

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAM

CIVIL APPEAL NO. 25 OF 1989

BETWEEN

ARUSHA MUNICIPAL COUNCIL . . . . . APPELLANT  
(Decree-holder)

AND

LYAMUYA CONSTRUCTION CO. LTD . . . . . RESPONDENT  
(Judgment-debtor)

R U L I N G

SHANGALI-DR/TAXING OFFICER:

The decree holder Arusha Municipality Council through their advocate Mr. Lobulu has filed a bill of costs consisting of 12 items with a total of Shs. 802,450/=.

The Judgement Debtor Lyamuya Construction Co. Ltd. were represented by one Shayo Senior from Shayo/Jonathan & Co., Advocates based herein Arusha.

As if he knew that there would be a strong resistance regarding for items No. 1 and 10 Mr. Lobulu started by adducing reasons for praying for Shs. 750,000/= on the first item namely instruction to appeal. He stated that the appeal to the Court of Appeal was one of the most complex one which involved tremendous research as evidenced by the long list of authorities which was filed by the appellant. He further submitted that the appeal consisted of four volumes supported by a heap of number of exhibits intended to be examined in the appeal. The Counsel went on and said that the complexity of this appeal is underlined by the fact that the respondent decided to engage and instruct two very senior and prominent advocates. Mr. Lobulu contended that although the matter

As resolved on the preliminary point of law the Decree holder is still entitled to the full costs. The Counsel invited the attention of the Court to THE MBEYA COOPERATIVE UNION (1968) HCD No. 173 where it was held that an instruction fee is for work done in preparing a case before trial and therefore it is irrelevant whether the trial itself would or would not be long and tedious. The learned Counsel also attracted the attention of the Court to another case of SIMNGA vs. ELIAS (1972) HCD No. 66 where Instruction fees was defined to mean and cover not only the attendance of a solicitor when he takes his clients instruction but all his work other than that which is elsewhere specially provided for, in looking up the law and preparing the case for trial.

Mr. Lobulu submitted that item No. 1 is his marked instruction fees of which he prays the Court to grant as intact as they are.

Regarding to Item No. 10, the learned Counsel admitted the absence of receipts to support the claim, but he insisted the same to be a genuine claim of the work done by his Secretarial staff in preparation of the four volumes including the Stencils, duplicating, printing, binding etc. He contended that the requested amount under item 10 is in the lower side compared with the work done.

On item 8, 9 and 11 the Counsel submitted that all the receipts are accompanied thereto.

Regarding to Item 12 the Counsel stated that there are no receipts but it is clear according to the Court records that he did attend the Court as shown.

Mr. Lobulu prayed the Court to tax the rest of the items according to the scale provided by the law.

In resisting the submission made by the Counsel for the Decree Holder, Mr. Shayo Senior for respondent stated that the appellant had filed 12 grounds of appeal and thereafter abandoned 10 of them; only two grounds were argued. He further submitted that in the result the appeal took only half an hour. Mr. Shayo submitted that the taxing officer have a duty to see costs do not rise to unreasonable level. However the Counsel conceded that the respondent filed 4 volumes in the High Court but insisted that that should be considered in the High Court. Furthermore he conceded that two advocates were instructed by the respondent but that is immaterial and should not be considered.

Mr. Shayo referred to the case of SUMNRICKS Vs. SMITH (1950) 111 ER 550 in which the principle on how the taxing officer should exercise his duty was laid. The Counsel submitted that the purpose of costs is compensatory and not punitive. He thus, prayed the Court to reduce the costs to the extent of leveling it with the work done.

Quoting para 9 and 12 of the Third Schedule to the Tanzania Court of Appeal Rules, 1979 the Counsel suggested instruction fees to be Shs. 100,000/= instead of Shs.750,000/=.

Mr. Shayo further reminded the Court that in the judgement of the Court of Appeal at the last para it is clearly shown that the appellant is entitled to be paid by respondent only  $\frac{2}{4}$  of the costs of the case both in the Court of Appeal and the High Court. Therefore he prayed the costs to be reduced accordingly.

Regarding to Item 4, Mr. Shayo submitted that such a claim is not provided under para 9 (3) of the Third Schedule to the Tanzania Court of Appeal Rules, 1979. Also item 10 is not supported by any receipt and therefore they should be struck off. Mr. Shayo prayed the bill to be reduced so as to reflect the reasonableness.

In a short reply Mr. Lobulu for the Decree Holder submitted that the duty of the taxing officer is to consider what is before him and not to base his decision on speculations. The Counsel denounced the claims made by Mr. Shayo Senior that 10 grounds of appeal were abandoned. The Council requested the Court to peruse the record and the ruling of the Court of Appeal which indicate clearly that the first two grounds were argued as preliminary points. This, had they failed on the said two grounds they would have considered all the remaining 10 grounds of appeal.

Mr. Lobulu further contended that what actually matters in taxation is the preparations involved in the appeal and not hours spent in Court. At the end the Counsel for the Decree Holder requested the Court <sup>not</sup> to discourage the Counsels by granting too low fees or too high fees.

As the above arguments portray, there is a genuine quarrel between the Counsels. I agree with Mr. Lobulu on the volume of work done by his office. I also support and appreciate the ~~cited~~ authorities by him, i.e. Ujagar Sigh Vs. Mboya Cooperative Ltd. (1968) HCD No. 173 and Sianga Vs. Elias (1972) HCD No. 66.

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On the other hand I agree with Mr. Shayo Senior that the amount prayed for in Item 1 is a bit too serious. However, I am convinced that that amount is not so excessive to the point of reducing it to Shs. 100,000/= as suggested by Mr. Shayo.

Therefore, having considered all the argument from both parties I tax off Shs. 200,000/= on item 1 and allow Shs. 550,000/=.

Item 2 have got two parts i.e. Instruction to file notice of appeal Shs. 60/= and preparing Notice of Appeal Shs. 15/=.

There was no quarrel on this item. I therefore tax it as presented to the tune of Shs. 75/=.

Item 3 was not contested and therefore I tax it as presented Shs. 500/=.

Item 4 was objected by Mr. Shayo on the ground that perusals are not provided separately for under the taxation rules. I agree with Mr. Shayo because perusals are included under instruction fees as shown under Para 9 (2) (3) of The Third Schedule to the Tanzania Court of Appeal Rules, 1979.

Item 5 to 9 are taxed as presented and allow a total of Shs. 26,250/=.

Although there are no receipts to support item 10 it is a fact that there was a serious preparations of records as shown. I therefore tax off Shs. 9,825/= in item 10 and allow Shs. 10,000/=.

Item 11 is hereby taxed as presented Shs. 500/=.

Regarding item 12 transport to and from the Court, I disagree with Mr. Shayo that such item is covered under Para 9 (3) of the Third Schedule to the rules. I am convinced that attendance fees and transport fees are two different things.

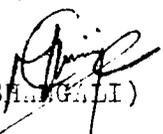
Therefore although there are no receipts to support item 12, the Court record is clear that the Decree Holder was attending the Court and certainly using means of transport. I therefore tax off Shs. 800/= on item 12 and allow Shs. 4,000/=.

In total the amount taxed off in this bill of costs is Shs. 211,125/= and amount allowed is Shs. 591,325/=.

The order of the Court of Appeal clearly directed that the appellant be entitled to be paid by respondent  $\frac{3}{4}$  of the costs of this Court and in the Court below. Therefore, the appellant is entitled to only  $\frac{1}{4}$  of the bill of cost. That is  $\frac{1}{4}$  of Shs. 591,325/= which amount to Shs. 147,831.25.

For avoidance of any doubt the appellant is entitled to be paid by respondent Shs. 147,831.25 only.

DATED at ARUSHA this 29th day of June, 1991.

  
(M.S. SHUNGU)

TAXING OFFICER