

TANZANIA / JUDGMENT

Maombi Madogo

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
DAR ES SALAAM MISC. COMMERCIAL APPLICATION NO. 110 OF 2023 (Originating from
Taxation Cause No. 43 of 2022) Between MR. ERIC JOHN MMARI.....
APPLICANT And M/S HERKIN BUILDERS LIMITED..... RESPONDENT

RULING

Date of Last Order: 19/02/2024 Date of Ruling: 30/04/2024 GONZI, J. In the Chamber summons which was brought under section 14(1) of the Law of Limitation Act, Cap 89 of the Laws of Tanzania; Section 95 of the Civil Procedure Code, Cap 33 of the Laws of Tanzania and section 2(1), (2) and

(3) of the Judicature and Application of Laws Act, Cap 358 of the Laws of Tanzania; the Applicant prayed for Orders that:

- (i) The Court may be pleased to extend time within which to apply for an order to set aside the dismissal of Bill of Costs Number 43 of 2022; 1 (ii) That the Court be pleased to make an order restoring into record/ register Bill of Costs No. 43/2022; (iii) Any other relief that the Court may deem fit to grant in the circumstances. The application is supported by an affidavit of Mr. Elvaison Erasmo Maro, Learned Advocate for the applicant. It is stated that on 18th February 2022, the High Court delivered its Judgment in Commercial Case No. 138/2019 wherein it ordered, inter alia, that the Respondent should pay costs of the suit to the applicant. Pursuant to the Court Order, on 19th day of April 2022, the Applicant filed in Court a Bill of Costs which was registered as Bill of Costs No.43/2022, so as to recover a sum of Tshs.66,547,664.98 from the Respondent Company. On the other hand the Respondent on 4th day of March 2022 filed a Notice of Appeal to the Court of Appeal against the decision of the High Court. The applicant stated further that up to 4th day of July 2022, the Applicant had not yet been served with any Summons or Notice of Hearing of the Bill of Costs No. 43/2022 and that due to uncertainty as to the position of the law as to whether a Bill of costs application could proceed parallel with the notice of appeal to the Court of Appeal, the Applicant's lawyers made some follow-ups in Court where they were notified that there was another case registered in court as Bill of Costs No.43/ 2022 but involving TIB Development Bank and Picolo Beach hotel Limited & Pascal Rutala. The applicant wrote a letter to the Hon. Deputy Registrar on 18th April 2023 followed by a reminder letter dated 30th May 2023

inquiring on the status of the applicant's Bill of Costs. The efforts led to the applicant's counsel meeting with the Hon. Deputy Registrar who advised the applicant's counsel that the file had been traced and that they would be responded to in writing. On 30th June 2022, the applicant's counsel Gwakisa Sambo when attending a matter in Court was served with a reply letter dated 22nd June 2023 enclosed with proceedings of the applicant's Bill of Costs No.43/2022 and which showed that the Applicant's Bill of Costs No.43/2022 had been struck out because of non-attendance by both parties on 4th July 2022 when it was called for mention. The applicant concluded in his affidavit by stating that neither the applicant nor the Respondent ever entered appearance in the Applicant's Bill of Costs No.43/2022 in four different dates as they were never notified of the ongoing court processes. The applicant attached to his affidavit copies of the Judgment of the High Court in Commercial Case No. 138/2019 dated 18th February 2022 as annexure A. He also attached as annexure B the Applicant's Bill of Costs No.43/2022 claiming for Tshs. 66,547,664.98. Annexure C to the affidavit is the Respondent's notice of appeal to the Court of Appeal. A Ruling in Bill of Costs No.43/2022 between TIB Development Bank versus Picolo Beach Limited and Pascal Rutala is annexed as Annexure D, while annexures E-1 and E2 are the two letters by the Applicant's lawyers to the Hon. Deputy Registrar of this Court when following up the status of the applicant's Bill of Costs. Annexure F to the affidavit is a copy of the Reply letter from the Court dated 22nd June 2023 while Annexures G -1 and G-2 are copies of the Proceedings and Drawn Order in the applicant's Bill of Costs No.43/2022. Through the counter affidavit of learned advocate Omari Msemu, the Respondent resisted the application and challenged the factual allegations contained in the affidavit. The respondent stated in the counter affidavit that the Applicant had a duty to follow-up in court the progress of his Bill of Costs No.43/2022 so as to be updated on the status of his case. He stated that the Bill of Costs was called before the Hon. Deputy Registrar more than 4 times without the Applicant being present. He stated that the letter dated 18th April 2023 to the deputy registrar inquiring the status of the bill of costs was authored long after the Applicant's Bill of Costs had been struck out. The Respondent stated that the Applicant has himself to blame for not following up his Bill of Costs for almost 1 year. The Respondent concluded by stating that actually the Applicant's Bill of Costs was struck out by the Taxing Officer. It was not dismissed as stated by the Applicant. On 19th February 2024, the court ordered the hearing of the application to proceed by way of written submissions whereby a schedule was given to both parties to file their respective written submissions in Court. Learned Advocate Elvaison Maro, represented the applicant while the Respondent was represented by Mr. Omari Msemu learned advocate. In his submissions in support of the application, the Applicant argued that the application is made under section 14(1) of the Law of Limitation Act* Cap 89, RE 2019; section 95 of the Civil Procedure Code Cap 33, RE 2019; section 2(1)(2) and (3) of the Judicature and application of Laws Act, Cap 358. He argued that the applicant is seeking for an extension of time to set aside the order striking out the bill of costs and for restoration of the Bill of Costs Number 43/2022 which was struck out by the Hon. Taxing Officer on 4th July

2022. He argued that the Advocates Remuneration Order GN.263/2015 has no provision for the remedy of setting aside the order of striking out or for restoration of the Bill of Costs and that is why he preferred the application under section 95 of the CPC and section 2(1), (2) and (3) of Judicature and Application of Laws Act. He relied on the case of Benjamin Mwakyala versus Geoffrey Ndalenda, Land Reference No. 6/2020 decided by the High Court of Tanzania at Mbeya where the Court on reference proceedings against the decision of the Taxing Officer held that the Advocates Remuneration Order has no provision on how an order of dismissal of the Bill of Costs for want of prosecution can be challenged, but that, by borrowing leaf from the Civil Procedure Code, the applicant can apply for restoration of the dismissed Bill of Costs. The counsel, further, relied on the cases of Salum Suiiman Ally versus Diamond Trust Bank Tanzania Limited, Reference No.7/2021 also decided by the High Court and the case of Aero Helicopter (T) Limited versus J. F. Jansen, (1990) TLR 142 for the argument that where there is no applicable law, the inherent powers of the court can be invoked. The Applicant's counsel also relied on the case of R versus Maryam Abdul Razak Abdul Wadud (2010) to substantiate his argument. The Applicant's counsel submitted that through the affidavit of the applicant's counsel, an account for every day of the delay has been made. He argued that the delay was caused by the Court as the applicant was not notified by the Court of the dates the case was called hence he was not aware even of the existence of the order striking out of the Applicant's Bill of Costs until 30th June 2023 when the Applicant's lawyers were served with copies of proceedings by the court. He submitted that at the time the Bill of Costs was filed there was uncertainty as to whether or not the Deputy Registrar had mandate to proceed with the hearing of the Bill of Costs after a notice of appeal had been lodged in the court of appeal. The learned counsel cited a number of decisions of the High Court showing that uncertainty including the case of Serenity on the Lake Ltd versus Dorcas Marlin Nyanda (2019). He submitted that after the Bill of Costs No.43/2022 was filed, the court issued five different orders directing that the applicant and the Respondent be served to appear but that in each such time there was no actual service effected to either of them. He argued that this was contrary to Order 6(1) of the Advocates Remuneration Order which requires parties to taxation proceedings be served. The applicant's counsel submitted that the striking out order was made by the Taxing Officer without the applicant being served with summons to appear. He argued that this affected the applicant's natural justice right to be heard before an adverse action or decision is taken against such party as stated in the case of Abbas Sherally and another versus Abdul Fazalboy, Civil Application No.33 of 2002. The applicant therefore prayed for extension of time for setting aside the order striking out the bill of costs and for restoration of the Bill of Costs so as to be taxed accordingly. Mr. Msemo, Learned Advocate for the Respondent did not file reply submissions on time as ordered by the court. The Court had directed that the Respondent to file the reply submissions by 19th March 2024. However, the reply submissions by the Respondent were filed on 21st March 2024 without prior seeking and obtaining extension of time from the court. The Applicant, in his rejoinder submissions, raised this issue of the respondent's reply submissions being filed outside the prescribed time. The law is very clear. In the case of CRDB BANK PLC VERSUS HERI MICROFINANCE

LIMITED & CASSIANO LUCAS KAEGELE, Civil Appeal No. 20 of 2020, delivered the Court of Appeal of Tanzania at Sumbawanga held at page 15 of the Ruling insisting on the need for court orders to be respected thus: "It is well settled that orders of the Court are to be respected and implemented. In Karori Chogoro v. Waitihache Menengo, Civil Appeal No. 164 of 2018 (unreported) the Court held: "Court orders should be respected and complied with..." The same sentiment was expressed in Olam Tanzania Limited v. Halawa Kwilabya, Civil Appeal No. 17 of 1999 (Unreported), where we stated: " ... Court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will grind to a halt or it will be so chaotic that everyone will decide to do only that which is convenient to them... Courts of law should always control proceedings, to allow such an act is to create a bad precedent and in turn invite chaos." As it stands, no reply submissions exist in court as they were filed out of time and therefore there was nothing for the applicant to make rejoinder submissions in respect of. I looked at the order of the Taxing Officer dated 4th July 2022 in respect of which extension of time is sought to set it aside and have the Bill of Costs restored. The Order reads: "Since when the Decree holder filed this taxation cause he did not appear with no reason advanced for his absence. As by now the decree holder has no interest to proceed with this taxation cause, I strike it out with leave to refile if the Decree holder will be interested later".⁹ This is the order that has prompted the Applicant to bring the present application. I decided to consider the present application on the ground of illegality first for illegality is a good cause for extension of time even where the applicant is unable to account for every single day of the delay (see for example the case of Charles Richard Kombe versus Kinondoni Municipal Council, Civil Reference No. 13/2019, decided by the Court of Appeal of Tanzania). It appears that the Taxing Officer passed an order which is alien to the Advocates Remuneration Order 2015. Did the Taxing Officer have jurisdiction to pass the order striking out the Bill of Costs with leave to refile due to non-appearance of parties to the Taxation Cause? I entertain serious doubts. As if that is not enough, the applicant on the other hand, clearly being perplexed by the order of the taxing officer not mandated by the Advocates Remuneration Order 2015, resorted to inherent jurisdiction of the court to bring the present application. He did so even though the Advocates Remuneration Order, GN No.263 of 2015 is handy and adequate under Order 8(1). As the Order of the Taxing Officer striking out the Applicant's Bill of Costs allowed the applicant to refile his struck-out application for Bill of Costs whenever he would be interested to do so, if the order was valid, the¹⁰ Applicant ordinarily would be expected to utilize the avenue given in the order of the Taxing Officer by refiling the applicant's struck out Bill of costs. In alternative, if the Applicant considered the order invalid or that he was anyhow aggrieved by it, he was expected to timely bring an application for reference before a Judge of the High Court challenging the order of the Taxing Officer in terms of Order 7(1) of the Advocates Remuneration Order,

2015. If late to file the reference, the Applicant should have applied for an extension of time to file the reference in terms of Order 8(1) thereof. I say so on the understanding that the only remedy to challenge the decision, and in my view, any decision, of the Taxing Officer under the Advocates Remuneration Order 2015, is reference. The drafters of the law intended it that way and no specific grounds are prescribed under Order 7(1) for one to initiate reference. This means that the drafters of the law intended a "one cap fits all" approach to remedying all grievances against all the decisions of the Taxing Officer as such, to be remedied by way of reference to High Court Judge. In terms of Order 3 of the Advocates Remuneration Order, a Taxing Officer presides over "taxation proceedings" which mean an application for taxation of a bill of costs or an application to enforce, set aside, or determine any question as to validity or effect of a remuneration agreement. Therefore, any decision of the Taxing Officer emanating from or in relation to "taxation proceedings" is subject to reference under Order 7(1) of the Remuneration Order. The Order provides that: 7.-(1) Any party aggrieved by a decision of the Taxing officer, may file reference to a judge of the High Court.
- (2) A reference under order (1), shall be instituted by way of chamber summons supported by an affidavit and be filed within 21 days of from the date of the decision. The remedies of setting aside or restoration of dismissed or struck-out cases are not in the purview of the Advocates' Remuneration Order 2015. Throughout the entire Advocates Remuneration Order, 2015 there is no provision that adopts the general procedures or remedies applicable under the Civil Procedure Code Cap 33 of the Laws of Tanzania. The Advocates Remuneration Order, 2015 was promulgated much later after the Civil Procedure Code, Cap 33 of the Laws of Tanzania. If the drafters of the Advocates Remuneration Order, 2015 had intended to use the Civil Procedure Code as a fall-back option, they could have categorically stated so in the Remuneration Order. In fact the only place in the Advocates Remuneration Order, 2015 where the Civil Procedure Code is mentioned is under Order 67 thereof which regulates costs in summary suit and it reads: Not with standing anything to the contrary in this Order, when a judge of the High Court enters judgment under Order XXXV of the Civil Procedure Code, he may, on application in writing, and without the filing or taxation of any bill of costs, or of notice to any party, sign a certificate of the costs of the suit. Again, the Advocates Act makes no mention of the application of Civil Procedure Code except under section 24A which adopt the appeal procedure under the Civil Procedure Code for use by the Advocates Committee. I reproduce the section hereunder: 24A-(1) Any advocate aggrieved by any decision or order of the Committee under this Act may, within thirty days of such decision or order, appeal to the High Court against such decision or order.
- (2) On any appeal under this section the High Court may affirm, reverse or vary the decision or order appealed against, and may in addition thereto exercise all the powers conferred upon the High Court by the Civil Procedure Code, in relation to an appeal from civil suits. 13 The above provision shows that when enacting the Advocates Act and the Advocates Remuneration Order, the drafters thereof had in mind the Civil Procedure Code but deliberately decided not to make it applicable to taxation of costs proceedings before the

Taxing Officer. Neither the Advocates Act nor the Advocates Remuneration Order expressly or by implications adopt the provisions of the Civil Procedure Code in respect of taxation of costs proceedings or the remedial processes under Civil procedure Code in respect thereof. There can be no dispute that the power to dismiss cases for default or non-appearance of parties or their advocates as well as the incidental powers to set aside such orders and restore the cases is the prerogative of the Court with reference to express provisions in the Code of Civil Procedure. Those powers could only be exercised by the Taxing Officer, in taxation proceedings if they were expressly conferred by the statutory Rules. There can be no implied jurisdiction. As Nyarangi, JA., stated in the "MV Lilian S" [1989] 1 KLR case: - "Jurisdiction is everything, without it, a Court has no power to make one more step. Where the Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of 14 the matter before it the moment it holds the opinion that it is without jurisdiction." I understand that the Civil Procedure Code contains ample provisions on inherent powers of the Court and specific provisions on dismissal or striking out of suits and applications as well as for setting aside the dismissal orders and restoration of the suits or applications. However, the fact is the provisions of the Civil Procedure Code do not apply in taxation proceedings before the Taxing Officer. In fact, the Advocates Remuneration Order, 2015 was not made under the Civil Procedure Code. The Advocates Remuneration Order, 2015 is made under Section 49(3) of the Advocates Act, Cap 341 of the Laws of Tanzania. In authorizing the making of the Advocates Remuneration Order, the Advocates Act prescribed as follows under section 52 thereof: "As long as any order made under section 49 is in operation the taxation of bills of costs of advocates shall, subject to the subsequent provisions of this Part with respect to agreements as to remuneration, be regulated by that order." The above provision underscores the truth that the promulgation of the Advocates Remuneration Order 2015, was to streamline the law in respect 15 of taxation of costs in line with the dictates of the Advocates Act so that the proceedings in respect of taxation of costs and advocates remuneration agreements could be governed by the two laws only. Since the Advocates Act and the Advocates Remuneration Order, 2015 made under section 49 of the Advocates Act are in existence, there is no justification to borrow powers and processes obtaining under the Civil Procedure Code. The Civil Procedure Code is a general law and does not apply where there is a specific law on the subject. Section 5 of the Civil Procedure Code is categorical in that: "In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special form of procedure prescribed by or under any other law for the time being in force/" On the basis of section 5 of the Civil procedure Code, I find that the specific law in taxation of costs adequately provides under Orders 7 and 8 the procedure for challenging all the decisions by the Taxing Officer in taxation proceedings, i therefore entertain serious doubts and I would not accept the invitation to resort to general law in respect of the taxation of costs issues while there is specific law on the same. 16 Under Order 7(1) of the Advocates remuneration Order, all grievances arising out of taxation of costs and determination of advocates remuneration agreements proceedings, regardless of the grounds thereof, can be channeled to the Judge

of the High Court for remedy. As no specific grounds for reference are specified, the provisions of the Advocates Remuneration Order also do not confine the type or scope of reliefs or remedies which a Judge of the High Court may grant upon a successful application for reference. Setting aside the dismissal order or an order striking out the Bill of Costs as well as passing an order for restoration of the case before the Taxing Officer, are among the remedies which the High Court Judge can make upon a successful reference. Looking at the scheme of the Advocates Remuneration Order, GN.263/2015, the powers and functions of the Taxing Officer with respect to Bill of costs and remuneration agreements have been stipulated under Orders 3,4, and 5 thereof hence these provisions were inserted before and thus precede those of Order 7(1) during the law-making process. This means that when Order 7(1) of the Advocates remuneration Order was being made to provide remedies to an aggrieved party, the drafters of the law already had in mind what grievances might arise from the exercise of the powers under Orders 3,4 and 6 and they found it convenient to fit them all under one umbrella remedy of reference to High Court Judge. It was intended that the remedy of reference stipulated under Order 7(1) should cover and cater for all grievances which might arise from the exercise of the powers of the Taxing Officers which powers are stipulated in the preceding provisions of Orders 3, 4 and 6. These powers and functions include powers to determine taxation of costs proceedings arising from bills of costs and to enforce, set aside, or determine any question as to the validity or effect of a remuneration agreement. Order 3 read together with Order 5 of the Advocates Remuneration Order, 2015 provide that the Taxing Officer has jurisdiction to set aside a remuneration agreement or any agreement regulating fees or costs of the case during the taxation proceedings before the Taxing Officer. It does not entail the Taxing Officer setting aside her own decisions resulting from the Taxation proceedings. In fact, the Taxing Officer has no jurisdiction to set aside his own decision once made. The Advocates Act provides under section 64(2) that: "The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the High Court, be final as to the amount of the costs covered thereby, and the High Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs." The above provision is a vivid proof that when it comes to setting aside decisions of the taxing Officer including a certificate of taxation issued by the taxing officer, it is the High Court Judge on reference who can set it aside. In Kenya a similar provision is found under Section 51 (2) of the Advocates Act Cap 16 of the Laws of Kenya and is phrased identically that: "The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs." Section 51 (2) of the Advocates Act Cap 16 of the Laws of Kenya was interpreted in the case of *Ndungu Githuka and Company Advocates v Geoffrey Moriaso Ole Mailoy* 2019] eKLR, the court held that: "section 51(2) of the Advocates Act is to the effect that only the "court" can alter the amount in the certificate or enter judgment upon it and that the Taxing Officer's mandate ends after

taxation and signing of the certificate of costs." In order to buttress my position that the exercise of powers of the Taxing Officer and the mechanism for an aggrieved party to challenge the exercise of such powers, are circumscribed by the Advocates Remuneration Order and the Advocates Act only, I borrowed leaf from the legal position on a similar law obtaining in Kenya. In her online article entitled "Re-Thinking the Jurisdiction of the Taxing Officer in Kenya's Judiciary", the learned author Priscah Wamucii Nyotah acknowledges the limited powers of Taxing Officers under the Advocates Remuneration Order and in her article she calls for amendment of the Advocates Act and the Advocates Remuneration Order to broaden the jurisdiction of the Taxing Officers so that they can enjoy wide powers in taxation proceedings similar to those under the Civil Procedure Code. She observes at page 9 of her article that: "In many quarters particularly in practice, there has been no distinction between the office of a Deputy Registrar on the one hand and that of a taxing officer on the other hand. The two offices have been taken to as one. The confusion arises due to application of Civil Procedure Act and Rules to taxation proceedings taken under the Advocates Act. Courts have clarified that the two offices are separate and distinct and that Civil Procedure Act and Rules do not apply to proceedings under the Advocates Act. the courts were unanimous that the jurisdiction of a Deputy Registrar under the Advocates (Remuneration) Order is distinct and separate from jurisdiction of the Deputy Registrar under the Civil Procedure Act and therefore the procedure adopted in one cannot be substituted in the other... an applicant cannot invoke appeal procedures provided for under the Civil Procedure Rules for purposes of challenging decisions of taxing officers. The position expressed by the courts in these and many other, decisions, is the law as regards this issue. Consequently, the Civil Procedure Act and Civil Procedure Rules cannot be invoked to cover for any scenario that has not been provided for under the Advocates Act and the ARO in taxation proceedings before a taxing officer." I had the privilege to read the decisions of the Court of Appeal and the High Court of Kenya cited by the above-named author as well as other related 21 decisions. For example, in *Daphne Musyoki Mwose Kitelev O N Makau & Mulei Advocates & 2 others* [2022] eKLR it was held by the High Court of Kenya that: "It must be remembered that section 3 of the Civil Procedure provides that: 'In the absence of a specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.' What I understand by that provision is that where there is a specific provision or special jurisdiction prescribed by any other law, the provisions of the Civil Procedure Act do not apply. Paragraph 2 of the Advocates Remuneration Order provides that: 'This Order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in subordinate courts (other than Muslim courts), in a Tribunal established under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and in a Tribunal established under the Rent Restriction Act.' Since paragraph 22 aforesaid is specific that in matters remuneration between

advocate by his client and the taxation of the advocate's costs and taxation between party and party the A d v o c a t e s R e m u n e r a t i o n O r d e r \s the one that applies, it is my finding that there is no room for invocation of the provisions of the C i v i l P r o c e d u r e A c t Section 27 of the said Act, in my view, deals with determination of who to pay costs, from where the costs are to be paid and the extent of payment of such costs but not the actual taxation. What I understand by the extent is that the Court may, for example, cap the amount payable but, unless the court itself determines the quantum of costs, in the exercise of its discretion, a process which strictly speaking is not taxation, taxation must be in accordance with the provisions of the A d v o c a t e s R e m u n e r a t i o n O r d e r" In the case of Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited, Civil Appeal No. 154 of 2014 reported in (2017) eKLR, the Court of Appeal of Kenya fG.B.M. KARIUKI. SICHALE & KANTAI. JJAl sitting at Nakuru held: • The jurisdiction is conferred on the Taxing Officer by law. It is derived from the Advocates Act and 23 the Advocates Remuneration Order. The Taxing Officer sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services rendered. The jurisdiction cannot arise by implication nor can parties by consent confer it. And inherent jurisdiction cannot be invoked where adequate statutory provision exists. It was held in Taparn vs Roitei [1968] EA 618 that inherent jurisdiction should not be invoked where there is specific statutory provision to hieet the case. The Advocates Act and the Advocates Remuneration Order confer on the Taxing Officer jurisdiction to tax bills of costs between advocates and their clients (as well as between party and party in litigation) so as to determine legal fees for legal services rendered. The order of the Taxing Officer in Bill of Costs No.43/2022 dated 4th July 2022 in respect of which extension of time is sought so as to challenge it, "Since when the Decree holder filed this taxation cause he did not appear with no reason advanced for his absence. As by now the decree holder has no interest to proceed with this taxation cause, I strike it out with leave to refile if the Decree holder will be interested later". As for the order of the Taxing Officer striking out the Bill of Costs for non- appearance of the parties, I can say that it seems that no such powers exist under the Advocates Remuneration Order, 2015. To the contrary, under Order 68 of the Advocates Remuneration Order, 2015 the Taxing Officer is mandated to proceed with taxation of the Bill of Costs exparte in the event of non-appearance of one or both parties to the taxation cause. Order 68 is complemented by Section 62(4) of the Advocates Act that: If after due notice of any taxation, either party thereto fails to attend, the taxing officer may proceed with the taxation ex parte. Obviously, the law regulating taxation of costs has given taxation proceedings a unique feature different from the ordinary proceedings. Taxation of costs is to assess the amount of costs payable. At the taxation hearing, the Taxing Officer will consider a document known as a Bill of Costs submitted by the receiving party (usually the winning party) to decide the 25 quantum (amount) of costs payable by the paying party (usually the losing party). The Taxing Officer will determine each disputed item in the Bill of Costs after hearing objections, if any, and submissions from each party, if they are present. In their absence after being duly notified, the taxing Officer may still conduct taxation in the absence of one party or both parties and finally come up with the certificate of taxation. The Taxing Officer has the Bill of Costs presented by the receiving party, (applicant), the case file

in which the order of costs was made, to refer to; and the Fee Scales in the Advocates Remuneration Order that prescribe the chargeable fees for different items of advocates' fees and costs. For all legal and practical purposes, taxation proceedings can proceed in the absence of both parties so long as they were duly notified. The powers of dismissal or striking out of the Bill of Costs for non-appearance of parties are non-existent in the scheme of the Advocates Remuneration Order and that is why the Advocates Remuneration Order, 2015 does not contain any specific remedies in respect thereof akin to those obtaining under the Civil Procedure Code. There was no need to put a specific remedy for setting aside or restoration of the Bill of Costs by the taxing Officer, in respect of an eventuality like dismissal or striking out, that legally could not be triggered off under the scheme of the Advocates Remuneration Order. At any rate, by not restricting the grounds under which reference could be preferred under Order 7(1), the Advocates Remuneration Order, 2015 left the gate wide enough to absorb all grounds of challenge to any decision of the Taxing Officer as a Taxing Officer. If my finding are right, then the Applicant in this case is entitled to an extension of time to file reference seeking the High Court Judge to set aside the order of the Taxing Officer that struck out his Bill of Costs with leave to refile. That is what he prayed for in prayer (i) of his chamber summons. Illegality is a good ground for extension of time even where the applicant cannot account for every single day of the delay (see for example *Bulyanhulu Gold Mine Ltd & Others vs Petrolube T. Ltd & Another* (Civil Application 364 of 2017) [2020] TZCA 1844 (11 November 2020)). In his affidavit the Applicant raised the ground of illegality directed at the order of the Taxing Officer striking out his Bill of costs. He pegged the illegality to his not being served with any summons or notice of the date of hearing of his Bill of costs. I find elements susceptible to illegality in respect of the jurisdiction of the Taxing Officer in passing an order of striking out the Bill of Costs with leave to refile it that is not provided for in the Advocates Remuneration Order, 2015. The present application, as it can be seen in the Chamber summons, was brought under section 14(1) of the Law of Limitation Act, Cap 89 of the Laws of Tanzania; Section 95 of the Civil Procedure Code, Cap 33 of the Laws of Tanzania and section 2(1),(2) and (3) of the Judicature and Application of Laws Act, Cap 358 of the Laws of Tanzania. The prayers sought are that (i) The Court may be pleased to extend time within which to apply for an order to set aside the dismissal of Bill of Costs Number 43 of 2022. (ii) That the Court be pleased to make an order restoring into record/ register Bill of Costs No. 43/2022. The Applicant has resorted to the provisions of the Civil Procedure Code which provide the remedies of setting aside the *exparte* orders, dismissal orders and restoration orders. He has cited some authorities to support his opted course. In my view, the Applicant has misconceived some of the authorities. In particular, in my understanding, the decision of this court (as per Hon. Maruma, J.) in *Godrej Consumer Products Limited versus HB Worldwide Limited* (2022) was made in an application for reference where the aggrieved party successfully challenged the decision of the Taxing Officer who had struck out his Taxation case for want of prosecution. The Court in entertaining the reference application exercised its powers under Order 7 (i) of the Advocates Remuneration Order and set aside the order of the Taxing Officer consequently restored the struck-out case. The Court did not hold that the Taxing Officer could set aside

his own decision. As regards the Applicant preferring the present application outside the ambit of the enabling provisions of Order 8 (1) of the Advocates Remuneration Order, 2015, that is wrong. However, it is trite that wrong citation of the enabling provisions of the law or even non citation thereof is not fatal to the proceedings so far as the Court is vested with the requisite jurisdiction in law to entertain the application. (See for example *Saggu versus Road Master (U) Ltd* 2002 1EA 258). I am satisfied that this court under Order 8(1) of the Advocates Remuneration Order, 2015 is clothed with jurisdiction to determine an application for extension of time to file an application for reference against the decision of the Taxing Officer. Even though the specific provision was not cited, that was not a fatal irregularity. It is on that basis that I continued to deal with the application at hand. I am of the view that the Order of the Taxing officer dated 4th July 2024 striking out the Bill of Costs with leave to refile, appears to have been tainted with illegality as the Taxing Officer exercised jurisdiction which it appears 29 that she did not have under the provisions of the Advocates Remuneration Order, 2015. Illegality is a good ground for extension of time even where a party does not account for every single day of delay. This court has power to extend time under Order 8 of the Advocates Remuneration Order for the applicant to file an application for reference. Prayer number (i) in the Chamber Summons has a bearing to powers of this court in the envisaged reference as setting aside of the order of the Taxing Officer is among the powers which can be properly exercised by the High Court Judge when and if reference is successfully made. The order for restoration sought under item (ii) of the Chamber summons is prematurely made as it presupposes that an extension of time has already been granted and reference application has been filed. That is not the case yet. This is an application for extension of time to file reference. In the event time is extended to file reference, that is when the Applicant may bring the substantive prayers against the order of the Taxing Officer. As I wind up, in my considered opinion, it feels like the Taxing Officer and the Applicant herein have both gone astray. The Order of the Taxing Officer seems to be lacking in jurisdiction for being alien to the Advocates 30 Remuneration Order and the present application has perpetuated that error by pegging the application outside the purview of the Advocates Remuneration Order, 2015. I reiterate that there is a distinction between the office of a Deputy Registrar on the one hand and that of a Taxing Officer on the other hand though they are presided over by the same person. The two offices are separate and distinct and Civil Procedure Code does not apply to proceedings under the Advocates Act and the Advocates Remuneration Order. The jurisdiction of Hon. Deputy Registrar as a Taxing Officer under the Advocates Remuneration Order is distinct and separate from jurisdiction of the Hon. Deputy Registrar as such under the Civil Procedure Code and therefore the procedure adopted in one cannot be substituted in the other. An applicant seeking to challenge the decision of a Taxing Officer, as a Taxing Officer, cannot invoke remedial procedures provided for under the Civil Procedure Code which could perfectly be used for purposes of challenging decisions of Hon. Deputy Registrar as a Deputy Registrar. The Civil Procedure Code cannot be invoked to cover for any scenario that has not been provided for under the Advocates Act and the Advocates Remuneration Order in taxation proceedings before a Taxing Officer. That possibility is excluded by the Advocates Act, the

Advocates Remuneration Order read together with section 5 of the Civil Procedure Code. In the end, I find merit in the application at hand on the ground of likelihood of illegality and therefore I allow the application. I grant the Applicant 14 days from the date of delivery of this Ruling to file an application for reference against the order of the Taxing Officer striking out the Applicant's Bill of Costs Number 43 of 2022 with leave to refile. I make no order as to costs. Ruling is delivered in court this 30th day of April 2024 in the presence of Elvaison Maro learned advocate for the applicant and Omari Msemo learned advocate for the Respondent. 32

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