

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

**(CORAM: LILA, J.A., NDIKA, J.A. and MWAMBEGELE, J.A.)**

**CIVIL APPLICATION NO. 576/02 OF 2018**

**KITINDA KIMARO ..... APPLICANT**

**VERSUS**

**ANTHONY NGOO ..... 1<sup>ST</sup> RESPONDENT**

**DAVIS ANTHONY NGOO ..... 2<sup>ND</sup> RESPONDENT**

**(Application for Reference from the Ruling and Order of the Single Justice of  
the Court, at Arusha)**

**(Mbarouk, J.A)**

**dated the 12<sup>th</sup> day of July, 2018**

**in**

**Civil Reference No. 6 of 2016**

**.....**

**RULING OF THE COURT**

16<sup>th</sup> December, 2020 & 11<sup>th</sup> February, 2021

**MWAMBEGELE, J.A.:**

At the centre of controversy between the parties to the present reference is the quantum of an instruction fee awarded to the respondents by a single Justice of the Court in Civil Reference No. 6 of 2016, a reference from a taxing officer. The application is by a notice of motion taken under rule 125 (5) of the Tanzania Court of Appeal Rules (the Rules). It is supported by an affidavit deposed by Kitinda Kimaro; the applicant.

The ground upon which the notice of motion is anchored is that the sum of Tshs. 150,000,000/= awarded by the single Justice of the Court as instruction fee is on the high side; it should be reduced to Tshs. 20,000,000/=.

The material background facts to the present reference are very short and not difficult to comprehend. They go thus: the respondents successfully appealed to the Court in Civil Appeal No. 25 of 2014 for which they filed a bill of costs before the Taxing Officer of the Court (Bampikya, SDR). One of the items in the bill of costs was an instruction fee which was taxed at Tshs. 250,000,000/=. Dissatisfied, the applicant filed a reference to the Court where the single Justice (Mbarouk, J.A) reduced it to Tshs. 150,000,000/=. Undeterred, the applicant has come to this Court on a reference "so as to reduce the awarded instruction fee amount of Tshs. 150,000,000/= to Tshs. 20,000,000/= on the grounds of errors comprised in inconsistency, unreasonableness and excessiveness of the amount awarded."

When the application was placed before us for hearing on 16.12.2020, both parties were represented; while Mr. Mpaya Kamara and

Ms. Neema Mutayangulwa, learned advocates, joined forces to represent the applicant, the respondents had the services of Mr. Michael Ngalo, also learned advocate. Messrs. Kamara and Ngalo, learned advocates, also represented their respective clients in the taxation proceedings before the Taxing Officer as well as in the reference before the single Justice.

The learned advocates for both parties are at one on the relevant principles underpinning applications of this nature. These principles have been articulated in several decisions of the Court; in **Attorney General v. Amos Shavu**, Taxation Reference No. 2 of 2000, **Hotel Travertine Ltd v. National Bank of Commerce**, Taxation Civil Reference No. 9 of 2006, **the East African Development Bank v. Blue Line Enterprises**, Civil Reference No. 12 of 2006, **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 (all unreported). These cases followed the settled law in **Rahim Hasham v. Alibhai Kaderbhai** (1938) 1 T.L.R. (R) 676 and **Premchand Raichand Ltd and Another v. Quarry Services of East Africa Ltd and others (No. 3)**



[1972] 1 E.A. 162 by the erstwhile Court of Appeal for Eastern Africa and Court of Appeal for East Africa, respectively.

The general rule articulated by the above authorities is that the award of instruction fee is peculiarly within the discretion of a taxing officer and the court will always be reluctant to meddle with it unless the discretion has been exercised unjudicially. In **Amos Shavu** (supra) the Court reiterated the position taken in **Rahim Hasham** (supra) that while the Court has power in appropriate 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. The Court also reiterated the stance taken in **Premchand Raichand** (supra) to the effect that the Court will only meddle with the decision of the taxing officer if the award is so high or so low as to amount to injustice to one party.

In **Premchand Raichand** (supra) the erstwhile Court of Appeal for East Africa laid down four guiding principles which have to be considered when determining the quantum of an instruction fee. These are; **first**, that costs shall not be not allowed to rise to such a level as to confine

access to the courts to only the wealthy; **secondly**, that the successful litigant ought to be fairly reimbursed for the costs he reasonably incurred; **thirdly**, the general level of the remuneration of advocates must be such as to attract worthy recruits to an honourable profession; and, **fourthly**, 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 were restated by the Court in **Amos Shavu** (supra) and **Cashewnut Board of Tanzania** (supra).

As already stated, the learned advocates for the parties are not in disagreement on the foregoing principles. The issue on which these trained minds have locked jaws before us and indeed before the single Justice, is whether the amount of Tshs. 150,000,000/= awarded by the single Justice is still on the high side as to go against the principles laid down in **Premchand Raichand** (supra). Mr. Kamara for the applicant told the Court that at p. 18 of the decision, the single Justice of the Court observed that Tshs. 150,000,000/= as instruction fee would be in accord with the principle of consistency and would meet the justice of the case but

yet, he contended, the same was still on the high side and was not consistent with cases of that nature. Mr. Kamara particularly referred us to a decision of a single Justice of the Court in **Hotel Travertine** (supra) in which the amount awarded as instruction fee was Tshs. 22,000,000/= and that case, like the present, was involving and the amount claimed and the value of the subject matter were in the same region. Mr. Kamara told the Court that the case at hand had striking similarities with the **Hotel Travertine** case. The learned advocate submitted further that costs are not meant to be a penalty but meant to indemnify a successful litigant for expenses reasonably incurred. He thus urged us to take the **Hotel Travertine** case as a guide and reduce the amount awarded by the single Justice of the Court as instruction fee and substitute therefor with Tshs. 20,000,000/= or with Tshs. 22,000,000/= as it was in that case.

On the other hand, Mr. Ngalo submitted that the single Justice of the Court, at p. 11 of the decision, stated the principle that would guide him in the determination of the matter. That principle is that a decision of a taxing officer would only be interfered when the Court is satisfied that the decision was arrived at upon a wrong principle or a wrong consideration. He went on to submit that the single Justice considered the complexity of



the case and time taken to finalize it and finally came to a conclusion that Tshs. 150,000,000/= as instruction fee would be appropriate for two advocates. In the circumstances, Mr. Ngalo urged us not to meddle with the said quantum. To buttress the argument that the discretion of a taxing officer judicially exercised should not be meddled with, the learned counsel referred us to **Mutamwega Bhatt Mugaywa** (supra) and para 9 (2) of the Taxation of Costs Rules – Third Schedule to the Tanzania Court of Appeal Rules. In that case, he submitted, instruction fee was taxed at Tshs. 40,000,000/= as instruction fee for one advocate and was not interfered by the Court on a reference.

In a short rejoinder, Mr. Kamara submitted that no reason was given by the single Justice why he departed from the amount awarded as instruction fee in the **Hotel Travertine** case. He thus reiterated his prayer to have the fee reduced to the Tshs. 20,000,000/= or Tshs. 22,000,000/=; the one awarded in the **Hotel Travertine** case or thereabouts.

Before us as well as before the single Justice, the learned counsel for the parties brought to the fore cases for comparison to guide us in our

determination. While Mr. Kamara for the appellant compared the matter before us with the **Hotel Travertine** case, Mr. Ngalo thought the figure of Tshs. 150,000,000/= awarded by the Single Justice of the Court as instruction fee was quite apposite for two advocates and, what we understood as coming to a worst situation, the case of **Mutamwega Bhatt Mugaywa** (supra), would act as a guide.

The arguments fronted by the learned advocates for the parties before us are essentially the very ones they fronted before the single Justice. Having considered these rival arguments of the advocates for the parties to this reference, we agree that in the light of the principles laid down in **Premchand Raichand** (supra), the learned counsel were quite in the right track to peg cases on which to compare with the present. In the **Hotel Travertine** case (supra) which Mr. Kamara applies it as a guide, the instruction fee granted by the Taxing Officer was Tshs. 22,221,187/40 and on reference the single Justice of the Court (Ramadhani, J.A – as he then was) did not disturb it on account that; **one**, the judgment appealed against was for Tshs. 592,250,163/=; **two**, the Hotel itself was estimated to be Tshs. 2.2 billion and; **three**, the litigation was quite involving.



In **Mutamwega Bhatt Mugaywa** (supra), the case referred to us by Mr. Ngalo and which he seemingly implores us to take as a guide when things come to worse, emanated from an election petition. The Taxing Officer awarded Tshs. 40,000,000/= as instruction fee for one advocate. On reference to a single Justice, the same was maintained. The single Justice declined to interfere with it for the reason that there was no error of law or principle by the taxing officer in awarding the amount.

On the materials before us, we have considered all the cases which have been referred to us by the learned advocates for the parties. Indeed, we are guided by the principles enunciated in **Premchand Raichand** (supra) and recited in **Amos Shavu** (supra) and **Cashewnut Board of Tanzania** (supra). Much as we agree that, in terms of para 9 (2) of the Taxation of Costs Rules set out in the Third Schedule to the Rules and case law referred to above, the discretion of the Taxing Officer in matters of this nature is very wide. We also accede to the principle that once those powers are judicially exercised, they should not be meddled with. However, we are certain that once the costs awarded are on the high side, the same abrogate the principle of not limiting access to courts of law to the wealthy. In the matter under consideration, the single Justice

was of the view that the taxing officer abrogated the principle of consistency and reduced the amount by Tshs. 100,000,000/=. However, we respectfully think, like the taxing officer, the single Justice fell into the same error as he did not state on which case he was guided by that conclusion. That is to say, we think the single Justice, like the taxing officer, did not observe the consistency principle.

We have keenly considered the guiding principles and the cases referred to us by the learned advocates. Fortunately, we could also lay our hands on other taxed bills of costs in several recent cases. One such case is **Cashewnut Board of Tanzania** (supra). In **Cashewnut Board of Tanzania** (supra), the amount awarded as instruction fee by a taxing officer was Tshs. 67,632,990/= and, on a reference, a single Justice of the Court (Kalegeya, J.A) awarded Tshs 40,000,000/=.

Be that as it may, we think, in the circumstances of this case, in observance of the principle of consistency, we should be guided by the **Mutamwega Bhatt Mugaywa** and **Cashewnut Board of Tanzania** cases (supra). We say so because, the amount suggested by Mr. Kamara in the light of the **Hotel Travertine** case is also far too low as to abrogate

the principle of a successful litigant being reimbursed fairly and to dissuade worthy persons from joining the legal profession. We have also read the record of appeal from which the reference stems. It is no doubt that the matter was not only involving but also complex and took considerable time to finish. We glean this from the Judgment of the Court when justifying a certificate for two advocates at p. 30 of the judgment. We will let the Judgment of the Court speak for itself:

*"Taking into account the complexity of the issues involved and the multiplicity of proceedings (preliminary point of law prior to the hearing of the appeal, the cross appeal, revision proceedings) and the numerous authorities filed. We exceptionally allow costs for two advocates. We think it is reasonable and proper under the circumstances."*

After taking into consideration all the above factors, we have reached the conclusion that this is a case where the amount awarded on reference from the taxing officer by the single Justice as instruction fee, was on the high side and, with respect to the single Justice, it should be reduced. We think Tshs. 40,000,000/= per advocate, as was the case in **Mutamwega Bhatt Mugaywa** (supra) and **Cashewnut Board of Tanzania** (supra),



would meet the justice of the case. We thus substitute the Tshs. 150,000,000/= awarded by the single Justice of the Court with Tshs. 80,000,000/= as instruction fee for two advocates.

In the upshot, this reference is allowed to the extent stated. In the peculiar circumstances of the reference and bearing in mind the verdict we have arrived at, we refrain from making any order as to costs.

**DATED at DAR ES SALAAM** this 4<sup>th</sup> day of February, 2021.

S. A. LILA  
**JUSTICE OF APPEAL**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

The ruling delivered this 11<sup>th</sup> day of February, 2021 in the presence of Mr. Mpaya Kamara, learned counsel for the Applicant and Mr. Michael Ngalo, learned counsel for the Respondents is hereby certified as a true copy of the original.



  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**