

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL REFERENCE NO.14 OF 2022

(Arising from Bill of Costs No.26 of 2021 in the Resident Magistrates' Court of Dar es Salaam at Kisutu, originating from Civil Case No.243 of 2018 in the Resident Magistrates' Court of Dar es Salaam at Kisutu)

SUNSHARE INVESTMENT LIMITED..... APPLICANT

VRS

FAITH KESSY.....RESPONDENT

RULING

Date of last Order: 25-10- 2023

Date of Ruling: 23-11- 2023

B.K. PHILLIP, J

Aggrieved by the Ruling of the taxing officer, the applicant herein lodged this application under Rule 7(1) and (2) of the Advocates Remuneration Order, 2015. The applicant's prayers are reproduced verbatim hereunder;

- i) That this Honourable court be pleased to determine this reference in respect of the correctness, legality, and validity of the decision of the taxing master dated 6th December 2022 in Bill of Costs No.26 of 2021 arising from Civil Case No.243 of 2018 (Kisutu RM's Court) to satisfy itself on the proper exercise of discretion.
- ii) The costs of this application be provided for.
- iii) Any other orders as the Hon Court shall deem fit to grant.

The application is supported by an affidavit sworn by learned advocate Samson Edward Mbamba. The learned Advocate Anna Amon Mlimakifi, filed a counter affidavit in opposition to the application.

A brief background to this application is that the applicant and respondent herein were the plaintiff and defendant respectively in the above-mentioned Civil Case No.243 of 2018, in which the applicant sued the respondent for payment of Tshs 55,186,000/= being cash collected by the respondent on behalf of the applicant and wrongly appropriated by him, interests on the decretal sum, damages and costs of the case. Upon receiving evidence from both sides, the trial court dismissed the case with costs. Consequently, the respondent filed a bill of costs with a total of Tshs 13,130,000/=. The same was heard on merit and in his ruling, the subject of this ruling, the taxing master awarded the respondent costs to the tune of 10,180,000/= made up of instruction fees to a tune of Tshs.5,500,000/=:, attendance in court Tshs.4,100,000/=:, and costs for prosecuting the bill of costs Tshs.500,000/=:The applicant has moved this court to check the appropriateness of the amount awarded to the respondent.

This application was heard by way of written submissions. The learned advocates Aziza Msangi and Anna Amon filed the submissions for the applicant and respondent respectively. Ms. Msangi started her submission by adopting the contents of the affidavit in support of the application. Her arguments were to the effect that the sum of Tshs 5,500,000/= awarded to the respondent as instruction fees is huge, excessive, and unjustifiable because the case was not complex. It involved one witness only thus the advocate for the respondent did not have a big task to pursue the case. She

was of the view that the appropriate and reasonable amount to be awarded to the respondent would be 8% of the claimed amount which according to her is Tshs 4,000,000/= only.

Moreover. Ms. Msangi submitted that under the law the taxing master has been given a wide discretion in taxing costs for the cases, but that discretion has to be exercised judiciously. The purpose of instruction fees is only to compensate the Advocate for the work done in preparation and conduct of the case and not to enrich him/her. To cement her arguments she cited the case of **Tanzania Rent a Car Limited Vs Peter Kimuhu, Civil reference No.9 of 2020**, (unreported).

Concerning the costs for attendance in court which was taxed at the rate of Tshs. 100,000/= per day for 41 court sessions, Ms. Msangi contended that the taxing master did not exercise his discretion judiciously since it is not correct that all court sessions were for the hearing of the case. Expounding on this point, Ms. Msangi pointed out that in some court sessions, the case was called for mention thus, the learned Advocates and the parties spent less than fifteen minutes in court. Specifically, she mentioned the court sessions indicated in items 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, and 33 in the bill of costs. She insisted that the taxing master erred in taxing the attendance fees at a flat rate of Tshs.100,000/= in total disregard of the fact that except for the sessions for hearings, the rest of the days' parties spent very short in court. She was of the view that the reasonable attendance fee to be taxed for attendance in court is Tshs.50,000/= per session which in total would be 2,050,000/= only instead of Tshs 4,100,000/=.

In conclusion of her submission, Ms. Msangi prayed this application be allowed by reducing the amount of costs awarded to the respondent.

In rebuttal, Ms. Amon contended that the instruction fees awarded to the respondent were quite in order and reasonable. The taxing master took into account the position of the law in item 5 of the 9th schedule of the Advocates Remuneration Order, 2015 which provides for a scale of 8%-10% in contentious proceedings for a liquidated sum between 30,000,000/= to 70,000,000/=. She pointed out that in the case at hand the claimed amount was Tshs.55,189,000/= thus, the instruction fees awarded to the respondent were reasonable and within the scale allowed by the law. Moreover, Ms. Amon contended that the case was complex involving bank transactions which required the respondent's advocate to conduct deep and thorough research on the disputes by going through several receipts and documents. She added that the case took 4 years to be determined. She implored this court not to reduce the instructions fees awarded to the respondent. She distinguished the case of **Tanzania Rent a Car Limited** (supra) from the case at hand on the ground that it involved a matter which was struck out on technical grounds whereas the case at hand was heard to its finality.

About the attendance fees, Ms. Amon argued that the taxing master took into consideration the four principles laid down in the case of **Premchand Raichand Ltd and Another Vs Quarry Services of East Africa Ltd (no.3) (1972)1EA 162**, in which the court held that an advocate is entitled to costs of Tshs.100,000/= for mention and on mathematical exercise, but rather on experience of any reasonable person. She contended that the applicant failed to justify the grounds for the prayer to have the attendance

fees reduced. She was emphatic that the amount of Tshs. 100,000/= per attendance is fair as the same covers transport costs to court and time spent in court which has to be reckoned from the time a party or an advocate arrives at the court premises and stays there waiting for the case to be called.

In addition to the above, Ms. Amon argued that the amount awarded for attendance in court has taken into account the current inflation and rise of costs in various goods and services, and the fact that the Advocate for the respondent was using private transport. In conclusion of her submission, Ms. Amon prayed this application be dismissed with costs.

Having analyzed the rival arguments made by the learned advocates as well as perused the court's records, let me proceed with the determination of the merit of this application. It is noteworthy from the outset that, an application for reference in respect of taxation of a bill of costs is maintainable only on very exceptional circumstances since the taxing master is conferred with discretionary powers on the assessment of the costs tabled before him/her. In the case of **Thomas James Arthur Vs. Nyeri Electricity Undertaking [1961] EA 492** was held as follows.

"Where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the court will intervene only in exceptional cases"

Whereas in the case of **Asea Brown Boveri Ltd Vs Bawazir Glass Works Ltd and Another [2005] 1 EA 17**, the Court had this to say on when and how the taxation should be questioned;

*"A taxation reference would be entertained either on a point of law or on the ground that the bill as taxed was **manifestly excessive or inadequate**. The instruction fees should cover advocate's work, the taxing master should tax each bill on its merits, the taxing master should exercise his discretion judiciously and in accordance with applicable schedule..."*

(Emphasis added)

Back to the application at hand, the major argument raised by Ms. Msangi is that the amount of costs awarded to the applicant is excessive. Starting with the instruction fees, the court's records show that the instruction fees claimed by the respondent were Tshs 5,500,000/=. The taxing master awarded the same as claimed. According to item 5 of the 9th schedule to the Advocates' Remuneration fees, the scale for charging fees in contentious matters where the subject matter is between Tshs.30,000,000/= to Tshs.70,000,000/= ranges between 8% to 10%. It has been submitted by Ms. Msangi that the matter was not complex and the respondent brought in court one witness only. The court's record shows that at the hearing of the case at the lower court each side had one witness only. However, in my opinion, the complexity of the matter does not depend on the number of witnesses in the case. It depends on the issues in controversy between the parties and the facts of the case among other things. Be as it may, upon going through the court's record I decline to agree with Ms. Msangi that the case was not complex.

I have also taken note that this case has been in court for four years. The amount awarded by the taxing master is within the range provided in law because it is less than 10% of the amount claimed by the respondent (Tshs.55,186,000/=). Having in mind the position of the law, to wit; questions solely of quantum are regarded as matters with which the taxing masters are particularly fitted to deal with and that this court will intervene only in exceptional cases where there is an error in law or principle applied by the taxing master, I do not see any plausible reasons to interfere with the decision of the taxing master as far as the instruction fees are concerned.

Coming to the amount taxed for attendance in court, I have noted that Ms. Amon did not dispute that the dates for the sessions mentioned by Ms. Msangi in his submission were not for the hearing of the case. This means that what is indicated in the respondent's bill costs, that is, the hearing of the case started on the 2nd of September 2019 and continued up to the 22nd of December 2022 whereas each side called one witness only is not correct. It is common knowledge that it is not true that when a case is called in court all the time it is called for a hearing. On some days cases are called for necessary orders only and on such days parties spend a short time in court. Thus, I agree with the concern raised by Ms. Msangi on the taxing master's decision to tax a flat rate of Tshs. 100,000/= for all sessions. The same is erroneous. The dates on which the case was called for mention

were supposed to be taxed at the rate of Tshs 50,000/=only. This is per the findings of the taxing master himself made in his ruling on page 4. Surprisingly, he proceeded to tax the costs for attendance in court at a flat rate of Tshs. 100,000/=.

From the foregoing, out of the 41 court sessions taxed by the taxing master, 22 sessions were for mention and the respondent deserves to be paid Tshs.50,000/= only for attendance in court. Thus, the costs for attendance in court are hereby reduced to the tune of Tshs.3,000,000/=only

In the upshot, this application succeeds to the extent explained herein above. Each party will bear his/her costs.

Dated this 23rd day of November 2023.




B.K. PHILLIP
JUDGE.