IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 217 OF 2015

(Arising from Commercial Case No. 166 of 2014)

NATIONAL BANK OF COMMERCE LIMITED ..... APPLICANT

VERSUS

MM WORLDWIDE TRADING CO. LTD
JACOB FREDRICK MSAKI } **..... RESPONDENTS**
ANNETE JACOB MSAKI

16th February & 15th March, 2016

RULING

MWAMBEGELE, J.:

The National Bank of Commerce was the plaintiff in Commercial Case No. 166 of 2014 in which she sued the respondents herein jointly and severally for, *inter alia*, payment of USD 683,839.70 being outstanding amount on facilities granted to the first defendant; the first respondent herein. That suit was struck out on 25.05.2015 on point of law raised by way of a preliminary objection. Consequent upon that, the respondents filed a Bill of Costs in this court which was heard on 02.07.2015 and a ruling thereof delivered by the Taxing Master on 14.07.2015. The Bill was taxed at 24,648,810/=. This

included Tshs. 25,438,810/= as instruction fee. This amount aggrieved the applicant, hence this reference in which the indulgence of this court is sought "to interfere and reverse the decision of the Taxing Master by reducing the instruction fees to an amount commensurate with the effort and work put by the respondent to defend the suit." The reference has been taken under rule 5 (1) and (2) of the Advocates' Remuneration and Taxation of Costs Rules, GN No. 515 of 1991 (henceforth "GN No. 515 of 1991"). It is supported by an affidavit sworn by Gaspar Nyika, learned advocate and officer of this court.

The application was argued before me on 16.02.2016 during which Ms. Burure Ngocho, learned counsel, appeared for the applicant and Mr. Frank Mwalongo, learned counsel, appeared for the respondents. Both parties had earlier filed skeleton written arguments as dictated by rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012. At the oral hearing, both learned counsel for the parties sought to adopt their respective skeleton arguments earlier filed as well as the affidavit and counter affidavit for and against the application, respectively.

The learned counsel for the applicant submitted that the Bill of Costs claimed Tshs. 72,760,000/= which included instruction fees of Tshs. 70,000,000/= and the Taxing Master taxed it at Tshs. 24,648,810/= which means that the respondents were awarded a full 3% of the subject matter of the suit. The learned counsel argued that the respondents ought not to have been awarded the full 3% because the amount claimed was not commensurate with the efforts and labour employed in the suit because it ended by a preliminary objection without going into full trial. The learned counsel urged the court to employ the principles laid down by ***Premchand Raichand Ltd and another Vs Quarry Services of East Africa Ltd and others (No. 3)*** [1972] 1 EA

162; in which it was held that in considering instruction fee, the court must consider the following principles:

a) that costs be not allowed to rise to such a level as to confine access to the courts to the wealthy;
b) that a successful litigant ought to be fairly reimbursed for the costs he has had to incur;
c) that the general level of remuneration of advocates must be such as to attract recruits to the profession; and
d) that so far as practicable there should be consistency in the awards made.

Relying on the ***Premchand*** case (supra) the learned counsel for the applicant submitted that in order to ascertain whether the instruction fee claimed was fair and reasonable, the court ought to have considered the issue whether the same was based on the amount of work involved in preparation of the suit, the difficulty and importance of the case as well as the amount of money involved.

Ms. Ngocho, learned counsel, also cited ***C. B Ndege Vs E. O. Ayila & AG*** [1988] TLR 91 to buttress the proposition that instructions cost should be commensurate with amount of time, energy and industry involved and that the sum should not be pegged to the fund deposited by any party and ***George Mbuguzi & anor Vs A. S. Maskini*** [1980] TLR 53 to reinforce the proposition that issues to consider in determining the fairness and reasonableness of the instruction fee is complexity of the matter.

She submitted that the suit having ended on a preliminary objection, the Taxing Master ought to have considered that fact as was the case in ***NBC Ltd Vs Kapinga & Company Advocates***, Civil Reference No. 4 of 2003 and ***National Chicks Corporation & ors Vs NBC Ltd***, Commercial Case No. 11 of 2014; unreported decisions of this court.

On the strength of the above, the learned counsel submits that the amount awarded was on the high side.

On the other hand, Mr. Mwalongo, learned counsel for the respondents, was brief but to the point. He submitted that the amount awarded by the Taxing Master was the minimum provided by the law and practice. The learned counsel cited Schedule IX of the Advocates' Remuneration and Taxation of Costs Rules, GN No. 515 of 1991 which pegs scale of fees for contentious proceedings for liquidated sum in original and appellate jurisdiction at 3% for any amount exceeding Tshs. 3,000,000/=. The learned counsel also referred to the proviso to the schedule which pegs the amount at two-thirds of the amount where the defendant does not dispute the claim and does not file a defence. The learned counsel cites the ***Mbuguzi*** case (supra) and ***Hotel Travertine Ltd Vs NBC Ltd***, Taxation Reference No. 9 of 2006 (unreported) and ***Citibank Tanzania Ltd Vs Tanzania Telecommunications Co. Ltd & 4 others***, Civil Application No. 112 of 2003 to support his arguments.

In a short rejoinder, Ms. Ngocho, learned counsel for the applicant, stated that the ***Mbuguzi***, ***Hotel Travertine*** and ***Citibank*** cases (supra) are distinguishable because all the three cases were fully heard; they did not end at the preliminary stage as is the case in the present case. She added that the ***Citibank*** case, for instance, the subject matter was Tshs. 18M/= whose

3% would have been USD 558000 but the court granted only Tshs. 15M/= (USD 7500) only. The learned counsel added that the learned Taxing Master should have exercised his discretion to reduce the amount.

The only issue for determination in this reference is whether the amount awarded by the Taxing Master is on the high side to warrant interference by this court. In resolving this contentious question I start with the premise that taxation powers are discretional upon the Taxing Officer and this court will not interfere with such powers unless it is satisfied that the same was based on a wrong principle – see ***Pardhan Vs Osman***, [1969] 1 EA 528 and ***George Mbuguzi Vs A. S. Maskini*** [1980] TLR 53; the decisions of this court. The reason why such powers, especially on the quantum of instruction fee, should be left within the empire of the Taxing Master was aptly explained by this court (Hamlyn, J.) in the ***Pardhan*** case (supra) as follows:

> "... judges, lacking the experience of taxing masters, will not interfere with the quantum allowed as an instruction fee upon taxation, unless it is manifestly so high or so low that it calls for interference by reason of some misdirection having occurred or some wrong principle having been adopted."

The same principle is applicable in the Court of Appeal – see: ***Gautam Jayram Chavda Vs Covell Mathews Partnership*** Taxation Reference No. 21 of 2004 (unreported).

Reverting to the present matter, the main complaint by the hinges on the award by the Taxing Master of Tshs. 25,438,810/= as instruction fee. In arriving at this figure the learned Taxing Master had this to say at p. 3 of the ruling:

> "I [have] made my opinion several times like what I did in the cited case of ***National Chicks Vs National Bank of Commerce***, Comm. Case No 11 of 2014 when discussing the criteria of allowing instruction fee. There is a point of no dispute that the relevant provisions for a matter whose value of a subject matter exceeds TShs. 3,000,000 is 3% of the said amount. I went through the case of ***George Mbuguzi Vs A. S. Maskini*** [1980] TLR 53. Nothing has been said which amounts to a departure of the said 3% principle. The proper computation should be based on 3% ...
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> Looking at the records, the total amount claimed in the suit was USD 683,839.70. At the exchange rate of TShs. 1240 per one dollar, that makes TShs. 847,960,360/= of which its 3% is TShs. 25,438,810/50. I therefore tax the TShs. 25,438,810 as instruction fee. ..."

Mr. Mwalongo, learned counsel for the respondents, submitted that what the Taxing Master did was to apply the law; not discretion. Ms. Ngocho, learned counsel for the applicant stated that the Taxing Master ought to have exercised the discretion which he did not. The para quoted above from the

ruling of the Taxing Master vindicates the contention that the learned Taxing Master did not apply discretion in awarding the instruction fee.

The question which lingers my mind at this juncture is whether, in view of clear provisions of the law, the Taxing Master ought to have granted a lesser amount the suit having ended on a preliminary point of objection without going into full hearing. Let me start with an observation that the principle of taxation by considering the 3% scale prescribed for instruction fees is for contentious matters. What is a contentious matter?

I have not been able to get the definition from **Black's Law Dictionary** which definition, it being a legal dictionary, would have made me comfortable. But the Oxford Advanced Learner's Dictionary defines the term "contentious" as:

> "1. likely to cause disagreement between people:
> *a contentious issue/topic/subject ..."*

And the **Cambridge Advanced Learner's Dictionary** defines the term as:

> "causing or likely to cause disagreement: *a contentious decision/policy/issue/topic ..."*

In terms of the Advocates' Remuneration and Taxation of Costs Rules, GN No. 515 of 1991 [which have now been revoked by the Advocates Remuneration Order, 2015, (GN. 264 of 17.07.2015)], the Bills of Costs are taxable in accordance with the scales provided for under the said , GN No. 515 of 1991. Accordingly, the law as it is, does not differentiate as between the matter

which has been determined to its finality and on merit or that which has been determined through a preliminary objection.

The operative word is "contentious", and as such, in taxing costs regard is to be had only on the nature of the subject matter of the suit regardless of the nature of proceedings that brought it to its finality. This clear conclusion is vindicated by the proviso to the Schedule IX thereof, whereby the scales applicable to taxing a matter in which defendant does not dispute a claim and does not file a defence, is two-thirds of the fees provided in GN No. 515 of 1991. It is apparent therefore that where a matter is contentious, upon its determination whether on merits or otherwise, on the basis that costs follow event, the taxable rates are as provided in GN No. 515 of 1991.

From the foregoing discussion, it can be said that costs are taxable on the rates provided by the law regardless of whether the matter was determined on a preliminary point or after a full trial. Addition or deduction therefrom is discretional upon the High Court Judge, and as such, any party seeking to have the amount taxed at lower rate than the prescribed scales or additional rate than the prescribed scales has to lay grounds for the Judge to exercise such discretion.

This court was once seized with an identical discussion in ***Tanzindia Assurance Company Limited Vs RABCO Tanzania Limited***, Commercial Case No. 37 of 2006 (unreported). In that case, relying on another unreported decision of this court of ***MGS International (T) Ltd Vs Halais Pro-Chemie Industries Ltd***, Commercial Case No. 3 of 2003, my brother at the Bench Werema, J. had an opportunity to discuss this issue at length. In that case, the Taxing Master had awarded 6% instead of the 3% provided for

by GN No. 515 of 1991. The learned Taxing Master had given reason for so doing. In upholding the discretion of the Taxing Master, His Lordship Werema, J., at pp 7 and 8, had this to say:

> "The interpretation of the Rules and Section 30 of the Civil Procedure Act arose in MGS INTERNATIONAL (T) LTD VS HALAIS PRO-CHEMIE INDUSTRIES LTD (Commercial Case No. 3/2003) (unreported). Kalegeya J. (as he then was) resolved what appears to be a contradiction of these provisions by deciding that a taxing master may judiciously depart from the schedules because awarding of costs is fully discretionary. The ratio of that decision appears to me to be that once a taxing master acts judiciously, devoid of applying a wrong principle of law or considerations, the court would rarely interfere with the decision. The grounds attracting such interference were stated by his lordship to include cases where the award is manifestly excessive or low as to appear unconscionable. A menu of factors to be taken into account by the taxing master indicated to include:
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> (a) the suit amount;
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> (b) the nature of subject matter;
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> (c) complexity of the suit;
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> (d) time taken for hearing, extent of research involved;

(e) parties general behaviour and facilitation of expeditious disposal of the case;
(f) public policy by ensuring that allowable court; that litigation should be affordable; and
(g) maintenance of consistency in quantum of costs allowable".

The foregoing discussion in ***Tanzindia***, shows that the decree holder may be entitled to 3% or more depending on the circumstances of each case. In the same line of argument, the decree holder may be entitled to a lesser amount, depending on the circumstances of the case. In all the circumstances in the cases above, the cases were finalized by a hearing.

In the present case, the matter had not been finalized by a hearing; it ended by a successful preliminary objection. In the same line of reasoning, it seems to me, the Taxing Master, as a matter of discretion, could have offered a lesser amount as the whole matter was within his discretion depending on the efforts and industry put in the case. I think 1½% of the amount the subject matter of the suit would have been apposite in the circumstances. For the avoidance of doubt, I am aware of the warning by Buckley, J. in ***In the Estate of Ogilvie, Ogilvie Vs Massey*** (1910), 103 L.T. 154, C.A, as quoted in the ***Pardhan*** case (supra). His Lordship Buckley, J. had this to say:

"On questions of quantum the decision of the taxing officer is, generally speaking, final. It must be a very exceptional case in which the court would even listen to an application to review his decision."

In my view, in the case at hand, there are exceptional circumstances envisaged by His Lordship Buckley, J. in the above quote that may warrant this court to interfere with the decision of the Taxing Master. These are, as Mr. Mwalongo, learned counsel for the respondents, rightly submitted and as conceded by Ms. Ngocho, learned counsel for the applicant, that the Taxing Master applied the law and not discretion. And that the circumstances of the present matter, as rightly submitted by Ms. Ngocho, learned counsel for the applicant, are such that the Taxing Master should have exercised the discretion bestowed upon him because the suit terminated without a full trial.

All considered, the amount of Tshs. 25,438,810/= which is 3% of Tshs. 847,960,360/= awarded by the Taxing Officer, is set aside and, in lieu thereof, replaced with Tshs. 12,719,405/ which is 1½% of Tshs. 847,960,360/=.

In the end of it all, this reference succeeds to that extent. In the peculiar circumstances of this case, no order is made as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 15th day of March, 2016.

J. C. M. MWAMBEGELE
JUDGE