IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB – REGISTRY

AT MUSOMA

TAXATION REFERENCE NO. 1 OF 2021

(Arising from Misc. Application No. 43 of 2018 at the

District Land and Housing Tribunal of Tarime at Tarime)

MACHENES OTAIGO ..... APPLICANT

VERSUS

JOSEPH NCHAGWA.....RESPONDENT

RULING

22nd March and 29th April 2022

F. H. MAHIMBALI, J.:

The applicant has been aggrieved by the decision of the District Land and Housing Tribunal for Tarime in its taxation duty when it taxed the total costs is 4,879,000/= in prosecuting Land Application No. 2 of 2015.

Originally, the respondent successfully filed a land suit against the applicant before the DLHT of Tarime. Aggrieved by that decision the applicant unsuccessfully appealed to the High Court. Following the last verdict of the High Court, the respondent then returned to the DLHT and

filed the bill of costs No. 43 of 2018 in which it was taxed at a tune of **Tsh. 4,879,000/=**.

Aggrieved by the taxation order, the applicant has by way of reference preferred the current taxation reference under order 7(1) of the Advocates Remuneration Order GN 264 of 2015 challenging the decision by the DLHT. Thus, urging this Court to revise the said order by the DLHT.

The main reason for the said reference to this Court as per affidavit of the applicant is mainly one that there has not been production of receipts and vouchers at the DLHT as basis of the said award.

During the hearing of the application, Ms Helena Mabula represented the applicant whereas Mr. Kadaraja who resisted the application represented the respondent.

Arguing in support of the application, Ms Mabula queried how the taxing officer, included expenses which were not part of the order. Costs were awarded in land Application no 2 of 2015. Therefore, the DLHT has no legal justification in awarding costs when determining Misc. Application no 43 of 2018 (Bill of costs) with costs in Land Appeal No 28 of 2017. Moreover, there were no accompanying receipts in support of

the application. In the absence of receipts, it is a wonder then how can one assess the same and reach to that award. She relied her submission in the case of **Thinamy – Entertairnment Limited and 2 others vs Dino Katsapas,** Misc. Commercial Case No. 86 of 2018 (see page 7 and 8) where it was held that proof of the same is necessary. Although Order 58, rule 1 of GN 264 of 2015 provides that receipt or voucher has to be produced during taxation at the request, the practice has been this, proof of it is done by production of the said receipt/voucher.

Furthermore, she wondered as to why, of all the items presented, the taxing matter failed to tax off even a single item. That was surprising to her.

She then urged the court to quash the taxation proceedings and the resulting orders thereof.

Countering the application, Mr. Kadaraja for the respondent argued that as most of the taxed items are prescribed by the law, thus, the need of documentary proof is uncalled for. On the need of issuance of receipts and vouchers, Mr. Kadaraja contended that the taxing master in this matter clearly stated in his ruling at page 3. As it is a discretional issue to the taxing master, he was not compelled to demand them.

On the issue of the cited case being of the High Court, he argued that first it is not binding to this Court, secondly, it has been overridden by other cases with opposite stand/position of the law.

Responding on the issue as to why the taxing officer has not taxed off any item in his taxation duty, he too queried the relevance of the question. He was of the interest to know, what amongst the items presented, the learned counsel wanted them to be taxed off by the taxing master and based on what reason? As there is not any item substantively argued/countered, then there is nothing material to challenge the same. Drawing reference in the case of **Registered Trustees of Cashewnut Development Fund Vs Cashewnut Board of Tanzania**, Civil Reference no 4 of 2007, CAT at Dar es Salaam how the Court of Appeal gave a direction what taxation application should consider. As there is no any faulting ground, he prayed that the reference application be dismissed with costs.

On the issue of the mentioned cases being included together, he submitted that, the settled law is, costs are taxed differently.

Lastly, he challenged the application itself in terms of order 7 (3) of GN 264 OF 2015, that the applicant after had filed his/her reference application, failed to serve copies thereof to the respondents within clear

seven days as provided by the law. As they were served beyond the seven clear days, there has been violation, the application was not properly filed. He therefore prayed that the application be struck out.

In her rejoinder submission, Ms. Helena Mabula reiterated her submission in chief that failure to demand the receipt, she is of the view that the taxing master failed to observe the law as the Decree Holders were only justified to claim the said amount upon production of relevant receipts/vouchers.

Regarding the mentioned case by the learned advocate, which overrides the case, she challenged it by want of issue of the said authority he had referred. As he has failed to cite the said case nor supplied the same, she is not in a proper position to know if the said case really exists and that it holds the said legal principle as propagated.

In reply to the issue of failure to effect service of the reference within clear seven days to the respondent, she admitted it. However, it was for want of physical address of the respondent. When it was known, he was dully served. She is thus of the view that there has not been any prejudice to him as he filed the same though on default.

I have considered the grounds of reference argued for and against by the parties and their respective affidavits, submissions thereof and the application itself in reaching this end.

According to the certificate as to the folios giving rise to the current application, it is clear that the said bill of costs application emanates from Land Appeal No. 28 of 2017 as originated from land Application No. 2 of 2015 by Tarime DLHT. This suggests that the bill of costs filed and determined by the DLHT, embodied costs for the both cases; that of DLHT and by the High Court as dated 22/11/2017. In my considered view that was not a right way. It was expected as a matter of law, since the matter ended at the High Court, then the applicant ought to have filed his application before the High Court for it to be lawfully dealt with. Otherwise, the applicant is not justified to file the same at the subordinate court for a matter that ended at the High Court and embodied in it the litigation costs at the High Court (See order 2 and 3 of the Advocate's Remuneration Order, GN 264 of 2015). The rationale is simple, whereas executions are done by the Court of first instance, bill of costs are determined by the last court which dealt with matter finally. As the respondent filed both costs at the DLHT, that was not legally right. The right course was to file at the Court of the last instance and in this course, the High Court.

Considering what has been gleaned above, by the applicant's motion of filing the bill of costs at the DLHT, it can be considered that he waived his legal costs' rights ordered by the High Court. Thus, the taxation should have confined itself as per costs at the DLHT, the applicant being the victorious at both DLHT and the appeal at the High Court. If that is considered right, then costs in items 1, 2, 3, 20, 21, 22 and 23 are taxed off for being inapplicable to the bills at the DLHT as these cover costs at the High Court. This means that a total costs of 2,120,000/= are taxed off.

Regarding payment of instruction fees, as a general rule, the award of instruction fees is the discretionally power of a taxing officer and the higher court will always be reluctant to interfere with his decision, unless it is proved that the taxing officer exercised his discretion injudiciously or has acted upon a wrong principle or applied wrong consideration (See **Haji Athumani Issa v Rweitama Mutatu** 1992 T.L.R 372 (HC) & **Tanzania Rent a Car Limited versus Peter Kimuhu**, Civil Reference No. 9 of 2020) This has been articulated in several decisions of the Court of Appeal such as: **The Attorney General v. Amos Shavu**, Taxation Reference No. 2 of 2000, **The East African Development Bank v. Blue Line Enterprises**, Civil Reference No. 12 of 2006 (both unreported), **Premchand Raichand**

Ltd and Another v. Quarry Services of East Africa Ltd and Others (No.3) [1972] 1 E.A. 162 by the erstwhile Court of Appeal for Eastern Africa and Court of Appeal for East Africa, respectively. Specifically, in **Premchand Raichand Ltd and Another** (supra) the erstwhile Court of Appeal for Eastern Africa laid down four guiding principles which have to be considered when determining the quantum of an instruction fee. These are; -

> *"First, that costs shall not be allowed to rise to such a level as to confine access to the courts to only the wealthy; second, that the successful litigant ought to be fairly reimbursed for the costs he reasonably incurred; thirdly , the general level of the remuneration of advocates must be such as to attract worthy recruits to an honourable profession; and fourthly , that there must, so far as practicable, be consistency in the awards made, both to do justice between one person and another and so that a person contemplating litigation can be advised by his advocates very approximately, for the kind of case contemplated, is likely to be his potential liability for costs .*
> "

These principles were restated by the Court of Appeal in the case of **The Attorney General v. Amos Shavu** (supra) and **Registered Trustees of the Cashewnut Industry Development Fund** (supra).

As it can be gleaned from the above provision, the taxing officer has been given wide latitude and discretion to determine taxing costs as it appears to him to be proper for attainment of justice. However, the said discretion should be exercised within the cost scales prescribed in the Rules. In addition, the taxing officer is also supposed to consider other factors such as the greater the amount of work involved, the complexity of the case, the time taken up at the hearing including attendances, correspondences, perusals and the consulted authorities or arguments.

In **Hotel Travertine Ltd** (supra), Ramadhani, J.A (as he then was) considered a similar issue as whether the receipts were required to prove a claim for instruction fees. He observed this at page 3 of the Ruling that: -

> *"This claim too was taxed off because there was no receipt attached. That amount I think is reasonable and there can hardly be a receipt unless one went to the court by a taxi. But if one uses one's car that can be difficult to account with a receipt. So, I will allow that claim."*
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> [Em phasis added].

On the basis of the above provision and authority, I am in agreement with Mr. Kadaraja that in taxation of bill of costs there is no

need of proof of instruction fees by presentation of receipts, vouchers and/or remuneration agreement because the taxing officer, among others. What is to be determined is the quantum of the said fees in accordance with the cost scales statutorily provided for together with the factors enumerated above. With respect, I find the submission by Ms. Helena Mabula on this point to have missed a good point.

In line with this, I wish to add by stating that, it is trite law that instruction fee is supposed to compensate adequately an advocate for the work done in preparation and conduct of a case and not to enrich him. In **Smith v. Buller** (1875) 19 E9.473, cited **in Rahim Hasham v. Alibhai Kaderbhai** (1938) 1 T.L.R. (R) 676, the Court observed that,

> *"Costs should not be excessive or oppressive but only such as are necessary for the conduct of the litigation."*

That said, I am in agreement with the settled position of the law that, proof of payment of instruction fees and other payable costs in taxation causes are legally discretionally by the taxing master in its range unless it is payment by disbursement. Therefore, there is no need of establishing them by production of electronic receipts or any other proof of payment as challenged. A mere provision of legal service (if not in pro bono) is itself an entitlement to reimbursement for the legal

services rendered. In the current case, all the charged items were in a proper range serve that, the filing of the same ought to have been at the court of last instance should the respondent needed to claim all costs of the case from its inception to the High court as decreed.

Having taxed off the High Court costs which is **2,120,000/=,** the remaining payable balance is TZS: 2,729,000/=.

In the upshot, I am convinced that the application is meritorious for its grant as to the extent of quantum. Accordingly, I revise the DLHT's decision to the extent explained above. Each party to bear own costs.

DATED at MUSOMA this 29th day of April, 2022.

F.H. Mahimbali

JUDGE

Court: Judgment delivered this 29th day of April, 2022 in the absence of both parties.

F. H. Mahimbali

JUDGE

29/04/2021