IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 327 OF 2015

(Arising from Commercial Case No. 90 of 2011)

NIC BANK TANZANIA LIMITED ..... APPLICANT/J. DEBTOR

VERSUS

PATRICK EDWARD MOSHI
JANETH PATRICK MOSHA ..... RESPONDENTS/D. HOLDERS

30th October & 22nd December, 2016

RULING

MWAMBEGELE, J.:

The applicants NIC Bank Tanzania Limited was the plaintiff in Commercial Case No. 90 of 2011 in which she had sued the respondents Patrick Edward Moshi and Janeth Patrick Mosha for failure to honour their obligations as guarantors in relation to a credit facility of Tshs. 52,000,000/= advanced by the applicant to one PATCO Enterprises (T) Limited. By a ruling of this court handed down on 11.09.2014, that suit was struck out with costs. Consequent upon that ruling, the respondents filed a bill of costs totaling Tshs. 11,565,000/= which was taxed at Tshs. 2,305,889/=. An amount of Tshs. 9,259,111/= was taxed off.

The applicant/judgment debtor was not happy with the decision of the Taxing Officer awarding that amount to the respondents/decree holders. The complaint has been lodged in this court through this reference which has been taken under the provisions of Paragraph 7 (1) of the Advocates Remuneration Order, 2015 – GN No. 264 of 2015. It is supported by an affidavit of Stemius Salvatory, an officer of this court and courts subordinate hereto, save for the Primary Court.

On 13.10.2016 Mr. Theodor Primus, the learned counsel who appeared on that date holding brief for Mr. Protace Kato Zake, learned counsel for the respondents prayed to have the matter disposed of by way of written submissions. As Mr. Salvatory, the learned counsel who appeared for the applicant had no objection, the court granted the prayer and proceeded to provide the submissions schedule. Except for the rejoinder, both learned counsel for the parties complied with the schedule.

The rejoinder submissions have been filed out of time and without leave of the court to be so filed out of time. The learned counsel for the applicant states that there was no way the same could be filed in time because they were served out of time. That they were served with the reply submissions on 30.10.2016 while the same were ordered to be filed on 27.10.2016.

I have felt it appropriate to determine this point at the outset. The order of this court of 13.10.2016 required the respondents to file their reply submissions by 27.10.2016. The reply submissions filed shows that they were indeed filed on that date. The court also ordered the applicant to file rejoinder submissions, if any, by 31.10.2016. The court record shows that it was filed on 03.11.2016. The applicant's counsel states in the rejoinder submissions that he took that course because he was served the reply

submissions on 30.10.2016. I have considered this mishap and think it deserves serious consideration at the outset. It is apparently clear that the applicant's counsel filed his rejoinder submissions out of time. Also glaringly clear is the fact that he so filed out of time without leave of the court. A document filed out of the timeframe ordered by, and without leave of, the court is as good as if it was filed at all.

I am not prepared to accept the excuse fronted by the counsel for the applicant. He was in court when the submissions dates were fixed. Litigants and their advocates are supposed to be vigilant. Thus the learned counsel for the applicant or the applicant herself ought to have followed the matter up having seen the slated date; that is, 27.10.2016 ticked without his being served with the documents. Such simple search would have unveiled the obvious fact that the documents were filed timeously and would have therefore have saved him from a mess he is just about to be in. For the foregoing reasons, I expunge the rejoinder submissions filed out of time and without leave of the court from the record of this matter.

Reverting to the submissions for the parties, Mr. Stemius Salavatory, learned counsel for the applicant, arguing for the reference, submits on the claims he alleges to be excessive, that under rule 46 of the Advocates' Remuneration and Taxation of Costs Rules, GN No. 515 of 1991 the total amount of the bill of costs ought to have been disallowed because the amount taxed is more than one-sixth of the total amount of the bill of costs exclusive of court fees. He argues that the total amount of the bill of costs was Tshs. 11,490,000/= and the amount taxed was Tshs. 2,965,889/=; thus, he argues, one-sixth of the total amount is Tshs. 1,915,000/- and the amount taxed off is Tshs. 9,259,111/=. Therefore, he argues, as the amount taxed off on the bill of

costs presented by the respondents exceeds one-sixth of the total bill, the whole of the bill of costs ought to have been disallowed as mandatorily required by rule 46 of the Advocates' Remuneration and Taxation of Costs Rules, GN No. 515 of 1991.

The second complaint is about the application of the doctrine of *Ex Turpi Causa*. Under this head, the learned counsel argues that items 1 to 28 of the bill of costs were not supported by receipts. The learned counsel has heavily relied on the provisions of section 80 (1) and (3) of the Income Tax Act, 2004 and regulations 4 (1) (2) 10 (5) and 24 of the Income Tax (Electronic Fiscal Devices) Regulations, 2012. Arguing that the provisions of section 80 of the Income Act have been couched in mandatory terms, the learned Taxing Officer ought to have complied with it to the letter. He argues that the costs under items 1 to 28 cannot be enforced by a court of law under the doctrine of *Ex Turpi Causa* (doctrine of illegality of defence) whose origin is in the maxim *Ex Turpi Causa non oritur actio* (no action or cause of action which is founded on illegal conduct can be enforced by a court of law or no one can benefit from this own wrong). The learned counsel has also assisted the court by submitting on the origin of the doctrine as well as case law in England in ***Holman Vs Johnson*** (1775) which is applicable in Tanzania by virtue of section 2 (3) of the Judicature and Application of Laws Act – Cap. 358 of the Revised Edition, 2002 and ***Issa Athumani Tojo Vs Repuclic*** [2003] TLR 199 and ***the Kiriri Cotton Company Ltd Vs Ranchhoddas Keshavji Dewani*** [1958] 1 EA 239.

The third ground of complaint, which is somehow an extension of the second ground, is about lack of credible evidence to support items 1 to 28 of the bill of costs. The learned counsel relies on rule 55 of GN No. 515 of 1991 and

Hotel Travertine Ltd Vs National Bank of Commerce, Taxation Reference No. 9 of 2006 (unreported) to contend that the items must be taxed off.

The last ground has been argued in the alternative. Under this ground, the learned counsel for the judgment debtor argues that items 2 to 28 of the bill of costs which were taxed at Tshs. 30,000/ each is on the high side given the fact that the distance between the advocate's office which is located at Zanaki Street/Sokoine Drive is less than three (3) kilometers and that the cost of hiring a taxi within the city is charged at the maximum rate of Tshs. 5,000/= a trip.

Responding, the learned counsel for the decree holders kicks off by a kind of preliminary objection stating that the applicant/judgment debtor has based his prayers under rule 46 and 55 of the Advocates' Remuneration and Taxation of Costs Rules, 1991 – GN No. 515 of 1991 which were revoked by Paragraph 71 of the Advocates Remuneration Order, 2015. He argues that the application is incompetent for being made under a non-existing law/a repealed law.

Reverting to the response to the grounds for reference, the learned counsel has submitted in respect of ground 1 that the learned counsel for the applicant has misinterpreted the provisions of Paragraph 48 of the Advocates Remuneration Order, 2015. He argues that the catch phrase in the paragraph is "shall not be entitled to the costs of such taxation". That the provision does not refer to the costs of the bill of costs.

On the doctrine of *Ex Turpi Causa*, the learned counsel for the respondent argues that the law applicable in taxation proceedings is the Advocates

Remuneration Order, 2015 thus the provisions of of section 80 (1) and (3) of the Income Tax Act, 2004 and regulations 4 (1) (2) 10 (5) and 24 of the Income Tax (Electronic Fiscal Devices) Regulations, 2012 are inapplicable in the present application. He adds that the provisions of paragraph 58 (1) of the Advocates Remuneration Order, 2015 stated that receipts/vouchers are supposed to be produced at taxation if required. Therefore, he argues, the respondents "were not required to do so and failed".

He submits further that the charges were made considering the fact that there are two respondents. Insisting on the discretion of the taxing officer, the learned counsel submits that he taxed it as he did after finding that it was necessary to do so.

Before confronting the grounds for reference, let me state at this juncture that taxation powers are discretional upon the Taxing Officer and a court will not interfere unless it is satisfied that the same was based on a wrong principle – see ***Pardhan Vs Osman***, [1969] 1 EA 528 and ***George Mbuguzi and Another Vs A. S. Maskini*** 1980] TLR53. The reason why such powers, especially on the quantum of instruction fees, should be left within the empire of the Taxing Officer was explained with sufficient lucidity by this court (Hamlyn, J.) in the ***Pardhan*** case (supra) as follows:

> "... judges, lacking the experience of taxing Officers, will not interfere with the quantum allowed as an instruction fee upon taxation, unless it is manifestly so high or so low that it calls for interference by reason of some misdirection having occurred or some wrong principle having been adopted."

The same principle is applicable in the Court of Appeal – see: ***Gautam Jayram Chavda Vs Covell Mathews Partnership*** Taxation Reference No. 21 of 2004 (unreported).

Having laid the basis for my decision, let me now revert to the grounds for reference. I will start with the point in the form of a preliminary objection raised by the learned counsel for the respondent to the effect that the applicant/judgment debtor has based his prayers under rule 46 and 55 of the Advocates' Remuneration and Taxation of Costs Rules, 1991 – GN No. 515 of 1991 which were revoked by Paragraph 71 of the Advocates Remuneration Order, 2015. He argues that the application is incompetent for being made under a non-existing law or a repealed law. This issue will not detain me as it has amply been explained at page 2 of the ruling of the Taxation Officer. The learned Taxing Officer aptly stated, and correctly so in my view, that the bill of costs the subject of this reference was filed on 24.10.2014. By then, the law applicable was the Advocates' Remuneration and Taxation of Costs Rules, 1991 – GN No. 515 of 1991 because the Advocates Remuneration Order, 2015 which revoked them under paragraph 71 was proclaimed vide GN. No. 264 of 17.07.2015. Thus the law applicable in the present instance, as rightly put by the learned Taxing Officer, is certainly the Advocates' Remuneration and Taxation of Costs Rules, 1991 – GN No. 515 of 1991. The preliminary objection raised by the learned counsel for the respondent is therefore overruled.

Now back to the complaint raised by the applicant regarding the applicability of the provisions of rule46 of the Advocates' Remuneration and Taxation of Costs Rules, 1991 – GN No. 515 of 1991. This rule has been recited under paragraph 48 of the Advocates Remuneration Order, 2015. It reads:

"When more than one-sixth of the total amount of a bill of costs exclusive of court fees is disallowed, the party presenting the bill for taxation shall not be entitled to the costs of such taxation:"

The correct position of the law is as expounded by the learned counsel for the respondent in his written submissions. The one-sixth rule stated in rule 46 of the Advocates' Remuneration and Taxation of Costs Rules, 1991 – GN No. 515 of 1991 is making reference to costs of taxation. I read nothing in the rule which would suggest that it is making reference to costs of the total bill of costs as the learned counsel for the applicant would want this court to hold. The words used – costs of such taxation – are by no means ambiguous; they refer to the costs of such taxation before the Taxing Officer. The interpretation injected to the rule by the learned counsel for the applicant is therefore erroneous. This point of reference therefore fails.

The second complaint is about the application of the doctrine of *Ex Turpi Causa*. The learned counsel for the applicant argues that items 1 to 28 of the bill of costs were not supported by receipts and that the learned Taxing Officer should have applied the provisions of section 80 (1) and (3) of the Income Tax Act, 2004, regulations 4 (1) (2) 10 (5) and 24 of the Income Tax (Electronic Fiscal Devices) Regulations, 2012 to reject them. On the other hand, the learned counsel for the respondent argues that the law applicable is the Advocates' Remuneration and Taxation of Costs Rules, 1991 – GN No. 515 of 1991. I have subjected the arguments by both parties to serious consideration and I tend to agree with the learned counsel for the applicant that the applicable law in present taxation proceedings was the Advocates' Remuneration and Taxation of Costs Rules, 1991 – GN No. 515 of 1991. The

provisions of rule 55 (1) of the Advocates' Remuneration and Taxation of Costs Rules, 1991 – GN No. 515 of 1991 mandatorily require that the claims must be supported by receipts or payment vouchers. Rule 55 (1) provides:

> "Receipts or vouchers for all disbursements charged in a bill of costs together with all documents or drafts or copies thereof shall be produced on taxation."

This provision is based on the assumption that expenses that are to be reimbursed to a successful litigant are those which have been reasonably incurred. The learned Taxing Officer used ***Wambura Chacha Vs Samson Chorwa*** (1973) LRT n. 4, on the stance that a winning party must be fairly reimbursed for the costs it incurred. He also used the wisdom in ***Hotel Travertine Ltd Vs National Bank of Commerce***, Taxation Reference No. 9 of 2006 (unreported) to award the respondent a flat rate of Tshs. 30,000/= per item. The learned Taxing Officer did not arrive at that figure without consideration of some relevant facts; he scanned the court record and indeed saw that counsel for the parties entered appearance, save for item 10. I think the learned Taxing Officer exercised his discretion well. Having seen that the court record vindicated counsel for the respondent had entered appearance as claimed in the bill, it would have been unfair, in my view, to dismiss the claims in those items in their entirety. For this reason, it seems to me that word "shall" used in rule 55 (1) quoted above is not used in imperative terms as the learned counsel for the applicant would like to hold.

The same would be my decision on the third ground of complaint which is to the effect that there was lack of credible evidence to support items 1 to 28 of the bill of costs.

The last ground which has been argued in the alternative and is that items 2 to 28 of the bill of costs which were taxed at Tshs. 30,000/ each is on the high side. The learned counsel has argued that the distance between the advocate's office which is located at Zanaki Street/Sokoine Drive is less than three (3) kilometers and that the cost of hiring a taxi within the city is charged at the maximum rate of Tshs. 5,000/= a trip. Despite the fact that there is no proof that the highest rate chargeable by taxis in the City Centre is Tshs. 5,000/=, it is convincingly plausible that the office of the learned counsel is located within the city centre. This is discernible from paragraph 1 of the plaint at which the applicant's counsel states her address to be "**C & M Advocates, 6th Floor, Wing 'B' NIC Life House Building, Sokoine Drive/ Ohio Street, P. O. Box 71791, Dar es Salaam**". The amount of Tshs. 30,000/= awarded *pro rata* to make a sub-total of Tshs. 660,000/=, was, in my view, given the distance between the court premises and the office of the counsel for the applicant which I have the liberty to take judicial notice of, on the high side. The learned Taxing Officer, it seems, did not consider this relevant fact. His decision therefore deserves interference by this court. It seems to me that in the absence of receipts or payment vouchers to substantiate the claims, and given the fact that the distance of the between the court premises and location of the office of the applicant which is hardly about three kilometers, a flat rate of Tshs. 10,000/= per item; to make a sub-total of Tshs. 220,000/=, would have met the justice of this case. The amount of Tshs. 660,000/= awarded is therefore substituted with Tshs. 220,000/=.

In the upshot, save for the variation stated in the foregoing paragraph, this reference stands dismissed with costs.

Order accordingly.

DATED at DAR ES SALAAM this 22nd day of December, 2016.

J. C. M. MWAMBEGELE
JUDGE