

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MBEYA SUB- REGISTRY)

AT MBEYA

CIVIL REFERENCE NO. 3 OF 2023

(From the decision of Resident Magistrate Court of Mbeya at Mbeya in Bill of Costs No. 10 of 2023)

MERU AGRO TOURS AND CONSULTANTS

CO. LTD..... APPLICANT

VERSUS

CHARLES TILLY HAULE.....RESPONDENT

RULING

Date of last Order: 05/09/2023

Date of Ruling: 05/10/2023

NDUNGURU, J.

The applicant herein filed the instant reference application calling upon this Court to intervene, peruse, quash and set aside the ruling of the taxing master issued in Taxation Cause No. 10 of 2023. The application is pegged under the provisions of Order 7 (1) and (2) of the Advocates Remuneration Order, 2015 G.N. No. 264 of 2015. It is supported by an affidavit deposed by one, Idris Muhidin Msemo, the applicant's counsel. The application is

however, resisted through the counter affidavit and the same sworn by one, Gladness Luhwago, the respondent's counsel.

For better understanding of the essence of this application, I find it pertinent to briefly narrate the background are that: The applicant herein, Meru Agro Tours and Consultant Co. Ltd, filed Civil Case No. 8 of 2021 before the Court of Resident Magistrates of Mbeya at Mbeya (herein referred to as the trial Court) against the respondent, Charles Tilly Haule. That suit was struck out on a successful preliminary objection by the respondent. Consequent upon that, the respondent filed Bill of Costs No. 10 of 2023 and he had claimed Tshs. 9,985,000/= before the Taxing Master. The said claim for costs was heard and finally taxed at a tune of Tshs. 9,305,000/=. Aggrieved by the decision of the taxing master, hence the applicant lodged the present reference.

When the matter was called on for hearing, the applicant was represented by Mr. Idris Muhidin Msemu, learned advocate whereas the respondent enjoyed the service of Ms. Gladness Luhwago, learned advocate. Upon the request of the parties, this Court allowed the parties to

argue this application by way of written submissions and they complied with the scheduling order of this Court.

In support of the application, Mr. Msemo prayed to adopt the affidavit supporting the application and continued to argue that; the taxing master erred to invoke the scales which are set in the 9th schedule. He also submitted that, since the preliminary objection falls under intercutting applications the taxing master could have invoked the provision of item 1 (m) (ii) of the 11th schedule to the Advocates Remuneration Order, 2015 G.N. No. 264 of 2015. To cement his arguments, he cited the case of **Musa Amsi & 2 others v Azid Kaoneka**, Reference Application No. 9 of 2020, HC at Tanga (unreported).

He added that, the amount of Tshs. 1,000,000/= could have been enough as instruction fee on the reason that the matter ended at the preliminary stage. To reinforce his submissions, he referred the Court in the case of **Shahista Adams v Jitesh Jayantilal Valji Ladwa & another**, Civil Reference No. 03 of 2021, HC (Land Division) at DSM (unreported).

Regarding to the costs for attendance and breakfast, Ms. Msemo argued that, there is no any scale in the Advocates Remuneration Order which provides for attendance of the decree holder in person and reimbursement for the breakfast and or diner or lunch. He also submitted that, there was no receipt produced to prove the attendance of the respondent (decree holder) and or any receipt produced to prove the consumptions by the decree holder for breakfast.

In relation to consultation fee, Mr. Msemo submitted that, the taxing master failed to exercise her discretion judiciously on the reason that she did not request the receipt as the prove. To bolster his submissions, he referred the Court to the case of **John Eliafye v Michael Lesani Kweka**, Civil Reference No. 12 of 2007, CAT at DSM (unreported).

He also faulted the decision of the taxing master on the ground that the amount for the attendance of the decree holder during the hearing of the Bill of Costs included in body of the bill of costs. He cited Order 55 (3) of the Advocates Remuneration Order, 2015 G.N. No. 264 of 2015 and case of **Delta Africa Limited v Vodacom Tanzania Public Limited**,

Taxation Reference No. 21 of 2022, HC (Commercial Division) at DSM (unreported).

Mr. Msemo further submitted that, the taxing master erred when awarded costs for defending the bill of costs by the counsel for the decree holder without considered the provided scale. He added that, the taxing master did not take into account that the bill of costs had been heard within a single day and orally. Finally, he prayed the Court that the decision of the taxing master be quashed and set aside.

In replying, Ms. Luhwago submitted that, the provision of item 1 (m) (ii) of the 11th schedule to the Advocates Remuneration Order (supra) covers fees for opposing or agree with applications by way of notice of motion or chamber application and not otherwise. She went on to submit that, the taxing master clearly dedicated the law which was applicable when she was awarded the instruction fee. She also argued that, this Court is not bound to follow the case of **Musa Amsi & 2 other** (supra) because it is persuasive one.

She further submitted that, there is no dispute that in all three days that the respondent entered appearance before the Court. She added that,

there is no provision of the law guide the taxing master to consider receipt in awarding costs for attendance and breakfast. She went on to submit that, there is no law compelled the decree holder to produce receipt unproving consultation fee and the receipt for all disbursement shall be produced if so required by the taxing master.

She continued to submit that, in awarding consultation fee what is required is only the proof that the payments were actually made to a registered advocate. To support her assertion, she referred the Court to the cases of **Peter Suga v Lusoka Musa**, Taxation Reference No. 1 of 2023, HC at Tabora and **John Eliafye v Michael Lesani Kweka**, Civil Reference No. 12 of 2007, CAT at DSM (both unreported).

Lastly, Ms. Luhwago argued that, the taxing master did not contravene Order 55 (3) of the Advocates Remuneration Order on the ground that the bill of costs No. 10 of 2023 at page 2 is clear that the costs for attending bill of costs appeared at the end and left blank. She went to submit that, what is reflected at page 8 of paragraph 2 of the impugned ruling is just typing error on part of Court itself which should not be used to discourage the respondent right. In conclusion, she prayed the Court

that the arguments advanced by the counsel for the applicant be disregarded for lack of merit.

In his rejoinder, Mr. Msemo reiterated his submission in chief. He also argued that, if that was an error on the part of the taxing master why they were not took any step or measure to ensure the rectification of the said error. In conclusion, he reiterated his earlier prayer.

Having considered the opposing submissions from the parties, the Court's record and pleadings filed in this Court, the pertinent issue for determination is whether the application has merit or not.

It must be noted that, the taxation of costs is not a mathematical exercise but it is a matter of opinion, the Court will not interfere with award merely because it thinks the award somewhat too high or too low: it will interfere if the award is so high or so low as to amount to an injustice to one party or another. See the case of **Registered Trustees of the Cashewnut Industry Development Fund v Cashewnut Board of Tanzania**, Civil Reference No. 4 of 2007, CAT at DSM (unreported).

Regarding to Tshs. 8,000,000/= as instruction fee, counsel for the applicant proposed that taxing officer should have assessed the instruction

basing on the scale which are set in the 11th Schedule item 1 (m) (ii) to the Advocates Remuneration Order, 2015 G.N. No. 264 of 2015. In the first place, I disagree with Mr. Msemo because the said provision of the law provides costs for applications made by way of motions of motion or chamber application including appeals from taxation and not main suit.

In the instant case, the applicant (the Plaintiff) filed Civil Case No. 17 of 2022 seeking for the payment of Tshs. 137,007,000/= being the amount collected from the customers by the respondent and he did not remit to the company. The question here is whether the Civil Case No. 17 of 2022 falls under a claim for liquidated sum or not. The Black's Law Dictionary defines liquidated sum as an amount contractually stipulated as reasonable estimation of actual damages to be recovered by one party if the other party breaches; also, if the parties to contract have agreed on liquidated damages, the sum fixed is the measure of damages for a breach.

In terms of section 74 (1) of the Law of Contract Act, (Cap 345 R.E. 2019) the liquidated sum is a known sum of money. It is a sum fixed in a contract or certainly loan amount. See **Southern Highland Earthworks Company Ltd v UAP Insurance Tanzania Ltd**, Taxation Reference No.

01 OF 2021, HC at Songea (unreported). A liquidated sum must be agreed by parties in advance by the parties, and it should be included in a contract. A claim for liquidated sum is different from a claim for specific damages which were presented in the suit which prompted the bill of costs leading to the instant reference. Apparently, the claim was not for a liquidated sum as envisaged under Schedule nine of the Order. In that regard, I find that the taxing officer was wrong to invoke 9th schedule item 6 of the Advocates Remuneration Order, 2015 to award the sum of Tshs. 8,000,000/= as instruction fee.

In the premises, I am of the settled view, the instruction fee of Tshs. 8,000,000/= awarded to the respondent was excessive and amount to an injustice to the applicant. I therefore substitute the Tshs. 8,000,000/= awarded by the taxing officer with Tshs, 1,000,000/= as instruction in accordance with item 1 (d) of the 11th Schedule to the Order.

In relation to taxed amount of Tshs. 100,000/= being consultation fee under item 1 of the bill of costs, I am of the view that, the decision of the taxing officer was fair and reasonable because the said Order 58 (1) of the Advocates Remuneration order, 2015 does not impose the mandatory

requirements to produce receipts or vouchers at taxation but only if required by taxing officer. I therefore find that the applicant's arguments are baseless. Further, I confirm the sum of Tshs. 100,000/= being consultation fees for item 1 of the bill of cost as taxed amount.

As regard the issue of charging Tshs. 1,000,000/= as costs of prosecuting the Bill of Costs No. 10 of 2022, when submitting on this point the counsel for the respondent admitted that the impugned ruling reveal that they were made prayer regarding costs for prosecuting bill of costs and then the taxing officer granted the same, but she alleged that is just typing error. I disagree with the counsel for the respondent because even the taxation proceedings in Bill of Costs No. 10 of 2023, reveal that the decree holder made such prayer during the trial. Indeed, it is my finding that, the same was wrongly awarded since they were prayed and granted in contravention of Order 55 (3) of the Advocates Remuneration Order, 2015. It ought not be granted in the Bill of costs.

Coming to the costs for attendance and breakfast for three days incurred by the respondent, counsel for the applicant submitted that there is no any scale in the Advocates Remuneration Order which provides for

attendance of the decree holder in person and reimbursement for the breakfast and or diner or lunch. I disagree with Mr. Msemo because first, there is no dispute that the respondent entered appearance in Court for those three days. Second, according to Order 42 of the Advocates Remuneration Order 2015, the taxing office is empowered to award the costs of any matter to the party or advocate. In that regard, the respondent is entitled such costs. I therefore find that the taxing officer was proper to award Tshs. 45,000/= as the costs for attendance and breakfast for three days. The taxed costs for attendance and breakfast to the respondent are not varied.

In the premises, the reference is directed against the instruction fee (Tshs. 8,000,000/=) whereby Tshs. 1,000,000/= has been considered to meet justice and the rest taxed off, costs for attendance and breakfast is confirmed at Tshs. 45,000/=, consultation fee also is confirmed at Tshs. 100,000/=, costs for prosecuting bill of costs of Tshs. 100,000/= which has been taxed off in its entirety. The item 3, 6 and 7 of the bill of costs are not subject of this reference. The total bill, therefore, comes to Tshs. 1,285,000/=. I thus substitute the Tshs. 9,305,000/- awarded by the taxing

officer with Tshs. 1,285,000/= as taxed amount. I therefore partly grant the application and partially dismiss it to extent shown above.

It is so ordered.



D. B. Ndunguru
D.B. NDUNGURU
JUDGE
05/10/2023