

**N THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

TAXATION REFERENCE NO. 15 OF 2023

(Arising from Taxation Cause No. 47 of 2023)

MAXCOM AFRICA PUBLIC LIMITED1ST APPLICANT
JUMA RAJABU FURAJI.....2ND APPLICANT
NASIBU VICTOR MAKASI.....3RD APPLICANT
AHMED SALUM LUSSASI.....4TH APPLICANT
HASHIM IBRAHIM LEMA.....5TH APPLICANT
BANDA BEACH PROPERTY
DEVELOPERS LIMITED.....6TH APPLICANT
LUBROSS HOLDINGS LIMITED.....7TH APPLICANT
J-LINK LIMITED.....8TH APPLICANT

VERSUS

STANBIC BANK TANZANIA LIMITED.....RESPONDENT

Date of last order: 17/10/2023

Date of Ruling: 30/11/2023

RULING

NANGELA, J.

The Applicant herein has, by way of a chamber application filed on 16th August 2023, moved this court seeking to challenge the decision of the Taxing Officer, Hon. Minde, DR, issued on 26th July 2023, in Taxation cause No. 47 of 2023. The Chamber

summons was supported by affidavit of one Selemani Almasi the Applicants' Advocate. The same was filed under Order 7 (1) and (2) of the Advocates Remuneration Order, GN No. 263 of 2015.

The Applicants are praying for the following orders:

1. That this Honourable Court be pleased to interfere and reverse the order of Taxing Master in Taxation Cause No. 47 of 2023 delivered on 26th July, 2023 on the grounds that;
 - i. That the Taxing officer awarded amount on instruction fee which ought not to be awarded and contrary to established principles under the law.
 - ii. That the Taxing officer determined the taxation cause despite being objection raised to stay it pending determination of the Appeal on Commercial Case No. 94 of 2021 after being notified that Notice of Appeal has been filed and ruling was not delivered.
2. Costs of this Application be provided for by the Respondent.

3. Any other and further orders as this court may be pleased to grant.

The Respondent contested the application by filing a counter affidavit sworn by Mohammed Zameen Nazarali, Respondent's advocate. While disposing of this application, Mr. Seleman Almas Advocate appeared for the Applicant while Mr. Mohammed Zameen Nazarali, learned Advocate, represented the Respondent. Both agreed to have this application disposed of by way of written submissions. I granted their prayer and issued a schedule of filing their respective written submissions. I am glad the parties adhered to the schedule and filed their respective submissions as directed by this court.

In his submission, Mr. Selemani, the Applicant's Advocate, adopted the content of the Affidavit filed in support of this application. He submitted, that, the Taxing Officer acted erroneously by proceeding to entertain the Taxation Cause No.47 of 2023 despite there being an objection to the effect that a Notice of Appeal to the Court of Appeal had been lodged and the bill of costs should have been stayed.

He argued that, as a generally accepted legal position, once a Notice of Appeal is lodged in the Court of Appeal of Tanzania against the decision of the lower court, the appellate proceedings are deemed to have started and, hence, all other proceedings at the lower court in respect of the matters ought to be put on hold. He placed reliance on the case of **Jubilate Massawe vs. Emmanuel Nnko** Civil Reference No.15 of 2022

(unreported) whereby this court (Hon. Tiganga, J;) affirmed that once a Notice of Appeal has been duly lodged to the Court of Appeal, the High Court ceases to have jurisdiction over the matter.

Several other court decisions were cited including the decision of the Court of Appeal in the case of **Serenity on the Lake Ltd vs. Dorcus Martin Nyanda**, Civil Revision No. 1 of 2019 (CAT) Mwanza, (unreported); **Tanzania Electric Supply Company Limited vs. Dowans Holdings S.A (Costa Rica) and Dowans Tanzania Limited (Tanzania)**, Civil Application No. 142 of 2012 (unreported) and the case of **Awinie Mtui and Three Others vs. Stanley Ephata Kimambo (Attorney for Ephata Mathayo Kimambo)**, Civil Application No. 19 of 2019 (unreported).

Mr. Selemani submitted despite there being such authorities and the objection or prayer he raised to have the taxation proceedings stayed, Taxing Officer proceeded to issue her ruling and never addressed the issue concerning the stay of taxation which issue was raised because of the existence of the Notice of Appeal filed in the Court of Appeal.

On his part, Mr. Selemani contended that, the Taxing Officer was a duty bound to hear and determine the point raised by the Applicant since it was couched as a point of law seeking to challenge the jurisdiction of the Taxing officer, or she had a legal obligation even to pronounce that whether notice of appeal lodged at the court of appeal is not a bar to proceed with determination of taxation cause or otherwise. He maintained

that, by failing to do so, there was a serious irregularity on the part of Taxing Officer warranting the intervention of this court.

Submitting on the second ground, Mr. Selemani argued that the second ground is like the first ground only that, after the objection was raised to stay the taxation due to there being a notice of appeal lodged in the Court of Appeal, the Taxing Officer was supposed to invite the parties to address that issue, but she never did that. He submitted that, doing so was necessary because that was an issue touching on the jurisdiction of the Taxing Officer. Mr. Seleman argued that there was, as such a serious and incurable procedural irregularity.

To strengthen his position reliance was placed on the case of **Said Mohmed Said vs. Muhusin Amiri and Another**, Civil Appeal No. 110 of 2020 wherein the Court of Appeal nullified a ruling of the lower court and due to the procedural irregularity committed by Taxing Officer.

Submitting on the last ground, it was Mr. Selemani's submission that, the Taxing Officer awarded amount of instruction fee which was contrary to the law and without any proof of it. He submitted that the Taxing Officer awarded the Respondent TZS 386,699,179/= as instruction fee being a 3% of the total amount claimed. In his submission, however, he conceded that the awarding of the instruction fee is a discretionary matter and court cannot interfere unless it was exercised injudicially.

Mr. Selemani submitted even so that, according to Order 46 of the GN. 264OF 2015, bills of costs are to be taxed on their

prescribe scale. He contended that, as far as the matter at hand is concerned, the Respondent claimed a colossal amount of TZS 386,699,178.5571 as instruction fee and failed to provide proof of the payment claimed or to show that costs were actually incurred by the Respondent which necessitate a reimbursement.

To support his submissions, reliance was placed on the case of **John Eliafye vs. Michael Lesani Kweka, Taxation Reference No. 12 of 2007**, Court of Appeal of Tanzania at Dar es salaam and in the case of **Tanzania Rent A Car Limited vs Peter Kimuhu**, Civil Reference No. 9 of 2020, Court of Appeal of Tanzania at Dar es salaam (unreported).

Although in the **Tanzania Rent A Car Limited** (supra) the Court of Appeal stated that no need for proof of receipt regarding payment of instruction fees as there is no law to that effect, he contended that if the Court could have been made aware of its earlier decision, the Court would have ruled otherwise. Mr. Seleman urged this court to tax off the claim of instruction fee on item 1 for failure to provide proof of payments as required by law. He concluded by urging this court to make a finding that this application has merit and proceed to reverse the decision of the taxing officer.

Submitting in opposition to this Reference Application and the prayers sought by the Applicants, Mr. Mohammed Zameen Nazarali commenced his submissions by adopt the Respondent's counter-affidavit filed in this court. Relying on paragraph 7 of the counter affidavit, he argued that the same evinces that the

Applicants never raised an objection that was served to the Respondent.

He contended that, by looking the court records that fact does not exist and hence the court cannot summon the parties to address the issue which does not exist or even not properly raised before it. According to Mr. Nazarali, the Applicant counsel's submission that there was an objection raised before the court, is a mere statement from the bar and it ought to be disregarded. In support of that position, he relied on the case of **Camel Concrete (T) Ltd vs. Tanzania National Roads Agency (TANROADS) & Another**, Misc. Civil Application No. 675 of 2020.

Mr. Nazarali submitted further that, even if the Applicants' counsel could be right on that, the filing of an appeal does not obstruct the determination of the bill of costs.

To cement his position, he cited the case of **Faith Medical Tanzania Clinics & 3 others vs. Maendeleo Bank Plc**, Commercial Reference No.2 of 2023. He also cited the cases of **Muhoni Kitege vs. Principal Secretary of Energy and Minerals & Another**, Misc. Land Application No. 123 of 2021, **KCB Bank Tanzania Limited & Another vs. Delina General Enterprises Limited**, Commercial Reference No. 24 of 2022, **Mohamed Kanji vs. Mac Group Ltd**, Reference No. 22 of 2022, and the case of **Rose Mkeku (the administratrix of the estate of the late Simon Mkeku) vs Parvez Shabbrdin**, Misc. Land Application No. 89 of 2021. He submitted that the cited cases herein are of the position that, the bill of cost is part

and parcel of decree because that is what makes the decree complete.

Submitting on the third ground, Mr. Nazarali agreed that the general law governing reference is that allowance of instruction fee is a matter peculiarly left in the discretion of the taxing officer and courts are reluctant to interfere unless such discretion has been exercised injudiciously. He cited the case of **Kitinda Kimaro vs. Anthony Ngoo**, Civil Appeal No. 576/02 of 2018 to substantiate his submission.

He submitted further that; the Applicant has not contested the applicability prescribed scales but only questions the proof of the awarded claimed of instruction fee. He disagreed with the Applicant's submission arguing that Order 46 of the Advocate Remuneration Order, does not set any condition and the word used in it is "shall", meaning that it compels all bill of costs to be charged on the prescribed scale.

He cited the cases of **Commissioner of Tanzania Revenue Authority vs. African Barrick Gold Plc**, Civil Appeal No. 11 of 2020, (unreported); **Mollel Electrical Contractors Limited vs. Mantrac Tanzania Limited**, Civil Reference No. 5 of 2020, (unreported) and the case of **NMB Bank Plc vs. Quality Motors Limited & 6 others**, Taxation cause No. 22 of 2021.

It was Mr. Nazarali's submission that, the law does not provide for any requirement of evidence of receipts and that, the Taxing Officer is vested with the discretion to determine bill of costs which discretion she must exercise accordance with the

law. He submitted that, as regards the case at hand, the Taxing Officer charged a 3% on instruction fee which is in line the scale and she cannot go below that.

Commenting on the Applicant's counsel's submission regarding the case of **Tanzania Rent A car** (supra), Mr. Nazarali submitted that, whether the decision was held per incuriam or not that remains the sole responsibility of the Court of Appeal to decide. Indeed, that is a correct position. He as well distinguished the case of **John Eliafaye Michael Lesani Kweka**, Taxation Cause Reference No. 12 of 2007, arguing that the case is distinct from the one at hand because the one at hand is about instruction fee while that of **John Eliafaye Lesani** (supra) was about fees for legal consultation and preparation of defense and, that, the Applicant therein failed to identify the advocate who provide him with such assistance.

He submitted further that, the decision in **John Eliafaye** originates from a bill of costs filed in the Court of Appeal, which is regulated by the Court of Appeal Rules, 2009 unlike the case at hand which is regulated by the Advocate Remuneration Order whereby this order provides for a statutory scale that govern the instruction fee to be charged.

Finally, Mr. Nazarali relied on the case of **Arusha Hardware Traders Ltd & 3 others vs. M/S Exim Bank Tanzania**, Misc. Commercial Application No. 2 of 2021, arguing that the issuance of receipt to evince payment of instruction fees is no longer an issue necessary. He urged this court to uphold the ruling of the Taxing Officer and dismiss the application.

Having gone through the rival submissions filed by the respective learned counsels for the parties herein, the issue is whether there is any merit in this reference application. In his submission, the counsel for the Applicant has urged this court to find that there is merit in the application. His position to that effect is premised on the grounds raised by the applicant he has fully supported in his submission.

As regards the first ground, the argument from the Applicant's counsel is that the Taxing Officer erred when she decided to proceed with the taxing of the bill of costs while the Applicant has raised an objection that there is a pending notice of appeal before the Court of Appeal and thus, the taxation proceedings be stayed first. On his part Mr. Nazarali argued that there has never been such an objection and the record will bear witness to that effect. He contended that, such a matter was raised in the submission and being a statement from the Bar, should be ignored. He cited and relied on the case of **Kitinda Kimaro vs. Anthony Ngoo**, Civil Appeal No. 576/02 of 2018 to substantiate his submission.

I think I should first consider this first ground. The issue to start with is whether there was any indication to the court that a notice of appeal had been lodged in the Court of Appeal, and, if so, whether the Taxing Officer could not have proceeded with the hearing and determination of the taxation cause filed in this court.

As I noted herein above, the argument made by the counsel for the Respondent was that there has never been a

notice of objection on a point of law from the Applicant. However, a point of law may be raised even without there being a formal filing of it. As I look at the record of the proceedings before the Taxing Officer, I do note that on the 5th of July 2023, the following was recorded by the court:

Coram: J.M. Minde, Taxing Officer.

For Applicant: Advocate Aida Jamal.

For Respondent: Advocate Seleman Almas.

Cc.Ms....

Ms. Aida:

"The matter comes for mention...we pray for extension of time to file rejoinder."

Advocate Seleman:

"We have no objection, but I want to notify this court that we have filed a Notice of Appeal with respect to (sic) the Commercial Case No.94 of 2021 subject to this Bill of Costs and we duly served the Respondent. We asked (sic) this Taxation Cause No. 47/23 be stayed pending hearing of the intended appeal."

Advocate Aida:

"Pursuant to the Order that this matter be argued by way of written submission, the argument was supposed to be raised via written submissions."

Oder:

-Rejoinder submission be filed by 10th July 2023.

-Mention with a view of fixing a ruling date 11/7/23 at 9.00.

"-The raised objection be dealt with in the ruling."

As it may be observed from what transpired in court on the 5th of July 2023, indeed the Taxing Officer was informed of the pendency of an appeal at the Court of Appeal and, that, she also noted that the notification was raised as an objection to the continued hearing and determination of the Taxation Cause No.47 of 2023. She even made an order to the effect that the matter will be dealt with in the ruling.

Unfortunately, however, the ruling with was handed down by the Taxing Officer on the 26th of July 2023 did not address that aspect. That was indeed an inadvertent mistake since, had the Taxing Officer reflected on the orders she made on the 05th of July 2023, she would have find it a point to address the concern or “objection” which the Applicant brought to her attention on that material date and have it addressed in her ruling.

In my view, that omission was fatal because, as rightly argued by Mr. Seleman, the objection or concern which he had raised before the Taxing Officer was meant to bring to her attention that her jurisdiction to continue with the matters before her should not be exercised for the moments until the appeal preferred by the Applicant is heard and determined by the court of appeal. In my view, the situation at hand is no different from what this court (Hon. Tiganga, J;) dealt with in the case of case of **Jubilate Massawe vs. Emmanuel Nnko** (supra).

In that case, the court affirmed the position that once a Notice of Appeal has been duly lodged to the Court of Appeal, the High Court ceases to have jurisdiction over the matter. He

did consider the exceptional legal position set out in the case of Matsushita Electric Co. Ltd vs. Charles George t/a G.G. Traders; Civil Appeal No. 71 of 2001 (CAT) (unreported), where it was stated that:

“Once a Notice of Appeal is under Rule 76 (now Rule 83(1) of Rules) then the 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 point of law, or execution where there is no order of stay of execution from this court.”

Noting, like what happened in the application at hand, that, the counsel for the Applicant had brought to the attention of the Taxing Officer that the matter should be stayed pending determination of the intended appeal pending before the Court of Appeal of Tanzania, the court made a finding that the Taxing Officer erred as she ought to have stayed the proceedings waiting for the outcomes of the pending appeal. The court proceeded to quash the decision of the Taxing Officer and order that the record be remitted to the Taxing Officer for her to stay the matter pending determination of the Appeal by the Court of Appeal or till when the Notice is withdrawn or deemed to be withdrawn from the Court.

Looked at from the lenses of what was submitted herein by the Applicant’s counsel, I find that, a similar approach is warranted here. There being proof that the Applicant’s counsel

did bring to the attention of the Taxing Officer the legal questions regarding the need to stay the taxation proceedings, such an issue ought to have been addressed by the Taxing Officer and decide thereon. Not doing it was procedurally fatal leave aside the outcome of not staying the matter.

Where a point of law or one which has a similar character and more so when it questions the propriety of a court's exercise of its powers over a matter before it, the same must be addressed first. In the circumstances of this matter, therefore, this court finds that the first ground raised and argued by Mr. Seleman has merit in it and, by itself it can potentially dispose of this reference application without any need to look at the rest of the grounds.

In the upshot of the above, this court proceeds to grant the application and settle for the following orders:

1. That, the ruling by the Taxing Officer, dated 26th July 2023 is hereby quashed and set aside.
2. The record of the Taxation Cause No.47/23 and the Bill is hereby remitted to the Taxing Officer for her to cause it to be stayed pending the hearing and determination of the preferred appeal before the Court of Appeal of Tanzania or until when the notice of appeal will be withdrawn or deemed to be withdrawn from the Court.

3. In the circumstances of this matter, I
make no orders as to costs.

It is so ordered.

**DATED AT DAR-ES-SALAAM ON THIS 30TH DAY OF
NOVEMBER 2023**



DEO JOHN NANGELA
JUDGE