

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DARE ES SALAAM

COMMERCIAL REFERENCE NO.07OF 2023

(Originating from CommercialTaxation No 21 of 2021)

FIROZ HAIDERALI JESSA APPLICANT

SALIM HAIDERALI JESSA.....2ND APPLICANT

NASIRI HAIDARALI JESSA.....3RD APPLICANT

VERSUS

DIAMOND TRUST BANK (KENYA) CO. LTD..... RESPONDENT

RULING

Date of Last Order: 12.12.2023

Date of ruling: 09.02.2024

AGATHO, J.:

This ruling serves a dual purpose, first to determine the preliminary objection raised by the respondent and to determine Commercial reference No 07 of 2023. This ruling was triggered by the preliminary objections on point of Law taken by the respondent against the competence of Commercial refence No 07 of 2023.The respondent upon being served with the application, filed a counter affidavit, and simultaneously raised a preliminary objection on point of law to effect that: the present application is *resjudicata*.

Before analyzing the rival submissions of the parties on the Preliminary Objection it is worth sketching the background of this application albeit briefly. It is on record that, sometimes in 2021 the

applicant herein filed taxation Cause No 21 of 2021 which on 1st July, 2021, which was dismissed for want of prosecution. Irked by that decision, the applicant filed Misc. Commercial Application No 96 of 2021 requesting for setting aside a dismissal order and restoration of the Taxation cause No 21 Of 2021 the same was dismissed by the Taxing Master for want of merit. Adamantly, the applicant filed Reference No 1 of 2022 challenging dismissal order of Misc. Commercial Application No. 96 of 2021 which was struck out for being time barred. Afterwards, and still enthusiastic to pursue the reference, the applicant filed Misc. Commercial Application No 155 of 2022 seeking for an extension of time to lodge a reference to High Court against the Taxing Master's dismissal order in Taxation Cause No 21 of 2021. The said application was granted. Subsequently, the Applicant filed a fresh application, Misc Commercial Reference No 7 of 2023 challenging dismissal order of taxing officer in Taxation Cause No 21 of 2022. It is against the above background the respondent upon being served with chamber summons and supportive affidavit, filed a counter affidavit and simultaneously raised preliminary objection from which this ruling has arisen.

It was by consensus that the POs and the reference application be disposed by way of written submissions. The Court drew the submissions schedule and the parties complied with it. When the matter called on for hearing the Applicants were under legal representation of Mr. Erick Denga, learned Advocate, and the Respondent had legal services of Laurent Leonard, learned counsel.

It is also on record that on 12/12/2023 the parties appeared before the court following the order that they address the court on the competence of the application at hand given the fact that there was

reference Application No. 1 of 2022 which was struck out for being time barred. The learned counsel representing the parties appeared on that day and made their respective submissions reflected herein below.

Having depicted the background of the reference application, it is ideal to turn to the point of preliminary objection in relation to what has been submitted by the parties learned advocate.

Submitting in support of the preliminary objection, the learned advocate for respondent had it that, the instant application is the second attempt by applicant seeking to set aside the order of the taxing officer in respect of Taxation Cause No 21 of 2022. Expounding his submission Mr. Leonard told the court that, the first attempt was Commercial reference No 1 of 2022 which was struck out for being time barred. According to Mr. Leonard the instant reference is the second attempt. He reasoned that, the provision of section 9 of the Civil procedure Code (R: E of 2019) bars the court from trying similar matters which has been conclusively determined. According to Mr. Leonard reference No 1 of 2022 was determined to its finality as such applicants are precluded from instituting fresh reference. He added that the applicants in reference No 7 of 2023 are in pursuit of similar reliefs they sought in the previous reference knowingly full well that this court has no jurisdiction on both grounds of functus officio and limitation. To cement his argument, he placed his reliance on the case of **Sabuni Detergents Limited and another V. Haroon Daudi Abdulla and Two others, Commercial Case No 46 of 2006**. And the case of **Felician Credo Simwela V. Quamara Massod Battezy and another DC civil appeal No 10 of 2020 High Court at**

Sumbawanga. In which the court pointed out the factors to be considered when the issue of res judicata is raised. One, identity of the matter in issue two, identity of parties' three, same title, four, concurrent jurisdiction and five, final decision.

It was further submission of the applicant's learned advocate that, all the conditions depicted on the above cases has been met as such the instant Commercial reference No 7 of 2023 is res judicata to reference No 1 of 2022 which was struck out for being time barred. Mr. Leonard informed the court that, it is trite law that struck out of the matter because it is time barred, the consequence is dismissal as depicted under Section 3 of the Law of Limitation Act and the same amount to conclusive determination of the suit to its finality. Further reliance was placed on the case of **MM Worldwide Trading Company Limited & 2 Others V. National Bank of Commerce Civil Appeal No 258 of 2017**. In which the court held that "the order striking out the suit for being time barred amount to conclusive determination of that suit by the trial court. Basing on the above cited cases, Mr. Laurent Leonard submitted that, all the required conditions have been met. In his view this is suit/reference is res judicata to commercial reference No 1 of 2022.

Submitting against the preliminary objection the learned counsel for applicants, Mr. Denga strongly submitted that, Commercial Reference No 07 of 2023 is not res judicata to reference No 1 of 2022. The learned counsel for applicant stated that the applicants filed Taxation cause No 21 of 2021 which was dismissed on 1st July 2021 and following the dismissal, they filed Misc. Commercial Application No

96 of 2021 requesting the court to set aside the dismissal order in Taxation Cause No 21 of 2021 which the same was dismissed for want of merits. Aggrieved with Taxing officer's decision, the applicants filed reference No 1 of 2022 challenging the dismissal order of Misc. Commercial application No 96 of 2021 which was struck out for being time barred. According to Mr. Denga the instant reference is not res judicata because in reference No 1 of 2022 the Applicants were seeking to challenge the decision of deputy registrar refusing to set aside the dismissal order of Misc. Commercial Application No 96 of 2022 while in the instant application the applicants are seeking to challenge Taxing officer decision on Taxation Cause No 21 of 2021.

It was further submission of the learned counsel for applicants that for the principle of res judicata to stand the five conditions stipulated under section 9 of the Civil Procedure Code must Co-exist. To cement his argument the learned counsel cited the case of **Peniel Lotta v Gabriel Tanaki & 2others Civil Appeal No 61 of [2003] TLR** in which the court of appeal and in their interpretation of Section 9 agreed that five ingredients must co-exist for res-judicata to stand. Which are: the matter must be directly and substantially in issue in subsequent suit and must have been directly and substantially in issue in the former suit; the former suit must have been between the same parties or privies claiming under them, parties must have litigated under the same title; the court which decided the former suit must have the same jurisdiction and the matter must have been heard and finally decided in the former suit.

Extending his submission, the learned counsel for applicants concluded that the first condition and fifth condition were missing in commercial reference No 1 of 2022 because there are no similarities of subject matter between commercial reference No 07 of 2023 and commercial reference No 1 of 2022. It was more of the applicants' submission that Commercial reference No 1 of 2022 was not determined to its finality following the striking out. It was further submission of Mr. Ndenga that the cases cited of **Sabuni detergent limited (supra) and MM Worldwide Trading company (supra)** supports applicants' instance. On the above reasons he invited this court to find that this point is devoid of merits and dismiss it.

In rejoinder Mr. Leonard briefly pointed that the arguments by Mr. Denga are misleading and reiterated his earlier submission and prayer. This marked the end of hearing of the preliminary objection.

Having analysed the submissions for and against the preliminary objection it is ideal to turn to the points of preliminary objection in relation to what has been submitted by the parties' learned advocates. I have carefully examined the rivalry submissions and noticed that the centre of dispute is whether the instant application is barred by res judicata to the reference No. 1 of 2022. The learned counsel for respondent submitted that Commercial Reference No 7 of 2023 and Commercial Reference No 1 of 2022 the subject matter is directly and substantially the same in both references. Whilst the applicants protested that, the instant reference is not res judicata to Reference No 1 of 2022 because the subject matter is not direct and substantially the same and the former reference was not determined to finality.

Following touring the rival submissions by the parties and the wording depicted under Section 9 of the CPC it is my considered view that, the case of **Peniel Lotta v Gabriel** (supra) have eloquently illustrated when the matter can be said to be res judicata as such it will assist in determining whether Reference No 07 of 20203 is barred by res judicata. In the light of Section 9 of the CPC as interpreted in the case cited above. I am convinced that the two reference are basically different. I am saying so on the following reasons, first and foremost the applicantsin reference No 1 of 2022 was challenging the taxing master's refusal to set aside dismissal order in Misc. Commercial application No 96 of 2021 to restore Taxation Cause No 21 of 2021 whilein Commercial reference No 07 of 2023 the applicants are challenging the Taxing officer dismissal order of Taxation cause No 21 of 2021.

Basically, from such background it is conspicuous that the cause of action in reference No 1 of 2022 was germinated from Misc. Commercial Application No 96 of 2021 in which the key issue was whether the Taxing Master was right or wrong to refuse to set aside dismissal order while the cause of action in Reference No 07 of 2023 originates from Taxation cause No 21 of 2021 in which the key issue is whether the Taxing Master was right or wrong to dismiss the Taxation Cause No 21 of 2021. I am aware that the doctrine of res judicata applies, not only to the specific claims made in first case but also to claims that could have been made during the same case.

However, it is worth noting that the substantiality and directness of the suit or application is not to be determined on the basis of the

remedies sought in either suit or application but on the subject matter or key issues in both cases as such the argument that applicant is seeking similar relief they sought in previous reference is devoid of merits because directness and substantiality cannot be determined on reliefs sought but rather to subject matter and the key issue.

Second, Commercial Reference No 1 of 2022 has no relation with Taxation Cause No 21 of 2021. Mr. Leonard for respondent had submitted that, in terms of Section 3 of the Law Limitation Act [Cap 89 R.E. 2019] the matter has been determined to its finality by striking out there fference No 1 of 2022. While the learned counsel for applicants was of the view that the striking out of reference No 1 of 2022 for being time barred had no effect of finality as such the applicants were not precluded from filling the instant reference. While I appreciate the arguments by the "learned advocate for respondent on this point and the case laws cited very careful (in particular the decisions in the case of **MM Worldwide Trading Company, and Peniel Lotta v Gabriel (supra)** on the interpretation of provisions of section 3 of the law of Limitation Act, which I fully subscribeto. However, the circumstances of the present case do not convince this court to bar Reference No 7 of 2023 under the guise of doctrine of res judicata. Looking at the content of annexure DBT-1, it is conspicuous that in Commercial Reference No 1 of 2022 the applicants were challenging taxing master's refusal to set aside the dismissal order of Misc. Commercial Application No 96 of 2021 and not taxation cause No 21 of 2021 as such Taxation Cause No 21 of 2021 has never been determined to its finality. In the upshot the instant preliminary objection is overruled for lacking merit.

Having disposed the PO and turning to the substance of the Commercial reference No 07 of 2023, Mr. Denga started his submission by narrating the historical background of this matter and told the court that the Taxing officer had no jurisdiction to dismiss Taxation cause No 21 of 2021. He elaborated that Order 68 of the Advocate Remuneration Order, 2015 gives power to Taxing officer to proceed with taxation ex parte if any of the parties or both failed to appear. His reliance was placed on the case of **Juma Maganga Lukobora & 7 others V TMDA & 3 Others Misc. Civil Application No 642 of 2020** in which the court held that taxation in itself is not a trial, hearing is only meant for justification. Therefore, the taxing officer is only required to peruse and tax upon the receipts of the bill of costs accordingly. If bill of costs is lodged timely the taxing officer has to proceed.

It was the submission of the applicants that, on 1st July, 2021 the taxing master dismissed Taxation Cause No 21 of 2021 contrary to Order 68 of the Advocates Remuneration Order. As such according to Mr. Denga the Taxing officer acted without jurisdiction. On the foregoing submission the learned counsel for applicant requested this court to fault the Taxing Master's decision by reversing and setting aside the said decision in Taxation Cause No 21 of 2021.

Submitting against the grant of the Reference No 07 of 2023 the learned counsel for respondent began his submission by narrating the historical background of this matter and strongly faulted the submission made by the learned counsel for applicants on the interpretation of Order 68 of the Advocates Remuneration Order. According to him the Taxing Master was clothed with jurisdiction to dismiss the Taxation

Cause No 21 of 2021 for want of prosecution. Extending his submission, the learned counsel for respondent joins hand with learned counsel for applicants that, Order 68 of G.N 263 OF 2015 vests taxing officer power to tax ex parte in case of non-appearance of either party or both parties because there are no limits on the powers of the Taxing master's in taxation proceedings. He reasoned that, there is no illegality committed by the Taxing Master because he has power to dismiss the taxation cause for want of prosecution. On the above reasons the learned counsel for respondent argued the court to dismiss the reference with costs.

But while preparing the ruling the court sought it prudent to get clarity on the competency of the reference application. And as stated hereinabove on 12th December 2023 the court summoned the learned advocates representing the parties to appear and address it on the competency of the reference application.

In his submission Mr. Denga for applicant admitted that the reference No. 1 of 2022 was struck out for being time barred. He pointed out that the said reference arose from Misc. Commercial Application No; 96 of 2021 in which the taxing officer, Mushi DR as he then was dismissed the said application refusing to set aside dismissal order and restoration of taxation cause No. 21 of 2021, which he earlier on dismissed for non- appearance of the applicant and her counsel.

It was the submission of Mr. Denga that the present reference is different from the reference No. 1 of 2022 in that the current reference merely aims at challenging the decision of the taxing master in taxation

cause No. 21 of 2021. Unlike in the Misc. Commercial Application No. 96 of 2021 which was the decision of taxing master refusing to set aside and restore the dismissal order in taxation cause No. 21 of 2021. He went on submitting that the Misc. Commercial Application No. 96 of 2021 was dismissed by Mushi DR for lack of merit. To Mr. Denga the present reference challenges the decision of the taxing master Mushi DR in taxation cause No. 21 of 2021 in dismissing the said taxation for non-appearance of applicants and their advocates instead of proceeding to tax it as required by Order 68 of the Advocates Remuneration Order, G.N. 263 of 2015. According to the learned counsel for the applicant, the illegality which was occasioned by the taxing officer in dismissing the taxation cause No. 21 of 2021 instead of proceeding to tax it was not at issue or was not one of the issues before Hon. Mkeha J in reference No. 1 of 2022. He justified the point of the said illegality as reason that moved this court, Hon. Nangela J to grant extension of time to file this reference through Mis. Commercial Application No. 155 of 2022. Mr. Denga contended that the said illegalities are still in tact and this is the only opportunity in which the applicant has moved the court to rectify them.

Having said all that, the counsel for the applicant submitted that that this application is competent before the court for the following reasons:

1. There is not any other pending matter between the parties in the court other than this one.
2. There is no likelihood of confusion or conflicting decisions of this

court over the issue as to whether the taxing master was justified to dismiss the taxation cause No. 21 of 2021 for non-appearance or want of prosecution as this issue was not litigated before Hon. Mkeha J in reference No. 1 of 2022. This is why even the counsel for the respondent have not raised preliminary objection to reference No. 1 of 2022. I strongly submit that this court has never pronounced itself the issue which is subject of this reference.

3. The order of the taxing master dismissing taxation cause No. 21 of 2021 is itself a decision and challengeable before the Judge in view of Order 7(1) of the Advocates Remuneration Order of 2015.
4. In my view it will be legally wrong the right to make reference against the decision of the taxing master dismissing the taxing cause for want of prosecution with reference against the decision of the same taxing master refusing to set aside and restore the taxation cause. This is the spirit behind the holding of the CAT in case of **YARA Tanzania Limited v DB Shapriya & Co. Limited, Civil Appeal No. 360 of 2022 CAT** it will be wrong to equate the right to appeal with the right to set aside a default judgment as riding two horses at same time. It is my humble submission that the provision of Section 5(1) AJA may be used as an inspiration to Order 7(1) of the Advocate Remuneration Order of 2015.

Mr. Denga argued that in the alternative but without prejudice to what he has submitted above. He begged to submit briefly that should this court find that the application in one way or another incompetent

before it, it should not strike it out in order to retain jurisdiction for the court to remedy the illegality committed in the taxation cause No. 21 of 2021 of dismissing for want of appearance/prosecution instead taxing it. The counsel referred to CAT decision in **Chama cha Walimu Tanzania v The Attorney General, Civil Application No. 151 of 2008 CAT** at pp. 15, 23, 24 and 25. Placing reliance on the above case, Mr. Denga prayed that the court not to strike out this application in cognizance of what the taxing master did in taxation cause No. 21 of 2021 dismissing the taxation cause for want of appearance instead of taxing it. To him that was nothing but patent illegality which should not be allowed to stand as leaving it unattended as said in **Chama cha Walimu's case** will be tantamount to perpetuating illegality. He concluded by praying to the court to set taxing master's decision aside and order the taxation to proceed before another taxing master.

Mr. Laurent Leonard, for the respondent submitted that, the applicants are trying to ride two horses at the same time. Having tried to exhaust the remedies to challenge the dismissal order by the DR (sitting as a taxing officer) in taxation cause No. 21 of 2021 up to the level of filing a reference No. 1 of 2022 they have now gone back to challenge the same order by taking a different route.

It was the submission of Mr. Leonard that this court having determined the reference No. 1 of 2022 to be time barred. It had conclusively determined the rights of the parties as far as taxation No. 21 of 2021 is concerned. Therefore, it is not open for this court to hear again another application in any form which has the nature of seeking to rectify or challenge the order made by the taxing officer in taxation

No. 21 of 2021. At this juncture, the respondent's counsel cited the decision of **MM Worldwide Trading Company Limited and 2 Others v National Bank of Commerce Limited, Civil Appeal No. 258 of 2017 CAT** where the CAT underscored that the order of striking out the former matter for being time barred amounted to conclusive determination of that matter. It was his humble submission that for this court having decided commercial reference No. 21 of 2021 being time barred that was a conclusive determination of the rights between the parties in taxation No. 21 of 2021.

Mr. Leonard went on submitting that they have looked at the impugned ruling of taxing officer in Misc. Commercial Application No. 96 of 2022, and it was his argument that the issue as to whether the taxing officer has power to dismiss or proceed ex parte was also covered. Similarly the respondent's counsel said if one looks at the impugned order in taxation cause No. 21 of 2021 the is as to whether the taxing officer has power to dismiss or to proceed in any other manner was also covered. To close this point Mr. Leonard reiterated his earlier submission that what the applicants are trying to do is trying to ride two horses at the same time.

Regarding the two decisions of the CAT cited by Mr. Denga for the applicants, Mr. Leonard was of the view that they are irrelevant in this matter for in the decision of **Chama cha Walimu**, the CAT was exercising its revisional jurisdiction while in this case at hand the court has been called to exercise its powers by way of reference (reference jurisdiction). Again, Mr. Leonard argued that going through the decision of **Chama cha walimu** there was clear nullity or illegality on the face

of record of labour court which prompted the CAT invoke Rule 4 (3) of the Court of Appeal Rules in order for it to invoke suo motu its revisionary powers something is not covered under Rule 7(1) and (2) of the Advocate Remuneration Order, 2015. Its my view that **Chama Walimu's case** is unrelated to the present case. It is thus distinguished.

As for the decision of **YARA Tanzania Limited** cited by the applicants' counsel, Mr. Leonard submitted that that decision is distinguished from the case at hand. In his view, in **YARA's case** the court was determining whether it can proceed to hear an appeal while the appellant had already filed an application to set aside the default judgment. And therefore, it is irrelevant and unrelated to the present matter. On this point I fully agree with the counsel for the respondent that **YARA case** is irrelevant in the context of this case.

Following above submission, Mr. Leonard argued and prayed that this application is incompetent and to allow it would let the applicants ride two horses at the same time. And indeed, it will lead to an endless litigation which is against public policy that there should and end to litigation. He thus prayed the application be dismissed with costs.

CounselDenga rejoined that it is not disputed that what the taxation master did in taxation cause No. 21 of 2021 is a clear illegality. Also, what was before this court in reference No. 1 of 2022 and what is being litigated in the present reference are two different issues. He critiqued the respondent's counsel submission that the issue of whether the taxing master had jurisdiction to dismiss the taxing cause No. 21 of 2021 was covered in the ruling of Misc. commercial application No. 96

of 2021 and in the dismissal in taxation cause itself (No. 21 of 2021). Mr. Denga argued that the counsel for respondent did not state how was it covered. In his view it was not covered.

Thereafter, Mr. Denga stressed that should the court rule that this reference is incompetent due to the existence of court's decision in reference No. 1 of 2022, it will be sitting as appellate forum to the ruling in the Misc. Commercial Application No. 155 of 2022. Mr. Denga ended his submission by reiterating what his submission in chief and prayed the decision of taxing officer in taxation cause No. 21 of 2021 to be nullified and set aside and the taxing cause be ordered to proceed before another taxing officer.

Having read the submissions for and against the grant of the reference, I join hands with the learned counsel for applicants that the taxing officer had no jurisdiction to dismiss taxation Cause No 21 of 2021 in terms of Order 68 of the Advocates Remuneration Order. He has power to proceed with taxation of the bill of costs even in the absence of any party or both parties. I also subscribe to the position that, a proper way to challenge the Taxing Officer's dismissal order is to file reference before High Court Judge. However, the question this court asked itself was whether reference No 07 of 2023 is proper before this court? It is undisputed fact that taxation proceedings normally are proceeded before Taxing Officer as such since Taxation Cause No 21 of 2021 was not heard on merits then the applicants ought to have applied for restoration of Taxation Cause No 21 of 2021 and not by way of reference. I am aware that vide Misc. Commercial Application No 96 of 2021 the applicants applied for restoration of

Taxation Cause No 21 of 2021 which unfortunately was dismissed for want of merits. And following the dismissal the applicant vide reference No 1 of 2022 sought to challenge the Taxing officer refusal to setting aside dismissal order before Hon. Mkeha J which was struck out for being time barred. Subsequently, the applicants applied for extension of time vide Misc. Commercial Application No 155 of 2022 and time was extended.

From the brief background of this reference, one will notice that the Taxing master had not decided anything in respect of which reference could be preferred. Therefore, since Taxation Cause No 21 of 2021 before Hon. Mushi, DR was dismissed for want of prosecution the applicants were supposed to apply for setting aside of the dismissal under section 95 and Order 1X Rule 9(1) of the Civil Procedure Code and stating the reasons why they did not appear to prosecute its cause and not filing a reference under Order 7(1) of Advocates Remuneration Order. This was done through Commercial Cause No. 96 of 2021 which was dismissed for lacking merit. The Reference filed thereafter was struck out for being time barred.

Taxation proceeding has been defined under Order 3 of Advocate remuneration Order to mean. For easy reference Order 3 provides that;

An application for taxation of bill of costs
or an application to enforce, set aside or
determine any question as to the validity
or effect.

I am aware that dismissal for want of prosecution amount to breach of Taxation principles for which a reference can be preferred.

However, the applicants have made this reference under Order 7 (1) of Advocates Remuneration Order seeking to fault the decision of Taxing Master knowingly that the Taxing officer had not taxed anything which can move the court under Order 7(1). The proper forum was for the applicants to apply for setting aside dismissal order which was done vide Misc. Commercial Cause No. 96 of 2021 and it was dismissed for want of merit. Aggrieved by that decision the applicants filed reference No.1 of 2022 under Order 7(1) of the Advocates Remuneration Order. This too was struck out for being time barred. That said and done, and despite being granted extension of time in Application No. 155 of 2022, this reference is un maintainable. It is a disguised attempt to pursue a matter whose subsequent application was declared time barred and consequently struck out which had similar effect of dismissal.

To elaborate further the incompetence and misplacement of the reference at hand drawn from a scrutiny of the Taxing Officer's ruling in Taxation Cause No. 21 of 2021, the last paragraph of the ruling states:

"...I am of the opinion that the preset application has been prepared under wrong provision and wrong forum, and above it Applicant's counsel has not shown sufficient cause prevented him from appearing in Taxation Cause No. 21 of 2021 on 1/7/2021 at 10:00 am when called up for hearing, therefore, application is dismissed with no order as to costs."

Two things are observed in the above extract, one, the application was incompetent for being preferred under wrong provision of the law and in the wrong forum. And two, the applicants failed to

show sufficient cause that prevented them to appear for hearing. These two defects have different implications or outcome. While an incompetent application is liable to be struck out, failure to provide sufficient cause for non-appearance results into dismissal of application for want of merit/prosecution. The Taxing Master combined the two. Besides that, since the application No.21 was preferred under a wrong forum the matter should have been struck out to enable the applicant to refile her application in a proper forum.

It is also trite law that the decision of taxing officer in Reference No. 21 of 2021 is amenable to reference to High Court Judge which was done. The matter was complicated further when the applicant applied for reference No. 01 of 2022 against decision in Application No.96 of 2021. The outcome of Reference No.01 of 2022 was striking out for being time barred. In accordance with Section 3(1) of the Law of Limitation Act [Cap 89 R.E. 2019] and as per the CAT decisions including **Ngoni – Matengo’s case (EA); East African Development Bank v Blue Line Enterprises Limited, Civil Appeal No. 101 of 2009 CAT; MM Worldwide Trading Company Limited & Two Others v National Bank of Commerce, Civil Appeal No. 258 of 2017 CAT** striking out order ought to have been dismissal for being time barred. The applicants knew that the Reference No. 01 of 2022 was struck for being time barred and so is Application No. 96 of 2021 all emanate from Taxation Cause No. 21. In my view it was not open for the applicant to apply for extension of time in Application No. 155 of 2022 without drawing this nexus. The trick the applicants used was having noted the pursuit via Misc Commercial No. 96 of 2021 and

Reference No. 01 of 2022 failed they attempted a second bite which is foreign approach in this court.

Nevertheless, the extension of time was granted to enable the applicants to challenge the taxing master's decision to dismiss the Taxation Cause No. 21 of 2021 for want of prosecution. While this is within the jurisdiction of this court, the defects found in ruling in Misc. Commercial Cause No. 96 of 2021 has not been addressed. Undisputedly, the decision in application No. 01 of 2022 is a decision on merit. However, this court cannot reopen that decision. The applicant pursuit of her taxation appeared to have been extinguished.

The respondent brought to the attention of the court the issue of Misc Commercial Cause No. 96 of 2021 and the Reference No. 1 of 2022 which ended in striking out order for being time barred. It is also clear that on pages 8-9 of the ruling in Application No. 155 of 2022 the court ruled that it was not concerned with Reference No. 01 of 2021 and hence the law of limitation cannot come into play.

Aware of that position and the nexus between the Taxation Cause No. 21 of 2021, Misc. Application No. 96 and Reference No. 01 of 2022, the applicants went ahead applying for extension of time in application No. 155 of 2022 which was granted to enable them to file reference against the dismissal for want of prosecution in Taxation Cause No. 21 of 2021. That is a precursor to the present reference application. But advocates as officers of the court ought to have clarified the matter. Despite that observation I am not authorized to examine what was decided by my fellow judge.

Nonetheless, the apparent circus can hardly be ignored. As much as res-judicata PO has been rejected the orders given in Reference No.1 of 2022 and in Application No. 96 of 2021 were consequential. They both were in substance dismissal orders. These cases originated from the Taxation Cause No. 21 of 2021. It was not open for the applicants to seek a second bite of the matter that was declared to be time barred. See the case of **East African Development Bank v Blueline Enterprise Limited, Civil Appeal No. 101 of 2009 CAT**. It should be remembered that Misc. Commercial Cause No. 96 of 2021 is not independent from Taxation Cause No. 21 of 2021. As held in **Hashim Madongo and Two Others v Minister for Industry and Trade and Two Others, Civil Appeal No. 27 of 2003 CAT** that it is not open for a party to go back to the same court and seek extension of time when the court has ruled the matter to be time barred. Albeit different from **Madongo's case**, in the case at hand Taxation Cause No. 21 of 2021 led to the Misc. Commercial Application No. 96 of 2021 and Reference No. 01 of 2022. It is tantamount to riding of two horses at the same time. Moreover, treating these cases as very distinct is unbecoming and unprocedural. I think the applicants have acted unreasonable having pursued the matter through Misc. Commercial Application No. 96 of 2021 and Reference No. 01 of 2022 to come back again to this court and attempt to reopen it while the order to struck out the Reference No. 01 of 2022 for being time barred is still in force. This is unreasonable and unprocedural.

From the above analysis, even though the decision in Taxation Cause No. 21 of 2021 has disturbing features that could be determined through reference, the present application is incompetent for there was

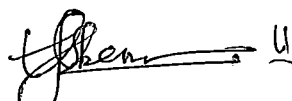
a route taken which ended in dismissal for want of merit in Application No. 96 of 2021 and later striking out of Reference No. 01 of 2022 for being time barred. These cases are off springs of Taxation Cause No. 21 of 2021. That said and done, to allow the present misplaced application is to cause more chaos. I am equally not able to deal with the ruling in Application No. 155 of 2022 granting extension of time which led to the filing of the present reference application. The applicants ought to find appropriate channel to pursue their right.

I, therefore, proceed to strike out this reference with no order as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 9th Day of February, 2024.




U. J. AGATHO
JUDGE
09/02/2024

Date: 09/02/2024

Coram: Hon. U. J. Agatho J.

For Applicant: Erick Denga, Advocate

For Respondent: Laurent Leonard, Advocate.

C/Clerk: Beatrice

Court: Ruling delivered today, this 9th February 2024 in the presence of Erick Denga, counsel for the Applicant, and Laurent Leonard, advocate for the Respondent.




U. J. AGATHO

JUDGE
09/02/2024