

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

(CORAM: NDIKA, J.A., GALEBA, J.A., And MGONYA, J.A.)

CIVIL APPEAL NO. 76 OF 2021

**MARY SIRIL CHUWA (As Administratrix of
the estate of the late Siril Tilito Chuwa)1ST APPELLANT**
BAZILI RAUYA..... 2ND APPELLANT
PANTALEO WAWAYA..... 3RD APPELLANT
PATRISI PANTALEO..... 4TH APPELLANT
HIPOLOTI P. MUSHI.....5TH APPELLANT
EVARIST T. MUSHI..... 6TH APPELLANT
VICENT S. CHUWA.....7TH APPELLANT
RONARD RAUYA..... 8TH APPELLANT

VERSUS

**URU SHIMBWE RURAL PRIMARY
COOPERATIVE SOCIETY RESPONDENT**

**(Appeal from the Ruling and Order of the High Court of Tanzania,
at Moshi)**

(Twaib, J.)

dated the 10th day of December, 2019

in

Consolidated Civil Reference No. 01 & 03 of 2019

JUDGMENT OF THE COURT

29th May & 11th June, 2024

MGONYA, J.A.:

This appeal arises from the decision of the High Court of Tanzania at Moshi in Consolidated Civil Reference No. 1 and 3 of 2019, where the High Court Judge (Twaib J.) varied the instruction fee awarded by the Taxing Officer in a bill of costs No. 6 of 2019.

The factual matter of this case, albeit briefly is thus; the appellants herein who are represented by Mr. Edward Peter Chuwa learned advocate, were the defendants in Land Case No. 33 of 2016 filed by the respondent herein. Among other things, the respondent claimed for a declaratory order that she is the lawful owner of the land commonly known as Gomberi Estate and payment of special damages to a tune of Tshs. 6,120,000,000/=. However, the suit was struck out with costs on a successful preliminary objection raised by the appellants' counsel. Following that order, the appellants' counsel filed a bill of costs claiming a total charge of Tshs. 1,298,890,000/=. Out of this amount Tshs. 1,294,650,000/= as portrayed in items 1, 2, 3, 4, 5, 6 and 7 was in respect of instruction fees for 7 appellants on the basis of 3% of the liquidated sum claimed by the respondent in paragraph 24 of the plaint. Tshs. 4,200,000/= as costs for attending court for mention and Tshs. 20,000/= being disbursements which amounted to a total of Tshs. 1,298,850,000/=.

Having heard the rival submissions made by the parties in support and against the bill of costs, the Taxing Officer (Hon. Mahimbali) taxed the instruction fee at 5,000,000/= in respect of each appellant while other costs were granted as prayed. More to that, he taxed Tshs. 1,000,000/= as the costs for attending taxation proceedings. Therefore, out of Tshs.

1,298,850,000/= in exercising his discretion as the Taxing Officer, taxed off Tshs. 1,258,690,000/=.

Both parties were dissatisfied with the ruling of the Taxing Officer, hence the appellant filed Taxation Reference No. 1 of 2019 while the respondent filed Taxation Reference No. 3 of 2019, which were later consolidated by the court.

Upon hearing of the consolidated matter, the High Court Judge (Twaib J.) varied instruction fees where he awarded only Tshs. 5,000,000/= as instruction fees in respect of all seven appellants, while other costs were not disturbed. The stated reasons for the decision were; **one**, all the appellants were represented by one counsel; **two**, nothing shows that there was complexity involved in the case; and **three**, the proceedings leading to the bill of costs were terminated before the actual trial.

Dissatisfied, the appellants filed this appeal against the whole decision of the High Court on the following grounds: -

- i) *That the decision of the High Court is problematic as the honourable Judge made a decision to reduce the taxed amount without addressing the grounds and reasons in support of the appellants' reference on the issue as to whether the Taxing Master was right to hold that the appellants were duty bound to*

produce receipts to prove that they had engaged an advocate to represent them;

- ii) That honourable Judge erred in law and facts in affirming the decision of the Taxing Master to tax the Bill of Costs for TZS 5,000,000/= below the scale provided by the law without any legal justification; and*
- iii) That honourable Judge erred in law in affirming the decision of the Taxing Master which held that the appellants had failed to prove whether their counsel was acting on contract of service or on a pro bono basis and that they were duty bound to produce a written contract for service.*

At the hearing of the appeal, Mr. Edward Peter Chuwa assisted by Ms. Anna Lugendo both learned counsel appeared for the appellants whereas, Mr. Alfred Sindato learned counsel represented the respondent.

When invited to submit in support of the grounds of appeal, Mr. Chuwa commenced by informing the Court that the 2nd and 3rd appellants are now dead, and prayed to mark their respective appeals abated. Consequently, under rule 105 (2) of the Rules, the Court granted the prayer. Equally, in terms of rule 102 (1) of the Rules, Mr. Chuwa prayed to withdraw the 5th appellant's appeal, the prayer which was not objected by Mr. Sindato, hence granted.

After all that, the learned counsel for the appellant adopted the written submissions and list of authorities lodged earlier. Mr. Chuwa relied on the case of **VIP Engineering and Marketing Ltd v. Citibank Tanzania Limited**, Civil Application No. 24 of 2019, Page 7 (unreported) in his arguments. He faulted the High Court Judge's reasoning that the matter was not heard to finality hence the appellants were not entitled to costs. The learned counsel went on to submit that the taxing officer and the High Court Judge reduced costs without abiding by the rules under Schedule 9 of The Advocates Remuneration Order, GN. 263 of 2015 (GN. 263). To bolster his argument, the case of **Tanzania Rent a Car Limited v. Peter Kimuhu**, Civil Reference No. 9 of 2020 (unreported) was referred to. It was the learned counsel's argument that, once a bill on instruction fee is submitted according to scale, a taxing officer, cannot, under the law reduce the fee. On this, he referred us to the case of **Hotel Travertine Ltd v. National Bank of Commerce**, Taxation Civil Reference No. 9 of 2006 (unreported). In his further submission, the learned counsel added that, they were not availed a chance to bring evidence before the taxing officer. Hence, the cost was supposed to be granted in accordance with the scale which is 3% of the liquidated claim. Consequently, he urged the Court to grant the costs on the prescribed scale.

In reply, having adopted the written submission, Mr. Sindato went on to submit on the 1st and 3rd grounds of complaint conjointly that, the appellants unfairly faulted the taxing master as they had a duty to produce receipts and the contract of service. By referring to section 110 of the Evidence Act and the decision made in **Anthony M. Masanga v. Penina (Mama Mgesi) and Another**, Civil Appeal No. 118 of 2014 (unreported), the learned Counsel contended that the appellants did not fulfil such legal duty of proving the claim hence the taxing master invoked the discretionary powers bestowed upon him under Order 12 (1) of GN. 263 when he taxed off items 1-7.

On the second ground, Mr. Sindato submitted that, the circumstance of the case and powers vested in him under Order 46 of GN. 263, the High Court Judge was correct and reasonable to reduce items 1-7 to Tshs. 5,000,000/= which is lower than that provided by the scale. He added that, on the listed reasons for the High Court's decision to reduce the instruction fee and on the same principle of proof, the Judge could not have enhanced the amount awarded by the taxing master as such decision could be unlawful.

In rejoinder submission, Mr. Chuwa submitted that the issues of additional advocate and complexity of the matter were stated by the High Court Judge and were not relevant.

Having carefully considered the submissions of both counsel and going through the authorities provided, we find the pertinent issues for determination to be; **one**, whether the appellants were duty bound to prove the instruction fees by production of receipts and a remuneration agreement; and **two**, whether the High Court Judge's decision to vary the quantum of instruction fees was justifiable.

In determining the first issue on the appellants' duty to tender receipts and remuneration agreement to justify the award of instruction fee; basically, instruction fees are meant to compensate the successful party for expenses paid to his advocate. In our jurisdiction payment of instruction fees to the lawyers is regulated by GN. 263. GN. 263 provides for remuneration of advocates in both contentious and non-contentious matters. More to that, the GN. 263 provides for the scale of fees in taxation of the costs and the power of the taxing masters in taxation of the bill of the costs. Unlike for receipts and vouchers, Mr. Sindato was unable to show us any Order in GN. 263 which compels an advocate to produce an agreement when present a bill of costs.

On the issue of production of receipts to prove the expenses and costs, Order 58 (1) of GN. 263 provides:

"Receipts or vouchers for all disbursements

charged in a bill of costs (other than witness allowances and expenses supported by a statement signed by an advocate) shall be produced at taxation if required by the taxing officer."

From the wording of the provision quoted above, receipts are required only for disbursements a Bill of Costs and tendering of the same is not mandatory unless they are required by the Taxing Officer to be presented in court. Although that is the law, the practice is for a decree holder to attach such receipts and vouchers with the bill of costs at its presentation. In fine, the first issue is answered in the negative that the appellants were not duty bound to produce any agreements in order to justify the instruction fee, they presented.

Moving to the second issue on whether the High Court decision was justifiable; it is a well settled principle that the award of instruction fees is peculiarly within the discretion of a taxing officer and the court should warn itself to interfere with the taxing officer's decision unless it is proved that the taxing officer acted injudiciously and upon wrong consideration. See -**Tanzania Rent a Car Limited v. Peter Kimuhu**, Civil Reference No. 9 of 2020 (unreported). The discretion is exercisable under Order 12 (1) of GN. 263, where a Taxing Officer has discretion to follow the Order or as it appears to him to be necessary or proper for attainment of justice.

The exceptional cases which invite the interference by a Judge was well stated by the Supreme Court of Uganda in **Bank of Uganda v. Banco Arabe Espanol SC**, Civil Application No. 23 of 1999 that;

"... an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, applied a wrong principle. That even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties. "

See also **Pardhan v. Osman** [1969] 1 EA 528.

Again, the principles governing the quantification of taxation have been stated in **Premchard Raichard Ltd and Another v. Quarry Services of East African and Others (No. 3)** [1972] 1 E.A 162 followed by a series of other decisions including in **The Attorney General v. Amos Shavu**, Taxation Reference No. 2 of 2000 and **The East African Development Bank v. Blue Line Enterprises**, Civil Reference No. 12 of 2006 (both unreported). In the latter case, it was held that:

- " i) Costs shall not be allowed to rise to such a level as to confine access to the courts to only the wealthy;*
- ii) A successful litigant ought to be fairly reimbursed for the costs he reasonably incurred;*
- iii) The general level of the remuneration of advocates must be such as to attract worthy recruits to the profession; and*
- iv) That, so far as practicable, there should be consistency in the awards made."*

As alluded to above, what triggered this appeal is the decision of the High Court Judge which varied the award from Tshs. 35,000,000/= to Tshs. 5,000,000/=. The learned counsel contended that the High Court Judge reduced costs without abiding by the Order as provided for under Schedule 9. Essentially that Schedule provides for the scale of fees for contentious proceedings for liquidated sums in original and appellate proceedings. As per item (f) of the plaint, the respondent herein claimed for specific damages to a tune of Tshs. 6,120,000,000/=: which falls under item 8 of the 9th Schedule which provides that, the instruction fees is 3% of the liquidated sum. While Mr. Chuwa faults the High Court Judge's

decision that reducing the fees was contrary to the scale set out in 9th Schedule, Mr. Sindato finds the decision proper.

On our part, being guided by the authorities above on the circumstances allowing interference with the discretionary powers of the taxing master in awarding costs, we find nothing to fault the High Court Judge in his decision. It is gathered from the record of this appeal that, having assessed the complexity of the matter; the Taxing Officer awarded Tshs. 5,000,000/= as instruction fee per appellant. However, since there were seven defendants, he ordered the awarded costs to be paid to each of them hence making a total cost of Tshs. 35,000,000/=.

Likewise, in reference, the High Court Judge did not disturb the award of Tshs. 5,000,000/= awarded by the Taxing Officer. It is evident from the content of the ruling that, he found it excessive and unreasonable that the said sum was allowed for each appellant while all of them were jointly sued and represented by the same advocate.

As it was established in **Premchard Raichard Ltd** (supra) that, in awarding legal fee, the successful litigant should be fairly reimbursed for the costs he reasonably incurred. Thus, awarding costs on the scale demanded by the appellants would be denying the court the discretion it has under order 12 (1) of GN. 263.

In the result and for the above reasons, we find the appellants' appeal unmerited. Consequently, we dismiss it. Considering the nature of this appeal, we make no order as to costs.

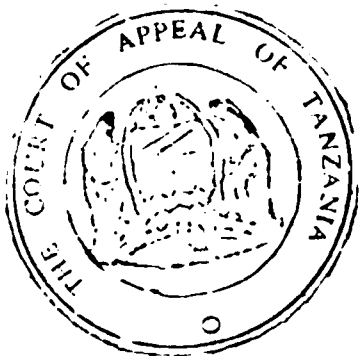
DATED at **MOSHI** this 10th day of June, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of June, 2024 in the presence of 1st, 4th, 7th Appellants in person, Mr. Alfred Sindato, learned counsel for the Respondent and Mr. Fred Kinyaiha, a member of board for Respondent and in the absence of 5th and 8th Appellant, is hereby certified as a true copy of the original.



A. S. Chugulu
A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL