

TANZANIA / JUDGMENT

nuran developers ltd vs poshh designs ltd 2023 tzhccomd 268 4 august 2023

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TZHCCOMDDECIDED
4 August 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
PAR ES SALAAM COMMERCIAL REFERENCE NO, 1 OF 2023 (Originating from Taxation Cause
No. 162 of 2022) NURAN DEVELOPERS LIMITED..... APPLICANT VERSUS POSHH
DESIGNS LIMITED.....RESPONDENT

RULING

A.A MBAGWA, J. This is an application for reference against the decision of the taxing officer in Taxation Cause No. 162 of 2022 in which the taxing officer awarded the respondent a total sum of TZS 31,956,435 being costs incurred in the prosecution of Commercial Case No. 86 of 2021. Aggrieved, the applicant herein has brought this application by way of chamber summons made under Rule 7 (1) and (2) of the Advocates Remuneration Order GN. No.263 of 2015 praying for the following orders:

- (i) That the Honourable Court be pleased to make reference and set aside the decision in Taxation Cause No. 162 of 2022. (ii) Costs of this application be granted to the applicant. (iii) Any other order this Honourable Court may deem just to grant. The application is taken at the instance of Victory Attorneys and Consultants and is supported by an affidavit and reply to counter affidavit i affirmed by Shahazmina Arshid Esmail, the principal officer of the applicant. On the contrary, the application is strongly contested by the respondent through a counter affidavit affirmed by Cuneyt Unal, the Managing Director of the respondent. In brief, the applicant faults the taxing officer for taxing the sum of TZS 31,956,435 on the ground that the taxed amount is excessive and unrealistic. She complained that there was double taxation as the taxing officer awarded attendance costs separate from the instruction fee contrary to the law. Further, it was the applicant's grievance that the amount of TZS 25,000,000/= awarded as instruction fee was excessive and exorbitant. The applicant added that the taxing officer was wrong to tax the instruction fee in the main suit separately from the counter claim. In contrast, the respondent resisted the application stating that the taxing officer correctly taxed the bill of costs at TZS 31,956,435. When the matter was called on for hearing, the applicant had the services of Mr. Deus Tarimo, learned advocate whilst the respondent was ably represented by Mr. Erick Mukandala, learned advocate. Both counsel adopted their respective depositions and skeleton arguments which they had filed in court

earlier. In addition, the counsel made a few oral comments on their skeleton arguments. 2 Submitting on the complaint of double taxation, the applicants counsel lamented that the taxing officer wrongly charged attendance fee under item 2 to 17 of the folio at TZS 1, 850,000/= while the same is part and parcel of the instruction fee. In support of his position, the learned counsel heavily relied on the decision of this Court in Jubilee Insurance Co. Ltd vs Vodacom Tanzania Public Ltd Company, Consolidated Taxation Reference No. 02 & 03 of 2020, HC (Commercial Division) at Dar es Salaam. Moreso, the applicant faulted the taxing officer for taxing the instruction fee at TZS 25,000,000/= as being exorbitant and unrealistic. He contended that the amount was arrived at in total disregard of the guiding principles to wit, the nature of the matter, amount involved, interest of parties and complexity of the matter. In the applicant's opinion, the matter to wit, Commercial Case No. 86 of 2021 was not complex nor did it take too long. To buttress his argument, the applicant's counsel cited the case of Hotel Travertine LTD vs National Bank of Commerce, Taxation Reference No. 9 of 2006, CAT at Dar es Salaam. Furthermore, the applicant's counsel assailed the ruling of the taxing officer for charging the instruction fee in the main suit and counter claim separately. He argued that the two were prosecuted conjointly as such, it was one case. To fathom his argument, the applicant's counsel told the 3 Court that the purpose of costs is to reimburse the successful party the costs he incurred and not to punish the unsuccessful one. On this, he relied on the cases of Wambura Chacha vs Samson Chorwa [1973] LRT 4 and Tanzania Rent a Car limited vs Peter Kimuhu, Civil Reference No. 9 of 2020, CAT at Dar es Salaam. On the adversary, the respondent's counsel strongly submitted that the taxing officer was correct by taxing the bill of costs at TZS TZS 31,956,435. He said that the decision of the taxing officer was in all fours with the provisions of the Advocates Remuneration Order in particular item 7 and 8 of the Ninenth Schedule and Orders 12(1) and 46. Submitting in support of the instruction fee of TZS 25, 000,000/= taxed by the taxing officer, the learned counsel said that the amount is reasonable and legal. He expounded that the main suit and counter claim are two separate suits and for that reason, the learned advocate charged the respondent separately. On this, he relied on the case of Stanbic Bank Tanzania Ltd vs Trust Engineering Work Ltd, Civil Appeal No. 374 of 2019, CAT at Dar es Salaam. The counsel elaborated that if the taxing officer had decided to strictly apply the law, the instruction fee would have been taxed at TZS 38, 238,834 for following reasons;

- a) The claim in the main suit was USD 69, 147 the equivalent of TZS 159, 038,100. Thus, by applying 7% which is provided under Item 4 7 of the Ninenth Schedule, the instruction fee would be TZS 11,132, 667/=.
- b) The claim in the counter claim was USD 323,696.63 the equivalent of TZS 744,500,800. Thus, by applying 3% which is provided under Item 8 of the Ninenth Schedule, the instruction fee would be 27,106,167/=. The respondent's counsel therefore dismissed the complaints that the instruction fee was exorbitant and unrealistic. Instead, the counsel urged the Court to uphold the instruction fee taxed by the taxing officer. Regarding the complaint that the attendance fee to the tune of TZS 1, 850,000/= was charged twice on the ground that it ought to be included in the instruction fee, the respondent's counsel replied that the items are

treated separately under the Advocates Remuneration Order. He cited the provisions of Item 3 of the Eighth Schedule to the Advocate Remuneration Order to augment his contention. The respondent's counsel also referred to the decision of this Court (Kahyoza J.) in *Rose Mkeku {the administratrix of the estates of the late Simon Mkeku} vs Parvez Shabbirdin, Wise*. Land Application No. 89 of 2021, HC at Mwanza where attendance fee and instruction fee were charged differently. In fine, the respondent's counsel beseeched the Court to dismiss the application for want of merits along with an order to the applicant to pay costs of the application. From the depositions and rival submissions as briefly narrated above, there are two issues for determination namely;

- (i) Whether the taxing officer erred in law by taxing the attendance fee to a tune of TZS 1,850,000/= separate from the instruction fee. (ii) Whether the sum of TZS 25,000,000/= awarded as instruction fee for prosecution of the main suit and counter claim was exorbitant and unrealistic. To start with the first issue namely, whether the taxing officer erred in law by taxing the attendance fee to a tune of TZS 1,850,000/= separate from the instruction fee, Item 3 of the Eighth Schedule to the Advocates Remuneration Order, entitles a party to claim TZS 50,000/= for attendance in court where he spends fifteen (15) minutes or less. This is charged based on the number of court attendances made and the time spent. It is different from the instruction fee which is basically predicated on the amount claimed in the plaint and complexity of the case, among other factors. I therefore agree with the respondent's counsel that court attendance fee is different from instruction fee and the same are provided for under different provisions of law. As such, I find no merits in the applicant's complaint. Coming to the second issue to wit, whether the sum of TZS 25,000,000/= awarded as instruction fee for prosecution of the main suit and counter claim was exorbitant and unrealistic. At the very outset, it is a settled law that a counter claim is a separate and independent suit from the main suit. This has been restated in a litany of decisions including *Airtel Tanzania Limited vs Ose Power Solutions Limited*, Civil Appeal No. 206 of 2017, CAT at Dar Es Salaam, *Stanbic Bank Tanzania Ltd vs Trust Engineering Work Ltd*, Civil Appeal No. 374 of 2019, CAT at Dar es Salaam and *Joe R.M. Rugarabamu v. Tanzania Tea Blenders Ltd*

[1990] TLR 24, to mention but a few. Alive to the above settled position, it is my considered opinion that, it was proper for the taxing officer to tax the instruction fee in the main suit separately from the counter claim. This is backed up by the fact that upon filing a counter claim, the other party had to defend it by filing a written statement of defence like the main suit. At page 3 of the impugned ruling, the taxing officer provides justification for arriving at the charged amount. For the sake of clarity, let me produce the relevant part. 'Commercial Case No. 86 of 2021 subject of this bill of costs took about 14 months as it was filed on 12/08/2021 and finalised on 21/10/2022 the decree holder was claimed (sic) a sum of USD 69,147 equivalent to Tshs. 159,038,100/=. With his defence judgment debtor filed counter claim for a sum of USD 323,696.63 equivalent to Tshs. 744,500,800/= make a total of Tshs 903,538,900/=. As the amount claimed is above 400 million, it is obvious that the scale applicable is the one provided under item 8 of the Ninth Schedule to the Order which is

3% of the amount claimed makes Tshs. 27,106,167/=. As the suit took only 14 months item 1 taxed at 25,000,000/= only' The above extract is quite elaborate on the scale used and the considerations taken into account to tax the instruction fee at TZS 25,000,000/=. It is a trite law that award of instruction fee is exclusively the discretion of taxing officer unless he acts injudiciously. In the case of Tanzania Rent a Car Limited Vs. Peter Kimuhu (supra) at page 9, the Court of Appeal held thus; "As argued for the both counsel for the parties for, it is a general rule that the award of instruction fees is peculiarly within the discretion of a taxing officer and the court will always be reluctant to interfere with his decision, unless it is proved, that the taxing officer exercised his discretion injudiciously or has acted upon a wrong principle or applied wrong consideration ". 8 In the matter at hand, the taxing officer charged instruction fee both in the main suit and counter claim at 3% of the claimed amount which equals to Tshs. 27,106, 167/= but in exercised of her discretion she reduced the amount and arrived at TZS 25,000, 000/= only. The taxing officer could still have arrived at TZS 38, 238,834, had she taxed the instruction fee in the main suit under item 7 of the Ninenth Schedule. All the above taken into account, I do not see any fault on the part of the taxing officer. In short, the instruction fee of 25,000,000/= is neither exorbitant nor excessive. Nor can anyone say that the taxing officer acted injudiciously, applied wrong principles or took into account wrong considerations. As such, I find no justification to interfere with the decision reached by the taxing officer. That is all said and done, the application for reference is without merits and for that reason, I hereby dismiss it. However, I make no order as to costs in order to bring the dispute to an end. It is so ordered. 9

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