IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISRTY

AT MOSHI

LAND REFERENCE NO. 7 OF 2019

(Arising from Bill of Costs No. 4 of 2019, High Court of Tanzania at Moshi)

BABITO LTD ..... APPLICANT

VERSUS

FREIGHT AFRICA NV – BELGIUM ..... 1ST RESPONDENT

TAHIR S/O MURTAZA VALJI ..... 2ND RESPONDENT

TOTAL FREIGHT SERICES (T) LTD .....3RD RESPONDENT

12th November & 10th December, 2020

RULING

MKAPA, J:

The applicant, **BABITO LTD** who was the Respondent in Bill of Costs No. 4 of 2019 lodged the instant application before this Court by way of Reference resisting the Ruling of Taxing Master in **Bill of Costs No. 4 of 2019.**

The Application has been brought under Rule 7 (1) and (2) of the **Advocates Remuneration Order G.N No. 264 of 2015** and is supported by the affidavit of Rajesh Kumar Shivji Ram Aggrawal, applicant's managing director which the respondents vehemently contested by filing a joint counter affidavit through Mr. Ndurumah Keya Majembe learned advocate raising the following grounds;

a. That, the learned Taxing Master erred in entertaining a time barred Bill of Costs lodged after a lapse of 60 days period of limitation.
b. That, the learned Taxing Master entertained incompetent Bill of Costs which was not drawn by the advocate finally on record as required by Order 64 (1) of G.N No. 264 of 2015.
c. That, the learned Taxing Master unreasonably awarded instruction fees to the tune of three million shillings in the absence of a separate pleading contrary to item 1 (m) of the 11th Schedule to the GN. No. 264 of 2015.
d. That, the learned Taxing Master unreasonably awarded travelling costs to the tune of two million shillings while there were no proof of receipts of the cost incurred.
e. That, the learned Taxing Master wrongly awarded the sum of two million shillings as charges for attending taxation matter, while the respondents never appeared throughout the proceedings.

When the matter was called for hearing parties consented the application be disposed of by way of filing written submissions. The applicant was represented by Mr. Bharat B. Chadha learned advocate while the respondents were jointly represented by Mr. Ndurumah Keya Majembe also learned advocate. In support of the application on the first ground regarding the Bill of Costs

being time barred, Mr. Chadha submitted that the decision to award costs was made by this Court in **Misc. Civil Application No. 14 of 2018** on 13th November, 2018 while the Bill of Costs was filed on 14th January 2019. Mr. Chadha explained further that from 13th November 2018 to 14th January 2019, 60 days period of limitation prescribed by the law had already expired. To support his argument he cited the decision in the case of **Eliminata Massinda V Maswet Massinda and Josephat Massinda**, **PC Civil Appeal No. 11 of 2018** (unreported) where the High Court in Arusha struck out the appeal for reason of a one day delay. He went on explaining that section 3 of the Law of Limitation Act Cap 89, [R.E. 2019] provides for consequences of failure to file application or suit after the expiry of period of Limitation namely dismissal. It was Mr. Chadha's view that, the application for Bill of Costs ought to have been dismissed.

As to the second ground Mr. Chadha objected that the application for Bill of Costs is incompetent for not being drawn and filed by an advocate who was finally on record contrary to **Order 64 (1) of G.N 264 of 2015** and that Mr. Amani Lawrence Shirima from Fortis Attorneys who filed an application for Bill of Costs never appeared in the conduct of **Misc. Civil Application No. 14 of 2018**. It was Mr Chadha's view that the fact that the said advocate was engaged with the same law firm

as that of the advocate who had previously represented the respondents, is not enough proof that he is indeed registered to work with the said firm. He went on elaborating that a firm of advocates as an entity does not possess the status of an individual advocate as was held in the case of **Joseph Mnyavano V. Andrew Mkangaa**, **Revision No. 281 of 2016**, thus representation has to be effected by individual advocate.

As regards to the 3rd ground Mr. Chadha contended that the legal fees to the tune of three million shillings awarded by the Taxing Master as instruction fees is contrary to Order 62 of GN. No. 264 of 2015. It was Mr. Chadha's view that extra fee is awarded only if separate pleadings are filed. However, in the instant matter advocate for the respondent filed a joint counter affidavit thus only entitled to the prescribed amount as per item 1 (m) (ii) of the 11th Schedule to the GN. No.264 of 2015 which is one million shillings (Tshs. 1,000,000/=)

Turning to the 4th ground the learned counsel challenged the amount of two million shillings determined by Taxing Master as traveling expenses while the same was neither claimed nor proved by receipts on the costs. Further, the Taxing Master failed to consider the fact that, it wasn't necessary for two advocates to travel from Dar-Es- Salaam to Moshi when the case was called

for mention, and while filing Counter Affidavit and a notice of preliminary objection.

On the last ground Mr. Chadha asserted that the Taxing Master awarded travel expenses to the tune of two million shillings (Tshs. 2,000,000/=) for attending taxation matter while the respondents nor their counsel never appeared throughout the proceedings. The learned counsel went on submitting that in the application for Bill of Costs subject to this application, the judgment holder was always being referred to as the applicant while the decree holder as the respondent. It was Mr. Chadha's argument that the Taxing Master *suo motto* corrected the error which prejudiced the judgment debtor by validating the invalid Bill of Costs. He finally prayed for this court to allow the Application.

Responding against the application Mr. Ndurumah submitted on the first ground the fact that the same had already been argued while arguing the preliminary objection. He thus prayed for this court to adopt and consider the contents of same in this application. He further prayed for the reasoning and court's findings on page 8 and 9 of the Ruling delivered on 28th June, 2019 be considered in respect of the 1st ground.

As to the second ground, Mr. Ndurumah averred that it is not the intention of the legislature to bind the last person appearing

on record to be the signatory of the Bill of Cost. It was his view that, the word advocate may include a group of advocates engaging in business under the umbrella of a single registered law firm. He went on elaborating that when a client instructs a law firm the instructions may be carried out by a qualified advocate engaged in the same firm. Since the advocate who signed the Bill of Costs is qualified, he prayed for this court not to disqualify the Bill of Costs at the expense of a party in whose favour the cost is awarded. The learned counsel argued further that, the cited cases are distinguishable as to the facts and circumstances.

Regarding the 3rd ground, Mr. Ndurumah asserted that the import of Order 62 of GN. No. 264 of 2015 is to discourage advocates from filing and billing for multiple pleadings. That, the purpose of Bill of Costs is not to profit the advocate but to reimburse the party on reasonable costs incurred in the process of prosecuting or defending the case before the Court. He went on explaining that, it is not possible to survive in legal practice by charging one million shillings for a case which may take months or years to be determined. Nevertheless, the learned counsel argued that given the circumstances of the case, there was no reason to alter or re-tax the bill which the applicant is pressing for.

It was Mr. Ndurumah's argument on the remaining grounds that, there was proof of travel costs in his personal name between 27th and 28th August, 2018 contrary to what the applicant alleged. Furthermore, on the material dates the respondent did file submissions in defence of the preliminary objection, submission in chief and rejoinder in respect of the Bill of Costs application. Therefore, the Taxing Master assessed travelling costs and cost for filing the submissions and arrived at a legally acceptable amount of two million shillings (Tshs. 2,000,000/=). He finally prayed for this court to dismiss the application with costs. There was no rejoinder.

Having regard to the facts and circumstances of the matter I think the issue for determination is whether or not the Application is meritorious.

As to the 1st ground it is undisputed the fact that the Bill of Costs was time barred by one day as it is on record that the **Misc. Application No. 14 of 2018** was struck out with costs on 13th November, 2018 and the application for Bill of Costs was filed on 14th January, 2019 whereby the mandatory 60 days had expired on Saturday 12th January, 2019. The subsequent filing was on Monday 14th January, 2019 and the respondent had to file the application for Bill of Costs on the 62nd day but the same is not barred by limitation as provided for under section 60 (1) (b) and (2) of the Interpretation of Laws Act CAP 1 [R.E 2019] read

together with section 19 (1) of Laws of Limitation Act CAP 89 [R.E 2019] which provides for exclusion of Saturday, Sunday and holidays.

In the circumstance, since the 60th day lapsed on Saturday which is an excluded day as well as Sunday, the law allows for the Application for a Bill of Costs to be filed on Monday 14th January, 2019. Assuming there was a one day delay, as argued by the applicant such omission in my opinion would not have resulted into a miscarriage of justice by invoking the Overriding Objective principle which urges Courts to do away with minor technicalities and concentrate on substantive justice by deciding cases on merit. I therefore find this ground is meritless.

On the 2nd ground which challenged the Bill of Cost not to have been signed by the advocate who was finally on record, I find it pertinent to refresh my memory on Order 64 (1) of G.N. 264 of 2015 which provides that:-

> *"Where there has been a change of an advocate or more than one change of advocates, the advocate finally on the record* ***shall*** *draw a single bill for the whole matter in respect of which costs have been awarded."(Emphasis mine)*

The above provision has been couched in mandatory term "**shall"** in which the function so conferred must be performed.

However, not in all circumstances when the word "shall" connotes mandatory requirement as has been illustrated in the case of **Goodluck Kyando V Republic** (2006) TLR 363 at pages 368 and 369, where the Court of Appeal while interpreting the changes brought about by the Interpretation of Laws Act had this to say;

> *"This Court in the case of **Fortunatus Masha V. William Shija and Another** had the occasion to construe the word "shall" as used in Rule 76(3) of the Court of Appeal Rules, 1979 and stated as follows at page 43;*
>
> > *"We think that the use of "shall" does not in every case make the provision mandatory. Whether the use of that word has such effect will depend on the circumstances of each case"*
>
> *... we would like to point out however, that since the coming into force of the Interpretation of Laws Act, Chapter 1 on the 1 September, 2004 vide Proclamation number 312 of 2004, the law in this point may change in view of section 53 (2) which provides;*
>
> > *(2) where in any written law the word shall is used in conferring a function, such word shall be*

interpreted to mean that the function so conferred must be performed"

Since it is undisputed that Order 64 (1) of GN. 264 of 2015, is coached in mandatory term my view is, the circumstances in the instant case is distinguishable as the advocates who prosecuted the case were engaged in the same law firm. The fact that another advocate named Amani Lawrence was not involved in finalizing the matter yet was involved in drawing the Bill of Costs, in my view is not fatal since he was engaged with the same law firm as decree-holder's advocate. More so, drafting of Bill of Costs is an administrative task which could be performed by any advocate within the law firm. I am therefore of the considered view that, the bill of cost was properly filed.

With regard to the 3rd ground on Taxing Master's fairness in determining the amount of three million shillings (3,000,000/=) as instruction fees, as rightly argued by the applicant all the respondents were jointly represented by a single advocate who had prepared a joint counter affidavit. In my opinion the Taxing Master ought to have considered whether the amount claimed was based on the amount of work involved in the preparation of the said documents? In the case of **C.B. Ndege V. SEO Apia & AG 1988 TLR** it was emphasized that instruction fees should be commensurate with the amount of time, energy and industry

involved. The same position was reiterated in the case of **Hap Athuman V. Rwetamamlatu (1992) TLR 172** where it was stated that *"instructions fees should have a bearing to the gravity and nature of work expedited by counsel of a successful party."*

From the foregoing legal position my view is, the amount of three million shillings which was awarded as instruction fees was unjustifiable as the same does not commensurate to the gravity of nature of the work, given the fact that the Respondent's counter affidavit was jointly prepared. In the circumstance, I hereby struck off the excess amount and remain with the scaled amount as prescribed under item i (m) of 11th Schedule to the Advocates Remuneration Order which is one million shillings (Tshs. 1,000,000/=) as cost for instructions fees.

The above amount is also taxed as far as the cost for attending to the taxation matter is concerned. I reduce the amount of two million shillings (2,000,000/=) awarded, to one million shillings (Tshs. 1,000,000/=) as costs for the Bill of Costs which makes the total cost awarded to the respondent being shillings 4,592,440/=.

In view of the above discussion, the application is partly merited to the extent explained above. In order to discourage endless litigations, I give no orders as to cost.

It is so ordered.

Dated and delivered at Moshi this 10th day of December, 2020.

S.B. MKAPA

JUDGE

10/12/2020