IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 42 OF 2007

STANBIC BANK TANZANIA LIMITED.....PLAINTIFF

VERSUS

1. P.G. ASSOCIATES LIMITED.....1ST DEFENDANT

2. PHILIP ADAM WENTZEL GRIESSEL.....2ND DEFENDANT

3. PRADEEPKUMAR LALJI GAJJAR.....3RD DEFENDANT

RULING

Date of Last Order: 27/11/2008
Date of Ruling: 3/3/2009

Werema, J

The Plaintiff/Respondent obtained a decree against the Defendants/Applicants. This decree was obtained upon a judgment on admission on 9th day of August 2007. This judgment decree in favour of the plaintiff against the defendants jointly and severally for US $.406,869.88 and Tshs.24,042,609.93.

Costs of the suit and incidental costs were also granted in favour of the plaintiff. The plaintiff/respondent applied to the Taxing Master praying for the taxation of bill of costs. The matter was placed before Hon. Kahyoza, the Taxing Master for this purpose. All parties did not appear on 22/10/2007 but on that day the Taxing Master ordered that taxation of the bill of costs be scheduled on 13/11/2007 and parties be notified.

On the scheduled day, Counsel for the plaintiff/respondent appeared but neither the Counsel nor the defendant/applicant appeared. The proceedings on that day show that the Taxing Master had requested to know whether or not the defendant/applicant were served. Mr. Kamala, the learned Advocate, informed the Court that:-

> *"Your honour we served the summons to F.K. who called P.G. Associates who collected the summons from F.K. In that regard the judgment debtors are aware of today's hearing. There is a lawyer from F.K. who can verify."*

This submission appears to be supported by the Counter – Affidavit of Pascal Kamala, the learned Advocate filed to resist the allegations that the defendant/applicants were not

aware of the presentation of the bill of costs by the plaintiff/respondent until 9/10/2008 when an e – mail from the plaintiff's Advocate was received.

Reading these two affidavits and the record of court proceedings, the version of Mr. Pascal Kamala, learned Advocate is more reliable and credible. I therefore make the following findings. First, that the defendant/applicants were aware of the fact of presentation of bill of costs by the plaintiff. Two, I find that the affidavit deponed by SENI SONGWE MALIMI Advocate, is false on that fact. I am not certain if the Advocate is lying under oath. He's verification indicate that the information is *"true to the best of information received"* from the clients. I think this is by all legal standards hearsay evidence. The rule of law is that an affidavit should contain only such facts as the deponent is able to prove of his own knowledge except on interlocutory application. This rule is to be found in Order XIX r. 3 (1) of the Civil Procedure Act, [CAP 33 R.E. 2002] which provides that:-

> *"3 (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on*

which statements of his belief may be admitted.

Provided that the grounds thereof are stated."

I have read the language used in the verification clause and I do not pretend to have appreciated the grounds of the Advocate's belief on what is stated in paragraph 4 and 8 of his affidavit. I think, in a situation such as this, Advocates should not take affidavits on matters which are better suited to be deponed by their clients. This is a mechanism affording maintenance of credibility of Court officers. Otherwise, it will appear officers of the Court are used as mouth-piece and conduit for lies to the Court. I also find the words as couched in the verification clause out-of-the ordinary. How can information be true to the best of another information?

Be as it may, the application before me is for extension of time within which to file an objection to the decision of the Taxing master dated 22/9/2008. There is, what appears to me an alternative prayer, which is that this Court be pleased to vary and/or set aside the Taxing Masters decision on the grounds set out there. The grounds includes what I have alluded above as ex-parte taxation of costs

proceedings. The other is that taxation of the Bill of Costs at 3% is oppressive because the matter was not fully litigated.

In order that the application for extension of time be granted, the application must first satisfy the Court that there exists good cause explaining an omission committed by him and which gave rise to the order that a party want the Court to set aside. From the facts, the omission to appear before the Taxing Master is explained. Those reasons do not disclose a sufficient cause. I am satisfied that the applicants, contrary to what they have pleaded were served with or were aware of the presentation of the Bill of Costs. In view of withdrawal of instructions from their lawyers (F.K. Law Chambers), I do not see how Counsel for plaintiff/respondent would be held accountable for the service of Bill of Costs. I agree with Mr. Kamala, learned Advocate that the applicants/defendant are bound by the provisions of Order III r. 5 of the Civil Procedure Act.

I think every person of the letter knows that the underlining policy of every civilized system of law is to have the business of the Court conducted and concluded expeditiously. There are many decisions in this jurisdiction underlining the policy. One of them is SALDANHA & OTHERS VS BHAILAL & CO. [1968] E.A. 29 which introduced the view

of Lord Denning, M.R. in FITZPATRICK V BATGER & CO LTD [1967] 2 ALL. ER 657. Business of the Court cannot be conducted and concluded expeditiously if litigants do not respect orders or summons issued requiring them to appear or to take any step in the proceedings of the Court. That conduct is unreasonable and where it is not explained, the Court will not exercise its discretion on an application to set aside any orders issued ex -parte.

I am mindful of the provisions of s. 14 (1) of the Law of Limitation Act [CAP 89 R.E. 2002] and find that the explanation advanced by the applicants/defendant far fall short of a reasonable explanation and gives insufficient cause for the omission. The applicants/defendants are not truthful when they say they were not served or that they were not aware of the proceedings before the Taxing Master.

I, therefore, having been satisfied that the applicant has not reasonably explained his omission to the satification of the Court, either under s. 14 (1) of the Law of Limitation Act, [CAP 89 R.E. 2002] or under Rules 6 (1) and 6 (2) of the Advocates' Remuneration and Taxation of Costs Rules, decline to enlarge time as prayed.

There is a second prayer. That the Court be pleased to vary and/or set aside the Taxing Master's decision. No enabling provision is cited for varying or setting aside that decision. Now, can this Court invoke the inherent powers of the Court under s. 95 of the Civil Procedure Act? In AHMED HASSAN MULJI V SHIRIMBAI JADAVJI [1963] E.A. 217, it was held that the inherent powers of the Court cannot be invoked if there was another remedy available. In the case before me, the alternative remedy is the one I have adjudged unavailable. That would have settled the matter. However, I think there is a substantive issue for consideration of the Court. This is whether the award of 3% as instruction fee is justifiable. Both parties have made lengthy submissions on the point. Though there was an alternative remedy, I am settled in invoking the inherent powers under s. 95 of the Civil Procedure Act to consider this point.

Let me start with a principle of taxation. Bills of Cost must be in accordance with the order of the Court. The Court ordered costs in favour of the successful party. But Counsel is saying since the case did not go to trial, the per centum of Advocate's fee at 3% is rather on the higher side. My understanding is that the applicants/defendants wants this percentage reduced. They also argue that the Court has

powers to a correct decision of the Taxing Master if he acted unjudiciously. Several cases were cited as being authority of existence of such powers. Among these are HAJI ATHUMANI ISSA VS RWEITAMA MUTATU [1992] TLR 372; ALI NUAMUGUNDA VS EMILIAN KIHWILI [1967] HCD 177; and THOMAS JAMES ARTHUR VS NYERI ELECTRICITY UNDERTAKING [1961] E.A. 492. What did these cases determine – I think there are two principles flowing from a litany of these cases. They were stated in NYERI ELECTRICITY UNDERTAKING. I had the chance to summarize them in TANZINDIA ASSURANCE CO. LTD VS RABCO TANZANIA LTD (Commercial Case No. 37 of 2006) unreported, as follows: -

(a) where there has been an error in principle the court will interfere, but question solely of quantum are regarded as matters with which the taxing masters are particularly fitted to deal and the court will intervene only in exceptional cases;

(b) the fee allowed was higher than seemed appropriate, but in a matter which must remain essentially one of opinion; it was not so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle.

I have read the pleadings, the taxing master's decision and the Court proceedings. I am settled in the position that there is nothing on record which justify intervention to set aside his decision. He acted judiciously. First, section 30 (1) of the Civil Procedure Act [CAP 33 R.E. 2002] confers a wide discretion to the Taxing Master to tax Bill of Costs. I am satisfied that 3% that appears in his decision is the minimum percentage under the Rules. But a Taxing Master can exercise his discretion to go below.

In MGS INTERNATIONAL (T) LTD VS HALAIS PRO – CHEMIE INDUSTRIES LTD (commercial case No. 3/2002), unreported, Kalegeya J (as he then was), decided that a taxing master may judiciously depart from the rates in the schedules because, he reasoned, awarding costs is fully discretionary. The ratio of these cases appears to be that once a taxing master acts judicially, devoid of applying a wrong principle of law or considerations, the Court would rarely interfere with the decision. One of the grounds to support such intervention upon a review of all of the cases cited to me is where the award is manifestly excessive or low as to appear unconscionable. I am not satisfied the award here was manifestly excessive or unconscionable. It

is so, particularly, when the 3% is the minimum base under the Rules. It is not a rip off.

On the basis of the foregoing, I do not see a point of substance to allow interference with the decision of the Taxing Master. I therefore do dismiss the reference and order that the bill of costs taxed at shs.31,189,203.62 by the Taxing Master, be upheld. The plaintiff/respondents shall have their supplementary costs in respect of these proceedings.

F.M. Werema

JUDGE

20/2/2009

1,835 words

I Certify that this is a true and correct of the original/order Judgement Ruling
Sign _____
Registrar Commercial Court Dsm.
Date 5/3/09