IN THE HIGH COURT OF TANZANIA

AT DODOMA

MISC. CIVIL APPLICATION NO. 3 OF 2012

EZEKIEL FANUEL MUSHI ..... APPLICANT

versus

N.B.C. LIMITED ..... RESPONDENT

11/12/2012 & 19/04/2013

RULING

HON. MADAM, SHANGALI, J.

This matter started in 2002 when the applicant **EZEKIEL FANUEL MUSHI** sued the respondent **N.B.C. LIMITED** in Civil Case No. 7 of 2002 over an inflated loan agreement. That suit dragged on in court until 20th August, 2009 when the trial District Court at Dodoma pronounced its decision in favour of the applicant with costs.

That decision was followed by a bill of costs filed by the applicant vide Misc. Civil Application No. 24 of 2011. In that bill of costs the applicant had claimed a total sum of TShs.**16,552,800/=** based on 137 items and disbursements.

Having heard the bill of costs, the Taxing Master allowed only TShs.**3,066,500/=** and taxed off a total of TShs.13,486,300. The applicant was not satisfied with that decision. Being represented by Mr. Nyangarika , learned advocate, the applicant has filed this reference intending to challenge the Taxing Master's decision. The respondent was represented by Mr. Lwazo, learned advocate. On 2nd November, 2012, the counsel's request to argue this reference by way of written submission was granted by this court.

The reference is based on four main issues, namely whether the Taxing Master failed to act judiciously when held that a client's visitation to his advocate chamber's in consultation and follow-up of his case has nothing to do with the conduct of the case and thereby taxed off all costs incurred by the applicant in such visitations. Secondly whether the Taxing Master applied wrong principle of taxation when he taxed off several costs incurred by the applicant in attending the court during mentions, hearings,

rulings and judgement dates because the court record of proceedings failed to record the presence or absence of the applicant. Three, whether the Taxing Master was wrong in rejecting all receipts submitted by the applicant to prove the costs incurred and instead reverted to arbitrarily flat rate of TShs.30,000 and TShs.6,500/= and fourthly whether the Taxing Master used a wrong principle in law in scornfully rejecting most of the instruction fees of the main suit, the interlocutory applications and for the preparation, filing and arguing the bill of costs.

In his written submission Mr. Nyangarika argued that the Taxing Master failed to act judiciously and ended-up taxing off most of the applicants bills of costs when he held that, quote;

> *"To my opinion visitation to counsel by a party or litigant is more personal business and arrangement which cannot be taken or affiliated to court business - - - -. It only suffice to say that bills pertaining to visitation to advocates chambers by the applicant are all thrown out and are accordingly taxed off in toto."*

Mr. Nyangarika submitted that such a statement is nothing but an overstatement given that a client has to visit his

advocate's chambers for the purposes of instructing the advocate albeit on the main case and on all other interlocutory matters including further consultations on the case. He submitted that such visits go further to the dates of interviews which are supposed to be made by the counsel to his client for the purposes of testifying in court, drawing defences, filing applications etc. Mr. Nyangarika argued that it was not proper for the Taxing Master to disregard the costs incurred by the applicant in visiting his advocate for the purposes of advancing the progress of the case. He insisted that the need of filing an application for restraining the respondent from selling the house in question at the time of filing of the plaint was clear just as the need for the applicant to visit his counsel much more frequently as shown in the bill of costs. Mr. Nyangarika submitted that in such a situation the bill of costs based on the visits made by the applicant to his advocate in view of advancing the interest of the case were wrongly taxed off and the Taxing Master did apply a wrong principle of the law in rejecting such costs.

On the second issue Mr. Nyangarika submitted that the way the Taxing Master considered the record on the dates which the applicant attended the court either during mentions of the suit and the applications or during the hearing or ruling is not clear at all and it raises a lot of questions leading to this reference. Mr.

Nyangarika stated that in taxing off some dates the Taxing Master stated in his ruling that;

> *" --- The court records reveal that the applicant did not appear (was marked absent"*

and that the referred dates were items No. 4,10,12,15,16,19, 70,74,78,79,97 and 124 of the bill of costs. The learned advocate contended that the Taxing Master erred in law in not holding that the record lied in the light of the applicants receipts on transport, accommodation and meals. He further argued that the Taxing master used a wrong principal in law in holding that the court's record marked the applicant absent while the record clearly did not bother to note anything on the appearance or non-appearance of the applicant on many dates under consideration. He cited 14/06/2002, 31/07/2002, 30/08/2002, 13/09/2005, 30/11/2005, 24/02/2006 and 20/08/2007 as examples. Mr. Nyangarika submitted that since there was poor court recording on the attendance of the applicant on mention dates, such dates should have been taxed.

Regarding to the dates of court attendance of the applicant during the hearing of the case Mr. Nyangarika submitted to the effect that the Taxing Master taxed off many of such days stating that the applicant did not make appearance. Mr. Nyangarika

argued that the Taxing Master acted on wrong principle in law by not considering the possibilities of failure of the court's record to show the right position given the receipts furnished by the applicant on transport, accommodation and meals on the dates in question. He prayed this court to revisit the bill of costs and award a proper taxation. Also Mr. Nyangarika asked this court to check the original court's record dated 13/03/2002 and 26/11/2003 which the Taxing Master claimed that they were not hearing dates while their records indicate that they were hearing dates. He also asked this court to check and determine the bill of costs for the dates which the court's record failed to show whether the applicant/plaintiff was absent or present. The dates were 20/12/2002 24/03/2003, 14/04/2003, 13/05/2003,24/06/2003, 18/07/2003, 02/02/2004, 10/03,2004, 21/04/2004, 21/05/2004, 19/08/2004, 24/11/2004, 16/12/2004, 2/02/2005, 11/03/2005, 18/04/2005, 30/05/2005, 20/07/2007 and 23/04/2009.

Mr. Nyangarika argued that generally the Taxing Master used a wrong principle in taxing off dates given the typed proceedings has omitted some dates and could have as well omitted some other important facts as the presiding magistrate could have omitted to record the presence of the applicant on the dates in question.

It is Mr. Nyangarika's submission that the Taxing Master also applied a wrong principle of law in taxation when he taxed off the costs of all the dates when the applicant appeared in court to receive ruling on allegation that "there is no corum in the court proceedings corresponding to those dates." Mr. Nyangarika complained that item 20 of the bill of costs corresponds with 18/11/2002 which indicates that the court fixed ruling to be delivered on 03/12/2002 and directed the plaintiff/applicant to be notified. Mr. Nyangarika stated that on 3/12/2002 the court delivered its ruling without recording the corum. Despite the fact that the applicant was able to produce his travelling and accommodation receipts to prove his court attendance on that date the Taxing Master shifted the blame of the absence of the corum to the applicant and denied him his costs. Mr. Nyangarika further submitted that the absence of the court's corum was a mistake committed by the court and the same should not go to the punishing of the applicant. He also cited item 79 and 80 where the same kind of fault was shifted to the applicant.

Mr. Nyangarika also complained that the Taxing Master applied the same wrong principle and taxed off items 99, 100 and 126 just because the corum in the court proceedings did not indicate well as whether the applicant appeared or not despite his travelling accommodation and meals receipts. He argued

that the Taxing Master used wrong principles in rejecting the date of attendance of the applicant in court.

On the third issue, Mr. Nyangarika submitted to the effect that the Taxing Master failed to adhere to the taxing principles in rejecting all receipts which were submitted by the applicant as proof of travelling fair, accommodation and meals and preferred to arbitrarily revert to a flat rate sum of TShs.30,000/= which lacked any basis in law. He contended that much as the Taxing Master could have queried as of duty some of the receipts, he was nevertheless not entitled in law to reject all the receipts submitted by the applicant because the practice is that where receipts are available the taxation should be based on the submitted receipts. He contended that where there are sufficient reasons to reject receipts, the same should be spelt out but not just to reject all receipts in a blanket form.

Finally Mr. Nyangarika submitted to the effect that the Taxing Master applied a wrong principle of taxation in taxing off most of the instruction fees hinging them basically on the mortgaged sum without bearing in mind the fact that the matter at stake was a business house located at Kondoa township worth not less than seventy five million shillings by then, and without taking into consideration the fact that there were several interlocutory

applications which caused the case to drag on for quite a long time without having anybody to be blamed directly for the delay, be it the applicant, the respondent, the court or the counsels for both sides. He further complained that the Taxing Master was unusually and unnecessarily scornful to the work done throughout the applicant's case in taxing off the instruction fees, whereby he went on to suggest that the delay in the finalization of the case generally was caused by the applicant and or his advocate without any tangible proof to that finding. Mr. Nyangarika stated that such sentiments on the part of the Taxing Master clearly and wrongly influenced him in taxing off most of the instructions fees for the preparation, filing and arguing the bill of costs. He prayed the reference to be allowed with costs.

In reply, Mr. Lwazo, learned advocate for the respondent submitted to the effect that in the determination of bill of costs the rule is that a party is only entitled to reasonable costs incurred in defending or prosecuting the case and therefore, the 65 times visitation of the client to his advocate for further instruction and consultations were personal business and the court cannot make the respondent liable for those costs incurred. Mr. Lwazo claimed that such costs are unreasonable and unnecessary as they do not form part of the suit and the same should not be restored because they are baseless and illegal.

Regarding to the determination of bill of costs on the mention dates and hearing dates, Mr. Lwazo submitted that the base for such determination is from the court's records where the authenticity of the information is found. He stated that the Taxing Master taxed only on appearances that were recorded in the court's record and correctly taxed off appearances that were illegally justified by the transportation, accommodation and meals receipts without being backed by the appearance on the court's record.

Mr. Lwazo submitted that the costs that are reasonable to be taxed are only those that are borne out of court's business including the visits and appearances made and recorded in the court's record.

Mr. Lwazo argued that the Taxing Master adhered to the principles of taxation by rejecting some receipts of fare and accommodation provided by the applicant because they were forged, cooked and fabricated hence their dates and serial numbers were doubtful.

Responding to the complaint that the Taxing Master arbitrarily reverted to a flat rate of TShs.30,000/=, Mr. Lwazo

submitted that in his bill of costs the applicant claimed for TShs.14,000/= as expenses for tea, lunch and dinner and TShs.15,000/= for accommodation per day for the past 7 years without variation as to inflation and the like. As a result the Taxing Master used his discretion to tax the same at a flat rate of TShs.30,000/= in order to cover the inflation and fluctuation of the prices from 2002 to 2009. He contended that the applicant should count himself lucky for getting such amount.

On the issue of taxing off most of instruction fees the learned advocate submitted that the suit was challenging recovery measures initiated by the bank over an overdraft secured by the applicant, and that the plaint is clear that the suit was mainly for declaratory orders. He contended that the instruction fees sought by the applicant were therefore at a higher side without any justification compared to the amount sought to be reimbursed. Mr. Lwazo submitted that the Taxing Master correctly taxed the bill of costs on that item after considering the nature of the work, its complexity and time taken for the applicant's counsel to handle the brief.

On the instruction fees for preparing, filing and arguing the bill of costs, Mr. Lwazo asked the court to ignore such claims

because there is no law that allows an advocate to claim fees for filing the bill of costs.

In conclusion, Mr. Lwanzo asked the court to dismiss the reference because the Taxing Master was correct in his decision. He prayed the court to rely on the decision of the case of George **Mbughuzi and Another vs A.S. Masikini (1980) TLR 53** where it was held that a decision of the Taxing Master will be interfered with by a court only when the court is satisfied that the decision was arrived at upon an application of a wrong principle or wrong consideration.

In order to determine this tangled taxation reference there are several facts and salient features which should be appreciated from the essence of the whole matter. First of all there is no dispute that the applicant was forced to engage an advocate and sue the respondent following the business loan dispute caused by the respondent. There is no dispute that the applicant was living at Kondoa township while his advocate was living at Dodoma town (about 160 kilometres) and the case was filed at Dodoma District Court. There is no dispute that the case was filed back in January, 2002 and ended on 26/10/2009 when the judgement was pronounced in favour of the applicant with costs. It is also not in dispute that the case was involving a good

number of interlocutory application and objections as evidently in the huge original trial court case file. At the same time when the main case was filed the applicant had to file a separate application seeking for an order to restrain the respondent from effecting their intended sale of the applicants house situated at Plot No. 12 Block "*P*" Kondoa township.

Now, if the conduct of the case took about eight years and within that period the applicant managed to visit his advocate 65 times, is there any reason for an alarm? In a simple arithmetic, it means the applicant visited his advocate only about 8 times in a year. In my view, eight (8) times visitation within one solid year for a client who had a serious case pending in court is at the lowest grade.

Again, where a decree holder has been drawn to a protruded litigation by a judgement debtor, the former has a right to claim for all reasonably incurred expenses in his efforts to follow-up and pursue his case. The principle is that a successful litigant ought to fairly be reimbursed the costs he had to incur in the conduct of the whole case. The magical and guiding words should remain to be *"costs must be incidental to the suit and must be reasonably incurred."*

Let me now determine the complaints raised by the applicant. I agree with Mr. Nyangarika that the Taxing Master applied a wrong principle of law when he held that the applicants visits to his advocate chambers had nothing to do with the conduct of the case and that such visits were private business visits. In my view it is very unwise and unjust to argue that way because, after all it was the respondent who dragged the applicant to the whole mess and costs, when he (respondent) unjustifiably inflated the loan amount granted to the applicant. Secondly, it is the duty of every serious litigant to follow-up his case and to make sure that every step in the case is in his finger tips in spite of engaging an advocate. The applicant was visiting his advocate in view of advancing the interest of his case because he was living away from Dodoma. The applicant did fulfil his duty and emerged the winner and therefore he should not be penalized when it comes to the determination of his bill of costs. Thirdly, as I have pointed above the applicant was residing at Kondoa while his advocate was residing at Dodoma Township and the applicant was able to visit his advocate eight times only in a year to follow up his case. In my opinion each bill of costs must be taxed and determined depending on its peculiar circumstances which caused the costs. The contention that the visitation made by the applicant to his advocate were personal business, unrelated to the conduct of the case cannot stand because the applicant was following up the interest of his case. It

was the very case which forced the applicant to engage and visit the advocate.

In the circumstances there is a good ground for this court to interfere with the decision of the Taxing Master because the alleged visitations costs are incidental to the whole case and reasonably incurred. Therefore items number 6, 8, 9, 11, 13,14,17,18, 25, 28, 30, 31, 33, 36, 39, 42, 44, 46, 47, 49, 50, 51, 52,54, 55, 56, 57, 64, 65, 67, 68, 69, 72, 73, 75, 81, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 104, 106, 109, 113, 116, 120, 121, 128, 129, 130, 131, 132,133,134,135,136, and 137 are restored and taxed as presented to a total sum of TShs.5,134,500/=.

In his assessment, it appears that the Taxing Master suspected the genuiness of the receipts furnished by the applicant and indeed found the exercise of examining them too involving and cumbersome. As a result he claimed that the receipts were designed to confuse the exercise of scrutinizing and examining them. As a result the Taxing Master taxed off most of the costs incurred by the applicant for attending the court on the dates of mention, hearings, ruling and judgement alleging that the receipts thereof were forged, cooked and fabricated.

With due respect to the Taxing Master there is no evidence to substantiate or support his conclusions and findings. It is a pity that the Taxing Master also taxed off some of the items because they were supported with receipts showing that the applicant was eating the same type of food, for several years. I was not able to understand if the Taxing Master was intending to say that it was wrong for the applicant to have eaten same type of food daily or there is a special menu for taxation purposes. While the Taxing Master appeared to be very inquisitive in the receipts, he totally failed to relate the alleged receipts with the specific items, leaving the whole taxation exercise confusing especially on costs incurred by the applicant for attending the court on the dates for mention, hearings and rulings.

I entirely agree with Mr. Lwazo that the base of determination of costs is the court's record of proceedings where the authenticity of the information is found. Therefore I have no quarrel with the court's record where the corum is specific that the applicant was absent. Such absence cannot be cured or justified in taxation by presentation of transport, accommodation and meals receipts. My concern is in regard to the position where the corum or the record of the court is silent regarding to the appearance or non appearance of the applicant. In my opinion it is the duty of the trial court's to record the appearance or non-appearance of every litigant and where the court's record is

silent, one cannot conclude with impunity that the litigant was absent. The applicant has stated that he was present in all dates where the court's record is silent and has produced his transport, accommodation and meals receipts to substantiate his claims. Why should one doubt him? I am of the view that the negligence or inaction committed by the trial court to keep a proper record should not be used to deny the applicant's rights to costs.

Therefore, the applicant is entitled to his mention dates costs on 14//06/2002, 31/07/2002, 30/08/2002, 13/09/2005, 30/11/2005, 24/02/2006 and 20/08/2007 which cover items 12, 15, 16, 70, 74, 78 and 97.

I have also noted that there are two separate items marked item 98 but showing different dates i.e. 19/09/2007 and 26/10/2007. The court's record is clear that they were mediation dates of which the Taxing Master taxed at 30,000/= each (flat rate). There are also two separate items marked item 97 but showing different dates i.e 10/10/2007 and 20/08/2007. The court's record indicates they were mediation dates of which the Taxing Master taxed TShs.30,000/= flat rate for 10/10/2007 but taxed off 20/08/2007 because the record of the court is silent on appearance or non-appearance of the applicant. In my opinion the applicant is entitled to all costs incurred on both dates in items

97 and 98 because non recording of his appearance or non-appearance was not his fault. The applicant is also entitled to his costs for 03/12/2002 (item 21) when the ruling was pronounced but the corum and appearances of the parties was not recorded by the trial court.

Regarding to the hearing dates, I agree with Mr. Nyangarika that on 13/03/2002 (item 7) and 26/11/2003 (item 40) they were dates fixed for hearing and the applicant is indeed entitled to his costs. Likewise, 13/05/2003 (item 29), 18/08/2003 (item 35), 02/02/2004 (item 41), 21/10/2003 (item 38), 21/04/2004 (item 45), 19/08/2004 (item 53), 16/12/2004 (item 59), 2/02/2005 (item 60), 11/03/2005 (item 61), 30/05/2005 (item 63) and 23/07/2007 (item 96). The applicant is also entitled to his costs for 8/11/2007 (item 99), 13/12/2007 (item 100), the dates for mediation and also 2/10/2009 (item 126) the date fixed for judgement.

I am also convinced that the Taxing Master applied wrong principle in taxation when he summarily rejected all receipts furnished by the applicant and arbitrarily reverted to his own flat rate sum of TShs.30,000/= which lacked any legal base against the above said 24 items. In fact the Taxing Master applied the same wrong principle when he decided to tax all 24 travelling

tickets at TShs.6,500/= instead of the amount shown in different receipts.

It must be noted that although the Taxing Maser had a legal duty to check and scrutinize the receipts, he should have exercised that duty judiciously by examining each item and its receipts and gave specific reasons for rejecting each of them instead of declaring them fake and fabricated hence declaring unjustified flat rate of TShs.30,000/= per each item. The contention by Mr. Lwanzo that the applicant should count himself lucky because the Taxing Master used his discretion to fix that flat rate in order to cover the inflation and fluctuation of the prices from 2002 to 2009 lacks any legal or logic support. At least I was not able to comprehend that argument.

Therefore the applicant is entitled to his full costs as presented in items numbers 2, 3, 5, 7, 12, 15, 16, 21, 29, 35, 38, 40, 41, 45, 53, 59, 60, 61, 63, 66, 70, 71, 78, 82, 95, 96, 97(a), 97(b), 98(a), 98(b), 99, 100, 101, 102, 103, 105, 107, 108, 110, 114, 115, 117, 118, 123, 126 and 127. Total amount taxed at TShs.3,541,300/=.

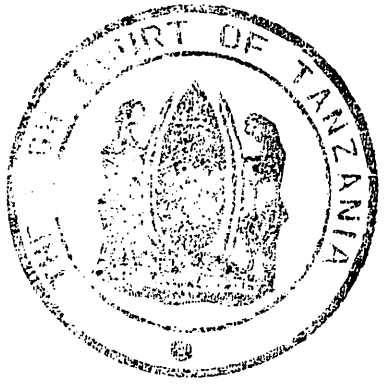
Regarding to the claims for disbursements, I agree with Mr. Nyangarika that the Taxing Master applied a wrong principle of taxation when he based the instruction fees on only the mortgaged sum without bearing in mind that even the business house of the applicant worth not less than seventy five million shillings was in danger of being auctioned by the respondent. Secondly the Taxing Master failed or neglected to take into consideration the myriad of interlocutory applications filed by the parties in the process of the litigation. There was no reason for the Taxing Master to belittle the task involved or to suggest that the delay of the case in court for 8 years was caused by any party to the suit because the case was under the control of the trial court. The trial court had a mandate to dismiss or penalize any party if it was satisfied that the party deliberately delayed the case.

On this complaint I agree with Mr. Nyangarika that the Taxing Master was unusually and unnecessarily scornful to the applicant and his advocate when he went to the extent of blaming them for delaying the finalization of the case without any scintilla of evidence. As it was held in the case of **George Mbughuzi and another (supra)** the decision of the Taxing Master may be interfered with by a court where it was arrived on application of wrong principle or a wrong consideration, so I do. I therefore enhance the instruction fees from TShs.2,000,000/= to TShs.3,500,000/=.

Having gone through the rest of the items under the disbursement schedule, I have no reason to disturb the rest of the findings of the Taxing Master. I must state here that the issue of instruction fees for the preparation, filing and arguing the bill of costs has exercised my mind. However, this being a court of law, must adhere to the position of the law, that, there is no law that allows an advocate to claim fees for preparation, filing and arguing the bill of costs.

Therefore, the instruction fees of the main suit, the interlocutory application and all other necessary disbursements are taxed at **TShs.4,566,500/=.**

In conclusion, the reference is allowed to the extent that the applicant's bill of costs is taxed at a total sum of **TShs.13,242,300/=.** The rest amount is hereby remained taxed off.

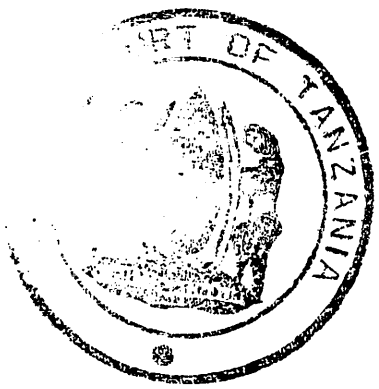


(M.S. SHANGALI)

JUDGE

19/04/2012

Ruling delivered to-date 19th April, 2013 in the presence of Mr. Mavunde, learned advocate, holding brief for both Mr. Nyangarika for applicant and Mr. Lwazo for the respondent.



(M.S. SHANGALI)

JUDGE

19/04/2012