IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

CIVIL REFERENCE NO. 7 OF 2021
(C/f Taxation Cause No. 2 of 2021, Originating from Misc. Civil Application No. 83 of 2020)

GENEVIVE MARIANNE HALL MONTAGNON ..... 1ST APPLICANT

CYRILLE XAVIER HARI ..... 2ND APPLICANT

FREDRICK MARTIN NYITI ..... 3RD APPLICANT

Versus

RAJAI ALLY MGOMBA ..... RESPONDENT

RULING

24th August & 7th October, 2022

Masara, J.

This application was preferred under Orders 7(1) & (2), 14 and 15 (a), (b), (c), (d) and (e) of the Advocates Remuneration Order 2015, GN. No. 264 of 2015 ("GN. No. 264"). The Applicant moved the Court to quash and set aside the decision of the Taxing Master in Taxation Cause No. 2 of 2021 delivered on 10/12/2021. The application is supported by four separate affidavits; namely, those of the 1st and 2nd Applicants and supporting affidavits by Fanuel Mgonzo and Robert Mgoha George. The Respondent did not file a counter affidavit.

At the hearing of the application, the Applicants were represented by Mr Robert Mgoha George, learned advocate, while the Respondent was

represented by Mr Prince Mwailwa, learned advocate. The application was disposed of through filing of written submissions.

Facts antecedent to this Application as gleaned from the records available are summed up as follows: On 19/08/2020, the Respondent filed an Application against the Applicants jointly in this Court, vide Misc. Civil Application No. 83 of 2020, craving for several orders, including: a declaratory order that the Respondent was a valid member of Tanzania Limitless Limited Company and that the whole procedure of forfeiting his shares was unlawful and void; an order for rectification of the register of members of Tanzania Limitless Limited so as to include the name of the Respondent therein; costs of that application and any other order(s) the Court deemed fit to grant. The application was scheduled for mention on 22/10/2020 and 06/11/2020. On 19/11/2020, counsel for the Applicants raised a preliminary objection challenging competency of the application. Counsel for the Respondent conceded to the preliminary objection. Consequently, the application was withdrawn with leave to refile. The Respondent herein was ordered to pay costs thereof.

On 14/01/2021, the Applicants filed Taxation Cause No. 2 of 2021 in this Court which was assigned to the Deputy Registrar, Ruth Massam (as she then was). The Applicants claimed a total of TZS 63,600,028.00 as costs

of prosecuting the application. In her ruling delivered on 10/12/2021, the Taxing Master taxed the bill awarding the Applicants TZS 2,880,000/= out of the whole claimed sum. The Applicants were not satisfied with the award. They filed this application seeking to challenge the decision of the taxing master and urging the Court to tax the bill of cost as presented.

In the Applicants' affidavits and the submissions by Mr Mgoha, five grounds of contention were raised. In the first ground, the Applicants challenged the decision of the taxing master for refusing to award TZS 9,224,000/= as instruction fees. According to Mr Mgoha, taking into account the complex nature of the issues involved in Misc. Civil Application No. 83 of 2020 which involved the Applicants who are foreign investors, the efforts deployed in the research and the amount of work performed, justified the instruction fees of USD 4000 paid by the Applicants. He relied on Order 15(a)-(e) of GN. No. 264 of 2015, which considers factors such as business of exceptional importance and complexity of documents prepared, nature and extent of pecuniary or other interest involved in the case, as factors that entitle an advocate to receive special fees. He also referred this Court to a number of decisions to reinforce his contention, including: **George Mbuguzi & Another vs A. S Maskini [1980] TLR**

53, **C. B. Ndege vs E. O. Apia & A. G [1988] TLR 91**, and **Premchand Reinchand Ltd & Others [1972] 1 E. A 162.**

Regarding the second ground, Mr Mgoha faulted the Deputy Registrar for failure to record appearances of the 1st and 2nd Applicants on 22/10/2020 in the court record. He fortified that the matter was fixed for mention on 22/10/2020 before Gwae, J., but he was not around. That the case was adjourned before Massam, DR. On that date, the 1st and 2nd Applicants plus one Fanuel Mgonzo, entered appearance in Court; but unfortunately, the record did not reflect their appearance. According to Mr Mgoha, the two entered appearance, but the DR did not record their appearance, making their appearance in Court unproven.

In the third ground, advocate for the Applicants faulted the taxing master for denying the 1st and 2nd Applicants travelling costs from Geneva-Switzerland to Arusha Tanzania, despite such costs being dully incurred. He maintained that the Applicants are not Tanzania citizens as they are Switzerland nationals. The Advocate further contended that the case was filed against the two Applicants and summons issued in their names. Therefore, the 1st Applicant had to travel from her country to Tanzania on 02/10/2020 and the 2nd Applicant travelled on 16/10/2020, so as prepare

themselves for the case, including seeking and engaging an advocate who would defend the case.

In the fourth ground, Mr Mgoha blamed the taxing master for refusing to award the Applicants accommodation costs that they spent at Mt. Meru Hotel in Arusha. He accounted that the 1st Applicant stayed at Mt. Meru Hotel, where he spent TZS 2,467,100/= as accommodation and meals expenses. The 2nd Applicant as well spent TZS 1,867,000 for the same purpose. That the same ought to be reimbursed.

In the last ground of reference, the decision of the taxing master was challenged for denying the 1st and 2nd Applicants reimbursement of USD 20,000 they paid to their employer H2 Solution & Management Srl, for the ten days they were out of work. He called upon the Court to take into consideration item 7 and 8 of the bills of cost and award the same. In totality of his submission, Mr Mgoha urged this Court to quash and set aside the decision of the taxing master.

On his part, Mr Mwailwa did not have much to say, considering that there was no Counter affidavit filed. He contended that the taxing master adhered to the principles of taxing bills as enunciated in **Hader Bin Mohamed Elemandry & Others vs Khadija Bint Ally [1956] EACA 23** and **Haji Issa vs Rweitama Mutala (1972) HCD 173**. He also

relied on Order 48 of G.N No. 264 of 2015 insisting that the advocate for the Applicants submitted cooked and unreal bill that is why the same was disregarded by the taxing master. He added, as the Applicants received less than one-sixth of the presented bill of costs, the Taxing Master should not have given them any costs. Therefore, that even the TZS 2,880,000/= awarded to the Applicants was wrongfully awarded. According to Mr. Mwailwa, on 22/10/2020 the Applicants did not enter appearance in Court as rightly found by the taxing master. He concluded by praying for dismissal of the application by upholding the decision of the taxing master.

In a rejoinder, Mr Mgoha raised an objection that since the Respondent did not contest the application for failure to file a counter affidavit, he is precluded from disputing issues of fact raised in the Applicants' affidavit. To nourish his argument, he relied on the Court of Appeal decisions in **William Getari Kegege vs Equity Bank and Another, Civil Application No. 24 of 2019** and **Martin D. Kumalija & 117 Others vs Iron and Steel Ltd, Civil Application No. 70 of 2018** (unreported).

I have given deserving consideration to the affidavits of the Applicants and their annexes, the record before me and the submissions by counsel for the parties. At the outset, I feel obliged to comment on the preliminary

objection raised by Mr Mgoha, regarding the Respondent's failure to file counter affidavit and its implication.

As correctly stated by Mr Mgoha, a party who fails to file a counter affidavit, or affidavit in reply, to contest what is deponed in the affidavit in support of the application, is precluded from disputing matters of fact stated in the affidavit. That party can only challenge the application on matters of law. The cited cases of **William Getari Kegere** and **Martin D. Kumalija & 117 Others** (supra) are instructive on that position. I have noted that the objection was raised in the rejoinder submission denying the Respondent room to submit on the same. However, after going through the reply submission, as lucky would have it, counsel for the Respondent's submission is basically hinged on legal matters only. In the premise, in determination of the application, I will confine the reply submission on matters of law only.

I now turn to the substantive part of the application. In respect of the first ground, the Applicants are challenging the decision of the taxing master for refusing to award the whole amount claimed in item one, which is the instruction fee. Mr Mgoha submitted at lengthy in his quest to justify payment of USD 4000, equivalent to TZS 9,224,000/=, as instruction fee.

He intimated that Misc. Civil Application No. 83 of 2020 was a complex one that involved foreigners; thus, it toiled him in research and time.

It has been a time long established principle of law in our jurisprudence that costs should not be excessive or oppressive but only such as are necessary for the conduct of the case. In the case of **Premchand Rainchand** (supra), the erstwhile Court of Appeal for Eastern Africa laid down four guiding principles which have to be considered when determining the quantum of instruction fees. The Court observed:

> *"**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."*

In the case of **The Attorney General vs Amos Shavu, Taxation Reference No. 2 of 2000** (unreported), the Attorney General instituted an appeal to the Court of Appeal and at the same time applied for stay of execution of the decree. However, the said application was struck out with costs on technical grounds. Subsequently, counsel for the respondent filed

a bill of costs at the tune of TZS 26,526,220/= out of which TZS 26,500,000/= was instruction fees. The Attorney General was aggrieved and hence lodged a reference application before Lugakingira, JA (as he then was). Having considered that the matter was not complex and that the application was only struck out for being incompetent, the awarded instruction fees was reduced to TZS 30,000.00 only. The Court held that: *"It is unprecedented for instruction fees merely to oppose a notice of motion to go into Millions."*

Also, in a recent case of **Tanzania Rent a Car Limited vs Peter Kimuhu, Civil Reference No. 9 of 2020** (unreported), it was held *inter alia* that:

> *"Similarly, in this case, since the appeal was not complex as it was only struck out on technical grounds, in observance of the principle of consistency, I am of the settled view that the instruction fees of TZS 10,000,000.00 awarded to the respondent was excessive. Having considered the complexity of the appeal and the time taken by the advocate in arguing the preliminary objection and the arguments thereto, I am satisfied that the reasonable sum to be awarded as instruction fees should be a total sum of 5,000,000,00. This, in my view, is a reasonable amount and will fully meet the justice of the case."*

From the above illustrated positions of the Court of Appeal, the complaint by counsel for the Applicants is unfounded. As the record depicts, the said

Misc. Civil Application No. 83 of 2020 was filed on 19/08/2020. It was scheduled for mention twice, that is 22/10/2020 and 06/11/2020. After counsel for the Applicants had raised a preliminary objection, the same was conceded by counsel for the Respondent on 19/11/2020. Basing on the above authorities, the application was not argued, it was struck out with leave to refile after counsel for the Respondent conceded to the raised preliminary objection. No efforts were put in place by counsel for the Applicants to justify payment of the USD 4000 as he purports. Similarly, the complexity complained of in the matter is nothing but fanciful. Awarding the Applicants USD 4000 would have been on the higher side, taking into account that counsel for the Respondent conceded to the preliminary objection. I therefore agree with Mr Mwailwa that the quantum awarded by the taxing master was justified. In the end result, this ground is devoid of merits.

Regarding second ground, which challenges the Deputy Registrar for failure to record the appearance of the 1st and 2nd Applicants in Court on 22/10/2020 when the case file in respect of Misc. Civil Application No. 83 of 2020 was placed before her for adjournment, it is my view that this ground needs not detain me at all. Court records speak for themselves. I believe that was recorded is a representation of what happened. It cannot

be lightly impeached. Nothing can be said outside that record. In this respect, I find authority in the reported decision of the Court of Appeal in **Halfani Sudi vs Abieza Chichili [1998] TLR 527**, where it was observed:

> *"We entirely agree with our learned brother; MNZAVAS, J.A. and the authorities he relied on which are loud and clear that "court record is a serious document. It should not be lightly impeached": **Shabir F. A. Jessa vs Rajkumar Deogra, [CAT- Civil Reference No. 12 of 1994** (unreported)] and that "There is always the presumption that a court record accurately represents what happened": **Paulo Osinya vs R. [1959] E.A 353**. In this matter, we are of the opinion that the evidence placed before us has not rebutted this presumption."*

Records do not support the assertion that the Applicants entered appearance in Court on the material date. In proving whether a party to a suit attended on the day the case is fixed for mention/hearing, recourse is the quorum in the court record. The picture annexed in the affidavits in support of the application, does not the bear a date when it was taken. It cannot therefore be relied on to conclude that the Applicants appeared in court as alleged. Since the Court record says nothing on whether the Applicants entered appearance on 22/10/2020 when Misc. Civil Application No. 83 of 2020 was fixed for mention, this ground of appeal remains unproved and insignificant. It is accordingly dismissed.

I will jointly determine the 3rd, 4th and 5th grounds relied upon by the Applicants to fault the decision of the Taxing Master. This is because they revolve on whether the Applicants incurred the said expenses (transport costs, food and accommodation expenses and reimbursement to their employer for being absent in office for 10 days). Mr Mgoha submitted extensively to support his contention that the Applicants incurred such costs.

Unfortunately, his argument was unsubstantiated. To begin with, the flight tickets raise a number of questions. In the first place, the 1st Applicant's flight ticket shows that he travelled from Geneva, Switzerland to Kilimanjaro International Airport on 02/10/2020. The 2nd Applicant is marked to have travelled on 16/10/2020. There is no sufficient evidence that they travelled to attend the case as claimed in item 2. They could as well have travelled for other company business. We also not informed why it was necessary for them to travel and stay for such long periods merely to attend a Mention of the Application. Furthermore, was it not possible for them to engage Counsel through a local employee of the Company? It is therefore my considered view that the Taxing Master was justified to refuse the claim TZS 3,661,928 as transport expenses for attending the case.

Further, on items 3 and 4, where both Applicants claim accommodation and meals for eight days, I also see no grounds to fault the Taxing Master. There appear to be some contradictions in the claims. As intimated earlier, the 1st Applicant travelled to Tanzania on 02/10/2020, but she got hotel services for only eight days, commencing from 17/10/2020. There is no explanation as to where she was between 02/10/2020 to 16-10/2020 while she was in Tanzania. That is clear evidence that their travel to Tanzania was for other chores unrelated to attendance in Court for the case.

The same applies to item 7 and 8, where the Applicants claimed TZS 23,000,000/= each, as the quantum reimbursed to their employer for being out of work for 10 days. This as well raises doubts because the 1st Applicant stated that she travelled to Tanzania on 02/10/2020 and the case was fixed for mention on 22/10/2020. That is 20 days stay in Tanzania. However, the record shows that the 1st and 2nd Applicants were absent from work place for only 10 days. Annexure G6 and G7 show that the Applicants were charged a total of 10 days. However, 4 days were meant to be days on transit to and from Tanzania. Those documents did not specify the dates the Applicants were missing at their place of work. Moreover, the said documents annexed in the application were simply tax

invoices, which were not yet paid. Therefore, the claimed sums in the 3rd, 4th and 5th grounds are unsubstantiated. The Applicants have in the first place failed to prove that they travelled to Tanzania just to attend Misc. Civil Application No. 83 of 2020 and, in the second place, have failed to explain the variation of days between the date of arrival in Tanzania and days accounted for the expenses incurred. The said grounds 3, 4 and 5 are therefore dismissed for lack of merit.

For obvious reasons, I will not venture to determine the contention raised by Mr Mwailwa regarding the legal position where the Bill submitted is disallowed for more than one sixth, excluding Court fees. The Taxing Master exercised her discretion properly in not awarding zero costs.

From what I have endeavoured to discuss above, the application is wanting in substance. It has no legs to stand on. I proceed to dismiss the same and confirm the decision of the taxing master in Taxation Cause No. 02 of 2021. Each party shall bear their own costs for this Reference.

Order accordingly.

Y. B. Masara

JUDGE

7th October, 2022