

**IN THE HIGH COURT OF THE
UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

CIVIL REFERENCE NO. 04 OF 2019

(Arising from Bill of Costs No. 119 of 2016)

- 1. HARRISSON MANDALI.....1ST APPLICANT**
- 2. MEKEFASON MANDALI.....2ND APPLICANT**
- 3. REHEMA R. KANGE.....3RD APPLICANT**
- 4. MARIAM MAGERO.....4TH APPLICANT**
- 5. EZRA J. MATOKE.....5TH APPLICANT**
- 6. MARY KILIAN JOSEPH MCHAU**
(Legal representative of Kilian J. Mchau).....**6TH APPLICANT**
- 7. ABDALLAH J. MVUNGI.....7TH APPLICANT**
- 8. ELIHURUMA MREMI.....8TH APPLICANT**
- 9. RUKIA ATHUMANI.....9TH APPLICANT**
- 10. MAJUTO RAJABU MBISA (Administrator of**
the Estate of Abuu M. Basai).....**10TH APPLICANT**

VERSUS

**THE REGISTERED TRUSTEES OF
ARCHIDIOCESE OF DAR ES SALAAM..... RESPONDENT**

Date of Last Order: 22.07.2020
Date of Ruling: 07.09.2020

RULING

V.L.MAKANI, J

The applicants named above are asking this court to look into to the justifiability, propriety, correctness and observance of the principles of Taxation of Bill of Costs as regards the decision of the Taxing Master in Application for Bill of Costs No. 119 of 2016 dated 18/06/2019. In the said decision the Taxing Master awarded TZS **60,542,000/=** out of **TZS 174,392,000/=** that was presented by the respondent. The applicants have moved this court under Order 7

(1) and (2) of the Advocates Remuneration and Taxation of Costs Order GN. No. 264 of 2015 (the **Advocates Remuneration Order, 2015**), section 95 of the Civil Procedure Code CAP 33 R.E 2002 (the **CPC**) and section 2(3) of Judication and Application of Laws Act, CAP 358 RE 2002 (**JALA**).

At the hearing of the application the applicants were represented by Mr. Mbamba, Advocate while Mr. Ngalo, Advocate appeared for the respondent.

Mr. Mbamba adopted the contents of the two affidavits by the applicants' that were filed. He styled his submission in three grounds that is, (a) lack of jurisdiction, (b) that some of the parties against whom the award was given were not the ones on record in the sense that, some withdrew their claims in the cause of hearing; and the Taxing Master did not bother to examine the proceedings to guide him on the propriety of the Bill of Costs; and (c) the Taxing Master was not guided by principles applicable in the exercise of discretion to determine Bill of Costs and hence reached an erroneous decision by awarding a huge sum of costs to the respondent.

Mr. Mbamba went on to say that at the time when the taxation proceedings were being concluded there was already a Notice of Appeal to challenge the decision that awarded costs to the respondent. He cited the case of **National Chicks Corporation Ltd & Others vs. National Bank of Commerce, Consolidated Civil Appeals No.95 of 2009 and Civil Appeal No. 29 Of 2010 (CAT-**

DSM) (unreported) where the Court ruled that pendency of appeal in the Court of Appeal stays taxation proceedings in the High Court for want of jurisdiction and operates to halt the proceedings in the High Court. He insisted that the Taxing Master had no jurisdiction to tax the bill of costs once a Notice of Appeal had been filed in the Court of Appeal.

On the second ground he submitted that by looking at page 13 of the proceedings (Annexure B to the affidavit) Hon.Mutungi J. ordered amendment of the pleadings, this was because some parties had passed away and it was to remove the names of the 11th and 12th plaintiffs in the plaint and the counterclaim, it was amended as per page 17 of the proceedings. He said that the Taxing Master taxed the bill of costs in respect of the 12th plaintiff notwithstanding that he was removed and was not party to the pleadings and some of them were already reported dead.

On the third ground Mr. Mbamba said, granting of instruction fee is in the Taxing Master's discretion but it has to be exercised judiciously. He supported his position with the case of **Hotel Travertine Ltd Vs. National Bank Of Commerce, Civil Reference No. 9 Of 2006**. He insisted that the Taxing Master did not exercise his powers judiciously because he did not take into account the fact that there was no complexity involved in the suit to entitle the respondents the award of TZS 60,242,000/= . He prayed for the decision of the Taxing Master be nullified.

In reply, Mr. Ngalo said that the jurisdiction issue was neither raised by the applicant before the Taxing Master nor was it pleaded or advanced in this reference as one of the grounds challenging the decision of the Taxing Master. He said that it is improper to raise the objection in the submissions. He said by doing so they have been taken by surprise and so has the court. He added that there is no dispute that the applicants issued a Notice of Appeal and they also applied for leave to appeal within time and he pointed out that this fact ought to have been stated in the affidavit. He said that following dismissal of the application for leave to appeal on 04/09/2017, the applicant withdrew their Notice of Appeal on 27/09/2017 as per page 7 and 13 of ruling in Application No.482/201. He said that by the time the application for bill of costs was proceeding there was no Notice of Appeal in existence as the respondent's main submissions were filed on 13/11/2018 and the applicants reply were filed on 26/11/2018. That during the time of hearing the only pending application was an application for extension of time to file revision. He insisted therefore that the High Court had jurisdiction to entertain and determine the said application since there was no Notice of Appeal in existence. He insisted that the raised objection has no merits and prayed for the same to be dismissed.

On the merits of this reference he prayed to adopt the contents of respondent's counter affidavit and submissions thereto. He said that the point that some of the parties were removed from the pleadings and that the Taxing Master proceeded to award costs to them was not raised and argued before the Taxing Master for his determination

and that the applicants have not shown the legal basis of this complaint and how they have been prejudiced and what the Tax Master should have done.

Mr. Ngalo was of further view that, the applicants have not advanced any legal basis or factual justification upon which inclusion of the removed parties has affected or prejudiced those who remained. He said that those who were removed have not complained against the decision of the Taxing Master and therefore the applicants have no locus to complain on behalf of them. That the bill of cost was filed and taxed as against those who remained on record of the suit and those who are alleged to have been replaced by their respective personal legal representatives or administrators. He prayed for this ground to be disregarded.

On the second ground, Mr. Ngalo said that the submissions that the Taxing Master did not exercise his powers judiciously has not been explained by the applicant and how the omission by the Taxing Officer affected his decision on the amount awarded. He said that the decision of the Taxing Master is well reasoned and there is nothing serious to fault it. He contended further that; the applicants did not state which items as taxed aggrieved them. He added that the 3% rate which was used by the Taxing Master was not in dispute. Further, he said the applicants Counsel did not raise or argue applicability of complexity or non-complexity of suit as factor to be taken into account by the Taxing Master, that it has for the first time been raised here during this application of Reference. He insisted that the applicants

have not explained which specific item they are complaining about as being on the high side and what they think should have been awarded instead. In conclusion he said that those grounds raised by the applicants were neither raised nor determined by the Taxing Master. That the applicant should have been challenging the findings and or holding of the Taxing Master based on rival pleadings and submissions placed before him for determination. He prayed for the application for reference to be dismissed with costs.

The applicants did not file a rejoinder.

Having gone through the rival submissions by the Advocates, I would first wish to tackle the points of objections raised by the applicants in their submissions.

Mr. Mbamba pointed out that the Taxing Master did not have jurisdiction to entertain the application for bill of costs as there was a Notice of Appeal in place that operated as a bar to the application for bill of costs. However, after going through the records, I am in agreement with Mr. Ngalo that Application No.619/2016 for leave to appeal was dismissed on 04/09/2017 and the Notice of Appeal was withdrawn on 27/09/2017 therefore at the time of the hearing of the application for bill of cost whose submissions were filed on 13/11/2018 and the applicants' reply on 26/11/2018 respectively, there was no existing Notice of Appeal before the court or an application for leave to appeal. On the other hand, and as further submitted by Mr. Ngalo, the issue of jurisdiction of the Taxing Officer

was not raised by the applicants nor discussed during the hearing of the bill of costs. Since an application for Reference is a second bite to the bill of costs, and is considered to be a sort of appeal, no new issues can be raised at this stage.

As regards the decision in respect of the bill of costs against the 11th and 12th applicants who were no longer parties to the proceedings, I am also in agreement with Mr. Ngalo that this issue was not raised nor discussed during the hearing of the application for bill of costs and so this issue cannot be raised at this stage. This court will rely on the case of **Hassan Bundala Swaga vs. Republic, Criminal Appeal No. 416 Of 2014** which was cited with approval in the case of **Mahaba Nyamhyanga Vs. Masara Chacha Matiko, Land Appeal No. 48 of 2019 (HC-Musoma)** (unreported) where it was observed that:

“It is now settled law that as a matter of general principle this court will only look into the matters which came up in the lower courts and were decided and not new matters which were not raised nor decided by neither the trial court nor the high court on appeal.”

In essence, reference to a Judge of the High Court being a second bite and has more or the same power like in an appeal then the issues not raised at the hearing of the bill of costs before the Taxing Master cannot be raised at this stage.

The merits of this reference can be consolidated into one ground, whether the decision in the Application for Bill of costs No.119 of 2016 was appropriate, justifiable and correct. The applicants are

dissatisfied with the amount awarded to the Respondent of **TZS 60,242,000/=** to the respondent. However, the applicants in their submissions did not establish which item was unlawfully charged or rather what was inappropriate in the awarded costs. It was expected of them or rather their Advocate Mr. Mbamba was supposed to categorically state the specific items the applicants were complaining about, whether they are on the higher or lower side. Unfortunately, he only concentrated on the objections and went on submitting generally that the Taxing Master did not exercise his powers judiciously because he did not take into account the fact that there was no complexity involved in the suit to entitle the respondents the award of **TZS 60,242,000/=**. Again, Mr. Mbamba did not show specifically how the complexity was unlawfully considered by the Taxing Master. In fact, Mr. Mbamba was too general hence leaving his arguments unsubstantiated. In that respect therefore, I see no sufficient reasons by the applicants to disturb the Taxing Officer's decision in this application.

In the circumstances, this court finds nothing to fault the decision of the Taxing Master in the Application for bill of costs No.119 of 2016. This application for Reference is therefore dismissed with costs for want of merit. It is so ordered.

V.L. Makani
V.L. MAKANI
JUDGE
07/09/2020

