**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**CIVIL REFERENCE NO. 4 OF 2007**

**REGISTERED TRUSTEES OF THE CASHEWNUT INDUSTRY DEVELOPMENT FUND.....APPLICANT**

**VERSUS**

**CASHEWNUT BOARD OF TANZANIA.....RESPONDENT**

**(Reference from the decision of the Taxing Officer of the Court of Appeal of Tanzania at Dar es Saiaam)**

**(Kitusi,DR-CA/ Taxing Officer)**

**dated the 17th day of May, 2007**
**in**
**Civil Appeal No. 18 of 2001**

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**RULING**

**5 & 11 February, 2009**

**KALEGEYA, J.A.:**

In this Reference, the Applicant is challenging the decision of a Taxing Officer (Kitusi, DR) by which he taxed the Bill of Costs as presented. The bill as per figures presented stood at shs. 67,688,990/= out of which shs. 53,000/= was uncontested. The contentious item and which has brought parties this far is the

instruction fee to oppose the appeal – shs. 67,632,990/=. The Applicant, represented by Prof. Fimbo, Advocate, complains that the *"Bill as taxed is, in all circumstances, manifestly excessive",* which is strongly countered by Mr. Kilindu, Advocate, for the Respondent.

Submitting in support of the application, Prof. Fimbo, Advocate, attacked the Taxing Officer's decision from five fronts: that the Taxing Officer wrongly used a short-cut and adopted the 3% scale on instruction fee applicable in taxation of costs in the High Court under the Advocates Remuneration and Taxation of Costs Rules; that he over-emphasised the value of the subject matter contrary to other Court decisions making reference to **Esmail International Ltd vs J.B. Kasidi and Another, (CAT), Civil Application No. 5 of 1990;** that he addressed himself on the suit amount instead of a decretal sum which never existed in this case, and made reference to **The Attorney General vs Amos Shavu, (CAT) Taxation Reference No. 2 of 2000 and Hotel Travertine vs National Bank of Commerce, (CAT) Taxation Civil Reference No. 9 of 2006;** that he breached a consistency principle pronounced in the cases above stated and specifically the one pronounced in

**Premchand Raichand Ltd and Another vs Quarry Services of East Africa Ltd and others (No. 3) [1972] E.A. 162** and lastly, that he failed to exercise his discretion under "Rule 12" of the Third Schedule to the Court of Appeal Rules (which I think should be referred to as "paragraph 12").

Mr. Kilindu, Advocate, responded by dismissing the application as being without merit insisting that no principle was violated by the Taxing Officer which would warrant the Court's interference with his decision making reference to **Arthur v Nyeri Electricity Board (1961) E.A 492; Haji Athuman Issa vs Rweitama Mutatu (1992) TLR 372** and so are the other cases already referred to by the Applicant's Advocate. He urged that, if anything, he was thorough as he considered other factors enumerated under para 9 (2) of the Rules including the suit amount which was approximately shs. 2.2 billion (shs. 1,887,590 + shs. 366,842,597.35); complexity and importance of the suit; the involving nature therefore which touched various disciplines of the law, a factor conceded to by the Applicant's Advocate; that hearing took a whole day and authorities were "thick". He submitted further that while a decretal sum is not

the only factor, 3% as was the case here, could be used as a guideline, making reference to **Travertine case** in which not only was the 3% adopted but also added was 7% interest.

Further to the above, Mr. Kilindu submitted that if the Applicant contemplated costs at 3% scale at High Court level if he lost, he should have contemplated higher costs by going to the Court of Appeal.

In rejoinder, Prof. Fimbo, Advocate, reiterated his main submissions insisting that the principle of consistency was not in the Taxing Officer's mind; the costs involved are party to party costs and not remuneration for Advocates and that it was wrong to be guided by a 3% scale where there was no decree let alone not being prescribed by the rules.

I should start by saying that I am gratified by the fact that both learned counsel are agreed as to the key guiding principles on taxation of costs. All the cases referred to in one way or another pronounce the same. And, in my considered view the **Premchand**

**case** aptly pronounces them. They include:- the *"Court owes a duty to the general public to see that costs are not allowed to rise to such a level as to deprive of access to Courts all but the worthy"; "a successful litigant ought to be fairly reimbursed for costs he has had to incur"; "the general level of the remuneration... must be such as to attract worthy recruits to... the profession"; "there must, so far as is practicable, be consistency in the awards made, both to do justice between one person and another and so that a person contemplating litigation can be advised by his advocate very approximately what, for the kind of a case contemplated, is likely to be his potential liability for costs";* the taxation of costs not being a mathematical exercise but entirely a matter of opinion, the Court will not interfere with the award merely because it thinks the award somewhat too high or too low: it will interfere if the award is so high or so low as to amount to an injustice to one party or another; in practical terms, apart from a small allowance to the appellant for the advice and undertaking of the appeal, there is no deference between fees paid to Appellant and Respondent. A fall in value of money, in comparable cases, may also be a factor to be considered.

Back to the matter before us, the relevant paragraph of the "Third Schedule" to the Court of Appeal Rules, entitled "TAXATION OF COSTS", gives a guideline to the Taxing Officer when considering an award on instruction fees to appeal or oppose appeal in the following wording:-

> *"9. (1) .....*
>
> *(2) The fee to be allowed for instructions to appeal or to oppose an appeal shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances.*
>
> *(3) The sum allowed under sub-paragraph (2) shall Include all work necessarily and properly done in connection with the appeal and not otherwise changeable including attendances, correspondence, perusals and consulting authorities".*

There is also paragraph 12 entitled "over-riding discretion" in the marginal notes thereof to which I shall shortly return.

Looking at the ruling as a whole, in his decision, the Taxing Officer was influenced by two major factors: the quantum of the suit amount and the complexity of the matter. On the former, he had the following to say:

*"The issue is on the amount and it is my finding that the amount involved is big. Mr. Kilindu said the instruction fee is about 3% of the amount....."*.

Towards the end of the ruling he goes on:-

> *"Nothing in rule 9 (2) of the rules aforesaid, shows that any of the seven listed factors is primary. However the amount involved has effect on the importance of the case and the interest of the parties to it. The higher the amount the bigger the interest and so is the importance attached to the case".*

On complexity, he observed,

> *"In my finding the appeal was complex and important. Eleven grounds of appeal were raised. There is a thicket of list of authorities and documents. The record of appeal consists of 364 pages".*

The question before us is whether the Taxing Officer erred in his first approach: relying on quantum of the suit and then 3% thereof when there was no decretal sum awarded. This clusters the first three attacks fronted by Prof. Fimbo, Advocate.

Admittedly, there was no decretal sum awarded. However, in my considered view, this does not preclude a Taxing Officer from making reference to the suit amount, seeking assistance when confronted by a decision regarding what should be awarded as instruction fee. Neither is he barred from seeking guidance from whatever angle that may assist in arriving at a befitting amount. This would also include seeking a leaf from the experience and procedure obtaining in the High Court. Costs are costs. With respect, contrary to Prof. Fimbo's strong attack, I find nothing wrong in seeking such guidance including looking at the prescribed scales. It would have been different if the Taxing Officer had categorically stated that he was adopting that scale or that it is provided by the Court of Appeal Rules. That would have been wrong because no rule provides such a scale: akin to that obtaining in the High Court.

Paragraph 9 (2) enjoins the Taxing Officer to have regard to *"the amount involved in the appeal".* And here we are agreed that no decretal sum was awarded at both levels: at the High Court and the Court of Appeal. That notwithstanding however, in my considered view, in an appeal emanating from a claim of money, even where the claim is dismissed at High Court level and subsequently by the Court of Appeal, intrinsically there would be *"an amount involved".* Like in this case, the Respondent had claimed a principal sum of shs. 1,887,590,526/= and shs. 366,842,597.35 as interest. The claim was dismissed by the High Court. Dissatisfied, the Plaintiff (Appellant in the Court of Appeal and Applicant in this reference) challenged that finding, complaining that the High Court erred. What were they seeking then from the Court of Appeal? A reversal of the decision so that their claim be granted. Now, can we say that there was no amount of money involved in the appeal in terms of paragraph 9 (2) as suggested by Prof. Fimbo? With greatest respect, I am not convinced. Underlying the whole Court battle was the sum claimed and disputed. Thus, as rightly pointed out by Mr. Kilindu, the sum involved is that which was the subject

matter of the suit and which as we have seen is about shs. 2.2 billion, a clossal sum by any standards. I thus hold that the Taxing Officer rightly considered the suit amount as a guide to his decision.

As to the 3% scale I have already observed that the Taxing Officer simply used it as a guide. He was entitled to seek assistance from any element which would enable him reach what he thought was a befitting figure. That said however, I am in agreement with Prof. Fimbo that having so sought guidance he over-emphasized the question of quantum contradicting his sound finding that all factors under paragraph 9 (2) are equally important and none is primary than the other. I will return to this later.

As to the 2nd factor, of complexity and work involved, I am minded to erect some profound reservations. The two counsel are the very ones who battled in both the High Court and the Court of Appeal. They were thus both pursuing what was not new to them. In the circumstances, in my view, this factor also was over-emphasized. I will also return to this shortly.

This brings us to the last complaint of Prof. Fimbo that the Taxing Officer did not exercise his discretion under paragraph 12. The said paragraph provides:

> *"If, after a bill of costs has been taxed, the taxing officer considers that, having regard to all the circumstances, the total of the bill before signing the certificate of taxation is excessive, he may make such a deduction from the total as will in his opinion render the sum reasonable".*

With respect to Prof. Fimbo, I find no mandatory element in that paragraph. The over-riding discretion bestowed upon the Taxing Officer strides from a decision to look at the total taxed amount and covers the decision on whether or not to reduce it. In a situation where items claimed are various, covering substantial sums, the Taxing Officer's over-riding discretionary forum may be called into play. Where however, the bill claimed is as is the case here, where minor items are undisputed, and only one generates heat, once that is decided, it would be absurd to call upon him to consider exercising the discretion under that paragraph. The Taxing Officer committed no error in this respect.

I now revert first to the 2nd factor of importance and complexity of the appeal as already hinted upon. In my considered view, regard being had to the all round circumstances, if the Taxing Officer had considered the 2nd factor in relation to the involvement of the Advocates right from the start of the dispute, he would not have attached over-emphasis on the work involved. They had facts at their finger tips: naturally they had already thoroughly researched. What was done at the Court of Appeal was just refinery of their respective arsenals.

If this element had been looked at together with the over-emphasis exalted on amount involved as exposed by the Taxing Officer's findings whose extracts are quoted above, the taxed amount would have been on the lower side.

With this finding, I need not discuss the consistency principle.

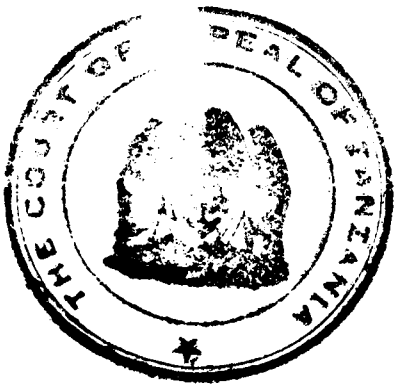
I am persuaded that indeed the Taxing Officer, over-emphasized the two factors: a suit amount and complexity of the matter. I am satisfied that the Applicant's complaint that in all the

circumstances, the bill was excessively taxed is justified. I hereby tax off shs. 27,688,990/= and this brings the award granted as instruction fee to shs. 40 million.

DATED at DAR ES SALAAM this 10th day of February, 2009.

L. B. KALEGEYA
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.




(P. B. KHADAY)
**DEPUTY REGISTRAR**