

IN THE COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL REFERENCE NO. 4 OF 2020

(Originating from Taxation Cause No.105 of 2019)

BETWEEN

CAMS GLOBAL LIMITEDAPPLICANT

VERSUS

LUCKY GAMES LIMITED.....RESPONDENT

RULING

B.K. PHILLIP, J

On 24th July 2020, the Taxing Master delivered his ruling in respect of Taxation Cause No. 105 of 2019, that was filed by the respondent herein, against the applicant following the court order which marked Commercial Case No. 37 of 2019 as withdrawn with costs. The said Commercial Case No. 37 of 2019, (Henceforth "The case") was filed in this court by the respondent against the applicant. The Taxing Matter awarded the respondent a total of Tshs. 8,220,000/= . Being aggrieved by the decision of the Taxing Master, the applicant lodged the instant application for reference under the provisions of Rule 7(1) ,(2) of the Advocates'

Remuneration Order G.N No. 264 of 2015. The application is supported by an Affidavit sworn by applicant's advocate, the learned Advocate Fredrick Augusti Massawe. The same contains narrations on the background of the matter and the following grounds of complaints;

- i) That the Hon. Taxing Master failed to exercise his discretion when he proceeded in making the award for the sum stated in the ruling in total disregard of the laid down laws and regulations.
- ii) That the Hon. Taxing Master failed to consider the fact that the EFD receipt issued to the Respondent by her counsel in respect of the fees for defending Commercial Case No. 37 of 2019 was issued after the conclusion of the case which is contrary to the laws and regulations.
- iii) That the Hon. Taxing Master failed to consider the fact that Commercial Case No. 37 of 2019 was concluded at very early stage, no hearing was conducted at all.
- iv) That item 2, 3, 4, 5 which were in respect of the costs for attendance in court were arbitrarily taxed at Tshs. 30,000/= without adducing any reasonable grounds and without regard to the facts that the counsel acting for the Respondent was only coming from her offices

which apparently are located very close to the court premises as they are located at Bibi Titi Mohamed Street. Further, that the costs for preparation and hearing the case are normally covered under the instruction fees.

The respondent's Advocate, Ms. Mariam Ismail filed a counter Affidavit in opposition to the application. I ordered the application to be heard by way of written submissions. Both counsels filed their written submissions as ordered.

Mr. Masawe started his submission by adopting the contents of the affidavit in support of the application. Referring this court to the case of **Attorney General Vs Amos Shavu , Taxation reference No.2 Of 2000**, (unreported) and **Premchard Raichard Limited and Another Vs Quarry Services of East Africa Limited and others (NO.3) (1972) EA.162**, Mr. Massawe submitted that although the Taxing Master has discretionary powers in awarding costs, the same must be exercised in line with the acceptable legal principles in awarding costs which are;

- i) The costs be not allowed to rise to such a level to confine access to the courts to the wealthy.

- ii) That a successful litigant ought to be fairly reimbursed for the costs he has to incur.
- iii) That the general rule of remuneration of advocates must be as such to attract recruits to the profession.
- iv) So far as practicable there should be consistency in the awards made.

Mr. Masawe proceeded to submit that the Taxing Master did not give due consideration on the fact that the case was all about a fairly simple issue, as it was founded on allegations for breach of contract and it ended by being withdrawn, therefore it was not heard. Expounding on the way the case was closed, Mr. Massawe submitted that from the date the case was filed in court to the date of withdrawal, the parties appeared in court four times only. He insisted that the sum of Tshs 8,000,000/= awarded to the respondent is exorbitant. He was of the view that a sum of Tshs 3,000,000/= would be sufficient for the instruction fee.

Moreover, Mr. Massawe, submitted that the sum of Tshs. 30,000/= awarded for each appearance in court is on the high side, excessive and oppressive on the ground that the office of the advocate for the respondent is located at Peugeot House. The taxi fare to and from the

court premises to Peugeot House is Tshs. 10,000/= only. Thus, he contended that the sum of Tshs. 10,000/= would be enough for transport costs to and from the Court.

In rebuttal, Ms Ismail submitted that the amount awarded to the respondent is not excessive and oppressive as alleged by Mr. Masawe. It is commensurate to the efforts and time spent in the case. She contended that the issue involved in the case was not simple. It was a complex matter which involved breach of contract in respect of sale of shares of a Company. Moreover, she contended that the 9th schedule to the Advocates Remuneration Order, G.N. No 264 of 2015 (Henceforth G.N. 264/2015), does not provide for any distinction between matters which are fairly simple or withdrawn at early stages and the ones which are complex or heard and finally determined. She maintained that instruction fee is for a work done in preparing a case before the trial. To cement her arguments, she cited the case of **Ujagar Singh Vs The Mbeya Cooperative Union (1968) H.C.D 173**, in which the Court held that an instruction fees is for work done in preparing a case before Trial, it is irrelevant whether the trial itself would not be long or tedious. She argued that the respondent charged a sum of Tshs. 11,505,000/= as instruction fees which is below 3% of the total amount claimed in the case (Tshs. 368,160,000/=), but

the Taxing Master reduced that amount (Tshs. 11,505,000/=) by awarding a sum of Tshs. 8,000,000/= only. She was of the view that the Taxing Master gave justifications for the instruction fee awarded to the respondent and took into consideration a number of factors, such as amount of labour and the amount of the subject matter. Ms Ismail further submitted that the amount of Tshs. 3,000,000/= suggested by the applicant for instruction fee is by far below the amount paid by the respondent.

As regards the complaint on the amount awarded for costs for attendance in court which is Tshs. 30,000 for each court session, Ms Ismail submitted that, the said amount is fair and reasonable because it includes transport costs to and from the court as well as the time spent in court waiting at the lobby for the case to be called and the time spent during appearance before the Judge. She insisted that the time spent by the advocates in court and the efforts made in defending a case should not be taken lightly or undermined. She prayed for the dismissal of the application with costs.

In rejoinder, Mr. Massawe reiterated his submission in chief and insisted that rule 12 in the 9th Schedule to GN No. 264/2015, gives the Taxing Master discretionary powers and room to give due consideration on other

factors when assessing the quantum of instruction fee and other costs incurred by the parties in the conduct of a case. He maintained that the law gives some flexibility and the Taxing Master is not supposed to apply the scale provided in the 9th Schedule to GN No. 264/2015 for charges on contentious matter strictly without any flexibility. Furthermore, Mr. Masawe submitted the case of **Ujagar** (supra) cited by the respondent is not binding to this court and that the simplicity/ complexity nature of the case has to be considered by the Court.

Having dispassionately analyzed the submissions made by the learned advocates, let me start by pointing out that the position of the law is that the taxation of bill of costs is within the discretionary powers of the Taxing Master. The court can only interfere with the decision of the Taxing Master where it is satisfied that he/she exercised his discretion basing on a wrong principle or wrong consideration. [see the case of **Amos Shavu** (supra), **Hotel Traveltine Ltd vs National Bank of Commerce, Taxation Civil Reference No.9 of 2006** (unreported) and **Premchand Raichand** (Supra)]. As correctly submitted by Mr. Massawe, the principles applicable in the taxation of bill costs are as stipulated in the case of **Premchand Raichad Ltd and another** (supra) and **Amos Shavu** (supra) which I have stated them earlier in this ruling. The factors to be taken into

consideration in assessing the instruction fee are among others, the complexity of the case, time taken up at the hearing and the amount of research involved. In the instant case it is not in dispute that the case was withdrawn at a very early stage before the hearing, just after completion of the pleadings. Under the circumstances, I am of the view that the respondent's advocate did not spend much time in handling the case. I have read the case of **Ujagar Singh** (supra) cited by Ms. Ismail, however I wish to say that I am bound by the position laid down by the Court of Appeal in the case of **Amos Shavu**(supra).I am aware that the respondent's advocate took time to prepare the written statement of defence, but upon perusing it I noted that it contains straight forward answers stated in four paragraphs, which were basically general denials of the claims. In addition to the above, I have perused the pleadings and am inclined to agree with Mr. Masawe that the case was not complex. It was a straight forward case arising from a contract. Under the circumstances, I am in agreement with Mr. Masawe that the instruction fees awarded is on the high side and is not in line with the findings made by the Taxing Master that the time taken to litigate on the suit was at a minimal level since the matter was withdrawn at the early stage of the proceedings. In my considered opinion for a case which is not complex like

the one in hand and the time to litigate the same was at a minimal level as noted by the Taxing Master, the amount of Tshs. 3,000,000/= suggested by Mr. Massawe is sufficient to cater for the instruction fee.

I have also noted that the instruction fee that was awarded to the respondent by the Taxing Master, was not based on the EFD receipt issued by the respondent, thus in my opinion the applicant's complaint on the EFD receipt is misconceived. I will not deal with it.

As regards the amount awarded for attendance in Court, I have noted that Ms. Ismail has not disputed the allegations made by Mr. Massawe that respondent's advocate's office is not far from the court premises, however she argued that the amount of Tshs. 30,000/= awarded for each attendance in Court is fair and reasonable because it includes among others, costs for time spent in court waiting for case to be called before the Judge. At this juncture I wish to point out that in my understanding the instruction fee caters for the research, preparation of pleadings as well as time spent in court. There are number of cases in which our courts have deliberated on what is covered by the instruction fee. For instance in the case of **East African Development Bank Vs Blue line Enterprises**

Ltd, Civil Reference No.12 of 2006, the Court of Appeal said the following

" It is trite law that instruction fee is supposed to compensate adequately an advocate for the work done in preparation and conduct of a case. The greater the amount of work involved ,the complexity of the case, the time taken up by the hearing of arguments and at times the amount involved in the case, have consistently being cited as factors to be taken into account in determining the appropriate instruction fee in any given case.."

(Also see the case of **ZTE Corporation Vs Benson Informatics Limited t/a Smart, Commercial Reference No.3 of 2018** (unreported) and **George Mbuguzi and another Vs A.S. Maskini [1980] TLR 53**)

From the foregoing, the arguments made by Ms. Ismail, that the amount for attendance in court covers other things such time spent in appearance in court apart from the transportation costs to and from Court is misconceived. Since it is not in dispute that the office of the respondent's advocate office is not far from the Court premises, I am in agreement with Mr. Massawe that the amount awarded for attendance in Court is on the high side too. Therefore, I find myself constrained to reduce it. In my opinion the sum of Tshs. 20,000/= for each appearance. I believe this is in

line with the principle stated in the case of **Premchard Raichard Limited**, that a successful litigant ought to be fairly reimbursed for the costs he has to incur. So, it means that the costs for the case should place the successful party to his /her original position as far as the costs he incurred in the case are concerned. Costs are not meant to cover general damages or anything similar to that suffered by a party in a case. All other entitlements of the decree holder apart from the amount of costs incurred in a case, are normally stated in the judgment and decree.

In the upshot, this application succeeds. For the reasons I have explained herein above, I hereby, set aside the instruction fees of Tshs. 8,000,000/= awarded by the Taxing Master and in lieu thereof I replace it with Tshs. 3,000,000/=. Similarly, the amount of Tshs. 120,000/= awarded for attendance in Court is hereby set aside and in lieu thereof I replace it with Tshs. 80,000/=.

Dated at Dar es Salaam this 29th day of January 2021.




B.K PHILLIP

JUDGE