

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL COURT)

AT DAR ES SALAAM

MISC. COMMERCIAL CASE NO. 86 OF 2018

(Arising from the ruling of taxation in Commercial case No 171 of 2013)

THINAMY ENTERTAINMENT LIMITED.....1ST DECREE HOLDER

RESORT WORLD LIMITED.....2ND DECREE HOLDER

COSTA GINNAKOPOLOUS.....3RD DECREE HOLDER

VRS

DINO KATSAPAS.....JUDGMENT DEBTOR

RULING

B.K.PHILLIP, J

This application is made under Rule 7(1) and (2) of the Advocates Remuneration Order, 2015, GN.No.264 of 2015, supported by an affidavit sworn by the advocate for the decree holders, the learned Advocate, Adronicus Kembuga Byamungu. The decree holders are praying for the following orders;

- (a) That this Hon. Court be pleased to examine the proceedings, ruling and drawn order of the Taxing Master in the Decree Holders Bill of Cost against the respondent in Commercial Case No. 171 of 2013 for the purpose of satisfying itself as to the correctness,

legality, or propriety of the said proceedings, Ruling and the drawn order arising there from.

- (b) That this Hon. Court after finding of errors in the proceedings, Ruling and drawn order in the decree Holders' Bill of costs in Commercial Case No. 171 of 2013 fault, quash, set aside and determine a proper taxation.
- (c) That this Hon. Court be pleased to tax item No. 1 of the Bill of Costs at the statutory rate of 3% as instruction fee pursuant to item 8 of the Eighth Schedule to the Advocates Remuneration Order, 2015, GN No. 264 of 2015.
- (d) Costs of this Application be borne by the respondent.
- (e) Any other reliefs this Hon. Court may deem fit to grant.

A brief background to this application is that, in the year 2013, the judgment debtors herein instituted a case against the decree holders vide Commercial case No.171 of 2013, which was struck out with costs following the expiry of its life span and failure by the judgment debtor to apply for extension of the life span of the case. Thereafter, the decree holders' advocate filed a bill of costs for the suit, which had 61 items with a grand total of Tshs 719,766,412/=, the same was heard and finally determined by the taxing master who awarded a total of Tshs 15,870,000/= only. She taxed off a sum of Tshs 703,896,412. In her ruling the Taxing Master relied on Item 1(m) (aa) of the 11th schedule of the Advocates Remuneration order, the case of **Ujagar Singh Vrs The Mbeya Cooperative Union (1968) H.C.D.173**, in which the court held that;

“An instruction fee is for work done in preparing a case before trial; it is irrelevant whether the trial itself would or would not be long and tedious”.

and the case of **George Mbuguzi Vs A.S Maskini (1980) T.L.R 53** to taxed off a total of Tshs 3,200,000/= as per items No. 2,3,14,18,22,25, and 31 of the bill costs for perusal and consultations related to the suit. In the case **George Mbuguzi** (supra) the court held that;

“.....the instruction fees are intended to cover not merely the attendance of a solicitor when takes his client’s instructions, but all his work, other than that which is elsewhere especially provided for....”

The Taxing Master stated that she awarded Tshs 5,000,000/= for each decree holder since it is possible to receive more than one instruction in a single suit.

In this application the decree holders are challenging the Taxing Master’s decision specifically in respect of the instruction and perusal/consultation fees which were taxed off as indicated herein above. The application was heard ex-parte since the Judgment Debtor did not enter appearance in Court despite being served with the notice for hearing of the application. I ordered this application to be disposed of by way of written submission.

In his submission Mr. Byamungu submitted that the decree holders are aggrieved by the decision of the Taxing Master for taxing off Tshs 547,422,600 for instruction fees which is item No. 1 in the bill of costs and awarded a sum of Tshs 15,000,000/= only below the prescribed minimum fees of 3% pursuant to item 8 of the 9th schedule to the Advocates Remuneration Order GN. No. 264 of 2015. (Henceforth "Remuneration Order"). Mr. Binamungu contended that the claim in the main case was for liquidated sum of USD 2,606,000/= which at the exchange rate of Tshs 2190 is equivalent to Tshs 5,707,140,000/=, therefore the award of Tshs 15,000,000/= as instruction fees is equal to 0.2628% far below the rate of 3% as stipulated in item 8 of the 9th schedule to the Remuneration Order. Mr. Byamungu contended further that, the Taxing Master is supposed to exercise his/her discretion judiciously, that means the discretion has to be applied within the bounds of the law. Mr. Byamungu insisted that the Taxing Master is not above the law, thus he/she cannot ignore the Remuneration Order or apply it the way she/he likes, on the contrary she/he has to use his powers according to the laws giving him/her jurisdiction to tax the bill of costs. He referred this Court to the case of **Asea Brown Boveri LTD Vs Bawazir Glass Works Ltd and another (2002) 1 EA 17 (CCR)**, in which the court held that the Taxing Master should exercise his discretion judiciously and in accordance with the applicable schedule. Another case referred to this court by Mr Byamungu is the case of **First American Bank of Kenya Vrs Shah (2002) 1EA 64** in which the court held that under the Advocates Remuneration Order, some of the relevant factors to be considered were the nature and importance of the matter , the amount or value of the

subject matter involved, the interests of the parties, the general conduct of the proceedings and any direction by the trial judge.

Furthermore, Mr. Byamungu distinguished the case of **Ujagar Singh versus The Mbeya Cooperative Union (1968) HCD No.173** which was relied upon by the Taxing Master in her decision on the ground it was for the claim based on breach of contract in which the plaintiff claimed and was awarded general damages to a tune Tshs 38,500/= ,therefore in that case the subject matter was not quantifiable in monetary terms. Mr. Byamungu contended that in the case **Ujagar** (supra) the Taxing Master exercised his discretion correctly by awarding 60% of the instruction fees. Moreover ,Mr. Byamungu contended that the item No. 1 (m) (aa) of the 11th schedule to the Remuneration Order deals with instruction fees in defending against applications or notice of motion ,thus cannot be applicable in the instant matter, since the bill of costs in hand is for defending a suit, therefore the Taxing Master misdirected herself.

In addition to the above, Mr Byamungu also distinguished the case of **George Mbuguzi Vrs A.S Maskini (1980) T.L.R 53**, on the ground that the plaintiff claimed for damages, thus it was not for a liquidated sum, while the case in hand the claim involved a liquidated sum. Also, Mr. Byamungu referred this court to the case of **Joreth Ltd Vrs Kigano and Associates (2002)1 EA 92 (CAK)**, in which the court held that instruction fee is an independent and static item, it is charged once only and is not affected or determined by the stage the suit has reached. Mr.

Byamungu proceeded to submit that instruction fees are agreed and charged in advance for representing a party to the final determination of the case, therefore, it does not matter at what stage the case is determined, the instruction fee is fully utilized and in event of earlier termination of the case, it is not expected of a client to claim refund of part of the fees. Mr. Byamungu insisted that a successful litigant should not be denied of a full recovery of the costs from the other party.

In conclusion of his submission, Mr. Byamungu submitted that, since the suit constituted of a liquidated sum to a tune of USD 2,606,000.00 and Tshs 528,000,000/= the decree holders' counsel were entitled to a charge of 3% of the claimed amount as instruction fees for defending the suit as provided by item 8 of the 9th schedule to the Remuneration Order.

In the course of composing this ruling , upon perusal of the court's record I noted that there was no any receipt to support the claimed instruction and consultation/perusal fees indicated in items 1,2,3,14,18,22,25 and 31 of the bill of costs which are the subject of this ruling.

To my understanding costs awarded to a party in a case are aimed at restituting a party to his/her original position by compensating him/ her the money he/she spent in prosecuting or defending a case in accordance with the laws. It follows therefore, that the principles of proof of claims are equally applicable in the bill of costs, that is, he who alleges has to prove. (See section 110 of the Tanzania Evidence Act, Cap 6 R.E 2002). I am of a settled view that a proof of any payments to an advocate has to be by

submitting Electronic Fiscal Device receipts.('EFD Receipts') (see section Section 36 (1) of the Tax Administration Act, 2015). In the case of **Professor Emmanuel A. Mjema Vrs Managing Editor Dira ya Mtanzania Newspaper and two others, Reference No 7 of 2017 at the High Court of Tanzania, Dar Es Salaam , District Registry**, my brother ,Hon Mgeta J, when taxing off the claims for instruction fees for failure to produce a EFD receipt as a proof for the same had this to say;

"It is a matter of law that all practicing advocates are registered VAT payers. (see section 29(1) of the value Added Tax, 2014). According to section 36(1) of the Tax Administration Act, 2015, a person who supplies goods renders services or receives payment in respect of goods supplied or service rendered shall issue fiscal receipts or fiscal invoice by using electronic fiscal devices.....

Any Act or manifestation of tax avoidance ought to be restricted, it follows, therefore, that such Advocates are required by law to issue EFD receipts upon payment for service rendered, claims on such payments shall be proved by submission of EFD receipt as evidence. In this case no such receipt was tendered, therefore, such claims remain unsubstantiated.

I accordingly tax it off".

In the instant application the decree holders did not submit any receipt to prove the claimed instruction and consultation fees, thus this court cannot award costs which are not proved as required by the law. It has to be noted that the Remuneration Order gives a standard scale for charges for

the legal services rendered to a client, but does not remove the legal requirement to prove the claims for whatever money spent by a party to a case in defending or prosecuting a case. I think it is not correct to assume that every party to a case pays a minimum fees of 3% of the value of the subject matter, since the purpose of paying the costs is to restore a party to his/her original position.

Having said the above and being alive of the legal principle that it is under exceptional cases courts do interfere with the award of costs made by a Taxing Master, since award of costs is within the discretional powers of the Taxing Master, unless he/she has failed to exercised his/her discretion judicially and/or acted upon wrong principles or applied wrong considerations in coming to his/her decision, in the circumstances of this case whereby there were no receipts submitted to prove the claim for the instruction fees to a tune of Tshs 562,422,600/= and consultation fees to a tune of 3,200,000/=, I do not see any justification to interfere with the decision of the Taxing Master. It is my finding that the Taxing Master exercised her discretion judicially by awarding the sum of Tshs 15,000,000/= for instruction fees. In the upshot, this application is dismissed in its entirety.

Dated at Dar es Salaam this 24th day of April, 2019




B.K. PHILLIP
JUDGE