

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

REFERENCE NO. 28 OF 2022

*(Arising from the Bill of Costs No. 17 of 2022 originating from Land Appeal No.
29 of 2018)*

1. NASSORO ERASTO MLOWE

2. RIZIKI ISAYA

} **APPLICANTS**

VERSUS

PROSPER LYARUU RESPONDENT

RULING

Date of last Order: 02.01.2023

Date of Ruling: 24.01.2023

A.Z.MGEYEKWA, J

This is a reference that emerged from a ruling of a Taxing Master, Hon. W. Hamza. The application is made under Order 7 (1) and (2) of the Advocates Remuneration Order GN. 263 of 2015. The application is supported by an affidavit deponed by Nassoro Erasto Mlowe and Riziki Isaya, the applicants.

The application has encountered formidable opposition from the respondent and has demonstrated his resistance by filing a counter-affidavit deponed by Prosper Lyaruu, the respondent.

When the matter was called for hearing on 12th December, 2022 the applicant enjoyed the legal service of Mr. Kajoki, learned counsel, and the respondent appeared in person. The Court acceded to the applicant's counsel proposal to have the preliminary objection and application disposed of by way of written submissions. The applicant filed his written submission in chief and reply to the preliminary objection. The respondent filed a written submission to support the preliminary objection and a reply to oppose the application and the applicant filed a rejoinder to support his application.

As the practice of the Court has it, I had to determine the preliminary objections first before going into the merits or demerits of the appeal. That is the practice of the Court founded upon prudence which we could not overlook.

The learned counsel for the respondent raised two objections that the affidavit in support of the application does not support the prayers sought in the chamber summons and the affidavit is defective for containing a defective verification clause.

Submitting on the first objection, the learned counsel for the applicant submitted that it is trite law that affidavits should support the prayers sought in the chamber summons but the instant affidavit does not state facts that support the application. The counsel for the respondent contended that the applicants have not disclosed facts either to their personal knowledge or facts that they believe to be true which will convince this Court to go through the decision of the Taxing officer. He added that the only facts in the affidavit are related to Land Appeal No. 29 of 2018 which was dismissed with Costs together with the Bill of Costs whereas the Taxing Master taxed Tshs. 2,550,000/=.

The learned counsel for the respondent continued to argue that the affidavit whose facts do not support the prayers sought in the Chamber Application is defective. He urged this court to find that the affidavit is defective and hence renders the whole application incompetent. Fortifying his submission, the learned counsel for the respondent cited the case of **Iddrisa R. Hayeshu v Emmanuel Elinani Makundi & 3 others**, Misc. Land Application No. 12 of 2022.

On the second objection, the counsel for the respondent contended that the affidavit in support of the application contains a defective verification clause. He argued that the verification clause does not contain all paragraphs. He

argued that the applicants have verified only three paragraphs thus failure to verify all paragraphs renders the verification clause defective.

In reply, the applicant was brief and straight to the point. On the first objection, Ms. Fauzia Kajoki submitted that the affidavit supporting the application is not defective. She stated that the instant application is for reference challenging the Taxing Master's decision. She went on to submit that paragraph 3 contains sufficient facts to support the application. To support his submission he referred this Court to paragraph 3 of the applicant's affidavit.

As to the second objection, the learned counsel for the applicant contended that the affidavit contains only three paragraphs, and the same was stated in the verification clause. She valiantly argued that there is no 4th paragraph in the affidavit. She distinguished the cited case of **Iddrisa R. Hayeshu** (supra) which deals with a defective affidavit while in the matter at hand, the affidavit is not defective.

In conclusion, the learned counsel for the applicant urged this Court to dismiss the preliminary objections with Costs.

In support of the application, the learned counsel for the applicant faulted the Taxing Master for not considering and deliberating the issue whether the Bill of Costs is reasonable and contained actual expenses incurred by the

respondent. Ms. Kajoki contended that the Taxing Master did not state reasons as to why she awarded the respondent Tshs. 1,000,000/= being the cost of the instruction fee. He claimed that the suit land did not exceed the value of Tshs. 3,000,000 which is why the matter was lodged first at the Ward Tribunal. Hence it was his view that the instruction fee cannot be above Tshs. 500,000/=. The learned counsel for the applicant went on to argue that nowhere in the Advocates Remuneration Order GN 263 of 2015 provides that the instruction fee for such an appeal is Tshs. 1,000,000/= and the Taxing Master is left with direction power to tax in the instruction fee. She continued to argue that the Taxing Master ought to have exercised her discretion power judiciously.

The learned counsel further submitted that the Taxing Master awarded the respondent Tshs. 1,000,000/= as Costs for attending and prosecuting this Bill of Costs. It was her submission that the Costs for prosecuting the Bill of Costs ought to have been less than Tshs. 200,000/= because prosecution of the Bill of Costs is easier compared to the prosecution of an appeal.

In conclusion, the learned counsel for the applicant beckoned upon this Court to quash and set aside the decision of the Taxing Master and grant a reasonable award to both parties.

Opposing the application, the learned counsel for the respondent contended that the Costs awarded as instruction fees were reasonable because Item 1

(1) of the 11th Schedule to the Advocates Remuneration Order, 2015 provides for prosecution fees in the appeal which is Tshs. 1,000,000/=. He went on to submit that since the Bill of Costs emanated from Land Appeal No. 29 of 2018 then the Taxing officer was reasonable to change instruction fees to Tshs. 1,000,000/=.

The learned counsel for the respondent continued to argue that the scales for charging appeals and applications are not based on the value of the subject matter. To support his submission he referred this Court to Item 1 (1) of the 11th Schedule to the Rules. It was his submission that since the Bill of Costs emanated from an appeal and the scales for charging appeals do not require the value of the subject matter then the proper amount of instruction fees is Tshs. 1,000,000/=.

The learned counsel for the respondent went on to submit that a Bill of Costs is a separate application of its own whereby the successful party files a Bill of Costs, and the same is heard and determined by the Taxing Master. He stressed that in doing so the Taxing Master was reasonable in awarding Tshs. 1,000,000/= since Item 1 (m) (ii) of the Rules provides for fees for opposed applications to be Tshs. 1,000,000/=. In his view, it was proper for the Taxing Master to taxed in Tshs. 1,000,000/= for prosecuting the Bill of Costs.

In conclusion, the learned counsel for the applicant contended that the instant application for reference is baseless. He urged this Court to dismiss the applicants' application with Costs.

In her rejoinder, the learned counsel for the applicant reiterated her submission in chief. Stressing on the point of scale of instruction fee, she stated that the appeal fee, Costs for defending the Bill of Costs, and Costs for court attendance were too high and unreasonable. She beckoned upon this Court to allow the appeal with Costs.

I have given careful deliberation to the arguments for and against the application herein advanced by both the learned counsels concerning the preliminary objection and application. Starting with the first objection raised by the respondent's counsel that the affidavit is defective. I have perused the affidavit and noted that the applicants have narrated all necessary facts and the same are squarely connected to the prayer made in the Chamber Summons. As rightly pointed out by the learned counsel for the applicants in paragraph 3 of their affidavit, the applicants made it clear that the awarded costs have been reached without the Taxing Master considering actual expenses.

On the second limb of objection, I am in accord with the counsel for the respondent that the applicant's affidavit contains 3 paragraphs, however, in

numbering the said paragraphs the applicants numbered the first paragraph twice. In my view, this is a minor error that can be corrected by the applicants, therefore, the same should not detain the time of this Court.

In the upshot, I find that the respondent's counsel preliminary objections are devoid of merit.

Back to the main application, the issue for determination is ***whether the application is meritorious.***

The first ground is concerning instruction fees. The applicant is complaining that the Taxing Master has awarded the respondent instruction fee to the tune of Tshs. 1,000,000/= without assigned any reasons. I have perused the Ruling with respect to Bill of Costs No.17 of 2020 and found that the Taxing Master in her Ruling specifically on pages 3 and 4 analysed and stated the reasons for awarding Tshs. 1,000,000/= as an instruction fee. The Decree Holder prayed for Tshs. 5,000,000/= as instruction fee, however, the Taxing Master found that the amount prayed was beyond the prescribed amount. The 11th Schedule of the Advocate Remuneration Order GN. 264 of 2015 specifically paragraph 1 (I) requires the Taxing Master to consider the amount of Tshs. 1,000,000/= reasonable but the charged amount should not exceed Tshs. 1,000,000/=. Reading the findings of the Taxing Master on pages 3 and 4 of her Ruling, it is clear that she used her discretionary powers to assess the instruction fee and she noted that the amount prayed of Tshs.

pleadings. In the case of **Martin Fredrick Rajab v Ilemela Municipal Council & another**, Civil Appeal No. 197 of 2019, the Court of Appeal of Tanzania borrowed a leaf from the case of **David Sironga Vs Francis Arap Muge and two Others** [2014] eKLR, the Court of Appeal of Kenya emphasized as follows: -

"It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for..."

Therefore, in my considered view, the Taxing Master was required to tax in Tshs. 550,000/= which was pleaded by the respondent instead of taxing in Tshs. 1,000,000/= the amount which was not pleaded for by the respondent. Consequently, I proceed to tax off Tshs. 450,000/= from awarded amount of Tshs. 1,000,000/= being the anticipated costs for attending and prosecuting the Bill of Costs. Therefore, the grant total taxed in the whole Bill of Costs is Tshs. 2,100,000/=.

In the final result and for the foregoing reasons, the reference is partly allowed as explained above. No order as to the Costs.

Order accordingly.

DATED at Dar es Salaam this 24th January, 2023.




A.Z.MGEYEKWA

JUDGE

24.01. 2023

Ruling delivered on 24th January, 2023 in the presence of Ms. Fauzia Kajoki,
learned counsel for the applicant.




A.Z.MGEYEKWA

JUDGE

24.01.2023