

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)**

AT ARUSHA

CIVIL REFERENCE NO. 6 OF 2019

(C/F District Land and Housing Tribunal for Arusha at Arusha Application No. 284 of
2016, Originate from Application NO. 67 of 2009)

MELKIORY MALLYA APPLICANT

VERSUS

ROSE PETER MASSAWE RESPONDENT

RULING

ROBERT, J:-

The Applicant, Melkiory Mallya, filed this Reference from the decision of the Taxing Officer in the Bill of Costs No. 284 of 2016 dated 2nd day of March 2018. The Reference was instituted by way of chamber Summons under Rule 7 (1) of the Advocates Remuneration Order, 2015 and supported by an affidavit of the Applicant. The Respondent filed a counter-affidavit objecting to the Applicant's reference.

A brief background relevant to this reference is as follows, on 28/7/2017 the Respondent herein as a Decree Holder filed Bill of Costs

No. 284 of 2016 at the District Land and Housing Tribunal of Arusha claiming a total of TZS 3,076,000/=. In the final analysis, the Taxing Officer taxed a total sum of Tshs. 2, 580,000/= to be paid to the Respondent herein. The applicant herein was aggrieved by the Ruling of the Taxing Officer and preferred this reference.

At the day set for hearing, the Applicant was present in person while the Respondent was represented by Mr. Jacob Malick, learned counsel. The matter was argued by way of written submissions.

Submitting in support of the reference, the Applicant adopted the contents of his affidavit, which he argued that was not opposed, to form part of his submissions. He stated that, the Respondent was awarded an excessive amount by the Taxing Officer. He argued that the receipts attached by the Respondent before the Taxing Officer were all written receipts, not EFD receipts, which is against the requirement of the law.

He submitted further that, the Respondent attached receipt No. 251 of 2017 dated 9/6/2017 to the bill of cost which showed that the Decree holder therein had paid TZS 500,000/= to J.K. Siay Co. Advocates in Application No. 280 of 2016 as instruction fee while the Judgment Debtor who is the Applicant herein is not part of that application. He also faulted receipt No. 0047 dated 20/3/2017 attached to the bill cost indicating

payment of TZS 400,000/= to Patrokili Peter Masawe who, he argued, was not a party in Application No. 284 of 2016.

He submitted further that, other receipts, such as receipt No.0062 dated 15/5/2017, No. 0067 dated 30/5/2017 and No. 0073 dated 21/6/2017 did not show the case number from which the Decree Holder had obtained instructions. He doubted if those receipts were related to instructions given in respect of Application No. 284 of 2016.

He went further submitting that, items No. 19,21,25,27,28,29,31 and 33 were taxed without any proof. He noted that there was a need to attach EFD receipt to prove that the instruction fees were really paid. To buttress his argument he cited the case of ***Alfayo Tingisha v Simon Laanyuni*** Misc. Civil Application No. 47/1998, High Court of Tanzania at Arusha (Unreported) where it was held inter alia that;-

“In assessing the costs which the Decree holder is entitled to reimbursement the Taxing Officer will have to be satisfied that the costs were actually incurred and that it was necessary”

He submitted that in the present case the Respondent's failure to attach EFD receipts means he failed to prove his application to the required standard. He therefore prayed for this reference to be allowed with costs.

In reply, Mr. Malick started his submission by urging the court to disregard the Applicant's assertion that his affidavit in support of this application was not opposed. He submitted that, the amount granted to the Respondent by the Taxing officer was not excessive but minimum and reasonable.

On the issue that the receipts used were not EFD receipts, he submitted that since the Applicant did not raise this issue at the trial Tribunal he has no right of raising it at this stage. However, to reply to the issue, he argued that, the Respondent was not able to use EFD receipts because by the time of filing Bill of Costs No. 284 of 2016 counsel for the Respondent operating as REMA MALICK J. Advocates had yet to be VAT registered. The Advocate paid for EFD machine on 26/10/2017 but was registered in April, 2018. Therefore their law firm started to use VAT machines in May, 2018 which means when the Bill of Cost No. 284 of 2016 was filed on 28/7/2017 they were unable to issue EFD receipts because they were not yet VAT registered. Prior to this the Respondents advocate Mr. Jackob V. Malick was operating under the legal firm called J.K. Siay & Co. Advocates where he was later separated and formed his legal firm styled as REMA MALICK J. Advocate on 5/8/2017.

On the receipt No. 251 dated 9/6/2017 bearing a different case number, he submitted that the difference in the case number was caused by a mere slip of a pen, instead of writing Bill of Costs No. 284 of 2016 it was written No. 280 of 2016. However, he submitted that, the issue was raised and argued at the trial tribunal and the Taxing Officer decided to tax it off. He referred the court to page 2 paragraph 3 of the impugned Ruling and expressed disapprobation for this issue to be raised again.

Regarding the payment of TZS 400,000/= in respect of receipt No. 0047 paid by Mr. Patriokil Peter Massawe instead of Rose Peter Masawe, he argued that the payment was legal because it was effected by the Respondent's husband and there is no law which prohibits payment by using another name.

Coming to the allegation that some receipts did not show the case number, he argued that the law does not make it necessary for the case number to be shown in a receipt as alleged by the Applicant. He maintained that what is important is the name of the giver and the receiver of the money to acknowledge the receipt thereof but not the case number. He argued further that parties herein at that time had only one pending case in the said Tribunal, the Bill of Costs No. 284/2016, which means payment was for that application.

He referred the court to Order 58 (1) of the Advocate Remuneration Order, G.N. No. 264 of 2015 which provides that: "Receipts or vouchers for all disbursements charges 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". He noted that, throughout the taxation cause in the trial Tribunal the Taxing Officer didn't inquire about the production of receipts.

On the issue ~~that there was no evidence to prove item 19, 21, 25, 27, 28,~~ 29, 31 and 33 which were taxed by the Taxing Officer, he argued that the Applicant didn't state what evidence is missing or he expected to be shown. He clarified that the question of EFD receipts is well clarified in response to other issues raised. He stated that the Taxing Officer made sure that all claims which showed doubts were taxed off.

Regarding the cases cited by the Applicant, he argued that it was not indicated if the cases are reported or not and the copies were not attached hence they could not go through the cases to ascertain whether they are relevant or not.

He emphasized that the question of EFD receipts is relevant in tax matters and not in applications for bill cost. There is no provision in the Advocate Remuneration Order, 2015, G.N. No. 266/2015 which requires

proof of payments by production of EFD receipts. He made reference to the case of **Buckreef Gold Company Ltd vs. M/S Taxplan Associates Ltd, Misc. Commercial reference No. 3 of 2017 (Unreported)** where Mruma, J held that, EFD receipts are relevant in tax matters where a dispute is to whether one pays taxes or government revenue which was not the case in this matter.

He submitted that the Applicant's claims are baseless and should be dismissed with costs and the Honourable court to uphold the amount granted by the Taxing Officer. He implored the court to invoke its inherent powers under Section 95 of Civil Procedure Code, Cap 33 R.E 2002, to award advocates fees for attending the taxation cause which were not awarded by the Taxing Officer.

In rejoinder submissions, the Applicant reiterated their concern on the EFD receipts and clarified that their complaint was not raised in relation to receipts issued by **Rema Malick J. Advocates** but the written receipts issued by **J.K Siay & Advocates**. He stated that EFD receipts started immediately after EFD Regulations, 2012 made under section 129 of the Income Tax Act (Cap 332). He maintained that since the learned advocate for the Respondent was operating under J.K. Siay & Advocates

when EFD receipts were already in use he was supposed to issue EFD receipts.

On the issue that there is no law which require receipts attached to the bill of cost to show the case number he submitted that, given the circumstances of the case at hand which involved the receipt attached to an application which the Applicant was not part of, it was necessary for all receipts to show the case number which the Decree Holder had paid as instruction fee.

With regard to the receipt which bear the name of Patriakil Peter Massawe, he submitted that the issue was not its legality but Mr. Patriakil was not part of the case in Application No. 284/2016 hence that receipt cannot be used. He maintained that, the Respondent failed to prove his costs before the Taxing Officer and prayed for this reference to be allowed in its entirety by quashing and setting aside the whole bill of costs taxed by the taxing officer with costs.

From the submissions made by both parties, it is clear that the concern raised is in respect of the award of TZS 2,580,000/= awarded by the Taxing officer which the Applicant considers to be excessive. The question for determination is whether there are sufficient reasons for this court to interfere with the award of the taxing officer or not.

This Court is aware that, as a principle of law, it can only interfere with the decision of the Taxing Officer if it is satisfied that the decision did not apply correct principles of law on taxation of costs or on the grounds that the bill of costs as taxed was in all circumstances manifestly excessive or manifestly inadequate.

One of the arguments raised in this reference is that, the receipts tendered before the Taxing Officer were not EFD receipts which is contrary to the law. On his part, the Respondent's counsel argued that, by the time of filing Application No. 284 of 2016 they had not yet received EFD machines that's why they used written receipts. However, the Applicant maintained that at the time of filing that application counsel for the Respondent was operating under the name of J.K Siay Advocates not Rema Malick J Advocates hence their argument of not having EFD Receipts because they had no EFD machines has no weight.

The law governing taxation of costs is the Advocates Remuneration Order, 2015 which is made under section 49(3) of the Advocates Act, Cap. 341. Taxation of costs in contentious proceedings is governed by the rates prescribed in the tenth, eleventh, and twelfth schedules to the Order. The cited law does not prescribe how payment of charges in respect of services offered by an Advocate should be proved. Similarly, the cited law

does not require the use of EFD receipts in taxation proceedings as a proof of payment or of validity of the payment receipts to be taxed. In fact, Order 58(1) of the Advocates Remuneration Order, 2015 require receipts or vouchers for all disbursements charged in a bill of costs to be produced at taxation only if required by the Taxing Officer with an exception of witness allowances and expenses supported by a statement signed by an Advocate.

~~It is not disputed that Regulation 10(5) of the Income Tax~~
(Electronic Fiscal Devices) Regulations, 2012 requires every user of Electronic Fiscal Device to issue fiscal receipt or invoice generated by his Electronic Fiscal Device to acknowledge payment. Regulation 21 punishes any failure to acquire or use Electronic Fiscal Device while Regulation 24 punishes any failure to demand and retain a fiscal receipt or fiscal invoice. However, Regulation 18 provides for circumstances where a user may temporarily be allowed to use manual receipt or invoice. While I find these Regulations relevant in acknowledging payment for purposes of taxation and punishing users for failure to issue fiscal receipt, nothing in these Regulations invalidates transactions done by users using manual receipts.

Accordingly, I do not agree with my Sister Hon. B.K Phillip in **Thinamy Entertainment Limited & 2 Others vs. Dino Katsapas,**

Misc. Commercial case No. 86 f 2018 (HC- Commercial Div.at Dar es Salaam) that proof of any payments to an advocate has to be by submitting Electronic Fiscal Device receipts simply because sections 36 (1) of the Tax Administration Act, 2015 requires use of electronic fiscal device.

I am in agreement with my brother Mruma, J. in **M/S Bukreef Gold Limited** (supra) that EFD receipts may be relevant when there is a dispute as to whether one pays taxes or government revenues which was not an issue here. This reasoning is shared with my brother V. L Makani, J in **Salehe Habib Salehe vs Manjit Gurmukh Singh and Another**, Reference No. 07 of 2019 where he held that

“The argument by Mr. Kinawari claiming presentation of EFD receipts and non-compliance by the decree holder of the Tax Administration Act and VAT Act in taxation of bill of costs cannot stand. The said pieces of legislation (Tax Administration Act and VAT Act) as we have seen hereinabove are useful in regulating tax matters and would come into play when and only if, for instance, and advocate’s tax books are not in order as assessed by the regulator, that is TRA.”

For reasons above, I find no reason to tax off receipts tendered before the Taxing Officer as proof of payment simply because they were not EFD receipts.

Another argument made by the Applicant was that, some of the receipts tendered bear different case numbers from the one relevant in this matter. In support of this argument, the Applicant made reference to receipt No. 251 dated 9/6/2017 allegedly used for payment of Application No. 280/2016 which the Applicant as Judgment holder was not part of. I have perused the impugned Ruling and learnt that the Taxing Officer had taxed off this item at page 2 of the Ruling for reasons that the receipt evidencing payment was not related to the case from which the bill of cost emanated. I find the matter to have been properly handled by the Taxing Officer and the said item rightly taxed off. Accordingly, I find no basis of any claim on this issue.

Coming to the receipt No. 0047 dated 20/3/2017 which bears the name of Patrokil Peter Massawe as a person who made payments to the Advocate for the Respondent instead of the Respondent Rose Peter Masawe, I find this to be an irregularity which the Taxing Officer ought to have considered and tax off because as contended by the Applicant, it will be hard to prove whether those instructions were related to Patrokil

himself or for the Respondent taking into account that the said receipt does not bear the relevant case number from which the bill of cost emanated. Accordingly, I deduct the amount of Tshs. 400,000/= from receipt No. 0047 which bear the name of Patrokil Peter Massawe from Tshs. 2,580,000/= awarded by the Taxing Officer. In the result, an order of the Taxing Officer awarding cost at the tune of Tsh. 2,580,000/= is hereby substituted with that of Tshs. 10,000,000/= for general damages.

In conclusion, this reference is partly allowed only to the extent of variations made to the award of costs. Apart from the said variations, I otherwise find this reference to be lacking in merit and dismiss it accordingly. In the circumstances of this case, I make no orders as to costs.

It is ordered.



K.N. ROBERT

JUDGE

17/2/2021

