

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT ARUSHA

MISCELLANEOUS COMMERCIAL REFERENCE NO 3 OF 2017

(C/F TAXATION CAUSE NO. 5 OF 2016)

M/S BUCKREEF GOLD COMPANY LTD APPLICANT

VERSUS

M/S TAXPLAN ASSOCIATES LTD 1ST RESPONDENT

M/S FIRST WORLD INVESTMENT

COURT BROKER 2ND RESPONDENT

RULING:

MRUMA, J.

This is a ruling on the reference made by the Applicant Buckreef Gold Company Limited objecting the decision of the Taxing Officer (Rumisha DR) who taxed the Respondents bill of costs at Tshs 33,940,000/=. The Respondents in these proceedings are M/S Taxplan Associates Ltd and M/S First World Investment Ltd.

The bill of costs the taxation of which is being challenged emanates from Miscellaneous Commercial Application No. 4 of 2016 which originates from Commercial Case No. 7 of 2014.

In Miscellaneous Commercial Application No. 4 of 2016, the Applicant was challenging attachment and sale of some of her properties in execution of a decree in Commercial Case No. 7 of

2014. The application was partly allowed. The Deputy Registrar held that the Applicant had proved equitable interest in RC Drill with Registration No.T.372 AHE. He accordingly ordered for lifting of attachment of the property and proceeded to condemn the Applicant therein to pay 85% of the costs.

Immediately thereafter counsel for the Respondent filed Taxation Cause No.5 of 2016 in which he presented his bill of costs for taxation. The total amount claimed in the bill was Tshs. 40,280,000.00/=. Out of this amount Tshs 20,000,000.00/= was said to be instruction fees paid to the Advocate by the 1st Respondent (who was the Decree Holder) and Tshs 20,000,000.00/= being instruction fee paid by the 2nd Respondent (who was the court broker executing the decree). It was the submission of the learned counsel that he was engaged by the two Respondents separately.

In this ruling the learned Taxing Office found that because there is no law which prohibits an advocate from changing different clients separately, the Applicants were entitled to claim back Tshs 16,830,000.00/= each being instruction fees paid to the advocate.

The Applicant was aggrieved and hence this reference. Let me start by explaining what advocate's costs are. Advocate's costs are the costs that an advocate claims from his own client and which the Advocate is entitled to recover for professional services rendered to and disbursements made on behalf of the client.

These costs are payable by client whatever the outcome of the matter for which the advocate's service were engaged and are not dependent upon any award of costs by the costs.

In contentious matters, the better practice envisaged by Section 54 of the Advocates Act (Cap 341 RE 2002) is for the advocate and the client to agree at the time instructions are given or within reasonable time thereafter as to his remuneration in respect of any contentious business done or to be done by him. Such agreements are required to in writing.

In the instant case, there does not appear to have been any writer agreement between the Respondent's and their advocate as to the amount payable as fees in defending the Applicant's interests in the objection proceedings (in Miscellaneous Commercial Application No. 4 of 2016).

However, in absence of an agreement for fees, if a dispute arises between an advocate and a client regarding the amount of fees payable such that the costs have to be taxed, the client is provided with a special protection under the Advocates Remuneration Order (GN 263). In awarding Tshs 16,830,000.00/= as instruction fee per each client, the taxing officer had this to say:-

"As submitted by Mr. Sambo, the amount that was involved is equivalent to Tshs 600,000,000/= since it was on liquidated sum, then the 3% of the said amount would bring the instruction fees to Tshs 19,800,000/=, Tshs 20,000,000/= claimed therefore is far beyond the provided scale"

The learned taxing master proceeded to award Tshs 16,830,000/= being 85% of the costs basing o the liquidated claim of Tshs 660,000,000.00/= which was claimed in the main suit.

I have carefully perused the records in Taxation Cause No. 5 of 2016 between the present Respondent Taxplan Associates Ltd and M/S First World Investment and Court Broker Vs. Buckreef Gold Company Ltd (the present Applicant) and also Miscellaneous Commercial Application No. 4 of 2016 from which that Miscellaneous Application arose. I note that in Miscellaneous Commercial Application No. 4 of 2016, First World Investment Court Brokers were joined as a necessary party. A necessary party is a party who being closely connected to the law suit, should be included in the case if feasible, but whose absence will not require dismissal of the proceedings (see Black's Law Dictionary 7th Edition Bryan A. Gaviner page 1144)

As the record would bear testimony, Miscellaneous Commercial Application No. 4 of 2016 originated from Commercial Case No. 7 of 2014. In that case (i.e Commercial Case No. 7 of 2014), the present applicant M/S Buckreef Gold Company Ltd was not a party. The Applicant came into picture in Miscellaneous Commercial Application No. 4 of 2016 when she unsuccessfully attempted to object attachments of some properties which she claimed to be hers. In Miscellaneous Application No. 4 of 2016, the court was asked to be pleased to investigate and declare that the property marked for execution of the Decree in Commercial Case No. 7 of 2014 were not liable to the execution as the same did not belling to the judgment debtor. The question for determination is whether the Court Broker

was a real party interested in the matter to enforce or defend the right sued upon and who would necessarily benefit from the outcome of the proceedings or in other words the question would be whether the Court Broker (M/S First World Investment Court Brokers was an indispensable party in the proceedings so as to entitle her to instruct an advocate to defend her rights or interests alongside with that of the decree holder (Taxplan Associates Limited).

In my view she was not. As the records would show M/S. First World Investment and Court Brokers was appointed by the Court to execute the decree. In executing the decree she was acting as an agent of the Court and therefore she was expected to act independently and impartially as she had no interest that would inevitably be affected by the Court's judgment or order. For instance the Court Broker would have not been affected had the Court ordered to lift the attachment of the disputed properties. In any result of the case the Court Broker would have been entitled to recover her statutory fees for the work done. A Court Broker being an agent appointed by the Court has the right to claim her fees by presenting her bill of costs to the court, and the practice has been to deduct and pay Court Broker's fees from the amount realized in the execution. The balance after deducting court fees and Court Broker's taxed charges is payable to the Decree Holder and anything remaining is payable to the judgment debtor.

In summary therefore I find that it was wrong for the Court Broker to instruct advocate Sambo to defend her in the application in which she was joined as a mere necessary party and had no

interest whatsoever that would inevitably be affected by whatever order of the court.

For those reasons I hold that the advocate was not entitled to instruction fees to appear and defend the 2nd Applicant in Misc. Commercial Application No. 4 of 2016. This applicant had nothing to defend. Thus, item 2 which was Taxed at Tshs. 16,830,000/= is taxed off. Similarly fees for filing affidavit of the Court Broker, Tshs 20,000/= (item 10) and filing fees for annextures Tshs 80,000.00 (item 11) are taxed off.

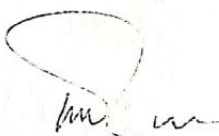
On the EFD's receipts, I would like to define what EFD (Electronic Fiscal Device) is. EFD is a machine designed for use in business for efficient management control in area of sales analysis and stock control systems and which conforms to the requirements specified by the law. As correctly observed by the Taxing Officer EFD receipts are more relevant in tax matters. There is no provision in the Advocates Remuneration on Order, 2015 (GN 264 of 2015) which requires proof of payment by production of EFD's receipts. EFD receipts may be relevant when there is a dispute as to whether one pays taxes or government renews or not. That was not the issue here.

That said, Miscellaneous Commercial Reference No. 3 of 2017 partly succeed. It succeed to the extent that the taxed bill costs is reduced to the extent explained above. The Applicant shall now pay (Tshs 33,660,000.00 - 16,830,000.00 + 100,000.00 +20,000.00) Tshs 16,930,000.00 as bill of costs in Miscellaneous Commercial Case No. 4 of 2016.

Taking into account that the court broker- First World Investment Court Broker (who is the 2nd Respondent in these proceedings ought to have known that being a court broker, therefore an agent of the court in executing a decree, she was not an indispensable party in that objecting proceedings (i.e Misc. Commercial Application No. 4 of 2016), I direct and order that she will bear and pay seventy five (75) percent of costs in these proceedings as shall be taxed.

Order accordingly.




A. R. Mruma,
Judge

28th March, 2018