

TANZANIA / JUDGMENT

# ms wulkan engineering ltd vs ms lodhia plastic industries ltd 2023 tzhc 23536 13 december 2023

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13 December 2023

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA ARUSHA DISTRICT REGISTRY AT ARUSHA CIVIL REFERENCE NO. 6 OF 2023 (Originating from Taxation Cause No. 7 of 2023, Original Civil Case No. 53 of 2021 Resident Magistrate's Court of Arusha at Arusha) M/S WULKAN ENGINEERING LIMITED..... APPLICANT VERSUS M/S LODHIA PLASTIC INDUSTRIES LTD ..... RESPONDENT

## RULING

3rd November & 13th December, 2023 TIGANGA, J. On 18th July 2023, the Taxing Master, Hon. F.Y. Mbelwa, SRM struck out Taxation Cause No. 7 of 2023 for want of prosecutions. Aggrieved by the decision, the applicant preferred this reference made under Order 7

- (1) and (2) of the Advocates Remuneration Order, 2015 (Advocates Remuneration Order) by way of chamber summons supported by affidavit of Lengai Nelson Merinyo, applicants' advocate. In his affidavit, My. Lengai deponed that, the Taxing Master had no power to strike out taxation causes for want of prosecution because he had acted successfully for the applicant in prosecuting Civil Case No. 53 of 2021. Objecting to the application Mr. Elvaision Maro for the respondent, filed a counter affidavit contending that this application is misconceived as the taxing master did not make any decision entitled for reference. He also filed the following preliminary objection; That, the application is incompetent for lack of jurisdiction to determine the same. During the hearing of the objection, the applicant was represented by Mr. Lengai Merinyo whereas the respondent was represented by Mr. Abdallah Issa Alii, all learned advocates. Supporting the objection, Mr. Alii submitted that, this application is made under Order 7 (1) of the Advocates Remuneration Order which provides that; "Any party aggrieved by a decision of the Taxation Officer may file reference to a judge of the High Court." According to him, the import of the above provision is to the effect that, there is no decision made by the Taxing Master which requires this Court to determine by way of reference. He argued that, since the taxation cause was struck out for want of prosecution, the ideal way forward was for the applicant to seek orders of restoration in the same court so that he could be heard on merit instead of challenging the

order that struck out the taxation cause by way of reference to this Court. 2 He referred the Court to the definition of a decision as made by the Black's Law Dictionary to mean; "... a determination arrived after consideration of facts and in legal context, law ;" He argued that there were no findings made by the taxing master before he struck out the taxation cause, thus there is nothing for this Court to determine. To cement his argument, he cited the case of Benjamin Mwakyala vs. Geoffrey A. Ndalanda, Land Reference No. 6 of 2020, HCTZ at Mbeya where this Court borrowed the leaf from the provision of the Civil Procedure Code, Cap 33 R.E. 2019 (CPC) and held that, in the case like the one at hand, the way forward was for the applicant to apply for restoration of the struck out application. He finally urged this Court to strike this application with cost for being incompetent and incapable of being entertained by this Court. In reply, Mr. Merinyo submitted that the jurisdiction of this Court in entertaining this matter is governed by section 77 and Order XLI of the CPC which is mutatis mutandis with the Indian Civil Procedure Code and Order 7 (1) and (2) of the Advocates Remuneration Order. According to him, the leading principle in Mulla on the Code of Civil Procedure Volume II, 15th Edition, 1999 is that in the cause of execution of a decree, there is a reasonable doubt the court may intervene. Thus, this Court has 3 jurisdiction to entertain this application because the move taken by the taxing master to struck the taxation cause raises reasonable doubt which requires attendance by way of reference. He prayed that this Court departs from its earlier decision on the cases of Benjamin Mwakyala (supra) and maintained that under order 68 of the Advocates Remuneration Order, the taxing master ought to have continued with the determination of the taxation cause even in the absence of both parties as held in the case of Salum Suleiman Ally vs. Diamond Trust Bank Tanzania Ltd, Reference No. 7 of 2021 HCTZ at Dsm. To sum up, learned counsel submitted that, this Court has jurisdiction to entertain this application and prayed that the objection raised be overruled with cost. In his brief rejoinder, Mr. Alii reiterated his earlier submission and maintained that the issue at hand is whether or not this application is competent before this Court not whether the taxing master erred in striking out the taxation cause. He was of the view that this Court cannot entertain this application for want of jurisdiction. After I have gone through the parties' submissions the only issue for determination is whether the application before me is competent and in compliance with the law. Respondent's counsel has challenged the competence of this application claiming that the taxing master's order to strike the taxation cause called for restoration and not reference, thus, this court lacks jurisdiction. The term 'Jurisdiction' is defined in Halsbury's Laws of England, Vol. 10, para. 314 to mean: the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a format way for its decision. The limits of this authority are imposed by the statute; charter or commission under which the court is constituted, and may be extended or restrained by similar means. A limitation may be either as to the kind and nature of the claim or as to the area which jurisdiction (emphasis supplied). The Court of Appeal in the case of Fanuel Mantiri Ng'unda V Herman Mantiri Ng'unda & 20 Others, (CAT) Civil Appeal No. 8 of 1995 (unreported) held thus; "The question of jurisdiction for any court is basic\ it goes to the very root of the authority of the court to adjudicate upon cases of different

nature ... The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case.

"[Emphasis mine.] 5 Having the above principles in mind, it has to be noted that, this application was brought under Order 7 (1) and (2) of the Advocates Remuneration Order which read; "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." With these provisions, it is crystal clear that any person aggrieved by the decision of the taxing officer has to file a reference to this Court. The argument raised by the respondent is whether striking out of the taxation cause amounts to a decision worth to be entertained by way of reference. Unfortunately, the same law has not provided for an alternative way forward in case the matter is struck out for the non-appearance of the parties. The respondent's counsel has cited the case of Benjamin Mwakyala (supra) which borrowed a leaf from the CPC that the way forward was the restoration of the struck-out case. I however, do not share the same view as my fellow learned Judge because the law is very clear that, as long as the taxing officer has given a decision which in a way aggrieves either party or both parties to the case, the only way to channel those grievances is by way of reference and not otherwise. Striking out of the 6 application for non-appearance of both parties was a decision reached by the taxing officer after he set the date for the hearing and none of the parties appeared. Whether or not his decision was correct is subject to this application but as far as jurisdiction goes, I am of the firm opinion that this Court is vested with jurisdiction to determine this application. Instead of the above, the objection raised is overruled with cost, I find this application competent and filed in compliance with the law as a result, this Court has jurisdiction to determine the same. It is so ordered. DATED and delivered at ARUSHA this 13th day of December 2023 JUDGE 7

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Prepared on 14 October 2026 · Esheria