

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

CIVIL REFERENCE NO. 6 OF 2016

KITINDA KIMARO.....APPLICANT

VERSUS

- 1. ANTHONY NGOO**
- 2. DAVIS ANTHONY NGOO }..... RESPONDENTS**

(Reference from the Ruling of the Taxing Officer of the Court of

Appeal of Tanzania at Dares salaam.)

(Bampikya, SDR, CA)

dated the 5th day of August, 2016

in

Taxation Cause No. 25 of 2014

RULING

5th & 13th July, 2018

MBAROUK, J.A.:

This is a reference from the ruling of the Taxing Officer in Civil Appeal No. 25 of 2014 dated 5th August, 2016. The same has been made under Rule 125(1) and (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules). In this reference the parties are represented by the same advocates who appeared before the Taxing Officer. These are Mr. Mpaya Kamara, learned advocate who appeared for the applicant and Mr. Michael Ngalo, learned advocate who appeared for the respondents.

A brief background of this reference is as follow, the decree holder in Civil Appeal No. 25 of 2014 and the respondents in this reference had through their advocates, filed a bill of costs of a total sum of Tshs. 421,607,000.00/=. The Taxing Officer taxed a total sum of Tshs. 258,908,090/= and a total sum of Tshs. 162,698,910/= which was taxed off. The judgment debtor/ applicant was aggrieved by that ruling and has preferred this reference.

At the day set for hearing, Mr. Kamara learned advocate for the applicant prayed to adopt his written submissions. Submitting in support of the reference, Mr. Kamara stated that the bone of contention is the amount of Tshs. 250,000,000/= awarded as instruction fees. He submitted that the amount is on high side and excessive, because the proceedings before the Court were neither complex nor time consuming. He therefore, prayed for the Court to intervene on the ground that the Taxing Officer acted unjudicious and unreasonable. He prayed for the Court to reduce the instruction fees to a total sum of Tshs. 20,000,000/=for two advocates.

He further contended that, although the Taxing Officer had discretionary powers and be guided by paragraph (9) (1) of the 3rd Schedule of the Rules, but the said power should be acted judiciously. In support of his contention he cited the case of **Premchand Raichand Limited & Another versus Quarry Services of East Africa Ltd & 3 Others** [1972] E.A. 162. He submit that, after the Taxing Officer held that the mining plot produced nothing, it was wrong for him to award a total sum of Tshs. 250,000,000/=, as instruction fees. He argued that, if the point of non-production of the mining plot was considered by the Taxing Officer he would probably have arrived at a different decision. Failure to consider this point resulted the Taxing Officer to have arrived at a wrong consideration and awarded the said amount without any justification.

The second complaint from Mr. Kamara was that, the Taxing Officer awarded travel expenses and accommodation without any proof. Mr. Kamara, argued that the Taxing Officer erroneously awarded travel expenses alleged to have been incurred by the decree holder for air tickets and accommodation without any proof. He argued that, the Taxing Officer

erroneously erred in taxation principles in allowing items No. 29,30,38 and 42 being air tickets for two advocates to attend Courts sessions, and accommodation expenses without any proof. However, Mr. Kamara did not dispute on the appearance of the respondent's counsel before the Court as pointed out by the Taxing Officer, but the means of transport used by the two counsel for the respondents was wrongly considered by the Taxing Officer having held that, a party is not obliged to produce receipts.

He further pointed out that, it was wrong for the Taxing Officer to assume and come to a conclusion that the counsels travelled by air, as they may have travelled by bus, private car or even by given a lift from a friend, therefore that was a wrong consideration which violated the Principles of taxation. In supporting of his argument, he cited the case of **George Mbuguzi & Another versus A.S. Maskini**, Civil Reference No 2 of 1976, H.C. (unreported).

Mr. Kamara argued that, the Taxing Officer did not take into consideration the Principles governing taxation of costs. For example the Principle of consistence, where he point out

that, the cost for fees which were requested by the respondents were a total sum of Tshs. 380,000,000/= and the Taxing Officer taxed off a total sum of Tshs.. 16,674,000/= and awarded a total sum of Tshs. 250,000,000/=. He added that, counting, the same, the amount taxed off and the amount awarded to the respondents, did not reflect the actual figure of the total sum of Tshs. 380,000,000/=. He said, this shows how the Taxing Officer was not consistent in his decision. He again cited the case of **George Mbuguzi, (supra)** to support his submission.

Mr. Kamara was of the view that, the overriding Principle is that costs should not be excessive or oppressive, as in this reference the costs are very excessive and oppressive. He then cited the case of **East African Development Bank versus Blueline Enterprises Ltd**, Civil Reference No 12 of 2006 (unreported), where the Court reduced the instruction fees for being excessive. Mr. Kamara continued to argue that, the case cited above, has the same facts as the reference before this Court, therefore prayed for the amount to be reduced to 20,000,000/=. He then urged me to find that, the Ruling of the

Taxing Officer a nullity for not complying with the Principles of taxation and the reference be allowed with costs.

On his part, Mr. Ngalo, learned advocate representing the respondents, opposed the application. He argued that, it is settled law that the taxation of costs and in particular the amounts awarded for each item on the bill is a matter of discretion of the Taxing Officer, but the same discretion has to be exercised judicially unless there is an error of law or Principle or the award made is manifestly excessive. He continue to argue that, the Ruling by the Taxing Officer which is subject to this reference does not show any error of law or Principle. To support his submission, he cited the case of **Mutamwega Bhatt Muganywa versus Charles Muguta Kajege**, Taxation Reference No. 5 of 2010, (unreported).

Mr. Ngalo argued that, in this reference the Court will only interfere with the Ruling of the Taxing Officer if he did not consider the relevant Principles set out in the case of **Premchand Reichand** (supra) or applied wrong Principles on his decision which in this reference the Taxing Officer applied all the required Principles. He pointed out that, the big issue before

the Court is the amount awarded by the Taxing Officer if they were fair and reasonable.

Responding to the first complaint of the applicant, Mr. Ngalo argued that the underlying Principle is that, both parties prepared themselves and a successful party is awarded costs. In support of his contention, he cited the case of **East African Development Bank case**, (supra). He submitted that, in the instant case, the Taxing Officer was justified in taxing the instruction fee to a total sum of Tshs. 250,000,000/= after noting the complexity of the appeal which emanated from the High Court where a decree amounting to 2.2 Billion, and multiplicity of proceedings, preliminary objections prior to the hearing of the appeal, the cross appeal, revision proceedings all these influenced the Taxing Officer to have come to that conclusion and awarded the said amount. He also pointed out that the advocate for the applicant did not pointed out any error of Principle made by the Taxing Officer as far as the award on instruction fee was concerned. He argued that, the relevant factors which a Taxing Officer must concern himself with when Taxing instruction fee are wide in terms of paragraph 9(2) of

the 3rd Schedule to the Rules, and the Taxing Officer directed himself properly on these Principles.

On complaint number two, Mr. Ngalo, learned advocate, argued that, the Taxing Officer was right to have taxed items No. 29, 30,38 and 42 for the transport and accommodation expenses as there is no specific Rule or section which empowers the respondents to produce the receipts and also the applicant has failed to give any section or authority to counter the Taxing Officer's decision and the Taxing Officer used his discretion to tax those amounts as per item 11(1) of the 3rd Schedule to the Rules, which allows such costs, to be charged and disbursed as reasonably incurred for attainment of justice. Therefore he said this point also has no merit.

On the issue of production of the mining plot, Mr. Ngalo argued that, the applicant claims that there was no production at the mining plot but he forgot that at the High Court the applicant was awarded Tshs. 500,000,000/=, as general damages and interest of 15% per month, hence those amounts were colossal sum of money which in addition to other factors alluded must have influenced the Taxing Officer to award Tshs.

250,000,000/= as instruction fee to the two counsel of the respondents. Mr. Ngalo distinguished the assertion of Mr. Kamara on the case of **Hotel Travertine LTD versus N.B.C, Civil** Reference No. 9 of 2006,(unreported), that the proceedings which eventually gave rise to this reference are incomparable with the proceedings of the cited case in its nature and complexity, time difference at which the two matters were decided. The case of **Hotel Travertine Ltd** (supra) was of 2006 compared to the impugned ruling of the Taxing Officer was issued on 2016 which is 10 years difference, hence the Taxing Officer exercised his discretion judicially in Taxing the present bill of costs.

Submitting on the issue of inconsistency, Mr. Ngalo argued that, the Taxing Officer was consistent as he was not given any other comparable awards to compare. As to the difference of figures, a total sum of Tshs. 16,674,000/= instead of a total sum of Tshs. 130,000,000/= Mr. Ngalo agreed but pointed out that it was numerical error and on the conclusion of the Taxing Officer's Ruling he taxed a total sum of Tshs. 258,908,090/= and a total sum of Tshs. 162, 698,910/= was taxed off which

renders the total sum of 421,607,000/= and this should be taken as correct one.

Mr. Ngalo concluded that, the Taxing Officer not only alluded to, but took into consideration all Principles governing taxation of the bill of costs, and there is nothing to fault the Taxing Officer's decision, because it has met the criteria of any judicial decision, and prayed for the reference to be dismissed with costs.

The general rule on taxation is as provided in Rule 125 of the Rules, that:-

- (i) Reference on taxation by a dissatisfied party shall be on a matter of law or principle.
- (ii) There shall not be a reference on a question of quantum only.

From the submissions of both counsel, it is clear that the bone of contention here is the award of Tshs. 258,908,090/= which gave rise to this reference. The pressing question now is whether the Court should interfere with the award of the Taxing Officer in this amount or not.

Before, I proceed further, I should indicate the main Principle which is going to guide me in the determination of this reference. It is a Principle of law that, the decision of the Taxing Officer will be interfered with only when the Court is satisfied that the decision was arrived upon a wrong principle or a wrong consideration. Where there has been an error in Principle the Court will interfere but solely on the question of quantum as regard to the matter which the Taxing Officer is particularly fitted to deal and the Court will intervene only in exceptional cases. From the Principle I have indicated above, I proceed now to consider the arguments that were raised in this reference.

This reference emanates from an appeal, so the guiding provision is paragraph 9(2) of the Taxation of Costs Rules set out in the 3rd Schedule to the Court of Appeal Rules, 2009, which provides thus:-

"9. Quantum of costs.

(1).....

(2) the fee to be allowed for instruction to appeal or to oppose an appeal shall be 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."

As can be seen here, the Taxing Officer has been given wide latitude in the determination of a taxation matter before him subject to the general guidelines set in terms of paragraph 9(2) of the 3rd Schedule to Rules. In the case of **The Attorney General versus Amos Shavu**, Taxation Reference No 2 of 2002 (unreported).The Court held that:-

"as general rule the allowance for instruction fee is a matter peculiarly in the taxing officer's discretion and court are reluctant to interfere into that discretion unless it has been exercised unjudicially."

Due to the Principle above, stated in Amos Shavu (supra) that means the Court do have power in proper cases to reduce the instruction fee allowed by the Taxing Officer, but it will only

do so where he has acted upon wrong Principles or applied wrong consideration in arising to his decision or when the award is so high or so low as leading to an injustice to one party.

Coming back to the impugned Ruling, the question is, can it be said that the Taxing Officer, has exercised his discretion unjudicially when he taxed the present bill of costs as he did and particularly when he awarded a total sum of Tshs. 250,000,000/= as instruction fees? The answer to this question ought to be obtained from his Ruling. In awarding the said total sum of Tshs. 250,000,000/=, the learned Taxing Officer reasoned as follows:-

"I have also put account the nature of the case which was a sale of block mining situated at Simanjiro area, the time taken from the filing the case up to the stage of hearing of the appeal filed in the court of appeal which is almost 3 years, the complicity of the issue involved on appeal, the authorities cited by the applicants advocates, I find the

applicant counsel spent a time for legal research contrary to the submission of the counsel for the respondent who submitted that the legal research involved in the appeal was too minimal.”

It is trite law that instruction fee is supposed to be compensated adequately to an advocate for the work done in the preparation and conduct of a case. The greater the amount of work involved, the complexity of the case, the time taken by an advocate hearing of arguments in the case, as factors to be taken into account in determining the appropriate instruction fee in any given case. The overriding Principle has always been that “costs should not be excessive or oppressive but only such as necessary for the conduct of the litigation, See the case of **Smith versus Buller** (1875) 19 E9. 473, cited in **Rahim Hasham versus Alibhai Kaderbhai** (1938) I.T.L.R (R) 676.

Attacking the reasoning in those passages, Mr. Kamara submitted that the Taxing Officer was not consistence on his decision, for example, the respondents claimed fee of a total sum of Tshs. 380,000,000/=, and the Taxing Officer taxed a

total sum of Tshs. 250,000,000/= and taxed off a total sum of Tshs. 16,647,000/= which make a total sum of Tshs. 266,647,000/=. The difference of a total sum of Tshs. 113,353,000/= was not accounted for by the Taxing Officer and this discrepancy Mr. Kamara pointed out as the violation of Taxation Principle of consistence which result into a wrong consideration.

Mr. Ngalo concede to that, but prayed for the Court to consider it as a human error which can be rectified by the Court as at the end the Taxing Officer's Ruling pointed out clearly that he taxed a total sum of Tshs. 258,908,090/= and taxed off a total sum of Tshs. 162,698,910/= which make a total of Tshs. 421,609,000/= as claimed by the respondents in the whole bill of costs.

It is the observation of the Court that costs are not meant to be a penalty, but are meant to indemnify a successful party against expenses reasonably incurred in indicating a successful party. In the case of **Premchand Raichand** (supra), the Court laid down four principles which have to be considered in the taxation of bill of costs, such as:-

- (i) That the costs be not allowed to rise to such a level as to confine access to the courts to the wealthy,*
- (ii) That the successful litigant ought to be fairly reimbursed for the costs he had to incur,*
- (iii) That the general level of remuneration of advocates must be such as to attract recruits to the profession and*
- (iv) That there should be consistency in the award made.*

In approaching the question as to what would have been a fair and reasonable instruction fee in the present reference, I am guided by among other things as pointed out in the case of **George Mbuguzi** case (supra) thus:-

" there must so far as practicable, be consistency in the award made, both to do justice between one person and another and so that a person contemplating litigation can be advised by his advocates very approximately what, for the kind of case contemplated, is likely to be his potential liability for costs."

In the determination of the taxation the Taxing Officer must observe the Principle of consistency. The ignoring of this Principle is an error of law which the Court can intervene. As per the record, the respondents' instruction fee prayed was a total sum of Tshs. 380,000,000/=, the Taxing Officer taxed a total sum of Tshs. 250,000,000/= and taxed off a total sum of Tshs. 16,647,000/= and this make a total sum of Tshs. 266,647,000/= and not a total sum of Tshs. 380,000,000/=. No where in the record is shown that the account of a total sum of Tshs. 113,000,000/= and this necessitates the Court to intervene because, the Taxing Officer did not consider the Principle of consistency in awarding a total sum of Tshs. 250,000,000/= as instruction fees.

Having given the matter most anxious and careful consideration, I have reached the settled view that in the circumstance of the case between the parties, instruction fees was excessive. I am satisfied that the most reasonable sum to be awarded as instruction fees should be a total sum of 150,000,000/= having considered the complexity of the case, time taken by an advocate in hearing of arguments in the case.

This will be accord with the Principle of consistency; and will fully meet the justice of the case.

In items No. 29 and 30, before the Taxing Officer was the expenses of the air tickets, and items 38 and 42 was the costs for accommodation, where the applicant pointed out that the Taxing Officer erroneously erred by awarding a costs of Tshs. 1,260,000/= in respect of item No. 29, a cost of Tshs. 1,010,000/= in respect of item 30, a cost of Tshs. 600,000/= in respect of item No. 38 and 300,000/= in respect of item No. 42 without any proof.

It is not in dispute that the two counsels appeared before the Court but the legal question whether it was necessary for them to have used air transport as the means of transportation. Item No. 11(1) to the 3rd Schedule of Rules, gives discretion to the Taxing Officer to allow such costs, charge and disbursements as shall appear to him to have been reasonably incurred. As point out early that, it is trite law that a superior court cannot overrule an exercise of discretionary powers of the Taxing Officer unless proof is shown that the discretion was exercised unjudicially. The act of the Taxing Officer taxing the


mentioned items above without any proof, this shows that the Taxing Officer acted unjudicially. Therefore, items No. 29, 30, 38 and 42 are hereby taxed off.

In the event, I allow the reference on items No. 29, 30, 38, and 42 making a total sum of Tshs. 3,170,000/= which are taxed off, and the awarded cost of Tshs. 250,000,000/= as instruction fees is hereby reduced to Tshs. 150,000,000/=. Therefore the bill of costs is awarded to the respondents to a total sum of Tshs. 155,738,090/= and a total sum of Tshs. 103,170,000/= is hereby deducted. Reference is allowed to the extent stated above. Each party to bear their respective costs of the reference.

DATED at ARUSHA this 12th day of July, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

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


É. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL