

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**REFERENCE NO. 8 OF 2022**

*(PuFrom the Bill of Costs No. 571 of 2020 )*

**THE REGISTERED TRUSTEES OF THE EVANGELISTIC  
ASSEMBLES OF GOD TANZANIA (E.A.G.T) ..... APPLICANT**

**VERSUS**

**FRIDA MFUKO (Administratrix of the estate of  
the late JOHN HENRY MFUKO) ..... RESPONDENT**

**RULING**

*Date of last Order: 10.08.2022*

*Date of Ruling: 19.08.2022*

**A.Z.MGEYEKWA, J**

This is a reference that emerged from a ruling of a Taxing Master, Hon. L. Chinyele C.P. The application is made under Order 7 (1) of the Advocates Remuneration Order GN.264 of 2015. The application is supported by an affidavit deponed by Mr. Diidace Celestine Kanyambo, the learned counsel

for the applicant. The respondent filed his counter-affidavit out of time without obtaining leave from the court, therefore the same is disregarded.

The applicant in his Chamber Summons prayed for the following orders:-

- i. That, this Honourable Court be pleased, to set aside the decision of the Taxing Master Hon. Chinyele C.P in in the Bill of Costs No. 571 of 2020.*
- ii. Costs of the application.*
- iii. Any other Oder(s) as this Honourable Court may deem fit and just grant.*

When the matter was called for hearing on 29<sup>th</sup> July, 2022 the applicant was absent and the respondent appeared in person, unrepresented. The Court acceded to the respondent's proposal to have the matter disposed of by way of written submissions. Pursuant thereto, a schedule for filing the submissions was duly conformed to.

In his submission, Mr. Kanyambo, learned counsel for the applicant urged this court to adopt the affidavit sworn by Mr. Diidace Celestine Kanyambo, the learned counsel for the applicant. He began by tracing the genesis of the matter that the applicant lodged a Land Application No. 227 of 2019 at the District Land and Housing for Temeke at Temeke suing the respondent. He submit that the applicant withdrew the application at the earliest stage

before it was heard on merit. He went on to submit that thereafter the respondent filed a bill of costs vide Bill of Costs No. 571 of 2020 which was heard on merit and the respondent was awarded costs to a tune of Tshs. 4, 501, 000/= including instruction fees. He added that the taxing master also added costs for the instructions fee based on illegal receipts that were produced by the respondent.

The learned counsel for the applicant continued to submit that the award of costs is stipulated under the Advocates Remunerations Order GN. No. 263 of 2015. He submitted that the defendant may be awarded costs only when the suit is for defending the proceedings. To buttress his submission he referred this court to Item 1 (d) of the Eleventh Schedule of the Advocates Remunerations Order GN. No. 263 of 2015.

He went on to submit that the position of instruction fee was elaborated by the Court of Appeal of Tanzania in the case of **Tanzania Rent A Car Ltd v Peter Kihuma**, Civil Reference No. 1 of 2020. The Court of Appeal nullified the bill of costs awarded on the ground instruction fee cannot be awarded where the case is not heard on its merit. He lamented the taxing master ought to have noted that the matter was not heard on merit thus the case was not complex to attract costs. He requested this court to borrow the leave from the cited case and side aside the decision of the taxing master.

Regarding the issue of illegality, the learned counsel for the applicant contended that the receipts produced by the respondent before the taxing master bore the date before the respondent had been served with a summons to appear in Land Case No, 327 of 2109. He went on to submit that the respondent received the summons on 7<sup>th</sup> January, 2020, thus, he was aware of the existence of Land Application No. 327 of 2019 on 7<sup>th</sup> January, 2020. He contended that the advocate's chargers and issuance of legal receipts to the respondent herein in Land Application No. 327 of 2019 ought to be done after the respondent herein produced receipts bearing the date of 17<sup>th</sup> December, 2019, the date before the respondent had not even known of the existence of the case. He faulted the taxing master for failure to analyse whether the receipts were genuine. He insisted that the taxing master awarded costs based on illegal receipt.

It was his further submission that the omission of the taxing master to determine and decide the raised concerns on the authenticity of the legal receipts dated 17<sup>th</sup> December, 2019 is a miscarriage of justice, He added that such illegality rendered the entire proceedings in Bill of Costs No. 571 of 2929 a nullity.

On the strength of the above submission, Mr. Kanyambo urged this court to set aside the decision of the taxing master in Bill of Costs No. 571 of 2020.

In reply, the respondent's counsel confutation was strenuous. The respondent came out forcefully and defended the taxing master decision as sound and reasoned. He contended that after being served with Application No. 327 of 2019 filled a written statement of defence and engaged an advocate to defend his case in which the applicant withdraw the Application on the stage of hearing. It was his view that in that regard the cost of instruction fee attendance fee and filing fee and disbursements fee must be paid by the applicant. Fortifying his submission he cited the case of **Tanzania Rent a Car** (supra):

The respondent submitted that the applicant directed the court broker to send the summons to his advocate but the court broker did not serve the respondent's counsel on the same date instead he served him on 7<sup>th</sup> January, 2020 and the respondent became aware of the existence of the said case on 17<sup>th</sup> December, 2019. To buttress his contention he cited the case of **Premchand Rakhand Ltd v Quarry Service of E.A Ltd**, Civil Application No. 4 of 1970.

The respondent continued to argue that to ascertain whether the instruction fee claimed was fair and reasonable. It was his view that the

court ought to have considered the fact that the chargers were based on the amount of work involved in preparation of the suit, the difficulty and importance of the case as well as the amount of money involved.

In conclusion, the respondent was firm that the costs charged by the taxing officer in Temeke District and Housing Tribunal are fair and reasonable. He urged this court to dismiss the reference with costs.

In his rejoinder, the learned counsel for the applicant reiterated his submission in chief. He added that the counsel for the applicant has not responded on the issue of receipts. He stated that fees are charged for suits that are defended and not otherwise in terms of item 1 (d) of the Eleventh Schedule of the Advocates Remuneration Order GN No. 263 of 2015. He claimed that it was the applicant who served the summons personally to the respondent and the same was received by the respondent's advocate on 7<sup>th</sup> January, 2020. He argued that a court broker does not perform the duties of service. He claimed that the respondent's allegations are mere words. He urged this court to ignore the cited cases by the respondent's counsel since the same are unreported and were not tendered in court.

In conclusion, Mr. Kanyambo beckoned upon this court to asset aside the taxing master decision with costs.

Having considered the arguments for and against the application, I remain with one central issue for determination, and that is none other than ***whether or not the present application is meritorious.***

In determining the above issue, I had first to peruse the proceedings in Misc. Application No. 327 of 2019 and find out what transpired that the District Land and Housing Tribunal. The record shows that on 22<sup>nd</sup> September, 2020, parties appeared before the Chairman and Mr. Didace prayed to withdraw the application. Mr. Sylvester Sebastian, the counsel for the respondent contended that the counsel for the applicant has not stated any good reason and claimed that the application was *res judicata* thus it was brought before the tribunal contrary to the law. He prayed the same be dismissed with costs and the tribunal granted the applicant's prayer with costs.

Reading the applicant submission, it clear that he is trying to move this court to find that the applicant was not required to pay costs resulting from the matter which was withdrawn before hearing the same on merit. In my view, I find no reason to differ with the Chairman findings, the Chairman was correct to issue costs based on the fact that there was a Notice of Preliminary Objection filed by the respondent on 23<sup>rd</sup> January, 2020 whereas the respondent raised three objections and the same was filed

before the withdrawal of the application. As rightly pointed out by the counsel for the respondent, the applicant filed the application on 17<sup>th</sup> December, 2019 and the applicant's counsel withdrew the application on 22<sup>nd</sup> September, 2020. Thus, the records reveals that the matter was pending before the tribunal for almost 10 months. Consequently, I stress that as long as there was a preliminary objection and the proceedings were defended, then the Chairman was right in taxing in instruction fee. Therefore, this ground is demerit.

Next for consideration is the issue of purported illegal receipts. The record reveals that the suit was lodged on 17<sup>th</sup> December, 2019 and the respondent's receipt is dated 17<sup>th</sup> December, 2019 while the parties appeared at the tribunal on 9<sup>th</sup> January, 2020. In the circumstances of the case at hand, I am in accord with the learned counsel for the applicant that the Chairman was not required to charge instruction fees from the date when the application was instituting as there is no proof that the respondent was served on that particular date and the applicant neither his counsel appeared before the tribunal on 17<sup>th</sup> December, 2019. In my view, the proof of summons is not related to the instruction of fees. In my understanding, the instruction fee is charged only once an advocate is instructed to represent the applicant in court or at the tribunal. Therefore, as long as the



respondent's counsel was not present at the tribunal on 17<sup>th</sup> December, 2019 then the instruction fee cannot be taxed in.

In the upshot, the application is partly allowed to the extent that the instruction fee to a tune of Tshs. 2,500,000/= is taxed off from the Bill of Costs. The total amount taxed in is Tshs. 2,011,000/=. Each party to bear his/ her own costs.

Order accordingly.

DATED at Dar es Salaam this 19<sup>th</sup> August, 2022.



A.Z.MGEYEKWA

JUDGE

19.08.2022

Ruling delivered on 19<sup>th</sup> August, 2022 in the presence of the respondent.



A.Z.MGEYEKWA

JUDGE

19.08.2022