

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL REFERENCE NO. 02 OF 2019

(Originating from Taxation Cause No. 33 of 2019 and Commercial Case No. 164 of 2018)

ECOBANK TANZANIA LIMITED.....APPLICANT

Versus

DOUBLE A COMPANY LIMITED.....1st RESPONDENT

A. A.TRANS LIMITED.....2nd RESPONDENT

ASGHER BASHIR VERSI.....3rd RESPONDENT

AKBER BASHIR VERSI.....4th RESPONDENT

Last Order: 20th Apr, 2020

Date of Ruling: 21st May, 2020

RULING

FIKIRINI, J.

This application by way of chamber summons, filed under Order 7 (1) and (2) of the Advocates Remuneration Order, G.N. No. 264 of 2015, is challenging the decision in the Taxation Cause No. 33 of 2018, dated 09th August, 2019 and hence this Commercial Reference No.02 of 2019. Supporting the application, Hope

this Commercial Reference No.02 of 2019. Supporting the application, Hope Liana, the applicant's Principal Officer, swore an affidavit contesting the award of Tzs. 17, 744, 176.115 and USD.168, 250.5236, averring the awards were arrived at based on improper and invalid Electronic Fiscal Device (EFD) receipts and that by so doing the respondent had committed the offence of *champerty* for claiming unsubstantiated fees knowing the suit was struck out.

Hope Liana further averred that a statement of defence made up of general denials would not have required that much time in researching, so the Taxing Master misdirected himself on the key and relevant principles of taxation. The decision subject of this reference was thus to be reversed.

Another affidavit filed in support was that of Bunella Magambo, which deponed that he was an advocate working for the law firm styled as Safari Africa Arbitration & Legal, and that was who represented the applicant and later followed up to make sure the applicant was availed with the necessary documents as reflected in paragraphs 3.

The respondents contested the application and Asgher Bashir Versi and Akber Bashir Versi, hereinafter referred as the 3rd and 4th respondents, Principal Officers of the 1st and 2nd respondents filed a joint counter-affidavit. The counter- affidavit dismissed, as baseless and unfounded, the averment that the defence which was

filed did not require any intense research warranting the fees claimed and granted. More so, this aspect was not backed with evidence. In paragraph 8 which responded to paragraph 9, 9.1 and 9.2 of the affidavit in support, it was deponed that the EFD receipts averred fake, were verified by TRA as exhibited by annexure TMT-1-a collection of correspondences.

While the applicant on the basis of the affidavit urged the Court to reverse the decision made by the Taxing Master, the respondents based on their joint affidavit had a different view, that the decision by the Taxing Master was proper and should be upheld.

The application was argued by way of written submissions, which will be summarized herein below. Mr. Deogratias Ringia and Ms. Inviolata Wangoma learned counsels appeared for the applicant and Mr. Dismas Raphael learned counsel appeared for the respondents. It was the applicant's submission that the bill of costs has to be based or supported by proof of valid EFD receipts citing the case of **Thinamy Entertainment Limited & Others v Dino Katsapas, Miscellaneous Commercial Case No. 86 of 2018, High Court Commercial Division at DSM (unreported) p. 6-8**. The Court cannot therefore award costs without proof of the EFD receipts that were valid, which in the Taxation Cause before the Court the

respondents relied on fake receipts. The concern was raised but was taken lightly by the Taxing Master, submitted the Counsel.

In awarding Tzs. 17, 744, 176.1175 and USD 168,250.5236 (exclusive of Value Added Tax -VAT), the Taxing Master should have taken into account the factors as stipulated in the case of **National Bank of Commerce Limited v MM Worldwide Trading Co. Ltd, Miscellaneous Commercial Cause No. 217 of 2015, High Court Commercial Division at Dar Es Salaam (unreported) p. 9-10**. Out of the almost seven factors, the Taxing Master only considered the first factor, which was on the suit amount and proceeded to tax the bill of costs and abandoned the other factors. This was capricious and injudicious exercise of discretion by the Taxing Master, he submitted.

Mr. Ringia further submitted that the Taxing Master was required to consider what was reasonable based on the nature, importance, difficulty in the case, interest of the parties, circumstances of each case as provided in the case of **VIP Engineering and Marketing Limited v Independent Power Tanzania Limited, Taxation Reference No. 15 of 2005, CAT (unreported) p. 4 -5**, which he cited in buttressing his position. Referencing to the Taxation Cause, he contended that the amount awarded did not resonate with the outcome since the suit was struck out on technicality for failure to comply to the High Court (Commercial Division)

Procedure Rules. This meant that no research was involved as the written statement of defence filed was evasive general denial which amounted to admissions, therefore little time and effort was spent on a simple case involving none repayment of a loaned amount of money. The matter was therefore not complex or peculiar, thus the award was contrary to the principles set out in the law.

The documents relied on by the Taxing Master were annexed during rejoining submission, which denied the applicant opportunity to submit on them, yet the Taxing Master used the same to clear allegations of fake EFD receipts and based his decision on them.

In light of the submission the applicant pressed the Court to reverse and set aside the decision of the Taxing Master and proceed to tax the bill of costs in accordance with the law and circumstances of this case. Since the EFD receipts annexed in the bill of costs were fake, then dismiss the Taxation Cause No. 33 of 2019 premising on the legal maxim "*he who knocks into Court's doors, must come with clean hands*"

Mr. Raphael submission was hinged on the following, that laws are handmaids of justice and should therefore be applied, invoked and be left to reign and carry the day to day exercise for meeting the ends of justice. Courts apply laws, rules and principles to meet the ends of justice which some were contained in enacted laws,

including the Advocates Remuneration Order 2015, the law that governs taxation and bills of costs, setting standards and principles of charging costs and taxation.

Expounding his submission on the award contested by the applicant, he submitted that bills of costs were taxable according to the scale as Order 46 of the Advocate Remuneration Order. While the respondents issued bill of costs of 3%, the Taxing Master taxed it at 1%, exercising his discretion, which the respondents respected.

Responding on the EFD fake receipts concern, he submitted that the receipts were verified as shown in the annexure TMT-1 marked DIRM-3 and cleared by Tanzania Revenue Authority (TRA) to be genuine. The respondents' counsel also submitted that the respondents were operating following the proper tax and legal procedures as they were VAT registered and possessed an EFD machine, which was functioning. And when it failed and was sent for repair, it was reported to TRA as per Regulations 18 (1) (c) and 18 (2) of the Income Tax (EFD) Regulations, 2012. So whenever the EFD was not functioning was not the respondents fault, but was the TRA system faulty.

And that was why the TRA, a body with the oversight role on the EFD machines, issued a letter with reference number TRA/RM/KTR/EFD/MS/109-445-991/01 dated 13th June, 2019, confirming the EFD receipts issued as genuine pursuant to section 86 (1) (b) of the Value Added Tax, 2014.

The Counsel also submitted in view of what he termed to be a scandalous attack leveled against the respondents, were humiliated and tainted dirty by a scandalous attack leveled against them considering the TRA was the main body established to verify and deal with genuineness of the EFD receipts had already verified the EFD receipts to be genuine and that were generated from a genuine and recognized EFD machine. The applicant can therefore not abdicate from paying costs caused by her frivolous and vexatious law suit filed against the respondents, pegging the submission on fake EFD receipts.

More to the submission was that, the applicant filed a law suit against the respondents namely Commercial Case No. 164 of 2018. The plaint contained 400 pages, the exercise which engaged respondents' lawyers to research, using their time and expertise fully. Different documents and laws were perused to distinguish facts, before embarking on preparing written statement of defence for each defendant as the suit was against them jointly and severally. Ascribing factors for consideration in taxation cause, Mr. Raphael referred this Court to the case of **National Bank of Commerce v MM Worldwide Trading Co. Ltd, Miscellaneous Cause No. 217 of 2015**, where the Court outlined factors to be considered.

The suit filed was for Tzs. 429,854,402.93 and USD 3,856,579.09 and USD 349,884, however, the bill of costs filed was for Tzs. 1,160,550,000/= and the claim was supported with EFD receipts and there was legal documentation to that effect, and eventually the Taxing Master after examination of the application and based on the legal principles, he taxed the amount and proceeded to award Tzs. 17,744,176.115 and USD 168,250.5236 that being 1% of the claimed amount in the suit. According to Mr. Raphael the Taxing Master acted judiciously as all the factors deserving consideration were considered. And that this was reflected in the decision made by the Taxing Master who desisted from awarding the bill of costs at 3% requested by the respondents to 1%, which was favourable to the applicant, who still seemed unsatisfied.

Extending his submission, Mr. Raphael submitted that the applicant had filed case of the same nature namely Miscellaneous Commercial Reference No. 06 of 2019, which was dismissed on 29th November, 2019 by this Court, and since the present reference and the one decided previously have similar facts and issues, *stare decisis* principle, should thus be invoked. Also urged the Court to ignore all the frivolous claims such as the respondents' counsel was not VAT registered or that fake EFD receipts were issued because it had been clarified by TRA to be not the case, despite the applicant's effort to smear the respondents.

He concluded his submission by stressing that the Court's *prima facie* duty was to ensure that rules governing it were observed strictly and practiced to meet ends of justice. On that note he prayed for the application to be dismissed with costs.

The only issue for determination in this reference is whether the Taxing Master acted judiciously in exercising the discretion vested on him in determining the Taxation Cause No. 02 of 2019, governed by the Advocates Remuneration Order.

The Taxing Master in carrying out his tasks is expected to focus on two things: *one*, to ensure the provisions of the law and rules in place, in particular the Advocates Remuneration Order, and specifically, Order 46 of that law, are observed. **See: Gautam Jayram Chavda v Covell Mathews Partnership, Taxation Reference No. 21 of 2004, CAT at DSM (unreported) and National Bank of Commerce v Kapinga & Co. Advocate, Civil Reference No. 4 of 2003, High Court at DSM (unreported).** *Two*, decisions outlining the factors for consideration in awarding, rejecting or reducing the amount of the award sought, such as in the case of **NBC** (*supra*) subscribed to by both counsels, have been considered. Well-illustrated outline was given in **NBC** case, for consideration by the Taxing Master, which included:

(a) The suit amount,

(b) The nature of the subject matter,

(c) Complexity of the suit,

(d) Time taken for hearing, extent of research involved,

(e) Parties general behavior and facilitation of expeditious disposal of the case,

(f) Public policy by ensuring that allowable court; that litigation should be affordable; and

(g) Maintenance of consistency in quantum of costs allowable.

While the applicant's counsel considers the Taxing Master not to have adhered to the guideline, the respondents counsel had a different view. And this compelled me to read thoroughly the decision of the Taxing Master.

In his decision, the Taxing Master was in complete agreement with Mr. Ringia that the value of the subject matter is one thing among many others which need to be considered in assessing fees. Factors such as time taken, complexity of the matter, energy and industry invested in the matter were equally important in assessing fees. He considered the case did not go on full trial as it was struck out, meaning it ended on technicality. That was therefore one of the factors he considered and applied his discretion by awarding the amount at 1% of the subject matter as fair

and reasonable, having in mind all four respondents were billed separately. After thorough consideration, the Taxing Master instead of awarding the amount of Tzs. 1, 160,550,000/= at 3% claimed, awarded bill of costs taxed at Tzs. 17, 194, 176.115 and USD 168,250.5236 taxed off at 1%, exclusive of VAT.

In the **Gautam Jayram Chavda** case (supra), the Court in cautioning the High Court, where the aggrieved party can refer the matter to, commended this to be observed:

“...Judges lacking the experience of the Taxing Master 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”

There is nowhere it has been provided that by considering one factor as its reason, the Taxing Master would be considered to have not acted judiciously. What guided the Taxing Master is provided under Order 46 of the Advocates Remuneration Order, and he accordingly taxed the bill of costs based on the rates provided. In the cases cited that of **NBC** and **VIP Engineering** (supra), aside from elucidating on what the Taxing Master is required to consider covering a number of factors, the decision never placed restriction on the Taxing Master’s discretion to either vary

the amount or percentage to be taxed. In the Taxation Cause subject of this reference he varied the percentage from 3% to 1%, which was a tremendous decrease and to the applicant's advantage.

The applicant also raised a concern that the decision was premised on fake EFD receipts and therefore should not have been granted, citing the case of **Thinamy Entertainment** (supra). I have carefully gone through the Taxing Master decision and I am convinced that the decision was prudently arrived at, after the concern was dealt with. The respondents in their counter-affidavit had annexed annexure TMT-1, which clearly illustrated what occurred. According to a letter with reference number TRA/RM/KTR/EFD/MS/109-445-991/02 dated 21st June, 2019, which is part of annexure TMT-1, the TRA verified that the EFD receipts involved were genuine. Also TRA confirmed that the respondents followed proper tax and legal procedures. I had no reason, like the Taxing Master, to doubt the explanation given by TRA that the EFD receipts were not fake but there was problem with the respondents EFD machines, which was reported to the TRA, who in return advised the respondents what to do. Later the TRA verified the receipts not to be fake, after an inquiry.

Other documents annexed to the counter-affidavit in support of the assertion that the EFD receipts were not fake, were the letters dated 20th June, 2019, with

reference number DA/TAXATION/2019/06/01; dated 14th June, 2019, with reference number DIRM/TRA/EFD/2019/06/11; dated 13th June, 2019, with reference number TRA/RM/KTR/EFD/MS/109-445-991/01; dated 10th June, 2019, with reference number DIRM/TRA/EFD/2019/10; dated 21st June, 2019 with reference number DIRM/TRA/EFD/2019/06/12; dated 12th September, 2018, with reference number DIRM/TRA/EFD/2018/02/09; dated 04th January, 2019, with reference number DIRM/TRA/EFD/2019/01/04; dated 18th February, 2019, with reference number DIRM/TRA/EFD/2019/02/15; copies of receipts issued by DIRM Attorneys, all being part of TMT-1, dealt with the issue of EFD receipts which were questionable.

With that in place one cannot keep on insisting that the receipts were fake. More so, the respondents cannot be condemned to have failed to account or prove their claim when the bill of costs was filed. The case of **Thinamy Entertainment** (supra), though was relevant but not to the present situation.

The applicant's prayer that the EFD receipts be considered as fake has not persuaded this Court. Equally, this Court has not found any ground to warrant its interference with the Taxing Master decision. The prayer that this Court reverse and set aside the Taxing Master decision and proceed to tax the bill of costs in accordance with the law and circumstances of the case is unwarranted and

While in agreement that “*he who knocks into Court’s doors, must come with clean hands*” nothing has so far established to indicate the respondents’ hands were tainted or unclean.

In light of the above, I find this reference lacking in merits and proceed to dismiss it with no order as to costs for the obvious reasons, that there is already taxed bill of costs which needs to be sorted. It is so ordered.



A handwritten signature in black ink, appearing to read "P. S. FIKIRINI".

P. S. FIKIRINI

JUDGE

21st MAY, 2020