

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

CIVIL APPLICATION NO. 24 OF 2019

VIP ENGINEERING AND MARKETING LTD APPLICANT

VERSUS

CITIBANK TANZANIA LIMITED RESPONDENT

**(Application for Reference from the Ruling of the Taxing Officer
at Dar es Salaam)**

(Kahyoza, DR)

Dated the 3rd day of July, 2019

in

Civil Appeal No. 23 of 2008

RULING

23rd March & 14th April, 2021

MWAMBEGELE, J.A.:

This is a ruling on a reference by the applicant, VIP Engineering and Marketing Limited, from the decision of a Taxing Officer of the Court in respect of Civil Appeal No. 23 of 2008. The reference has been made by a letter pursuant to the provisions of rule 125 (3) of the Tanzania Court of Appeal Rules (the Rules). The applicant moves the Court to vary the decision of the Taxing Officer (Kahyoza, DR - as he then was) who

awarded the applicant, *in te alia*, Tshs. 10,000,000/= as instruction fees on the ground that it is inordinately on the lower side.

The background of the matter may be narrated as follows: the applicant was the fourth respondent in Civil Appeal No. 23 of 2008 in which the respondent had preferred an appeal from the decision of the Commercial Division of the High Court in Commercial Case No. 6 of 2003. That appeal was struck out on a successful preliminary objection by the applicant and the Joint Liquidators of Tritel who were among the respondents. Consequent upon that, the applicant, together with The Joint Liquidators of Tritel, filed two different Bills of Costs which were consolidated and taxed together. The applicant had claimed Tshs. 280,000,000/= as instruction fees while The Joint Liquidators of Tritel claimed Tshs. 45,666,666/60 also as instruction fees. The Taxing officer taxed the instruction fees at Tshs. 10,000,000/= in respect of each applicant. Dissatisfied, the applicant preferred this reference. The same has been predicated on the following grounds; namely:

1. The Taxing Officer grossly erred in applying the general principles governing taxation of instruction fees without paying

regard to the peculiar facts and circumstances of the appeal from which the applicant was awarded costs;

2. The Taxing Officer applied wrong principles and or misdirected himself by not maintaining consistency in awards of instruction fees for prosecuting or defending appeals to the Court of Appeal regardless of whether the same (the appeals) ended on merits or not; and
3. The amount of Tshs. Ten Million awarded to the Applicant as instruction fees is manifestly or inordinately too low in the circumstances.

On the above grounds, the applicant proposed to ask the Court to be pleased to vary the decision of the Taxing Officer, increase the amount of Tshs. 10 million to Tshs. 280 million or to such a higher amount than the one awarded as instruction fees to the applicant and issue such other relief(s) to the applicant as it shall deem fit and just to grant in the circumstances.

When the matter was called on for hearing, the applicant was represented by Mr. Michael Ngalo, learned advocate. The respondent appeared through Mr. Dilip Kesaria, also learned advocate.

Mr. Ngalo, submitting in support of the application, told the Court that the reference was mainly on the quantum of instruction fees which was awarded to the applicant to oppose Civil Appeal No. 23 of 2008. He submitted that the applicant claimed Tshs. 280,000,000/= as instruction fees but the Taxing Officer exercised his discretion and taxed off the amount and awarded only Tshs. 10,000,000/= which, according to the learned counsel, was extremely on the lower side. Mr. Ngalo went on to submit that the Taxing Officer wrongly applied the principles governing the matter and as a result, he awarded the amount which was inordinately too low in the circumstances of the appeal.

One of the reasons given by the Taxing Officer for awarding the amount, Mr. Ngalo argued, is found at p. 7 to the effect that the appeal ended by a successful preliminary objection; that is, it did not proceed to full hearing. That, he contended, was an erroneous consideration in that para 9 to the Third Schedule to the Rules, does not state that where a

matter ends on a preliminary objection, instruction fees should not be the same as when the matter goes into a full trial. That consideration was repeated by the Taxing Officer at p. 10 of the ruling, he added.

Mr. Ngalo went on to submit that the Taxing Officer ought to have followed the principles referred to by the Court in **John Eliafye v. Michael Lesani Kweka**, Taxation Reference No. 12 of 2007 (unreported). The learned counsel added that the matter was involving and that they did not prepare for arguing the preliminary objection only but for the appeal at large. On this proposition, the learned counsel referred me to **East African Development Bank v. Blueline Enterprises Ltd**, Civil Reference No. 12 of 2006 (unreported, hereinafter referred to as **EADB**) in which the Court observed that anyone intending to enter appearance in this Court must prepare himself adequately in all respects.

Mr. Ngalo also addressed me on the second ground that the principle of consistency was not followed by the Taxing Officer. He contended that in awarding instruction fees, consideration should be had to the fact that the same must be consistent and predictable. This principle, he submitted, was stated in **EADB** (supra) and followed in **Kitinda**

Kimaro v. Anthony Ngoo and Another, Civil Reference No. 12 of 2006 and **Kitinda Kimaro v. Anthony Ngoo and Another**, Civil Application No. 576/02 of 2018 (both unreported). He added that in **Kitinda Kimaro v. Anthony Ngoo and Another**, Civil Application No. 576/02 of 2018, the Court found that Tshs. 40,000,000/= was the amount consistently awarded as instruction fees in recent cases. The learned counsel thus prayed that the same amount be enhanced as instruction fees in the case at hand.

Having stated as above, the learned counsel prayed that the reference be allowed with costs.

Responding, Mr. Kesaria submitted that there is no hard and fast rule of formular which guide Taxing Officers in awarding instruction fees. Referring me to the previous decisions in **Premchand Raichand Ltd and Another v. Quarry Services of East Africa Ltd and Others (No. 3)** [1972] 1 EA 162, **The Attorney General v. Amos Shavu**, Taxation Reference No. 2 of 2000 (unreported) and **EADB** (supra), Mr. Kesaria submitted that the Court will never interfere with the quantum of instruction fees awarded by the Taxing Officer, unless it is satisfied that he applied wrong principles in so awarding. In the case at hand, the learned

counsel argued, the applicant's complaint is on the quantum awarded and therefore the Court should not entertain it. Mr. Kesaria added that the Taxing Officer in the matter at hand referred to the discretion bestowed upon him by para 9 (2) of the Third Schedule to the Rules and cited all leading cases on the subject and arrived at the conclusion that Tshs. 10,000,000/= was a reasonable and proportionate amount in the circumstances. In the premises, Mr. Kesaria submitted, his discretion should not be interfered.

Prompted on the consistency principle, Mr. Kesaria submitted that the instruction fees awarded was consistent with other decision as, for instance, in **EADB** the amount awarded as instruction fees was Tshs. 10,000,000/= just like in the case at hand. That was quite proportionate an amount in the circumstances of the case where the case did not proceed to a full trial but struck out because the judgment and decree bore different dates. He added that the other decree holder; The Joint Liquidators of Tritel were satisfied with the Tshs. 10,000,000/= awarded as instruction fees because it was reasonable and proportionate in the circumstances of the appeal.

On the Tshs. 40,000,000/= proposed by the applicant as instruction fees, Mr. Kesaria submitted that there is no justification for that because the applicant did not produce any receipt to that effect.

The above said, the learned counsel implored me to dismiss the reference with costs.

In a brief rejoinder, Mr. Ngalo submitted that Mr. Kesaria did not respond to his submission that they prepared to argue the appeal as a whole not on the preliminary objection only as directed by **EADB**. With regard to the principle that the Court is reluctant to interfere with the discretion of Taxing Officers unless the decision was entered basing on wrong principles, Mr. Ngalo conceded to that salutary principle. However, he was quick to state that the applicant is not making this reference to merely challenge the quantum of instruction fees but that the Taxing Officer wrongly applied the principles and did not consider the circumstances of the appeal.

With regard to Tshs. 40,000,000/= as being without any receipt, Mr. Ngalo submitted that the assertion did not arise at the hearing of the Bill of

Costs and was not considered by the Taxing Officer thus the Court did not have jurisdiction to entertain it.

As regards the complaint that The Joint Liquidators of Tritel were satisfied with the Tshs. 10,000,000/= awarded as instruction fees, Mr. Ngalo submitted that the same did not preclude them from filing the reference and argue that the same was not adequate.

The learned counsel reiterated that the Taxing Officer did not correctly apply the governing principles on taxation and the reference should be allowed with costs and Tshs. 40,000,000/= be awarded as instruction fees.

From the foregoing submissions of the learned advocates for the parties, it is apparent that the kernel of contention here is the quantum of instruction fees awarded by the Taxing Officer. Indeed, the learned counsel for the parties are at one that discretion properly exercised by a taxing officer will not be interfered with by the Court. This is a well settled position in this jurisdiction. As observed in **Amos Shavu** (supra):

"As a general rule the allowance for instruction fees is a matter peculiarly in the taxing officer's

discretion and courts are reluctant to interfere into that discretion unless it has been exercised unjudicially."

Relying on **Rahim Hasham v. Alibhai Kaderbhai** (1938) 1 T.L.R.

(R) 676, the Court went on:

"... while the court has power in proper cases to reduce the instruction fee allowed by the taxing officer, it will only do so where he has acted upon wrong principles or applied wrong considerations in coming to his decision. This position has been restated in Premchand Raichand v. Quarry Services [1972] E.A. 162, where the Court of Appeal for East Africa stated that the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party"

In **Premchand Raichand** (supra), the erstwhile Court of Appeal for East Africa observed:

"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely

because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other."

In that case, the East African Court of Appeal articulated four guiding principles which have to be considered when determining the quantum of an instruction fee. These are; **one**, that costs shall not be not allowed to rise to such a level as to confine access to the courts to only the wealthy; **two**, that the successful litigant ought to be fairly reimbursed for the costs he reasonably incurred; **three**, the general level of the remuneration of advocates must be such as to attract worthy recruits to an honourable profession; and, **four**, that 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 advocates very approximately what, for the kind of case contemplated, is likely to be his potential liability for costs. These principles have been followed in a number of decisions of the Court – see: **Amos Shavu** (supra), **Hotel Travertine Ltd v. National Bank of Commerce**, Taxation Civil Reference No. 9 of 2006 (unreported), the

EADB (supra), Registered Trustees of the Cashewnut Industry Development Fund v. Cashewnut Board of Tanzania, Civil Reference No. 4 of 2007 and **Mutamwega Bhatt Mugaywa v. Charles Muguta Kajege**, Taxation Reference No. 5 of 2010 (both unreported), to mention but a few.

The overarching question before me now is whether I should interfere with the award of the Taxing Officer. Put differently, can it be said the Taxing Officer, in awarding the Tshs. 10,000,000/= as instruction fees, did not exercise his discretion judicially? Is that amount too low as to amount to injustice to one party? I think there are grounds for intervention. I shall demonstrate.

Before settling at Tshs. 10,000,000/= as instruction fees, the Taxing Officer observed at p. 7 of the typed ruling that; first, the appeal which led to the bills of costs before him did not go to full trial but was determined after a successful preliminary objection; secondly, the preliminary objection was that the judgment and decree had different dates which did not require a thorough and tasking research and; thirdly, when taxing a claim

for instruction fees, a taxing officer has to take into consideration subparagraph (2) of paragraph 9 of the Court of Appeal Rules.

The learned the Taxing Officer, having revisited several decisions on the point, went on at p. 11:

"The Courts have said that taxation of costs is not a question of mathematics, a number things, which I pointed out above, ought to be considered. The nature of the present matter, which was determined not on merit is also vital to be considered. There is also undisputed fact that following the Court upholding the preliminary objection, the appeal was struck out. The outcome showed that the game was not over. The respondent had a chance of reinstating the appeal. The matter was not conclusively determined."

I agree with Mr. Ngalo that, in pegging the award on the ground that "the game was not over", the Taxing Officer employed a wrong principle in taxing the instruction fees. The Taxing Officer ought not to have employed that principle, for Civil Appeal No. 23 of 2008 was actually over even though it was struck out. If the respondent was ever interested in

resurrecting the matter, he would file another appeal, not Civil Appeal No. 23 of 2008. That enjoins the Court to interfere with his discretion.

There is another ground for intervention. In reaching the amount of Tshs. 10,000,000/= as instruction fees, the Taxing Officer reasoned that the preliminary objection on which the appeal terminated was that the judgment and decree bore different dates which point was not novel and did not cost the competent and experienced advocate for the applicant time to conduct hefty research. That is not wholly true. As Mr. Ngalo rightly submitted, the applicant did not prepare for the hearing of the preliminary objection only but for the whole appeal. Mr. Kesaria did not make any response to this argument. I think Mr. Ngalo is right. A benevolent advocate will not prepare for the hearing of a preliminary objection only. After all, it is a thorough preparation which will normally unveil a preliminary point of law. A somewhat akin argument arose in **EADB** (supra) in which it was argued that this being an apex court of the land, one must thoroughly prepare himself before entering appearance. The Court agreed with the argument and observed:

"... anyone contemplating to appear in this Court, and indeed in any court of law, must prepare himself adequately in all respects".

There is yet another ground on which, I think, this Court needs to intervene. Throughout his ruling, the Taxing Officer did not seek to justify the award of Tshs. 10,000,000/= as instruction fees with other comparable proceedings around that time. That is what is called the consistency principle. As held in **Premchand Raichand** (supra) so far as practicable, there should be consistency in the awards of instruction fees made.

What then should have been the reasonable amount of instruction fees in the case at hand? Indisputably, the appeal the subject of the taxation proceedings under reference terminated on a preliminary objection. Mr. Ngalo submitted that the applicant's advocate prepared for the hearing of the appeal and not for the hearing of the preliminary objection and urged me to consider the decisions of the Court in **Kitinda Kimaro v. Anthony Ngoo and Another**, Civil Reference No. 6 of 2016 and **Kitinda Kimaro v. Anthony Ngoo and Another**, Civil Application No. 576/02 of 2018 (both unreported) as comparable to the case at hand. I agree with Mr. Ngalo on his submission that the applicant prepared for

the hearing of the whole appeal and not for the hearing of the preliminary objection only and therefore the instruction fees should not be pegged on the latter only. Nonetheless, with unfeigned respect to Mr. Ngalo, I would not agree that the case should be taken as if it proceeded to hearing and award Tshs. 40,000,000/= as was the case in **Kitinda Kimaro v. Anthony Ngoo and Another**, Civil Application No. 576/02 of 2018 (supra). This is so because despite the fact that the applicant's advocate prepared for the hearing of the appeal, he did not actually argue the appeal. The amount of instruction fees will be slightly below comparable cases which proceeded to full hearing.

In **Kitinda Kimaro v. Anthony Ngoo and Another**, Civil Reference No. 6 of 2016 (supra) a single Justice of the Court awarded Tshs. 150,000,000/= as instructions for two advocates. On reference in **Kitinda Kimaro v. Anthony Ngoo and Another**, Civil Application No. 576/02 of 2018 (supra), the full Court reduced it to Tshs. 80,000,000/= for two advocates. The full Court relied on **Mutamwega Bhatt Mugaywa** (supra) and **Cashewnut Board of Tanzania** (supra) which awarded Tshs. 40,000,000/= as instruction fees. I find guidance in the above three

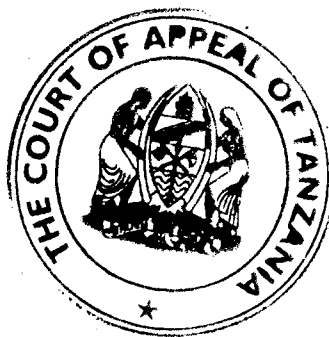
cases. In the case at hand, as the applicant prepared for the hearing of the appeal in all respects but did not actually argue it, I think Tshs. 25,000,000/= as instruction fees would have met the justice of the case. I thus substitute the Tshs. 10,000,000/= awarded by the Taxing Officer with Tshs. 25,000,000/= as instruction fees.

This reference is allowed to the extent stated with costs.

DATED at DAR ES SALAAM this 12th day of April, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The ruling delivered this 14th day of April, 2021 in the presence of Mr. Michael Ngalo, learned counsel for the Applicant and Mr. Michael Ngalo holding brief for Dilip Kesaria, learned counsel for the Respondent is hereby certified as a true copy of the original.



F. A. Mtarania
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DEPUTY REGISTRAR
COURT OF APPEAL