IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL REFERENCE NO. 09 OF 2022

(Arising from Taxation No. 69 of 2021)

OILCOM TANZANIA LIMITED & ANOTHER ..... APPLICANT

VERSUS

PAYAS R. MOLEMI &
GENOVEVA N. KILIBA
T/A BETTERLIFE INVESTIMENT ..... RESPONDENT

RULING

19th October, & 18th November, 2022

ISMAIL, J.

This is a matter predicated on rule 7 (1) and (2) of the Advocates Remuneration Order, 2015, GN. No. 263 of 2015. It seeks to reverse the decision of the Taxing Master in the taxation proceedings instituted vide Taxation No. 69 of 2021. The taxing Master taxed the costs at TZS. 28,872,402/- in favour of the respondents.

In the affidavit affirmed in support of the application, the applicant's basis for resentment is twofold. ***One***, that the said costs were not taxed off despite the applicant's contention that the same were not sufficiently proved. ***Two***, that the said costs were based on a non-existent decree. This is in view of the fact that the decree emanated from Civil Case No. 83 of 2017 and not Land Case No. 83 of 2017.

The averment raised in opposition is that the error in the numbering of the case was rectified by the Court, and that a new decree was issued to reflect the correct position. The respondents attached copies of the correspondence on the matter and the corrected decree.

Regarding the taxation of costs, the respondent's view is that the sum taxed and awarded was perfectly in order, considering that the law vests discretion in the Taxing Master to ensure that legal fees for an advocate do not exceed the cap of not more than one sixth of the value of the subject matter. The respondents took the view that the taxation of costs by the Taxing Master took into consideration all key factors.

Disposal of the application took the form of written submissions filed in conformity with the schedule drawn by the Court. Whilst the applicant's

submission was preferred by Ms. Flora German Kessy, learned counsel, her counterpart in the matter was Mr. Alex Balomi, learned counsel.

The applicant began by stating that the established principle is to the effect that the Court should not interfere with the bill of costs unless there is proof that the Taxing Officer acted injudiciously and contrary to the law. Ms. Kessy argued that the fees taxed by the Taxing Master defied the requirement of Order 72 of the Advocates Remuneration Order GN. No. 264 of 2015 which provides for scale of instruction fees to be levied by an advocate. The view held by the learned advocate is that the costs presented for were excessive and unproven, and that reasons were not stated for the decision made. There was nothing to prove costs incurred in each of the three matters from which the costs are alleged to have incurred. This, she contended, defied the requirement set in section 110 of the Evidence Act, Cap. 6 R.E. 2019, which requires an alleger to prove what he alleges. She stated that no electronic fiscal device receipts were submitted to prove that payments were made.

Regarding non-existent decree, the contention by learned counsel is that Order XX rule 6 (1) of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC) lays a mandatory requirement that a decree must agree with the judgment,

including a case number and description of the parties. Ms. Kessy made reference to the reasoning in ***Mohamed Bantura v. Hemed Mussa***, HC-Land Appeal No. 46 of 2021; and ***Marydelisa Christian & Others v. Barute Saccos Limited***, HC-Land Case Appeal No. 32 of 2021 (both unreported), in which the Court struck out an appeal for the reason that the decree did not agree with the judgment. She argued that titling of the decree as Land Case No. 83 of 2017 instead of Civil Case No. 83 of 2017 rendered the decree and the taxation matter a complete nullity.

The applicant urged the Court to invoke the provisions of Order 48 of GN. No. 264 of 2015 and nullify the taxation proceedings.

Submitting in rebuttal, Mr. Balomi saw nothing blemished in the taxation proceedings, contending that preference of the matter conformed to the requirements of Order 55 of the Advocates Remuneration Order, and that the applicant was accorded an opportunity to contest the bill of costs before the decision was made.

Unpacking the costs, Mr. Balomi submitted that TZS. 24,712,000/- constituted instruction fees, while an aggregate sum of TZS. 4,160,402/- comprised of disbursements, and that the same were reasonable and within

the confines of the scales set out for taxation of costs. Learned counsel sought to define instruction fees by relying on the meaning propounded in the case of ***Sianga v. Elias*** (1972) HCD 66, and argued that the trite position is that instruction fees are supposed to adequately compensate an advocate and not to enrich him. On this, Mr. Balomi relied on the decision of ***Smith v. Buller*** (1875) 19 E9.473, quoted in the subsequent case of ***Rahim Hasham v. Alibhai Kaderbhai*** (1938) 1 TLR 676. In the latter, it was held that costs should not be excessive or oppressive but only such as are necessary for the conduct of the litigation.

On the production of EFD receipt, the view held by the respondents is that this is not a mandatory requirement and that the Court of Appeal of Tanzania has pronounced itself on that.

Regarding the discrepancy on the number of the case, Mr. Balomi's take is that these are mere clerical errors which arise from the drafting of the documents by the Court itself, and are curable. In this case, he argued, the Court cured these discrepancies. He cited the provisions of section 96 of the CPC which allows rectification of errors, and that such rectification may be done at any time.

Learned counsel urged the Court to find nothing erroneous in the taxation of costs and the ruling sought to be reversed.

I will first address the question of variance of case numbers in the judgment and decree.

I have glanced through the decree extracted from the judgment of the Court on 3rd March, 2021. What comes out clearly, and without any contest, is that the same referred the case from which it emanated as Land Case No. 83 of 2017. This is in contrast with the judgment from which the said decree was purportedly extracted. The former rightly reads as Civil Case No. 83 of 2017.

It is also revealed that subsequent thereto, a request was made to the Court for rectification of the said error, a request which was acceded to, vide a letter dated 27th September, 2022. Admittedly, this was done subsequent to the issuance of a Certificate of Taxation dated 16th August, 2022. In effecting the rectification, the Court was moved by an undated letter which was received on 8th July, 2022. This means that, the existence of the errors was brought to the attention of the Court ahead of issuance of the certificate of taxation, though communication of the rectification was done a couple of

months later. It is my view that this is matter which had already been brought to the Court's attention and the respondents would not be held responsible for the length of time taken to have the errors addressed.

But even assuming that these errors subsisted up until the time the certificate of taxation was done, my conviction is that such variance, a key board error, in my view, would not have the effect of invalidating the taxation proceedings. They are trifling and curable errors which would be tolerated, unlike those exposed in the ***Maryodelisa Christian case*** (supra). The anomalies in the latter were far weightier, multiple and intolerable. I choose to treat the anomaly as curable and tolerable and ignore the applicant's persuasion to have it vitiated the taxation proceedings.

Moving on to the second limb, the applicant's contention is that the costs which were passed unscathed were not justified, and were excessive. They were not evidenced and that the receipt produced was not an EFD receipt.

Let me begin by restating what has been underscored in many a decision, the most authoritative being the Court of Apeal of Tanzania's decision in ***Tanzania Rent A Car Limited v. Peter Kimuhu***, CAT-Civil

Reference No. 9 of 2020 (unreported). In the latter, the upper Bench held, issuance of an EFD receipt does not constitute a prerequisite in matters of taxation of costs. It is enough if the applicant has been able to provide evidence that such payment was done. In the instant case, such evidence was through a normal receipt which was attached to the Bill of Costs.

This argument rhymes well with the decision of the Court in ***Salehe Habib Salehe vs Manjit Gurmukh Singh and Another***, Reference No. 07 of 2019, wherein it was held:

> *"The argument by Mr. Kinawari claiming presentation of EFD receipts and non-compliance by the decree holder of the Tax Administration Act and VAT Act in taxation of bill of costs cannot stand. The said pieces of legislation (Tax Administration Act and VAT Act) as we have seen hereinabove are useful in regulating tax matters and would come into play when and only if, for instance, and advocate's tax books are not in order as assessed by the regulator, that is TRA."*

I find that the contention by the applicant lacking in merit and I choose to disagree with it.

The applicant has qualms with the first item in the bill of costs. This relates to instruction fees which are considered to be excessive and that no reasons were given for charging fees which were levied in the matters.

As stated in the decisions cited above, costs are intended to redress the party to whom they were awarded. In so doing, scales as set out in the law must be observed and, where necessary, evidence must be produced. In this case, the respondents produced a payment receipt in respect of the sum of TZS. 24,712,000/-, paid as fees due for the conduct of the proceedings. In the absence of any evidence to the contrary, this was within the right exercise of powers of the taxing master to accede to the prayer and I find nothing blemished in that respect. There is no evidence that this was not within the scales set out for contentious matters. As to what is considered to be the failure to assign reasons, I draw an inspiration from the decision of the Court in ***Mbowe v. Attilio***, Civil Reference I-D-70; 15/8/70; wherein Georges, C.J. held:

> "I *would not wish to go so far as to say that a taxing master should state in detail the reasons which led him to come to the conclusion to come …. I would prefer, therefore, to state that while it is desirable that taxing master should set out their reasons, the mere fact that*

they have not done so in cases where instruction fees are being considered should not be considered a fatal error in principle necessitating that the matter be remitted to be taxed afresh."

It is in view of the foregoing, that I find that the contention by the applicant lacking in merit and I choose to disagree with it.

The rest of the items (2 to 39) constitute payments for disbursements allegedly incurred by the respondents. None of these are receipted and, I find this to be the least of the worries. This is in view of the decision in the case of ***Hotel Travertine Ltd v. National Bank of Commerce***, CAT-Taxation Reference No. 4 of 2007 (unreported). It was held as follows:

"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 all that claim."

I take the view, however, that the sums quoted in the said items are outrageously high and unjustified. For instance, item 2 has particulars saying: ***"Attending in court for filing this matter & Certificate of***

urgency." This item attracted the sum of TZS. 1,150,000/-. It is not clear if the said sum was instruction fees, filing fees or transport charges. The same applies to the rest of the items in which it is not clearly stated if the attendance stated meant that these were fees for such attendance of any other expense. In my view, the description in each of the said items does not give me the satisfaction that these costs were incurred and the fact that facts are not descriptive enough to make them verifiable. Thus, while the taxing master enjoys the latitude on how costs should be charged, I take the view that the passive nature played by the taxing master went against the position of the law, as set out in the case of ***Affayo Tingisha v Simon Laanyuni***, HC-Misc. Civil Application No. 47/1998, in which it was held *inter alia,* as follows:

> *"In assessing the costs which the Decree holder is entitled to reimbursement the Taxing Officer will have to be satisfied that the costs were actually incurred and that it was necessary"*

It is my contention that the opacity with which costs in items 2 to 39 are characterized, demand that the same be taxed off. Consequently, these costs are taxed off. This leaves item 1 which is upheld.

This reference application partly succeeds as stated hereunder. Each party will bear own costs.

It is so ordered.

DATED at **DAR ES SALAAM** this **18th** day of **November 2022.**

M.K. ISMAIL

JUDGE

18.11.2022