

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

REFERENCE NO. 14 OF 2019

VIJAY SHANTILAL CHOHAN.....APPLICANT

VERSUS

ABDUL SHAKOOR HALDAY.....RESPONDENT

RULING

Date of last Order: 03/08/2020

Date of Ruling: 27/10/2020

MLYAMBINA, J.

This is an application for reference against the decision of the Taxing Master. The application is made under *Section 7 (1) and (2)* of the Advocate Remuneration Order and it supported by the affidavit of Mr. Richard Rweyongeza. The main complaint of this reference is the instruction fees taxed to the tune of Tshs. 4,500,000/= by the Taxing Master. The Applicant was of position that the amount is excessive and it was taxed contrary to the law.

It is not in dispute that the bill of cost arose from *Misc. Civil Application No. 474 of 2017* which was an application for extension of time to lodge the Notice of Appeal. The Applicant was of submission that the instruction fee to defend the applications is governed by *the Eleventh 11th Schedule, Item (i) and (ii) of the*

Advocate Remuneration Order. Due to the fact that the said application was opposed, the law is very clear the Taxing Master was supposed to tax the instruction fee at Tshs 1,00,000/= only.

According to the Applicant, *Order 46 of the Advocate Remuneration Order* insists the Taxing Master to tax as per scales provided under the law. Under *Order 46* the Taxing Master has to follow the prescribed scale save where the Judge provides otherwise. The Applicant cited the case of **First World Investment Court Brokers v. Buckreef Gold Co. Ltd** (unreported) at page 10 the High Court elaborated the purpose of Order 46.

The Applicant submitted that the Taxing Master taxed the bill at TZs. 1.000,000/= to each Advocate which brings the total instruction fee to the tune of TZs. 3,000,000. Thus, the instruction fee to the three Advocates was awarded without any proof for the attendance, for example in the ruling in *Misc. Civil Application No. 474 of 2017* at page 3 it is shown when the matter was called for hearing only one Advocate (Mr. Kinguji) for the Respondent entered appearance and the trial Judge Honourable Mlyambina did not certify that the Taxing Officer should go beyond the prescribed scale.

The Applicant's complaint was to the effect that the Advocate Remuneration Order under *Order 49* provides that costs for more than one Advocate have to be certified by the Honourable Judge but the Taxing Master has awarded without any certification.

Notwithstanding, the Taxing Master awarded TZs. 3,000,000/= as instruction fees for 3 Advocates but surprisingly at the conclusion it is shown the total instruction fees to be TZs. 4,500,000/= with an excess of TZs. 1,500,000/=.

It was the Applicant's submission that there was no receipt tendered to support and justify the fee. Such attention was put to the Taxing Master but was ignored. Further, the Applicant cited the case of **Professor Emmanuel A. Mjema v. Managing Editor Dira ya Mtanzania Newspaper** (unreported) but the Taxing Master disregarded the said decision without any reason.

The other complaint by the Applicant was about the attendance. The Taxing Master awarded TZs. 150,000/= for the three Advocates in each attendance. In view of the Applicant, this was taxed without any proof of the attendances and it was contrary to *Order 49*. The attendances was taxed in item 2, 3, 5, 6 and 7 and each item was taxed at 150,000/= for the three Advocates in each appearance.

Further, items 8,9, 12, 13, 16 17, and 18 each was taxed at 50,000/= but the total amount was 1,800,000/=. The Applicant wondered how the figure had been reached!! Mathematically, in view of the Applicant, the total amount at the rate of TZs. 50,000/= would have been Tshs, 350,000/= and for the 3 Advocates the total would have been Tshs. 1,050,000/= but contrary to the law because the attendances for more than one Advocate would have been taxed upon being certified by Honourable Judge as per *Order 49*.

The Applicant informed the Court that he referred the Taxing Master to the case of **Professor Emmanuel A. Mjema** (*supra*) at page 4 on the requirement of EFD receipt on attendance but it was not taken into consideration. It was the Applicant's submission that cost for attendances would have been TZs. 700.000/= only and subject to EFD receipt.

The last submission by the Applicant was on award of TZs 1,000,000/= being costs for the bill of costs. The Applicant was of view that this was done contrary to *Order 48*. The law is very clear that when more than one sixth of the total bill is disallowed, the party presenting the bill for taxation shall not be entitled to cost of the taxation. The Respondent presented the claim of TZs. 44,150,000/= and its one sixth is TZs. 7.358, 333/= where the

extension of time within which to file Notice of Appeal out of time against the decision of the High Court, Fauz Twaib, J. dated 4th September, 2012. *Secondly*, an application for an order of extension of time within which to file application for leave to appeal out of time. In the view of the Respondent, these are two applications in one and it was struck out for lack of sufficient cause to account for the delay and for being omnibus among other grounds. Thus, they told the client (Respondent) that in *Misc. Civil Application No. 474 of 2017* there were two applications to urge and hence charged him separately and accordingly.

Thus, using 11th Schedule, Item 1 (m) (n), the three Advocate were entitled to TZs. 3,000,000/= for an application for Order of extension of time within which to file notice of appeal out of time (TZs. 1,000,000/= each) and another TZs. 3,000,000/= for an application for order of extension of time within which to file application for leave to appeal out of time TZs 1,000,000/= each making a total sum of TZs. 6,000,000/= and that was the essence of *Reference No. 15 of 2019*. That, TZs, 4,500,000/= awarded as instruction fees is small. It is unfortunately the Reference was dismissed by the Court for being time barred. Hence in compliance with Order 46 and did not need certification by a Judge. Further, in view of the Respondent, the Taxing Master had discretion to

award the amount awarded even Higher than that as the matter took time. It was filed on September, 2017 and end more than a year later, December, 2018.

On the applicability of *Order 49* that costs of more than one Advocate should obtain certificate of trial Judge, the Respondent replied that it is inapplicable here since Misc. Civil Application No. 474 of 2017 was not a suit and hence there were no trial, no Plaintiff, no Defendant, as well as there was no amount of money claimed and hence the Taxing Master had discretion to award the fees paid to all Advocates who represented the Respondent. The Respondent cited the case of **Thomas James v. Nyeri Electricity Undertaking** [1969] EA 492 where the Taxing Officer allowed instruction fees four times the fixed scale and on reference to the High Court, the Judge reduced the amount on ground of being excessive. On appeal, the Court of Appeal of East Africa reversed the decision of the High Court by stating that the Taxing Officer placed fair value for work and responsibility done. That he had considered time, energy and resources involved, nature and importance of the matter plus amount of money involved and value of the subject matter. The Court held:

...where there has been an error in principles, the Court will interfere, but question solely of quantum are regarded as

matters within discretion of Taxing Officer fitted to deal and the Court will interfere only on exceptional circumstance.

The Respondent also cited the Court of Appeal of Tanzania at Tabora in the case of **Bosco Peter Teti v. Life Mushi and 4 Others**, Civil Appeal No. 146 of 2017, which had the same position.

I have considered the submissions of both parties with the legal eye and logics. I fault the Respondent's submission that they were entitled to 6 Million because *Application No 474 of 2017* has two application in one. It was one application with two prayers which made the application omnibus. As such, it was proper to award the Respondent as one application. The Respondent contended that they told the client (Respondent) that in *Misc. Civil Application No. 474 of 2017* had two applications to urge and hence charged him separately and accordingly. I find such act, if true, benefitted the Advocates twice for one work. That was not proper. The error I find to have been committed by the Taxing Master, was to award the Respondent TZs 4,500,000/= instead of TZs 3,000,000/=. The award was contrary to the 11th Schedule, Item M. (i) and (ii) of the Advocate Remuneration Order. The Taxing Master ought to have taxed the instruction fees of TZs 1,000,000/= for each Advocate making a total of Tzs 3,000,000 only.

On the attendance of the Advocates, it is not proper to deny the Advocates instruction fees by merely relying on non attendance of other Advocate on a single day.

I further agree with the Respondent that there is no good reason to fault the Taxing Master decision on lack of certification only. It is my found view that the taxed 1,000,000/= for each Advocate as instruction fees is reasonable in terms of time and energy spent.

As regards the requirement of EFD receipts for instruction fees and attendance costs, the Respondent was of reply submission that, as per *the Advocates Remuneration Order, 2015* there is no requirement of EFD receipts in the application for bill of costs. Let alone any proof unless required by the Taxing Officer during taxation hearing which was not the case here.

In view of the Respondent, the EFD receipts are for Government Tax and there is a mechanism to deal with it and not during taxation of bill of costs. If the Government wants Taxing Master to ask for EFD receipts during taxation of bill of costs, *the Advocates Remuneration Order, 2015* would speak so. but there is no such requirement. The above contention. The Respondent cited the decision of my brethren his Lordship Mruma, J. in the case of **M/S Buckreef Gold Company Ltd v. Tax Plan Associates Ltd and**

Another, High Court Commercial Division at Arusha in Miscellaneous Commercial Reference No. 3 of 2017 (unreported) at page 6 of the typed ruling where Honourable A.R. Mruma has the following to say:

On the EFD's receipts, I would like to define what EFD is. (Electronic Fiscal Device) is a machine designed for the use in business for efficient management control in area of sales analysis and stock control systems and which conforms to requirements specified by the law. As correctly observed by the Taxing Officer, EFD receipts are relevant in tax matters. There is no provision in the *Advocates Remuneration Order, 2015 GN No. 264 of 2015* which requires proof of payment by production of EFD receipts. EFD receipts may be relevant when there is dispute as to whether one pays taxes or government revenues or not. That was not the issue here. (Emphasis added).

The Respondent cited the case of **Salehe Habib Salehe v. Manjit Gurmkh Singh and Another**, Reference No. 7 of 2019, Dar es Salaam (unreported) where Madam Justice Makani, J. made the same holding like Honourable Mruma J. The Respondent

submitted without fear that those cases are not good precedent in the light of *the Advocates Remuneration Order, 2015* and hence may the Court not follow them and instead follow the decision cited above of his lordship Mruma, J and Madam J and Madam Justice Makani J. that production of EFD receipts or any other receipts is not the requirement of *Advocate Remuneration Order, 2015* unless required to be supplied by the Taxing Officer during taxation. on the basis of the above argument, the Respondent replied that the above issues raised by the Applicant is devoid of merit and hence should be dismissed on the first place.

I have taken enough time to analyze *Advocates Remuneration Order, 2015* (supra). I must admit and align with my brethren Mruma, J, and my Learned Sister Makani, J, EFD receipts are required on tax matters alone. It is not the requirement of *Advocates Remuneration Order, 2015*. However, the Taxing Master has a discretion powers of requiring the production of EFD receipts or any other relevant receipt for proof of claims before the Court. The Applicant has complained that the Taxing Master did not consider the case of **Professor Emmanuel A. Mjema** (supra). However, the Taxing Master was very clear on his position. Page 3 of the ruling read.

On what must be taxed, I entirely agree with Mr. Primus Theodory that taxation of costs is in accordance with Advocate Remuneration Order, 2015, G.N 264 of 2015. According to this law, what should be taxed in which case and in what circumstances is provided by law.

In view of the foregoing, I find the Taxing Master cannot be faulted on not applying the principle enunciated in the case of **Professor Emmanuel A. Mjema**. The other issue raised by the Applicant is that attendance costs should be taxed at TZs. 700,000/= with EFD receipts and not TZs. 1,950, 000 awarded. The Respondent replied that the Taxing Officer properly taxed attendance TZs. 1, 950,000/= since this is accordance with the *8th Schedule to the Advocates Remuneration Order, 2015*. Taxing Officer at pages 4 and 5 of his ruling clearly stated that as per *8th Schedule*, an Advocate who attend in Court for not more than 15 minutes his/her costs of such attendance are TZs. 50,000/= per appearance and since there were three Advocates, then for each appearance he taxed TZs 150,000/=. He went further that the amount will increase if Advocates spent more than 15 minutes which is practical. According to Court practice, no Advocate who stay in Court for less than 15 minutes even if his/her case is the first case to be attended. I agree with the Respondent on three reason:

First, it is not in dispute that the Respondent was represented by three Advocates who entered appearance in all dates of the case. **Second**, it is also not in dispute that in *Misc. Civil Application No. 474 of 2017* there were 12 appearances. **Third**, had it been a dispute in any of the two, the Applicant was supposed to raise it during taxation hearing and not at this reference. That being the case, TZs 150,000/ that is TZs 50,000/= for one appearance of (each Advocate) multiplied by 12 will be 1,800,000/=. When this amount is added with TZs 150,000/= awarded for three attendances to file counter affidavit and submission will make total sum of TZs. 1, 950,000/=.

I also agree with the Respondent that an award of TZs 1,000,000/= being costs of taxation of bill of costs, was in accordance with the *11th Schedule to the Advocates Remuneration Order 2015*. Had the Applicant wishes to avoid paying the costs for taxation was supposed to invoke *Orders 5, 10 and 63 of Advocates Remuneration Order, 2015* to reach remuneration agreement but opted not where the Respondent was compelled to file bill of costs. Further the Taxing Master used his discretion as provided under the proviso to *Order 48* to exclude the instruction fees in computation of one- sixth and the Applicant had no authority to question his use of he said discretion.

In the end, therefore, the reference is partly granted with no costs. The instruction fees is reduced from TZs 4,500,000/= to TZs 3,000,000/= only. The rest of the awarded costs remains undisturbed.

Y. J. MLYAMBINA

JUDGE

27/10/2020.

Ruling delivered and dated 27th day of October, 2020 in the presence of Learned Counsel Theodori Primus, for the Applicant and in the presence of Learned Counsel Kinguji and Masama Elias for the Respondent.

Y. J. MLYAMBINA

JUDGE

27/10/2020.