

**IN THE HIGH COURT OF TANZANIA**  
**AT DAR ESS ALAAM**  
**CIVIL REFERENCE NO 4 OF 2004**  
**KALUNGA AND COMPANY ADVOCATE.....APPLICANT**  
**VERSUS**  
**NATIONAL BANK OF COMMERCE LTD.....RESPONDENT**

**RULING**

**MANDIA, J**

In Civil Case Number 275 of 2000 Tanganyika Cheap Stores Limited sued the National Bank of Commerce Limited for Shs. 200,000,000/= being general damages and compound interest thereon at the rate of 31% from June, 2000 until the date of Judgement and thereafter on the decretal amount at court rate until full satisfaction of the decretal amount. The National Bank of Commerce Limited instructed Kalunga & Company, Advocates, to defend their interests. On 3<sup>rd</sup> August, 2000, Kalunga & Company Advocates filed a written statement of defence and counter affidavit. It is not clear whether Civil Case Number 275 of 2000 proceeded to hearing or not. All in all, at one point in time Messrs Kalunga & Company, Advocates, sent their client the National Bank of Commerce a fee note based on Rule 40 and Schedule IX of the Advocates Remuneration and Taxation of costs Rules, 1991. The National Bank of Commerce refused to pay up. The Advocate then filed Miscellaneous Civil Application Number 279 of 2003. In this application Kalunga & Company, Advocates, presented a Bill of costs for taxation between a client and advocate. The High Court (Hon. Sheikh,

J) ordered that the Bill of costs be placed before the Taxing Master for taxation under Sections 61, 62 and 64 of the Advocates Ordinance Cap 341. On 9/5/2003 the District Registrar, Dar Es salaam put up the matter for taxation on 6/6/2003. On the appointed date, however, taxation was adjourned to 4/7/2003. On 4/7/2003 taxation was adjourned to 17/9/2003 and on 17/9/2003 taxation was adjourned to 3/12/2003. No reason was given for the adjournments. On 3/12/2003 the District Registrar ordered that the taxation proceedings be argued by way of written submissions. A time –frame was put up by which the parties would have presented their respective submissions by 31/12/2003 and ruling on the matter was to have been delivered on 16/1/2004. The ruling was however, not delivered until 24/3/2004, two months later. The court record shows that throughout the taxation proceedings the taxing master endorsed the record as the District Registrar, High Court and not as the Taxing Master. It is only in the typed copy of the ruling that the proper title Taxing Master is used.

The Bill of Costs filed by Kalunga & Company Advocates, had thirteen (13) items. The Taxing Master taxed as presented items number 3,5,6,7,8,9,10,11,12,13. The Taxing Master taxed off item 1 which is fee for perusing instructions to defend. The reason given by the Taxing Master for disallowing this item is that fees for perusal are part of fees for instructions to defend. Item 2 is the fees for instructions to defend. The amount charged is 3% of Shs. 200,000,000/= under Schedule IX of the Advocates remuneration and Taxation of Costs Rules, GN 515 of 1991. The Taxing Master taxed the item at Shs. 1,000,000/= on the ground that Civil Case

Number 275 of 2000 was an action for damages subject to the discretion of the trial court in awarding. In the reasoning of the Taxing Master such kind of claims are claims for an unliquidated sum so they are not covered by Schedule IX of GN 515 of 1991. The Taxing Master ruled that the applicable schedule is Schedule XI Paragraph 1(h) whose fee he noted is Shs. 3,100/=. However, the Taxing Master taxed the instruction fee at Shs. 1,000,000/=. The exact words he used to arrive at this figure of one Million Shillings are these:-

*"Bearing in mind the nature of the suit and exercising my discretion under Rule 11 to (sic) the Rules, I tax he item at Tshs. 1,000,000/= (one million)."*

In item 4 of the Bill of Costs, the amount charged is Shs. 100,000/= as costs for drawing an affidavit. The Taxing Master taxed this item at Shs. 30,000/= because "Sh. 100,000/= is on the high side." The Taxing Master also disallowed the claim for 20% of the Bill as VAT because the applicant has not produced an original or photocopy certificate as proof that he is a VAT number as 10-016422-R.

The subsequent Bill of Costs had 12 items. Items 6, 7, 8, 9, 10 and 11 were taxed as presented. Item 12 relating to transportation was taxed off for failure to produce receipts.

Item 1 of the subsequent Bill was Shs. 2,000/= being perusal fee. This was disallowed on the ground that perusal fee is part of the instruction fee. Item 2 was

instructions to file the annexed 2 was instructions to file the annexed Bill of Costs. This was charged at Shs. 274,356/= but was taxed at Shs. 100,000/=. Item number 3 was charged at Shs. 27,435/= but was taxed at Shs. 20,000/=. In items 2 and 3 the Taxing Master ruled that the appropriate Schedule is Schedule XI 1(h) which provided for Shs. 3,100/= only but using his discretion under Rule 11 of GN 515/1991, taxed the items at Shs. 100,000/= for item 2 and Shs. 20,000/= for item 3. Items number 4 and 5 were taxed off as being part of the instruction fees. These related to the drawing of the Bills.

The applicant Kalunga & Company Advocates was aggrieved by the taxation and he filed this reference. He was represented by Mr. Mhango, learned advocate, while the National Bank of Commerce Limited was represented by Mr. Kabakama, learned advocate. The reference was argued by way of written submissions. Generally, Mr. Mwezi Mhango, acting for the applicant, attacked the taxation exercise as whimsical, while Mr. Kabakama, acting for the respondent supported the taxation exercise.

The first thing we should do, as Socrates would put it, is to define our terms. In this regard I have to say that the Kingpin is GN 515 of 1991, the Advocates Remuneration and Taxation of Costs Rules, made under Section 69 of the Advocates Ordinance Cap 341 of the Laws of Tanzania. Rule 2 of GN 515 of 1991 states thus:-

"2. *These Rules shall apply for the purpose of the remuneration of an advocate of the High Court by his client as well as for the taxation of costs in contentious matters in the High Court and in courts subordinate to the High Court.*"

Rule 2 of GN 515/91 shows clearly that the Rules aim at achieving two objectives namely remuneration of advocates as a first objective, as well as taxation of costs in contentious matters as a second objective. This begs the question, how are advocates remunerated? As professionals, advocates are remunerated through the charging of fees. A second question crops up: What are fees? In this regard Black's Law Dictionary, Seventh Edition defines fees thus:-

*"Attorney's fees. The charge to a client for services performed for the client, such as an hourly fee, a flat fee, or contingent fee"*

The definition employs American nomenclature for a legal practitioner by calling him an attorney which is similar to our definition of a legal practitioner as an advocate. Fees are therefore, a charge for service performed. Fees are different from costs in that they are based on the Advocates Ordinance Cap 341 of the Laws, while costs are based on Section 30 of the Civil Procedure Code as well as Order XXV of the same Code. When one looks closely at the basic law providing for remuneration of advocates and taxation of costs, GN 515/91, it is observed that the Rules have twelve Schedules. Schedules I to X talk of scales of fees/charges in various types of proceedings while schedule XI talks about costs. Schedule XII caters for Bankruptcy Proceedings. By distinguishing between charges/fees in scheduled I to

X and costs in Schedules XI the Rules intended to that these subjects separately. They should therefore not be mixed.

Part III of the Rules caters for Taxation of costs in contentious proceedings. Rule 40 lays it down that the applicable Schedules are Schedule Ten, Eleven and Twelve. The rule omitted Schedule IX. It is Schedule IX which specifically caters for fees chargeable in contentious proceedings and this was omitted in Rule 40. If this omission is emphasized, the result will be that no advocate can charge fees in contentious proceedings, since all the other schedules relate either to non-contentious proceedings or to costs. The omission of the Ninth Schedule in Rule 40 must therefore have been due to "Lapsus Calami," and the Schedule has to be read into Rule 40 to remove the absurdity created by omission of the Schedule. Reading Schedule IX into Rule 40 will bring sense to the spirit and structure of the Advocates Ordinance and the Rules made there under to cater for remuneration of advocates.

Schedule IX, as said earlier prescribes various percentages of fees for claims from 20,000/= on the low side to over 3 million on the high side. The percentages of fees are for liquidated sums. Javitt's Dictionary of English Law defines "Liquidated" thus:-

*"Liquidated. A sum is said to be liquidated when it is fixed or ascertained. The term is usually employed with reference to damages".*

The heading of Schedule IX mentions "Liquidated sum" and the first line of the Schedule reads thus:-

**Amount**

**Fees**

For any claim not exceeding 20,000/=

25% - 30%

The percentages goes lower as the claims get higher. There is a Proviso to the Schedule which reads thus:-

*"Provided that where the defendant does not dispute the claim and does not file defence, the scale of fees should be two thirds of the fees above".*

A plain reading of the term "Liquidated" as used in Schedule IX therefore means an ascertained claim.

Having defined our terms, and having set out the position in law, let me go back to the reference. The Taxing Master disallowed the item on perusal on the ground that this is a part of instruction fee. It is not. There is a separate heading for Perusals in GN 515/1991 at page 1227 of the booklet holding the Government Notices for 1991. Perusals are shown as a separate item. Linking them with instruction fees is applying a wrong principle in law.

On instruction fees I have already showed that the applicable Schedule is Schedule IX on fees and not Schedule XI which relates to costs. Since it is agreed

that there was a claim of Shs. 200,000,000/= made by the National Bank of Commerce Limited, this ascertained sum should be taken as the claim which means the fee for such claim should be 3%. Disallowing the claim on the ground that it is an unliquidated amount is applying a wrong principle in law. Interestingly, the Taxing Master purportedly taxed the instruction fees under Schedule XI and himself acknowledged that under that Schedule XI he should allow only 3,100/= but he used his discretion to allow Shs. 1,000,000/=. He did not show the basis of jumping from the allowable Sh. 3,100/= to Shs. 1,000,000/=. It is trite law that where there is discretion, it should be exercised judiciously. On item 4 relating to drawing of a counter-affidavit I point out that there is no evidence that the Taxing Master acted on a wrong principle of law in awarding the amount he did.

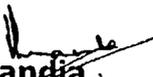
What is the net effect of all this? It is a settled principle of law that the High Court will not upset a taxation merely because the amount awarded is high. The High Court is not entitled to interfere with a Taxing Master's decision unless the decision is based on an error of principle. As such this court will only correct the errors of principle and remit the taxation to the Taxing Master with specific directions. I therefore order that the reference be remitted to the Taxing Master with the following directions:-

1. The Taxing Master should tax the items on perusals as a separate item and not as part of instructions to defend.
2. The instructions to defend should be taxed according to Schedule IX of GN 515 of 1991 and not Schedule XI of the same GN.

3. The item on VAT should be *faxed*.
4. Each party will bear their respective costs of this reference.

It is so ordered.

Dated this 10<sup>th</sup> day of September, 2004.

  
**Mandia**  
**JUDGE**  
**10/9/2004.**

**10.9.2004**

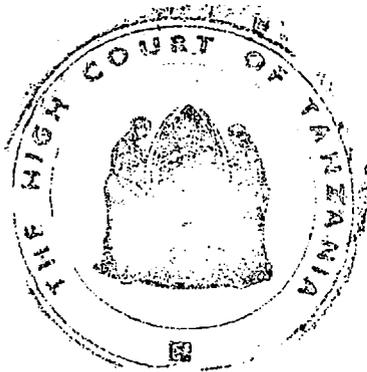
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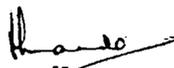
For the Applicant-absent

For the Respondent-Mr. Nyika

C.C-

Order: Ruling read this 10<sup>th</sup> September, 2004 in the presence of Mr. Nyika, advocate for the respondent.



  
**Mandia**  
**JUDGE.**  
**10/9/2004.**