which was before the Court of Appeal was limited to the question whether the High Court was right when it upheld the preliminary objection that the applicant had no *locus standi* in the winding up petition. The merits of the petition

were not before the Court because the High Court had not adjudicated on them. Mr. Mnyele said he had taken a lot of time canvassing the *locus standi* issue before the Court but apparently, according to the Ruling of the taxing officer, the Court disposed of the appeal quite quickly. She said:-

> The appeal was merely against an objection which was dismissed at a very early stage.

The learned advocate for the applicant needed to do a lot more than he did to convince me that the amount of legal work he did to argue in the appeal the sole issue on *locus standi* justified a claim for TShs. 20,000,000/= as instruction fees.

As correctly submitted by Ms. Sheikh, there is nothing in the ruling of the Taxing Officer to suggest that she flouted in any way the principles to be observed in the taxation of costs. The context of the ruling shows that the taxing officer was not saying that the appeal to the Court was complex. Rather, she was saying that the case as such was complex and that after the case (before the High Court) was over its complexity will be considered by the “taxing master of the High Court”.

If my decision were to be on the merits of the reference I would have dismissed it and confirmed the award of T.Shs. 1,000,000/= as instruction fees for preparing and arguing the appeal before the Court. However, the reference is incompetent for the reason already given earlier in this ruling and is struck out. The respondent will have its costs.

DATED at DAR ES SALAAM this 13th day of October, 2005.

J.A. MROSO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.M. RUMANYIKA)
DEPUTY REGISTRAR