

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL REFERENCE NO. 3 OF 2021

(Arising from Bill of Costs No. 79/2020, originating from Application No. 34/2017 of same District Land and Housing Tribunal)

YOENI NGODA ISAE.....APPLICANT

Versus

NDUNGU VILLAGE COUNCIL.....RESPONDENT

RULING


23/2/2022 & 31/3/2022

SIMFUKWE, J.

This reference is against the ruling of a Taxing Master, T.J. Wagine- the Chairman of the District Land and Housing Tribunal (DLHT), in a taxation matter. The application has been brought under **Regulation 7 (1), (2), (3) & (4) of the Advocates Remuneration Order, G.N. No. 264 Of 2015** and any other enabling provisions of the Law.

The application is supported by the affidavit deponed by the applicant, which was contested by the counter affidavit of Mr. Mndolwa Hiza Ibrahim, the Respondent's Chairman.

The respondent had presented before the DLHT the Bill of Costs amounting to Tshs. 3,480,000/= for taxation. That amount was taxed at


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Tshs. 2,430,000/= . Aggrieved by that ruling, the Applicant herein brought this application for reference seeking the following orders:

- 1. That this Honourable Court be pleased to revise the decision of the Taxing Master Hon. T.J. WAGINE (Chairman) in bill of cost No. 79 of 2020 of Same District Land and Housing Tribunal delivered on 08/06/2021 and make its appellate court's findings and determination and latter dismiss the decision of bill of cost with cost.*
- 2. That, the cost of this application be born on the Respondent's shoulder.*
- 3. Any other orders which this Honourable court may deem fit and just to grant.*

During the hearing of this application, the Applicant gave Power of Attorney to Msovo Tumaini while the respondent enjoyed the service of Mr. Erasto Kamani learned counsel, and the matter proceeded through written submissions.

The Applicant prayed for the court to adopt the whole of applicant's affidavit to form part of his submissions. Thereafter, reference was made to paragraph 4 of applicant' affidavit which reads:

"That, in responding the said bill of cost thereto the applicant herein raised two ground (sic) of preliminary objection challenging that he was not a part in application No. 33/2017 and another ground challenging the decree holder Bill of cost No. 79/2020 was time barred basing on ruling of Application No.34/2017 which was attached thereto." (sic)

He then submitted that, the applicant/respondent herein served him the copy of application of Bill of Costs No. 79 of 2020 which was filed on

09/10/2020 originating from Land Application No. 33/2017 and attached the copy of judgment of Application Case No. 34/2017 which was delivered on 13/2/2017.

The applicant thus condemned the decree holder for failure to apply for alteration of the said bill of costs of which from its title on historical background of the case, it showed that the decree holder applied for costs in respect of case No. 33/2017. Even the contents of the said application from item No. 15-20 & 30 clearly show same errors. He blamed the Chairman for proceeding to determine the case with such errors.

He also contended that, from the attached judgment of case No. 34/2017, the judgment is dated 13/02/2020 and the decree holder filed his application on 09/10/2020 thus he was out of time of 60 days prescribed by the law. Despite such errors, still the Chairman proceeded to determine the matter. The applicant attached a copy of the application of bill of costs of the decree holder which was filed on 09/10/2020 together with a copy of judgment of Application case No. 34/2017 dated 13/02/2020 for reference. The Applicant insisted that the application for bill of costs which was before the trial tribunal was time barred and the said application originated from Application case No.33 of 2017 which he was not a party.

The applicant also submitted in respect of paragraph 7 of applicant's affidavit which provides: -

"That the said amount of Tshs 2000,000/ = is unreasonable as it considering the fact that the case was beginning from a year of 2017 and the said advocate appeared once (single day) On 18/06/2020 from those years, and other factor that the amount whole amount was paid a previous day before



the next one of which advocate enter appearance to the Tribunal and there is no proof of retainer agreement between the Respondent and advocate.” (sic)

The applicant referred the court to the **11th schedule, item (m) (ii) of the Advocate Remuneration Order GN No. 264 of 2015** which provides about instruction fees that:

“Instruction fee for applications, notices of motion or chamber applications (including appeals from taxation) opposed is Tshs 1000,000/=”

Basing on this provision, the applicant submitted to the effect that the case which was before the tribunal was an application which the respondent opposed. Thus, the instruction fees were supposed to be Tshs 1,000,000/= according to that scale of fees and not Tsh 2,000,000/= as claimed and awarded. He opined that such amount is higher than the prescribed amount by the law and it's against the law. He referred to the case of **C.B. Ndege v. E.W. Aliya & A.G. [1988] TLR 91**, which held *inter alia* that instruction fees must be commensurate with the amount of time, energy and industry involved in a case. The applicant also cited the case of **Thomas James Arthur vs. Nyeri Electricity Undertaking (1961) EA 492** and argued that in that case, the Taxing Master had allowed the amount of instruction fees, which was four times the fixed scale. On reference to the Judge the amount was reduced on the ground that it was manifestly excessive.

The applicant thus commented that the amount claimed to be incurred by the respondent herein is higher and unrealistic considering the fact that

the advocate did not use much time and energy as he only appeared once before the trial tribunal.

The applicant submitted further in respect of paragraph 8 of applicant's affidavit which reads: -

"That, even the receipts submitted from the advocate office has a lot of doubts since the name of client's who paid the advocate is Ndungu village council. As known Ndungu is not a natural personal but legal probably it could be expected to see someone who acted on behalf of them as they did in a proceeding where the village was represented by chairman and there is no any village meeting was called so as to collect that amount of money to pay advocate so this raise doubt that those receipt was fabricated and cooked one since the village government, they don't have any fund so as they can got those money" (sic)

In respect of this paragraph, the applicant stated that the law which is responsible for village finance is **The Local Government Finance Act [CAP 290 R.E 2019]** in which **section 38 of the said Act** provides about expenditure as follow; -

"Subject to the other provisions of this Act, a local government authority may incur all expenditure necessary for, and incidental to, the proper carrying out of any of the functions or duties conferred or imposed on it by or under this Act or any other written law."

Further to that, the applicant argued that, according to page 50 of *MWONGOZO WA USIMAMIZI WA FEDHA NGAZI YA HALMASHAURI YA*

KIJJI NA KAMATI YA MTA A MEI 2009 it is "*Kamati ya Kijiji/Mtaa ya mipango, uchumi na fedha*" which is responsible to authorize expenditure and payment and not the Village Council.

In conclusion, it was the applicant's prayer that this submission to be accepted by this Court and the awarded costs of trial tribunal be referred and taxed in accordance with the requirement of law and the matter to be determined in favor of the applicant with costs.

In reply, Mr. Kamani learned counsel for the respondent submitted that it is not true that Bill of costs No. 79 of 2020 originated from Land Application No. 33/2017 as contended by the applicant. He averred that, as per the DLHT's records, the case which gave rise to Bill of costs No. 79 of 2020 is Land Application No. 34 of 2017 and the parties in that case were Yoen Ngoda Isae and Ndungu Village Council. He stated that even the dates in the first column, particulars of the services charged and a copy of the judgment which accompanied that bill, shows clearly that the said bill was originating from and was related with Land Application No. 34/2017 and not Land Application No. 33/2017.

The respondents' advocate admitted that the applicant indicated in the title of that bill and in some of the items that the said bill was originating from Land Application No.33/2017 instead of Land Application No. 34 /2017. However, he was of the view that it was just a human error or slip of a pen and such error cannot change the fact that the bill was not originating from Land case No. 34 of 2017 especially where there is nothing that was written or explained in that bill in respect of Land Case No.33 of 2017.

He added that, in the applicant's submission, he appreciated that the explanation that Bill of Costs No. 79/2020 originated from Land Application No.33/2017 was a human error where at page 2, 2nd paragraph he stated that the trial Chairman ought not to have proceeded to determine the application of bill of costs without being requested by the decree holder to make alterations of the errors which were found in title and in items 15-20 and 30 of the said bill of costs. Mr. Kamani also argued that it is not true however that those errors were not corrected since the same were rectified prior and or during the hearing of the bill of costs itself.

Moreover, the learned advocate argued that even the tribunal's decision which was delivered on 8/6/2021 in relation to that Bill of costs explains clearly that the decision which gave rise to the bill of costs No. 79/2020 was the decision of Land Application No. 34/2017 of which the applicant herein was a party. Thus, the applicant's contentions that he was not a party to the land case which gave rise to bill of costs No. 79/2020 are baseless and have no legs to stand on.

Replying to applicant's argument that Bill of Costs No. 79/2020 was time barred, the learned advocate replied to the contrary. He stated that the tribunal's records showed that the last order for hearing of preliminary objection which led to dismissal of Land Application No. 34/2017 was given on 10/7/2020 and the ruling was pronounced on 13/8/2020. Thus, since the order for hearing the Preliminary Objection in relation to Land Application No. 34/2017 was given on 10/7/2020, a simple logic will show that it could not be possible its ruling to be delivered six months before that is on 13/2/2020 as assumed by the applicant.

The learned advocate conceded that the first copy of judgment which accompanied the Bill of costs No.79/2020 showed that it was delivered on 13/2/2020. He argued that the date was erroneously inserted by the trial Chairman during the composition of his ruling. However, such error was rectified in the course of proceeding prior and or during the hearing of that bill of costs.

Mr. Kamani added that, even the Tribunal's decision of Bill of Costs No. 79/2020 makes it clear that the judgment which gave rise to that bill was delivered on 13/8/2020 and therefore was not time barred.

Concerning the applicant's contention that the taxed amount is more than what is prescribed by the law and that the same should be Tsh.1, 000,000, the respondent's advocate replied that the applicant has misconceived the gist of that provision as land cases which are otherwise termed as land applications in the DLHT are not among the applications referred to in **paragraph (m) (ii) of 11th Schedule to the Advocates Remuneration Order, 2015.**

He continued to argue that, although land applications are termed as applications, in real sense they are suits as their proceedings are like proceedings of any other suits which are instituted by presenting plaints in courts. He was of the view that, the provision which is applicable in dealing with bill of costs in land applications is **paragraph 1(d) of 11th Schedule of Advocates Renumeration Order,2015** and not **paragraph (m)(ii)**. He said that, such provision makes clear that the cost taxable where proceedings are defended or opposed is such sum as the Taxing Master considers reasonable but should not be less than Tshs 1,000,000/= that is it must start from Tshs 1,000,000 onwards.

It was further submitted that the taxing officer is vested with discretion power to determine which amount of cost is reasonable to be allowed under **section 30 (1) of the Civil Procedure Code (Cap. 33 R.E 2019)** (CPC).

Mr. Kamani stated further that, according to **proviso (aa) of paragraph 1 of eleventh schedule to the Advocates Remuneration Order, 2015**, in exercising such discretion the Taxing master is required to take into account the nature and importance of the cause or matter, the amount involved, interest of the parties, general conduct of the proceedings and all other circumstances.

It was further stated that, despite the fact that the Taxing master did not expressly explain, but it is presumed that in reaching to the conclusion that reasonable costs to be taxed should be Tsh. 2000,000/- the taxing officer took into account the fact that the matter involved in that case was very sensitive as it involved the village land which attracted public interests. To add on that, Mr. Kamani stated that the taxing officer considered the four months used for hearing the matter in court and the value of the subject matter and many other factors as listed in the afore cited provision. For the reasons stated, it was Mr. Kamani's firm view that the amount taxed is very reasonable and it is not true that the same is excessive and contravenes the provisions of the law.

Responding to the submission that the instruction fee was supposed to be Tshs.1,000,000/= it was stated that, it is not true since the advocate appeared more than once. To add on this argument, it was Mr. Kamani's view that the instruction fees is not assessed by considering the number of days the advocate appears in court but it is assessed basing on a

number of factors like time consumed in identifying parties' interests, energy and time spent in studying relevant laws relating to the dispute, complexity of the case, resources used in taking briefs and drafting of documents and many other factors. In this respect, it was submitted that the argument that the instruction fee was supposed to be Tshs 1,000,000/- for the reason that the advocate appeared only once is unfounded and baseless.

Responding to the laws which guide expenditure and payments in Local government, the learned advocate argued that it is irrelevant to bill of costs since it is known that the laws which guides taxation of bill of costs in Tanzania is the **Advocates Renumeration Order** (supra) and not **Local Government Finance Act** or ***Muongozo wa Usimamizi wa Fedha za Halmashauri***.

Mr. Kamani concluded that the applicant's application is destitute of merit and the same should be dismissed with costs.

I have carefully considered the arguments put forward by the parties, one issue which needs my determination, is whether this application has merits.

After examining the grounds of reference as well as the submissions made by parties, I will now look one ground after another. On the 5th paragraph of applicant's affidavit, the applicant is faulting the Taxing Master for failure to hear and determine his two preliminary Objections raised to challenge the filed Bill of Costs. He submitted in length in respect of those Preliminary Objections.

These submissions prompted me to revisit the Tribunal's records. Through those records, it is undisputed that the grounds for the raised Preliminary

Objections were two, first, that the matter was time barred and two, that the applicant herein was not part to the impugned decision which is subject of the bill of costs.


It is true that the Taxing Master did not determine the said Preliminary Objections before determining the Bill of costs. This was wrong as the preliminary objection on point of law has to be determined first. This was also discussed in the case of **Khaji Abubakar Athumani v Daudi Lyakugile TA D.C Aluminium & Another, Civil Appeal No86 of 2018**, CAT at Mwanza.

However, this being the second court and since the parties had opportunity to submit in respect of the said Preliminary Objections, then in order to avoid multiplicity of cases and to deal with substantive justice, I find it prudent to deal with the grounds of Preliminary Objections.

The first Preliminary Objection is that, the bill of cost was filed out of time since the decision which is subject of the bill of cost was delivered on 13/2/2020 and the bill of cost was filed on 9/10/2020 which is more than 60 days prescribed by the law. The respondent replied that the date of decision was erroneously inserted by the Chairman during composition of the ruling.

The records speak loudly that the ruling which is subject of bill of cost was delivered on 13/8/2020 and the bill of costs was filed on 9/10/2020. Thus, it was filed within time. It is true that the typed ruling was dated 13/2/2020 but such error was noted and corrected by the Tribunal Chairman (Taxing Master) on 14/12/2020. For ease reference the records reads;

"Village Chairman


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I am ready for hg your honour but before that there is a typing error on the date of delivering the judgement. It was 13/8/2020 and not on 13/2/2020 as it appears on the judgment.

Order

I noted that so the same shall be rectified as it was clerical or typing error.

So ordered.

Signed

14/12/2020."

Turning to the 2nd Preliminary Objection that the applicant was not part to the case in Land Application No.33 of 2017, this will not detain my time since the bill of costs emanated from Land Application No. 34 of 2020. As rightly submitted by the respondent's advocate, since in the first column, the particulars of the services charged and a copy of judgment which accompanied that bill showed that the said bill was originating from Land Application No.34 of 2020 then the raised Preliminary Objection has no merit.

Coming to the gist of this reference, it is the discretion of the court to award costs but such discretion has to be exercised judiciously. This is provided for under **section 30(1) of the CPC** that: -

"30.-(1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law from the time being in force, the costs of, and incidental to, all suits shall be in the discretion of the court and the court shall have full

power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of such powers."

Under paragraph 6 and 7 of applicant's affidavit, the applicant faulted the amount of 2,000,000/= awarded as instruction fee arguing that, what was supposed to be awarded was Tshs.1,000,000/- as per **11th Schedule item (m)(ii) of GN No. 264 of 2015**. Mr. Kamani for the respondent was of the view that the proper section is **paragraph 1(d)**. (supra)

I totally concur with the learned counsel for the respondent that the proper provision for instruction fees of Land Applications before District Land and Housing Tribunals is **item 1(d)** (supra) which was quoted by the learned counsel.

The factors to be considered in granting the costs is provided for under the proviso of paragraph m. For ease reference I quote it hereunder; -

*"aa) The Taxing Officer, in the exercise of his discretion, shall take into consideration the other fees and allowances to the advocate (if any) in respect of the work to which any such allowance applies, the **nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, and all other relevant circumstances;**" [emphasis added]*

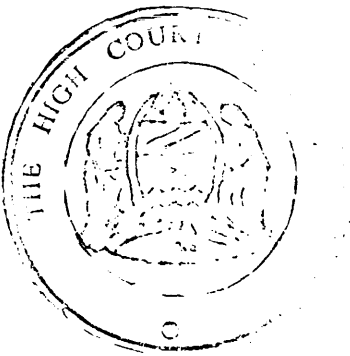
Guided by the above provision of the law, I find no need of disturbing the instruction fee of Tsh 2,000,000/- as awarded by the Taxing Master for

the reasons that the decree holder had presented receipt number 0009 dated 16/7/2020 whereby the amount paid to the advocate was Tshs 2,000,000/ for defending the respondent (Ndungu Village Council), in Land Application No. 34 of 2017. Moreover, this court is of considered opinion that the amount is reasonable and justifiable in the circumstances of this matter.

Having said that and done, and considering the fact that the applicant is not disputing the rest of the amount (Tshs 430,000/=) then, I find no need of disturbing the taxed amount of Tsh 2,430,000/= as taxed by Taxing master. I therefore dismiss this application with costs.

It is so ordered.

Dated and delivered at Moshi this 31st day of March 2022.




S. H. Simfukwe

Judge

31/3/2022