

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL REFERENCE NO. 10 OF 2021

LEOPOLD BULONDO APPLICANT

VERSUS

AGATHA SAMBALI RESPONDENT

**(Application for reference from the decision of the Taxing officer of the
Court of Appeal of Tanzania at Dar es Salaam)**

(Msumi, DR- CA)

dated the 11th day of May, 2021

in

Civil Application No. 143 of 2014

.....

RULING

18th July & 7th August, 2023

MWANDAMBO, J.A.:

The applicant Leopold Bulondo, was aggrieved by the decision of the Taxing officer in a bill of costs. The taxing officer taxed the respondent's bill of costs at TZS. 5,050,000.00 which aggrieved the applicant who has preferred a reference against that decision in pursuance of rule 125(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The bill of costs resulting into the impugned decision had stemmed from an application for leave to appeal from a decision of the High Court

at the instance of the applicant. However, the applicant withdrew that application with costs. Subsequently, the applicant lodged a bill of costs containing 13 items asking for a sum of TZS. 37,121,500.00 from which, TZS. 30,000,000.00 was for instruction fees. Needless to say, in the course of hearing, the respondent's counsel abandoned eight items reducing the taxable bill to TZS. 30,400,000.00 out of which, the Taxing Officer taxed the instruction fees at TZS. 5,000,000.00. The Taxing officer taxed other items at TZS. 50,000.00 and hence the total bill to TZS. 5,050,000.00. The applicant's contest in this reference is against the amount taxed for instruction fees.

Mr. Theodore Primus and Evance Ignace John both learned advocates, appeared before me for the hearing of the application representing the applicant and respondent respectively. Each had lodged written submissions and stood by them with nothing to add in elaboration by way of oral arguments. It is contended in the submissions of the applicant's learned advocate that the Taxing officer wrongly exercised his discretion resulting in an excessive award in violation of paragraph 9 (1) of the Third Schedule to the Rules. The learned advocate criticizes the Taxing officer for his over reliance on

Premchand Rainchand & Another v. Quarry Services of East Africa Ltd. & Others [1972] EA 162 on the award of the bill of costs, in particular, instruction fees in disregard of the dictates of criteria under the Third Schedule to the Rules. He argues that, the application was not complex neither did it proceed to hearing having been withdrawn on the date it was called on for hearing. It is the learned advocate's contention that, had the Taxing Officer have regard to the Court's decision in **Attorney General v. Amos Shavu**, Taxation Reference No. 2 of 2000 (unreported), he could not have awarded such a staggering amount thereby violating the principle of consistency. From such argument, the applicant implored the Court to set aside the award and substitute it with an amount it considers reasonable.

For his part, Mr. John argued that the Taxing Officer exercised his discretion properly and hence the award of the instruction fees he considered reasonable within the confines of para 9 (1) of the Third schedule to the Rules which is by no means in disharmony with the guiding considerations set out in **Premchand's** case (supra). He also relies on the warning made by Hamlyn, J. in **Pardhan v. Osman** [1969] 1 EA 528 against interference with quantum allowed by Taxing Officers

on instruction fees unless the same is manifestly so high or low as a result of misdirection or adoption of wrong principle. Further reference was made to a decision of the High Court in **Haj Athumani Issa v. Rweitama Mutatu** [1992] T.L.R. 372 for the same proposition.

Discounting the argument on complexity of the case and the time spent in court as irrelevant, Mr. John referred me to several decisions from within and outside Tanzania; **First American Bank of Kenya v Shah and others** [2002] 1 EA 64 (CCK), **Joreth Ltd v Kigano and Associates** [2002] 1 EA 92 (CAK) **Ujagar Singh v. The Mbeya Co-operative Union** [1968] H.C.D. n. 173 stressing the proposition that instruction fees are for work done in preparation for the work done regardless of the stage at which the matter has reached. Counsel urged me to sustain the award made by the Taxing Officer as reasonable and dismiss the reference.

I have given due consideration to the arguments for and against the reference and taken into account the authorities placed before me by both learned advocates. Apparently, there is hardly any divergence of opinion between counsel on the principles expressed in the cases placed before me except their application to the facts in this application. The

issue that arises for consideration is whether there is cause for interference with the Taxing Officers' discretion under paragraph 9 (1) of the Third Schedule to the Rules. The advocate for the applicant contends that the Taxing Officer did not exercise his discretion judiciously hence, according to him, an excessive award for instruction fees. It is significant that the Taxing Officer's discretion under para 9 (1) is not pegged on any parameters but as he considers necessary. However, it is trite law that such discretion should not be exercised capriciously, arbitrarily, or on personal whims. There is unanimity on authorities on circumstances under which the Taxing Office's overriding discretion can be interfered with. I need not belabour on it more than necessary. I would only add that it is also trite law that, discretion is said to be improperly exercised where the person making a decision takes into account irrelevant or extraneous matters in his decision or fails to consider relevant matters or where the decision is so perverse that no reasonable tribunal could have made it. See- **Mbogo & Another v. Shah [1968]** E.A. 93.

The applicant's advocate would have the Taxing Officer's decision interfered with allegedly because he did not take into account the fact

that the application was not complex and that in any case, it did not go to a hearing. Besides, relying on the Court's decision in **Amos Shavu** (supra), the learned advocate argues that the award of TZS 5,000,000.00 for instruction fees violated the principle of consistency. Although Mr. John was adamant impressing me to sustain the Taxing Officer's decision, it is common cause that the application, subject of the bill of costs was neither complex nor did it go to a hearing. I appreciate that involvement in the matter did not await a hearing as argued by Mr. John, I am far from being persuaded that an application for leave to appeal by itself would have been so involving to warrant instruction fees as high as TZS. 30,000,000.00 claimed in the respondent's bill of costs which the Taxing Office reduced to TZS. 5,000,000.00.

An examination of the Taxing Officer's ruling reveals that he was alive to the guiding principles in determining an amount payable towards instruction fees discussed in **Premchand's** case and **The Registered Trustees of the Cashewnut Industry Development Fund v. Cashewnut Board of Tanzania** [2011] EA 407. It is for that reason he rejected the respondent's argument inviting him to take into account other applications between the parties. Having so reasoned, the Taxing

Officer taxed instruction at TZS. 5,000,000.00 from TZS. 30,000,000.00. Earlier on, the Taxing Officer narrated factors to be considered in assessing instruction fees deduced from **Premchand and Cashewnut Board of Tanzania** (supra) to be:

"...bulkiness of the appeal, the difficulty and importance of the case, amount involved in the suit and whether there was any extensive research needed... which might have necessitated any additional energy expended" (at page 3 of the ruling).

The above notwithstanding, the Taxing Officer does not appear to have had regard to any of the factors in assessing the instruction fees at TZS. 5,000,000.00 in a simple application for leave to appeal which was nonetheless withdrawn. He simply said: *"Therefore, the charged Tshs. 30,000,000.00 is hereby taxed down to Tshs. 5,000,000.00"* (at page 4). There is nothing in the ruling justifying the conclusion that the Taxing Officer considered that amount to be reasonable in the circumstances. He just reduced the amount claimed to TZS. 5,000,000.00 without more. The above begs an answer to the nagging question whether the Taxing Officer exercised his discretion properly to which the respondent's counsel would have me answer affirmatively. The search for an answer

to this question takes me to **Amos Shavu** in which, Lugakingira, JA. observed:

*"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. As stated in **Rahim Hasham v. Alibhai Kaderbhai** [1938] 1 T.L.R. (R) 676, while the court has power in proper cases to reduce the instruction fees 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..." [at page 3].*

It is plain in the impugned decision that the taxing officer does not appear to have acted on any principles or applied any considerations in his decision because the ruling is conspicuously silent in that regard. As observed earlier, whilst he was alive to the factors to be considered in assessing instruction fees, he had no regard to any of them. In the absence of any indication that he applied any principles in arriving at his decision, the award remains an arbitrary one warranting interference. Despite the submissions by the respondent's counsel to the contrary, the award of TZS. 5,000,000.00 as instruction fees in an application for

leave to appeal which was nonetheless not pursued is so inordinately high amounting to injustice to the applicant as stated in **Premchand's** case. That amount must be and is hereby set aside.

There is a common denominator between this application and **Amos Shavu** (supra). In both applications giving rise to the bill of costs there was no hearing. Lugakingira, JA. dealt with a reference from an award of the Taxing Officer in the sum of TZS. 26,526,226.00 towards instruction fees in an application for stay of execution which had been struck out. The learned single justice took into account the fact that the application was not an involving one which collapsed on a preliminary objection readily conceded by the respondent. He observed:

"In all considerations there was nothing to justify the award of a million, leave alone millions of shillings" [at page 6) see also at page 7].

In the end, he reduced the award to TZS. 30,000.00 towards instruction fees. That was in the year 2002; twenty-one years ago. Everything considered particularly, inflation and devaluation of the shilling, a sum of TZS. 30,000.00 will be inordinately too low and unjust. Mindful of the above, I would substitute the sum of TZS. 1,500,000.00

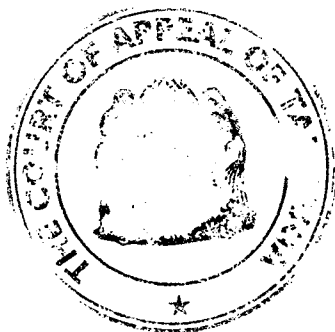
which I think will meet the justice of the case. The total amount will accordingly be TZS 1,550,000.00. Since the applicant did not press for costs, I decline ordering any.

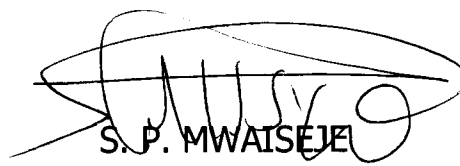
It is so ordered.

DATED at **DAR ES SALAAM** this 7th day of August, 2023.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 9th day of August, 2023 in the presence of Mr. Dickson Mbonde, learned counsel for the applicant and Mr. Evance Ignas John, learned counsel for the respondent, is hereby certified as a true copy of the original.




S. P. MWAIZEJE
DEPUTY REGISTRAR
COURT OF APPEAL