

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

REFERENCE APPLICATION NO. 9 OF 2020

(Arising from Bill of Costs No. 01 of 2019 originating from Civil Case No. 05 of 2018 of the District Court of Korogwe at Korogwe)

MUSA AMSI.....1st APPLICANT

SAKINA MUSA SECHONGE.....2nd APPLICANT

SAPI INVESTMENT LIMITED.....3rd APPLICANT

-VERSUS-

AZID KAONEKA.....RESPONDENT

RULING

Date of last order:- 24/03/2021

Date of judgment:-30/03/2022

AGATHO, J.:

This is an application for reference made under Order 7 Rules 1 and 2 of the Advocates Remuneration Order, G.N. No. 264 of 2015 by way of Chamber Summons supported by an Affidavit. The Application originates from Bill of Costs No. 01 of 2019 arising from Civil Case No. 05 of 2018 of the District Court of Korogwe at Korogwe. In the application, the Applicant is seeking for the following orders;

- 1) That, this Honourable Court be pleased to revise the decision of the Taxing Master in Bill of Costs No. 01 of

2019 of the District Court of Korogwe at Korogwe and make its own findings and determination.

2) That, costs of the Application be borne by the Respondent.

3) Any other orders which the Court deems just and fit to grant.

To oppose the Application, the Respondent filed a Counter Affidavit. On the 29th day of April, whereas Applicant is represented by Mr. Justus J. Ilyarugo, the Respondent was represented by Mr. George Rafael Magoti, Advocates.

On the 29th day of April, 2021, the Court ordered the matter to be disposed by way of written submissions. A filing schedule was set and adhered to.

As it has been the practise, the Counsel for the Applicant began to submit. In his submission, Mr. Justus Ilyarugo contended that the Bill of Costs originated from the preliminary objection raised by the third Defendant during the trial in Civil Case No. 9 of 2020. It was therefore his argument that for the purpose of taxation, the preliminary objection has to be categorised as an interlocutory determination/application as per Item 1 of the 1st column in the Eleventh Schedule of the Advocates

Remuneration Order, G. N. No. 264 of 2015 and that the advocate's fee should not be above TSH. 500,000/= . Did the Applicant counsel meant Item 1 (e) (i) of the 1st column in the Eleventh Schedule of the Advocates Remuneration Order, G. N. No. 264 of 2015. If that is so, then that deals with ancillary reliefs heard together with the petition. In the present case there was no petition.

The counsel referred the case of **Maxmillan Rwabulala v. Emilian Kalugala and Another [1987] T.L.R. 2** on the position that the only guide in determination of Bill of Costs is the Advocates Remuneration Order. He further argued that the trial Court wrongly taxed Tshs 2,170,000/= including only Tshs 20,000/= being court fee for filing reply to the written submission and the rest are fees for an Advocate who appeared twice in Court.

Referring to the case of **E.M. H. Chacha T/A Mwanza Mechanical Engineering V Katibu wa Wilaya Magu and Chama cha Mapinduzi Magu [1983] TLR 344(HC)** the counsel argued that costs must be incidental to the suit and that considering that the preliminary objection was disposed by way of written submissions and involved only one submission

which did not consume time, energy, and efforts then the Court ought not tax the Bill at TSH. 2,700,000/=.

Responding, the counsel for the Respondent disputed the Applicant's contention that a preliminary objection was to be considered as an interlocutory application and further argued that the same consumed time and energy in research. To support his argument, the counsel referred the case of **C.D. Ndege v E.W. Aliya & AG [1988] T.L.R 91** stating that the fee claimed was commensurate with the time, energy and resources applied in defending the matter, Civil Case No. 05 of 2018 and added that the same did not only cover client's instruction but all works incidental thereto. He referred the case of **George Mbuguzi v A. S. Maskini [1980] TLR 53**. It was his further contention that costs are awarded at the discretion of the Taxing Master unless he/she fails to exercise the discretion judiciously pursuant to Order 12 of the Advocates Remuneration Order.

Rejoining, the counsel for the Applicant reiterated his averments in the submission in chief and further prayed the Court to consider his application.

It is an established principle that the Court cannot interfere with the decision of the Taxing Master unless there is an error in principle or the fee awarded was manifestly excessive warranting intervention by the Court or did not act judiciously.

This was held in the case of **Kenya Ports Authority v Modern Holdings Limited, EACJ Taxation Reference No. 4 of 2010** referred in the case of **The Secretary General of the East African Community v Margaret N. Zziwa, Taxation Reference no. 1 of 2019** and the case of **Haji Athumani Issa v. R. Rweitama Mutatu [1992] TLR 372**.

In the instant matter, parties are contesting as to the legality of 2,170,000/= Tshs as the whole taxed amount. According to the decision and the Bill of Costs that was presented before the trial Court, the Taxing Master taxed item number 1 as first instalment of representation fee at TSH. 500,000/=, item number 2 at TSH. 750,000/= as second instalment of representation fee out of TSH. 1,000,000/= and 1,500,000/= respectively.

Items number 3,4,5,6,7 and 8, were claimed as Advocate's attendance fees to the Court at TSH. 50,000/= each. The Court taxed off items number 4,5 and 8 on the ground that the

advocate for the Respondent did not appear in Court and the rest of the items were taxed as presented.

Item number 9 was claimed as instruction fees for Bill of Costs at 700,000/= and was taxed as presented. Item number 10 was claimed at 20,000/=Tshs as fees for filing reply to the submission, item number 11 was claimed at TSH. 50,000/= as costs for filing the Bill of Costs, all were taxed as claimed thereby making a total of TSH. 2, 170,000/=.

The Court has considered submissions from both sides and the records and find that the Bill of Costs emanated from the Ruling of the District Court with respect to the Preliminary Objection raised in the main suit which is Civil Case No. 05 of 2018. The Court overruled the Preliminary Objection raised by the Applicants herein with costs.

A Preliminary Objection has been defined in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors [1969] EA 696** as a point of law that is pleaded or arises by clear implication out of pleadings, and which, if argued, as a preliminary point may dispose of the suit. In my view, the same falls under interlocutory applications because it is usually being determined pending disposal of the main case.

In the main case, the Preliminary Objection was raised in the Written Statement of Defence and it was dismissed with costs, it did not therefore dispose the suit.

Now, the second issue is what is the taxable fee where there is a preliminary objection that has been dismissed with costs. The counsel for the Applicant referred to Item 1 of the 1st column in the Eleventh Schedule of the Advocates Remuneration Order, G. N. No. 264 of 2015. There is no such item in the Order, the Applicant's counsel did not clearly specify the exact provision. Order 46 of the Advocates Remuneration Order, G.N. No. 264 of 2015 provides that fees shall be taxed on the prescribed scale. Regarding the exact fee, I am of the view that since the preliminary objection falls under interlocutory applications. Thus, a specific provision is Item 1(m)(ii) of Eleventh Schedule of the Advocates Remuneration Order, G.N. No. 264 of 2015, which states the amount to be TSH. 1,000,000/=.

In this matter since the Bill of Costs originated from the determination of the preliminary objection which did not finalise the matter, the amount of TSH. 500,000/= and TSH. 750,000/= under items 1 and 2 are varied and hereby collectively taxed at TSH. 1,000,000/=. The rest of the amount

which is TSH. 1,500,000/= is taxed off. The Advocate's instruction fees on Bill of Costs is taxed as presented at TSH. 700,000/=. The amount on disbursements is taxed as presented; TSH. 20,000/= Court fee for filing reply to submission and TSH. 50,000/= as Court fee for filing this Bill of Costs. The taxed costs for attendance are not varied, they are thus taxed as follows; items number 3,6 and 7 at TSH. 50,000/= each. The whole bill of Costs is therefore taxed at TSH. 1,920,000/= in total. It is so ordered.

DATED at TANGA this 30th Day of March 2022.



**U. J. AGATHO
JUDGE
30/03/2022**

Date: 30/03/2022

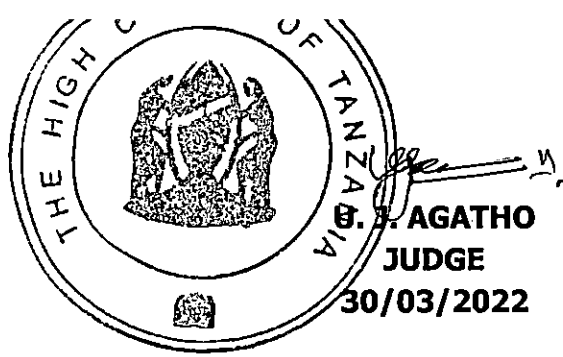
Coram: Hon. U. J. Agatho, J

Applicant: Justus Josephat Ilyarugo Advocate

**Respondent: Advocate Ahmed Makallo holding brief of
Advocate George Rafel Magoti**

B/C: Zayumba

Court: Ruling delivered on this 30th day of March, 2022 in the presence of both the Applicant counsel Ilyarugo, and Advocate Makallo holding brief of Advocate Magoti for the Respondent.



Court: Right of Appeal is available as per the law.

