IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM

COMMERCIAL REFERENCE NO. 03 OF 2019

(Original Taxation Cause No. 78 of 2019)

NATIONAL BANK OF COMMERCE LTD.....APPLICANT

Versus

SILAS LUCAS ISANGI.....1st RESPONDENT

FARM EQUIPMENT (T) LTD.....2nd RESPONDENT

TANPERCH LTD.....3rd RESPONDENT

QUALITY GROUP LTD.....4th RESPONDENT

KANIZ MANJI.....5th RESPONDENT

YUSUF MANJI.....6th RESPONDENT

Last Order:18th May, 2020

Date of Ruling: 30th June, 2020

RULING

FIKIRINI, J.

This reference has been made under Order 7 (1) & (2) of the Advocates Remuneration Order, 2015 GN. No. 264 published on July, 2015 (the Advocates Remuneration Order), Rule 2 (2) of the High Court (Commercial Division) Procedure Rules, GN. No. 250 published on 13th July, 2012 (the Rules) and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC). Supporting the application is an affidavit of Mr. Dickson Ikingura, applicant's Principal Officer duly authorized to swear the affidavit. In the affidavit the deponent averred that the

amount claimed by the 1st respondent of Tzs. 310,833,200/= as attachment fees for seventy (70) items attached and of Tzs. 493, 214,600/= as fees for sale of properties, and the eventual award of Tzs. 595, 869, 200/= to the respondent by the Taxing master, was arbitrarily computed and without justification. The applicant's Principal Officer in the affidavit has also averred that the 1st respondent was not entitled to the claimed charges and allowances separately as there was no evidence that all the stated expenses were incurred. The affidavit as well in paragraph 8 itemized a list of unjustified and unfair taxed amounts.

The 1st respondent, Silas Lucas Isangi, filed counter-affidavit objecting to the application, stating that the amount claimed was justifiable as its computation was guided by the Court Brokers Remuneration rate scales and valuation report. And that the Taxing Master considered all the factors in awarding the amount of Tzs. 595, 869, 200/=.

He also averred that the bill of costs was not duplicated as pointed out in paragraph 7 of the applicant's affidavit but was filed following the scale provided by the law. And the Taxing Master considered all the arguments raised by the parties prior to awarding the costs at the tune of Tzs. 595,869,200/= which was even below what was claimed by the 1st respondent.

The application was argued by filing written submissions. Dr. Onesmo Michael learned counsel for the applicant opted to adopt the skeleton arguments filed as the applicant's written submission whereas Mr. Eric Kamala learned counsel filed one for the 1st respondent on 5th June, 2020, which was well within time as the deadline was 8th June, 2020.

In challenging the award the applicant raised eight grounds which were as follows:

(a) *That the bill of costs filed by the 1st respondent was a mere duplicate as attachment and sale was done for the whole property that is on the same compound. That all assets that were attached were on the same compound and since it was a single act of attachment, the 1st respondent was not entitled to claim for every item available on the compound.*

(b) *That several items that form part and parcel of Plot No. 172, Block "C", Ilemela Industrial Area, Mwanza City, CT No. 10104 – L.R. Mwanza in the name of Tanperch Limited and Plots No. 8 and 9, Block "C" Ilemela Industrial Area, Mwanza City, CT No. 13515 – L.R Mwanza in the name of Tanperch Limited were charged separately.*

(c) *That for the movable assets attached, there is no evidence that the 1st respondent took possession and kept possession of the same for 30 days so as to justify payment of Tzs. 10,000,000/= each.*

(d) *That the 1st respondent was not entitled to claim charges and allowances separately as there is no evidence that he incurred expenses in the process of conducting attachment. Further, having claimed attachment and sale fees, the 1st respondent was not entitled to general costs in part A.*

(e) *Since the property is located in the same compound, it was sold in a single act to include all items, and, therefore, the 1st respondent was not entitled to claim for every item. In other words, the auction was not conducted for every item but for the whole compound and all assets inclusive.*

(f) *The running is vague, as it does not enumerate how Tzs. 595, 869, 200/= was arrived at.*

(g) *The total amount taxed, as it is VAT exclusive while in fact the 1st respondent did not claim VAT. Further, there is no evidence that the 1st respondent is VAT registered.*

(h) *That the amount awarded to the 1st respondent set a bad precedent and goes against the spirit of Court Brokers and Process Severs (Appointment, Remuneration and Disciplinary) Rules which put much emprises on integrity, honesty and collegiality of Court Brokers. Further, for Court Brokers to play a vital role in dispensation of justice, their charges should be reasonable, justifiable and fair.*

Submitting on the grounds, it was Dr. Michael's submission that although the 1st respondent disputed that the bill of costs filed was not a duplicate, but was, as the attachment and sale was one that included the property and everything within the property, therefore that was improper to charge every item separately and claim as such. He went on submitting that, the properties were counted as three lots, but this was for the purposes of registration otherwise all the three were in one compound and the 1st respondent sold them as one and in a single transaction. What was sold was a fish factory with three plots in one compound and several assets for fish processing. There was therefore no justification to treat them as three plots and claim every item separately. The 1st respondent failed to counter the assertions, while he had opportunity to do so, making it assumed as to have admitted the fact, submitted Dr. Michael.

The counsel went on submitting that there was no proof that the 1st respondent took possession and kept possession of the same for thirty (30) days to justify the payment of Tzs. 10,000,000/= for each. Item 1 of the 4th Schedule to the Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) Rules, 2017 (the Rules), presupposes the existence of movement and storage of movable property by court broker, imputing incurring of costs including storage costs though the court brokers were bound to have storage facilities as prerequisite to their registration. The costs to be claimed in this aspect were thus for storage for

at least thirty (30) days to reimburse the court broker for the costs which could have been incurred in storing the property. This is as well exhibited in the last paragraph of item 1 to the 4th Schedule to the Rules, but in the present situation there was neither attachment nor possession of movable properties. Instead the properties remained where they were without any movement or storage warranting reimbursement of costs incurred, which would be unfairly enriching the 1st respondent if is left to happen. And under item 5 (a) of the 4th Schedule to the Rules, storage charges for the 1st thirty (30) days were not recoverable as they were part and parcel of the attachment charges. According to the applicant's counsel the 1st respondent has not disputed this account in his counter-affidavit.

Dr. Michael, went on submitting that the 1st respondent did not respond to paragraph 8 (d) of the applicant's affidavit, regarding entitlement to the claim charges and allowances separately while there was no evidence to that effect. Fortifying his submission, Dr. Michael made reference to Rule 28 (1) of the Rules which provided that the prescribed fees, charges, and allowances were to be included in all expenses of attachment, advertisement, sale, inventories, necessary charges for safeguarding the property under attachment and so forth, it was therefore wrong for the Taxing Master to award Part A of bill of costs and at the same time grant fees for attachment and sale as it was contrary to Rule 28 (1) of the Rules.

Aside from the attachment and sale process, the applicant as well challenged the ruling of the Taxing Master as vague as it did not enumerate how the figure was arrived at. There was no specific award for each part of the bill of costs amounting to Tzs. 595, 869,200/=.

Another point raised was on VAT that the 1st respondent did not pray for VAT, yet the Court awarded him without justification. In paragraph 11 of the counter-affidavit the 1st respondent averred that award on VAT was a must since the amount exceeded Tzs. 40 million, the account disputed by the applicant contending VAT was only payable by those registered tax payers, of which there was no evidence that the 1st respondent was one of them. The 1st respondent had an opportunity of attaching certificate of registration with the counter-affidavit, which he did not. It was thus wrong for the Taxing Master to award relief not prayed for. The 1st respondent must have known he was not VAT registered that was why he never asked for the relief. To award the same was arbitrary and unfair, submitted the counsel.

Concluding her submission, the applicant contended that the court brokers were required to be honest, with integrity and collegiality. Also in the role they play in dispensation of justice, their charges were required to be reasonable, justifiable and fair. The 1st respondent in paragraph 12 of the counter-affidavit considered the

charges reasonable, but the applicant did not. It was the applicant's account that attaching and sale of a factory as a single item and then coming to claim for fees of attachment and sale of every item left a lot to be desired. Dr. Michael, urged the Court to set a good precedent otherwise the court brokers may abuse their noble role to protect interest of both the judgment debtors and decree holders. Disappointed by the award of Tzs. 595, 869,200/= plus VAT, he submitted would certainly prejudice the applicant as she will not be able to recover the decretal amount awarded and also would be unfair to the judgment debtors as their properties would be insufficient to satisfy the decree.

On the strength of his submission he urged the Court to quash or set aside with costs the ruling of the Taxing Master.

Replying to the submission, Mr. Kamala addressing the 1st 2nd and 5th grounds, submitted that the Taxing Master considered all arguments raised and finally awarded Tzs. 595,869,200/= which was below the amount claimed of Tzs. 807, 821,800/= claimed. Challenging the submission on treatment of the attached properties, it was his submission that the three properties were separate and distinct from each other and could not have been attached as a single property as suggested by the applicant. The fact all the properties were in one compound did not legally mean they were one and the same property and therefore should have been

attached as a single property. He went on submitting that the fact the applicant chose to purchase the said properties as a single lot, did not defeat the fact that the 1st respondent attached the three properties including items separately. Also, the three properties could have been sold separately to different buyers as they were separate and distinct properties.

The bill of costs reflected the three properties attached therefore not duplicate as claimed by the applicant. The attachment was in conformity to the Rules and the applicant has failed to point out error of the Court awarding the bill of costs making the Taxing Master's ruling unjustified.

On ground no.3, it was Mr. Kamala's submission that item 1 (b) of the Rules provided for fees payable for attaching and taking possession of movable property and keeping possession for 30 days, which justified 1st respondent's charging Tzs. 10,000,000/ = each. In this instance the proclamation for sale was issued by Court on 21st August, 2019, of which the 1st respondent took possession of the property right away, and it remained in possession until on 25th September, 2019, the day of the sale. All along the properties were under the 1st respondent providing for security and administration of all assets, movable and immovable. The applicant had therefore nothing to complain about since she found everything in good condition, without any theft or destruction of the movable properties. On top of his

response, he as well contested the applicant's position on interpretation of item 1 (b) of the 4th Schedule to the Rules, that there was no requirement to remove the attached properties from the compound for the fee to be payable.

The 4th ground, the counsel contended that the applicant conveniently omitted to cite Rule 27 (20 of the Rules. The properties to be attached and sold were located in Mwanza while the case leading to the attachment was conducted in Dar Es Salaam, therefore warranting the 1st respondent for claim of general costs as provided in part A of the bill of costs. The Taxing Master was thus correct to award the amount under part A of the bill of costs.

On the 6th ground, Mr. Kamala contended that the figure arrived at was consolidation of items on part A, B and C of the bill of costs, as reflected in page 5 of the ruling. The complaint by the applicant was thus baseless, he stated. As for the VAT issue, raised in ground 7, the counsel argued the award was discretionary as long as the amount has exceeded Tzs. 40, 000,000/=. Whether the 1st respondent was registered VAT Tax Payer or not was immaterial.

Submitting on the 8th ground, Mr. Kamala amplified his submission stating that in discharging his duties the 1st respondent acted in accordance with the law and practice guiding court brokers and charges charged were in accordance to the Court Brokers Rules. In this instance the 1st respondent acted on the applicant's

valuation report prepared by Kitupa Property Consults Ltd dated 24th June, 2019. The report classified several lots based on the indicated property involved hence the charges were reasonable, justified and fair.

It was Mr. Kamala's submission that since the Taxing Master powers were discretional and the award was based on direction, principle and provided scales under the Rules, this Court interference was thus unwarranted, as the Taxing Master exercised his powers judiciously. In support the counsel cited the case of **Thinamy Entertainment Limited & 2 Others v Dino Katsapas, Miscellaneous Commercial Case No. 86 of 2018**, that under exceptional cases courts can interfere with award of costs made by Taxing Master.

From the submission he did not find any good reason for this Court to interfere with the Taxing Master decision and urged the Court to dismiss the application with costs.

It is indeed correct that in awarding bill of costs the Taxing Master's powers are discretional. Failure in exercising the discretion judiciously by acting on wrong principles and having applied wrong considerations in arriving at the decision, is what can compel this Court to interfere with the Taxing Master decision and not otherwise. There is a number of authorities on the stance namely: **The AG v Amos Shavu, Taxation Reference No. 2 of 2000, CAT at DSM**, which cited with

approval the decision in **Rahim Hasham v Alibhai Kaderbhai (1938) 1 T.L.R (R) 676** and **Premchand Raichand v Quarry Services of East Africa Ltd (1972) E.A. 162**.

Even though, the decisions were in relation to bill of costs filed by advocates, but the principles are the same when dealing with court brokers as well. I, therefore based on the established principles in the above cited cases will examine the application before me. The Taxing Master's ruling, affidavit, counter-affidavit and submissions filed, will all be examined. On the first ground, it was the applicant's argument that the bill of costs was duplicate as attachment and sale done was for the whole property since all properties were in the same compound, the 1st respondent was thus not entitled to claim for every item available in the compound. The 1st respondent's reaction was that the properties though in one compound but in actual fact were three different properties.

According to paragraph 8 (e) of the applicant's affidavit the auction was conducted in a single act to include all items and not singly as per the claim lodged by the 1st respondent. The 1st respondent never responded to this in the counter-affidavit. And in his submission he contended that the bill of costs was based on the scales provided by the Court Broker's Rules, and that the Taxing Master considered all these arguments during the hearing and determination of the bill of

costs. It is possible that the arguments were raised and considered but the Taxing Master's ruling does not reflect that. So far what is seen in the ruling is the decision that only three (3) lots will be considered and not every fixture on the said properties. There was nothing stated on whether every item found in the three (3) lots or properties were to be separately charged.

Also there was no evidence led to indicate that items were sold separately to warrant the 1st respondent's claim. And since the applicant was present being interested and actually the one who was successful bidder, I tend to believe her account which has essentially not been controverted by the 1st respondent. The fact that the Taxing Master awarded the amount below what was billed, that by itself, does not make the unsubstantiated claim warranted.

On the second ground, regarding the properties being treated as three different plots while in one compound, this is not disputed. The properties though in one compound but three distinct properties namely: (i) Plot No. 127, Block "C", Ilemela Industrial Area, Mwanza City, CT. No. 10104-LR, Mwanza; (ii) Plots No. 8 & 9, Block "C", Ilemela, Industrial Area, Mwanza City, CT No. 13515-LR. The Taxing Master counted the properties in three lots, even though in one compound, meaning they could as well be sold to three different buyers, which was nonetheless not the case here. In the present situation there was only one auction

conducted and all the properties sold to the applicant who was a successful bidder. On the basis of what transpired, it is unrealistic for the 1st respondent to charge as claimed. Filing of the bill of costs can be in conformity but logic has to apply especially since the three (3) separate properties existing in one compound, were all transacted at once and to one bidder. The Taxing Master did not thoroughly address this issue if it was indeed raised.

The applicant's third ground is that there was no proof of the 1st respondent taking possession and being in possession for thirty (30) days to justify payment of Tzs. 10,000,000/= for each. It is on record that the proclamation of sale was issued on 21st August, 2019. By issuance of proclamation of sale it means the 1st respondent was to take possession of the properties attached, in this instance the three properties. The attachment can involve moving of attached properties if they are movable or simply attaching and possessing if immovable. The 1st respondent was in law required to be in possession until when the properties, be it movable or immovable, had been sold in an auction. From the record, the sale took place on 25th September, 2019, which was beyond the thirty (30) days provided in law.

The applicant's complaint as per the submission is that possession referred in item 1 of the 4th Schedule to the Rules, presupposes movement and storage of movable property by a court broker, which would have compelled the court broker to incur

costs in the process but not storage facilities as he was bound to have one, this being prerequisite to qualification for registration. The provision of item 1 (b) of the 4th Schedule to the Rule, as interpreted by the applicant, I find have been misconceived. Item 1 (b) states as follows:

> *"For attaching or taking possession of movable property and keeping possession of the same for 30 days or part thereof when estimated value of the property (in accordance) with the executing officer's inventory furnished under rule (60-or the decretal amount whichever is less.*
>
> *(b) exceeds Tzs. 5 million"*

Nowhere in the provision, it has been provided that attachment must involve removal of attached properties from the compound for fees to be payable. Fees according to the provision and interpretation can occur even when there is no moving of attached properties. In the present situation, despite there being no moving of properties, but it is apparent that possession took place and continued until when the auction took place. During all these time, as clearly pointed out by the 1st respondent, he was responsible for the security and administration of all assets, movable and immovable, on attached properties. This fact has not been countered by the applicant, as there was no reply to the counter-affidavit or

rejoinder filed in that regard. This is more supported by the fact that the applicant has never complained that they found the properties not secured and in poor condition, theft or destruction of some sort, the account which make me further agree to the 1st respondent's response.

On the fourth ground, the applicant challenged the award under part A, arguing that the award was contrary to Rule 28 (1) of the Rules, the assertion controverted by the 1st respondent, that the applicant omitted to read Rule 27 (2) of the Rules. It is indeed correct that the 1st respondent has not responded to averment in paragraph 8 (e) of the affidavit in support, but it remains as fact that while Rule 28 (1) has provided expenses of attachment but once the execution is to be carried outside the jurisdiction then application of Rule 27 (2) of the Rules cannot be escaped. In the present application the 1st respondent's travel to Dar es Salaam and all other information contained in there, must have been considered by the Taxing Master, which I do not see any reason to disturb. Awarding part A of the bill of costs was in my view deserved.

The fifth ground was on claim for inclusion of all items but separately counted and charged while the properties were in one compound. This are the areas the Taxing Master ought to have closely examine. Perusal of the ruling does not give the vibe that the issue was dealt with.

The sixth ground, that the Taxing Master has not shown how he arrived at the amount of Tzs. 595, 869, 200/=. From the ruling the Taxing Master satisfied himself that the bill of costs claimed was within the scales provided and relying on the valuation report supplied by the applicant, and the decretal amount of Tzs. 18,500,000,000 he concluded the that the claim was fair. He thus proceeded to consolidate part B and C, and awarded Tzs. 595,869,200/=, as a fair claim which is less than the prayed sum of Tzs. 807,821,800/=.

Consolidation of items A, B and C of the bill of costs while not contested, but I, agree with the applicant that lumping the figures together without outlining which amount in part B has been slashed or in part C, makes the award difficult to appreciate. The submission by the 1st respondent that the Taxing Master gave the reasons for the award of Tzs. 595, 869,200/= instead of Tzs. 807,821,800/=is unsupported. At page 5 of the ruling the Taxing Master stated:

> *"Having consolidated the items in PART B and C of the present Bill of Costs, it brings me to the total of Tzs. 595,869,200/=, which is taxed as such and the rest taxed off."*

Consolidation as point out above is not challenged but the amounts for each part were important to be stated to show how the final amount of Tzs. 595,869,200/= was arrived at from Tzs. 807, 821,800/=. This is pointed out considering the

importance of clarity in the decision and reasons in order to show that the one exercising discretion did so judiciously and not arbitrarily or unjustly.

On the last ground in relation to VAT, that the 1st respondent has not prayed for VAT yet the Taxing Master awarded it. Payment of VAT is a legal requirement under the Tanzania Revenue Authority, taxation system which has various laws and regulation guiding the process. Payment of VAT though looks like is charged only on persons registered for VAT, but in a situation where the amount has exceeded the threshold of Tzs. 40,000,000/= the Taxing Master cannot act blindly. Considering that it is mandatory by law for VAT to be paid on service proceeds thus the Taxing Master can as well proceed to award in exercise of his discretion.

On a general note, I would wish to echo the applicant's position that a number of people are part and parcel, bolt and nuts of the Court in dispensation of justice. All these people who factor in must fundamentally exercise integrity, honesty and collegiality in course of carrying out their duties.

In view of what I have concluded, I find there is a reason to interfere with the decision for applying wrong considerations in arriving at the decision.

In the upshot, I find the application with merit and proceed to quash the decision and set aside the order with costs. It is so ordered.

P. S. FIKIRINI

JUDGE

30th JUNE, 2020