IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

TAXATION REFERENCE NO. 5 OF 2010

MUTAMWEGA BHATT MUGAYWA ..... APPLICANT

VERSUS

CHARLES MUGUTA KAJEGE ..... RESPONDENT

(REFERENCE from the Ruling of the Taxing Officer of the Court of Appeal of Tanzania at Dar es Salaam)

(Mgetta, DR, CA)

Dated the 26th day of November, 2010
in
Civil Appeal No. 39 of 2008

.....

RULING

25th February & 10 May, 2011

MANDIA, J.A:

This is a reference from the ruling of the taxing officer in Civil Appeal No. 39 of 2004. The decree holder in that case and the respondent in this reference had, through his advocate Mr. Michael Ngalo, filed a Bill of Costs of a total sum of sh. 79,437,600/=. The taxing officer taxed off a total of sh. 31,137,600/=, resulting in the Bill being taxed at sh. 48,300,000/=. The judgment debtor was aggrieved by that ruling and made this reference to a single judge.

The judgment debtor in Civil Appeal No. 39 of 2004 and the applicant in this reference was represented by Mr. Magesa, learned advocate.

Mr. Magesa argued that at 48,300,000/= the taxed bill is still excessive. He took exception with sh. 40 million which the taxing officer allowed as instruction fees, saying that this was excessive. Mr. Magesa also argued that item 2, under the heading of "Receiving and Examining Pleadings filed in the High Court Proceedings, Exhibits, Submissions, Judgment and Decree," for which an amount of sh. 1,200,000/= as presented and taxed at sh. 1,000,000/= should have been part of item 1 regarding instruction fee. In effect, Mr. Magesa was arguing that the taxing officer erred in principle in allowing item 2 to be presented as a separate item. As for item 3 Mr. Magesa argued that the amount claimed sh. 1.3 million and taxed at sh. 1 million is high because item 7 of the scale of costs allows sh. 120,000/= only for drawing a memorandum of appeal. As for item 5 on service, Mr. Magesa argued that the taxed amount should have been sh. 20,000/= instead of sh. 50,000/=. In item 6 relating to research and preparation for the hearing of a preliminary objection the taxing officer allowed sh. 2 million out of the sh. 3 million claimed. Mr. Magesa contests this award. He is of the view that item 6 should have

been part of the instructions fee and should not have been brought as a separate item.

Mr. Magesa, learned advocate, did not contest item 7. As for item 8 which was taxed at sh. 2 million out of the sh. 3 million claim presented, he contended that according to the scale a claim for attending court is put down at sh. 30,00/= for the first thirty minutes and sh. 10,000/= for each subsequent thirty minutes. The same argument also refers to the claims in item 9, 10, 11, 12, 13 and 14. Out of these items the Bill shows that items 9 to 12 are routine court attendances for which the Bill presented is sh. 60,000/= per item, and that items 8, 13 and 14 were charged sh. 3 million, sh. 6 million and sh. 1,200,000/= respectively because they involve considerable time: six hours in the case of item 13 and one and a half in the case of item 14. The exact time used in arguing the Preliminary Objection in item 8 is not given so as to justify the bill of sh. 3,000,000/= presented but, as said earlier, the amounts claimed are contested by Mr. Magesa. Finally Mr. Magesa argued that the sh. 300,000/= claimed on item 15 is still excessive because the fee for drawing orders is sh. 10,000/= according to the scale.

Ngalo, learned advocate representing the respondent, opposed the application. He argued that the respondent filed a Bill of sh. 79,437,600/=

out of which sh. 31,137,600/=was taxed off leaving a balance of sh. 48,300,000/=. Learned advocate argued that the taxing officer was justified in taxing the instruction fee at sh. 40 million after noting the complexity of the appeal which emanated from an election petition in which 71 witnesses were called to testify, and in which the trial High Court wrote a 48-page judgment in which many authorities were cited and that this involved a lot of homework before drawing the memorandum of appeal. He also pointed out that the advocate for the applicant did not point out any error of principle made by the taxing master as far as the award on instruction fee was concerned. On item 2 Mr. Ngalo, learned advocate, argued that item 2 is not covered by instruction fee so it was proper to charge it as a separate item. As for item 3, Mr. Michael Ngalo argued that the scale does not cater for preparation of a record and this is why he put it up as a separated item. On item four which shows travelling expenses to Mwanza Mr. Michael Ngalo argued that it was necessary for the advocate to travel to Mwanza to lodge the record of appeal. In short, the learned advocate argued that the taxation was proper and should remain undisturbed.

The general rule on taxation is as provided in Rule 125 of the Court of Appeal Rules, 2009, which provides thus:-

(i) Reference on taxation by a dissatisfied party shall be on a matter of law or principle (Rule 125 (i))

and (ii) there shall not be a reference on a question of quantum only.

Is there a matter of law or principle in this reference, or Mr. Magesa, learned advocate, is contesting only the amount allowed to the respondent? Let us start with the biggest sum allowed, that is, the instructions to sue as show in item one. This reference emanates from an appeal, so the guiding provision is Rule 9(2) of the Taxation of Costs Rules set out in the third schedule to the Tanzania Court of Appeal Rules, 2009. The rule reads thus:-

*"9. **Quantum of costs***

(1) .....
.....
.....

(2) The fee to be allowed for instructions to appeal or to oppose an appeal shall be such sum as the taxing officer shall consider reasonable, having

regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to the allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances."

As can be seen here, the taxing officer has been given wide latitude in the determination of taxation matters before him subject to the general guidelines set in Rule 9 (2). Unless there is an error of law or principle, it is difficult to assail a decision of a taxing officer. The ruling by the taxing officer which is the subject of this reference does not show any error of law of principle, real or apparent as far as item one is concerned. Mr. Michael Ngalo, learned advocate representing the respondent, has shown how complicated the matter was in the trial court, an assertion which was not been denied by Mr. Magesa, learned advocate representing the applicant. The nearest Mr. Magesa could get in justifying the application is the assertion that the applicant, a former Member of Parliament, has no gainful employment so he will be bankrupted if the taxation ruling is left undisturbed. With much sympathy, I do not think that this argument has merit, and does not

negate the fact that a lot of work went into preparing for the appeal. I am satisfied that there is no error of law or principle in the amount of sh. 40 million as taxed as instruction fee. The amount will remain as taxed.

In item two the respondent presented a bill for sh. 1,200,000/= which was taxed at sh. 1,000,000/= for "receiving and examining pleadings etc". Mr. Magesa contends that allowing this item under a separate head is an error in principle. I agree with him. Rule 9 (3) of the Taxation of costs rule which appear as the Third Schedule to the Tanzania Court of Appeal Rules, 2009, provides thus:-

> *"9. **Quantum of costs***
>
> *1. .....*
> *.....*
> *2. .....*
> *.....*
> *3. The sum allowed under subparagraph (2) shall include all work necessarily and properly done in connection with the appeal and not otherwise*

changeable including attendances, correspondence, perusal and consulting authorities.

4. .....
.....″

"Receiving and Examining pleadings" is, to my mind "work necessarily and properly done in connection with the appeal as defined in Rule 9 (3), and is covered under the instruction fee. By allowing this separate item, the taxing officer in effect charged the applicant twice for the same item. Under Rule 125 (2) of the Court of Appeal Rules, 2009, a single Justice has power "to make such deduction or addition as will render the bill reasonable" in a reference whose complaint is that a bill is manifestly excessive or manifestly inadequate. Since two has been allowed in error I tax off the sh. 1,000.000/= under this head.

In item three the taxing officer allowed sh. 1,000,000/= for drawing up a memorandum of appeal. Mr. Magesa drew our attention to item seven of the Scale of Costs which sets the amount for drawing a memorandum of appeal as sh. 120,000/=. In taxing the bill at sh. One million the taxing officer went against the scale which he is mandated to follow as provided in Rule 124 (2) of the Court of Appeal Rules, 2009. In

his ruling, the taxing officer allowed an excess of sh. 880,000/= which is hereby taxed off, leaving a sum of sh. 120,000/= according to scale.

In item four the taxing officer allowed sh. 750,000/= for "attending Court to lodge Records of Appeal in Mwanza". Both the applicant and the respondent agree that the proper registry for lodging of the appeal is the Mwanza Registry, but Mr. Magesa argues that the lodging of the appeal could be made by a clerk in Dar es Salaam. With due respect, I am of the view that this argument is misguided. To get involved in litigation, a party must have the right of appearance under Rule 30 of the Court of Appeal Rules, 2009. It is this right of appearance which can give rise, in a civil matter, to a right of appeal under Rules 83 (1) of the Court of Appeal Rules, 2009. It was therefore proper for an advocate, duly instructed, to travel to Mwanza to lodge the appeal because even if the appeal was lodged in Dar es Salaam, the intended appellant had first to seek the written permission of the Registrar under Rule 16 (1), and thereafter pay for the expense of sending the appeal to the appropriate registry under Rule 16 (2). As to the expenses involved, Mr. Magesa contends that the travel to Mwanza should have been part of disbursements for which receipts ought to have been produced. On the other hand, Mr. Ngalo for

the respondent argues that Rule 11 (1) of the Taxation of Costs rules appearing in the Third Schedule. Rule 11 (1) gives discretion to the taxing officer to allow "such costs, charges and disbursements as shall appear to him to have been reasonably incurred ....." It is trite law that a superior court cannot overrule an exercise of discretionary power unless proof is shown that the discretion was exercised unjudiciously. There is no material before me to indicate unjudicious exercise of discretion so Mr. Magesa's argument fails as for as item four is concerned. The amount as taxed shall therefore remain undisturbed.

On item five Mr. Magesa suggested sh. 20,000/= as the proper allowable item for service, and Mr. Ngalo agreed to the suggestion. Item five is therefore reduced from sh. 50,000/= to sh. 20,000/= as mutually agreed.

Item six and eight go together. In item six the respondent presented a 3,000,000/= claim for preparations with regard to a Preliminary Objection filed by the respondent, and in item eight he charged sh. 3,000,000/= for attending court to hear the preliminary objection. The taxing officer allowed sh. 2,000,000/= for preparations and sh.

2,000,000/=for attending court for the hearing of the preliminary objection. Both the Taxation Rules and the Scale of Costs do not provide specifically for costs involving a Preliminary Objection, but if we take the standard definition of a preliminary objection in **MUKISA BISCUIT CO LTD vs WEST END DISTRIBUTORS LTD** (1969) E.A. 96 at page 701, the only conclusion we can arrive at is that a preliminary objection is an intermediary proceeding in which arguments of law are raised and decided upon. As to observed at p. 701 by Sir Charles Newbold, P in the Mukisa case (supra)

> *".....A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is agued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.* ***The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs,*** *and, on occasion,*

confuse the issues. This improper practice should stop." (Emphasis supplied).

The emboldened words indicate that costs raised while arguing a preliminary objection are additional to the costs in a suit. Indeed this is the position, since in some cases parties may be prompted to raise a preliminary objection, and in some case they may not be inclined to do so. I am satisfied that the respondent acted properly in raising a separate bill on the preliminary objection. Even though the bill was raised properly, I am not convinced that it was proper for the respondent to include two separate items – one for research and preparation and one for hearing. If we take a preliminary objection to be an application within the meaning of Rule 9 (1) of the Taxation of Costs rules set out in the Third Schedule, the taxing officer had discretion to set the fee. The rule reads thus:-

*"9. **Quantum of Costs***

(1) The fee to be allowed for instructions to made, support or oppose any application shall be such sum as the taxing officer shall consider reasonable but shall not be less than sh. 100/=."

The bill presented is for sh. 3,000,000/= which was taxed at sh. 2,000,000/=. No error of law as principle has been shown so the discretion of the taxing officer on quantum cannot be queried. As I said earlier, there are two separate items – one for preparation and another for hearing. If we interpret Rule 9(1) correctly, the instructions to raise a preliminary objection must necessarily include **both** preparation and hearing which makes it prudent for the party raising the objection to charge for the **hearing** of the objection only. For this reason, I tax off item six relating to preparation and leave item eight undisturbed.

Items 9 to 12 are not contested and were taxed as presented On item 13 an 14 which were court attendances, the respondent presented a bill for sh. 6,000,000/= and sh. 1,200,000/= respectively. Yet the same respondent presented a bill of 60,000/= for the attendances shown on items 10, 11 and 12. He did not show the difference between the respective court attendances so as to justify the higher figure in item 13 and item 14. This makes the amounts shown in items 13 and 14 unreasonable. They are both reduced to sh. 60,000/=.

Finally, the respondent charged sh. 300,000/= for drawing an order (item 15) and sh. 300,000/= for drawing the Bill of costs. The scale provides for a maximum of sh. 20,000/= for each of the two items.

Ignoring the scale is an error of law for which this court can intervene as held in **PREMCHAND RAICHAND & ANOR versus QUARRY SERVIES OF E.A. Ltd & Other 1972 E.A.** and again in **STEEL CONSTRUCTION PETROLEUM ENGINEERING (EA) Limited versus UGANDA SUGAR FATORY (1970) E.A.** 141. Sh. 280,000/= is therefore taxed off in items 15 and 16 respectively, leaving sh. 20,000/= in each of the two items.

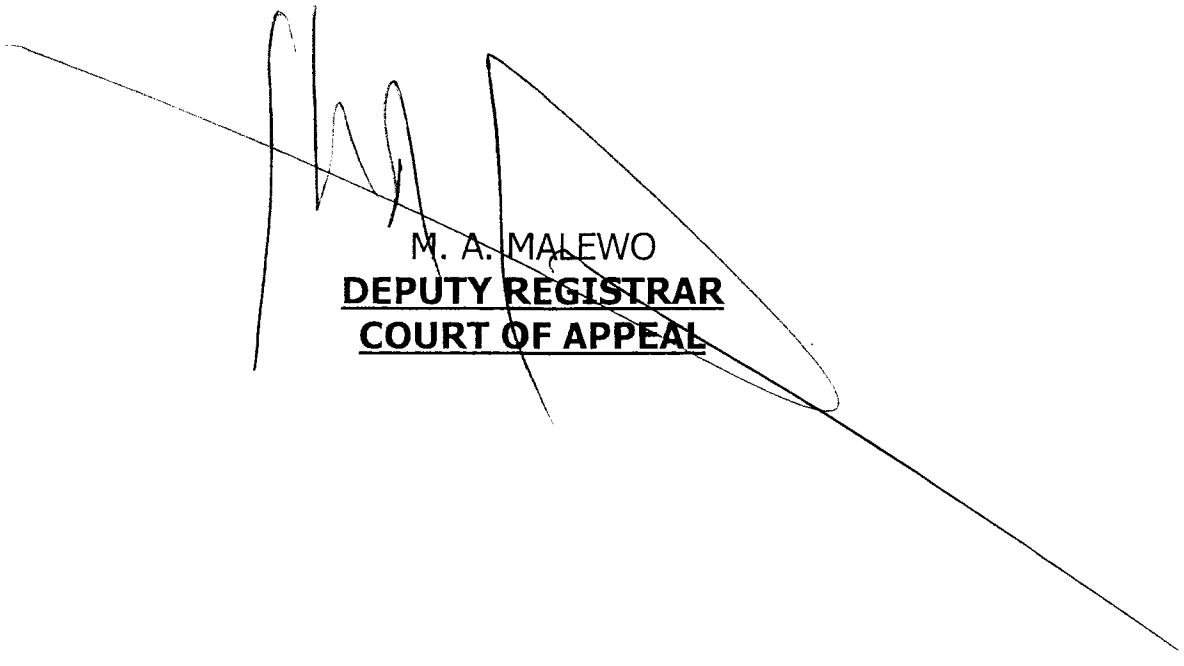
I would therefore allow the reference on the items as adjusted, which makes the taxed bill sh. 43,370,000/=.

Out of the seventeen items on the Bill of Costs, the applicant has managed to have eight items i.e. 2, 3, 5, 6, 13, 14, 15 and 16 adjusted. I would therefore order each party to bear their respective costs of the reference.

DATED at DAR ES SALAAM this 6th day of May, 2011

W. S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL