IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CONSOLIDATED CIVIL REFERENCE NO.5 AND 16 OF 2019
(Arising From Misc. Civil Application No. 18 of 2010)

SUGAR BOARD OF TANZANIA................................APPLICANT
VERSUS
MHANGO AND COMPANY ADVOCATES.................RESPONDENT
RULING

Last Order: 7/6/2021
Ruling:27/8/2021

MASABO, J.:

On 16th February 2010, Mhango and Company Advocates, filed her bill of costs (Misc. Civil Application No. 18 of 2010) in respect of Civil Case No. 236 of 1995 between **East African Agro Industries** and **Sudeco & Mtibwa Sugar Estates**, in which she appeared for the first defendant, SUDECO (now the Sugar Board of Tanzania). In the outcome of this application in which she had billed Tshs 3,030,000,000/= as instruction fee, Tshs 840, 000/= for appearance and court attendances and Tshs 244,000/= as reimbursables, it was decided that the instruction of Tshs 3,030,000,000/= was excessive and it was subsequently reduced to Tshs 25,000,000/= only. It was further held that, as Tshs 15,000,000/= had already been paid to the respondent in advance, only Tshs 11,084,000/= comprising of balance of unpaid instruction fees at Tshs.10,000,000/=, Tshs. 1,084,000/= as costs for court attendance and disbursement be paid to the respondent. It was also ordered that, an addition of

Tshs.1,000,000/= be paid to her as costs for attending the bill of cost proceedings.

Both parties were aggrieved. They filed cross reference to this court under Order 7 of the Advocates Remuneration Orders, 2015 praying for this court to revise and quash and set aside the decision of the Taxing Officer. The reference filed by the Sugar Board of Tanzania was admitted as Civil Reference No. 5 of 2019 and the one filed by Mhango & Company Advocates was admitted as Civil Reference No. 16 of 2019. Hence, the need for consolidation.

Through an affidavit deponed by Egid Seraphin Malusa Mkoba, the Sugar Board of Tanzania complained that the Taxing Officer did not take into account the fact that the respondent had been adequately remunerated given the nature of the matter. On the other hand, Mhango & Company Advocates complained that the Taxing Officer departed from principles governing taxation of bill of costs between advocates and clients.

Hearing proceeded in writing. Both parties had representation. Mr. Egid Seraphin Malusa Mkoba, learned counsel represented the Sugar Board of Tanzania and Mr. Nicholas Mwakasege. learned counsel appeared for Mhango and Company Advocates.

In respect to the complaint that **the respondent was adequately remunerated**, it was argued on behalf of the Sugar Board that, considering the nature of the matter, the respondent was adequately remunerated as prayers in the suit from which the bill of costs emanated

were only for declaratory orders. The plaintiff had not sued for a liquidated sum thus the 3% rule does not apply as the prayers in the plaint were for: Tshs. 100,000,000,000/- (one hundred billion shillings) being loss of business/profit, and in the alternative, Tshs 1,000,000,000/- (one billion) as loss of credibility and reputation. All these claims were, according to Mr. Mkoba, neither pleaded nor proved thus they cannot be used as a basis for computing of instruction fees.

Citing the case of **M/s Tanzania – China Friendship Textile Co. Ltd v Our Lady of the Usambara Sisters,** Civil Appeal No. 84 of 2002, CAT, he argued that, if as held in this case, general damages cannot be a basis for determination of pecuniary jurisdiction, the same can not be relied upon in determining advocates fees. He added that, as none of the prayers above was granted for want of proof, the 3% can not apply. The Taxing Officer was thus justified in exercising the discretion even though the amount awarded remained excessive under the circumstances of the case as there was no agreement as to the fees payable. The amount of Tshs 15,000,000/= which had already been paid to the advocate was, in his view, sufficient.

This argument was firmly resisted by Mr. Mwakasege who argued that, the sum of Tshs 5,000,000/= was an initial deposit made in the understanding that, at the conclusion of the case a fee note showing the chargeable fees would be issued. There was no agreement on the fee payable as the same was governed by the Advocates Remuneration and Taxation of Costs Rules,1991 which directed that all the money payable be reflected in the fee note. Mr. Mwakasege argued further that, when

instructing Mhango & Compony Advocates in 1995, the management of the Tanzania Sugar Board was fully aware of the arrangement but things changed after the conclusion of the matter and following the change of the management of the Sugar Board, which after the conclusion of the suit, opened new negotiations whereby they proposed a fee of Tshs 15,000,000/= only. Mr. Mwakasege argued that, the authority in **M/s Tanzania – China Friendship Textile Co. Ltd v Our Lady of the Usambara Sisters** (supra) is irrelevant and inapplicable.

Regarding the complaint as to the Taxing Officer's **departure from the principles governing taxation of bill of costs**, there were three main arguments. The *first* argument was that, the Taxing Officer wrongly relied upon the Advocates Remuneration Order 2015 as the suit from which the bill of costs emanated was instituted in 1995 and concluded on 3rd December 2004 and the bill of costs was instituted in 2010, well before the Advocates Remuneration Order 2015 came into being. In the view thereof, it was argued that, the applicable law is Rule 40 and schedule IX to the Advocates Remuneration and Taxation of Costs Rules, 1991, GN No. 515 of 1991 which was then in force. By applying the Advocates Remuneration Order, 2015 retrospectively to matters instituted before it came into being, the Taxing Officer, lucidly erred.

Second, it was submitted that**,** further to relying upon the new law, the Taxing officer lucidly failed to make a distinction between costs and instruction fees. Had he properly guided himself he would have taxed the instruction fees and costs separately. The Taxing Officer failed to make a distinction between the costs and instruction fees contrary to the Schedule

IX of the 1991 Advocates Rules which differentiated between the two. Moreover, it was argued that, instruction fee is statutorily determined in accordance with the value of the subject matter and the Taxing Officer has no discretion whatsoever, to vary it. Had the Taxing officer applied the principles applicable in Rule 40 and schedule IX to the Advocates Remuneration and Taxation of Costs Rules, 1991, (GN No. 515 of 1991), as construed by Mandia, J (as he then was) in **Kalunga and Company Advocates v NBC Ltd** Civil Reference No. 4 of 2004, he would have arrived at a different finding. The fixed statutory fee scale is 3% of the value of the claims whose subject matter exceeds Tshs 400,000,000/=.

Third: It was argued that, the Taxing Officer wrongly relied upon the decision of the Court of Appeal in **The Attorney General vs Amos Shavu**, Taxation Reference No.2 of 2000 as its facts are distinguishable from the instant case. In the said case, the applicant had complained that the Taxing Officer did not follow the 3% rule provided for under paragraph 9(1), 9(2) and (3) of the Third Schedule to the Tanzania Court of Appeal Rules, 2009 which is not applicable in the High Court.

In reply to these points, Mr. Mkoba argued that the Taxing Officer cannot be faulted for applying the Advocates Remuneration Order, retrospectively, as it has retrospective effect provided for under Order 72 which states clearly that the Advocates Remuneration Order 2015 shall apply to matters which were still pending in court. As for the 3% of the pecuniary value of the subject matter, he briefly submitted that the rule is applicable only in claims for liquidated sum, not otherwise hence irrelevant in the case at hand. He further argued that the Taxing Officer

correctly exercised the discretion vested in him by Order 12 of the Advocates Remuneration and Taxation of Costs Order 2015.

Having thoroughly read and considered the rival submissions by the parties and the record before me, I am now ready to determine the points raised by the parties. For obvious reasons, I have taken a liberty to start with the complaint on departure from the applicable law. It is a common understanding between the parties herein that, before the Advocates Remuneration Order 2015, GN No. 264 of 2015 came into being, remuneration of advocates was regulated by the Advocates Remuneration and Taxation of Costs Rules, 1991. These rules were repealed and replaced by Advocates Remuneration Order 2015. I may also add here that, both the 1991 Rules and the 2015 Order, are creatures of Part VIII of the Advocates Act, Cap 341. This part, covering sections 49 to 65, deals with remuneration of advocates. The rules are made under section 49(3) of the Act.

It is also common between the parties herein that, the suit giving rise to the bill of costs was instituted, heard and dissolved well before 2015 and the Bill of costs was instituted in 2010. Thu, at the time Mhango and Company Advocates received the instruction from the Sugar Board of Tanzania and throughout the conduct of the suit giving rise to the bill of costs and at the conclusion of the suit on 2nd August 2004, the applicable subsidiary law regulating the advocates remuneration was the Advocates Remuneration and Taxation of Costs Rules, 1991 and the same was still applicable when the bill for costs was filed for taxation in 2010 (Misc. Application No. 18/2010). But, at the time of the hearing and

determination of the application on 22/10/2018, these rules were no longer in force as they had already been repealed and replaced by the Advocates Remuneration Order, 2015.

From the ruling of the Taxing Officer, it can be vividly seen that the Advocates Remuneration and Taxation of Costs Rules, 1991 were not applied. Taxation of the bill of cost proceeded in accordance with the Advocates Remuneration Order, 2015. The Taxing Oficer held that, although the advocate is entitled to fees, the fee claimed must be in accordance with the remuneration agreement and since none was rendered to the court, the applicant's claim which *was more of equity than legal* as *it was not supported by the agreement*, was excessive. Exercising the powers vested on him by order 12 of the Advocates Remuneration Order 2015, GN No. 264 of 2015, he reduced the quantum claimed to Tshs 25,000,000/=. According to Mr. Mwakasege, this was a lucid misdirection as the Advocates Remuneration Order 2015, does not have a retrospective effect.

The retrospectivity of the Advocates Remuneration Order 2015 will, certainly, not detain me as it is a settled principle in our jurisdiction that, the effect of a new law is predicated upon the intention of the legislature. The position was articulated by East African Court of Appeal in ***Municipality* of Mombasa vs. Nyali Limited** (1963) E. A. 371 where it stated that:

> Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by legislation. In seeking to ascertain the intention behind the legislation the Courts are

> guided by certain rules of construction. <u>One of these rules is that if the legislation affects substantive rights, it will not be construed to have retrospective operation unless a clear intention to that effect is manifested;</u> whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention. [Emphasis added]

The position has been cited with approval in may decisions of the Court of Appeal including in **S. S Makorongo vs. Sererino Consigilio,** Civil Appeal No. 6 of 2003**; BIDCO Oil and Soap Ltd v Commissioner General of Tanzania Revenue Authority**, Civil Appeal No. 89 of 2009; **Rebecca Wegessa Isaack v Tabu Msaigana & Another**, Civil Application No. 444/08 of 2017; and **Lala Wino v Karatu District Council**, Civil Application No. 132/02/of 2018 (CAT) at Arusha (unreported). A new law that affects substantive rights would, therefore, not be construed to have a retrospective operation unless the contrary is expressly stated in the said law. The presumption against retrospectivity of substantive laws would be dispensed with if the new law indicates in clear terms that it is intended to operate retrospectively. As held by the Court of Appeal in **S. S Makorongo vs. Sererino Consigilio Civil Appeal No. 6 of 2003 (unreported),** the general rule of law is that, unless there is clear indication either from the subject matter or from the wording of the respective law.

Looking at the content of the Advocates Remuneration Order 2015, I entertain no doubt that, it is not merely a procedural law. It touches upon fundamental rights to remuneration thus, it is presumed to have no retrospective effect unless the contrary is clearly stated. This brings me to Order 72 which, according to Mr. Mkoba expressly provides a rebuttal to the presumption against retrospectivity. It states that:

> 72. Upon commencement of this Order, it shall apply in all proceedings pending, whether in the High Court, subordinate courts or tribunals, and without prejudice to the validity of anything previously done but-
> (a) if and so far as it is impracticable in any of those proceedings to apply the provisions of this Order, the previous practice and procedure shall be followed;
> (b) in any case of difficulty or doubt, a Judge or the Taxing officer may informally give directions as to the procedure to be adopted

When this provision is accorded a plain construction, it rhymes well with the argument fronted by Mr. Mkoba. In my considered view, the provision can justifiably be construed as a rebuttal to the anti-retrospectivity which entails, as argued by Mr. Mkoba, that the Advocates Remuneration Order 2015 applies retrospectively to matters antecedent to its promulgation. It should however be noted from the outset that, the rebuttal clause under this order is not free from exceptions. Paragraphs (a) and (b) permits the application of the provides two circumstances where previous practices and procedures may be applied to matters antecedent to the Advocates Remuneration Order 2015. Therefore, in my settled view, the 1991 Rules can be applied where the application of the Advocates Remuneration Order 2015 has proved impracticable or where the J*udge* or *Taxing Officer* directs otherwise. In the view thereof, and since it was not proved before

the Taxing Officer that the application of the Advocates Remuneration Order 2015 to the application at hand was impracticable, it can be justifiably concluded that there was no misdirection in the choice of the applicable law.

Mr. Mwakasege has complained against the remuneration agreement and the impression arising from his submission is that, the same is a creature of the Advocates Remuneration Order, 2015 an assertion which is incorrect as remuneration agreements are creatures of section 53 and 54 of the Advocates Act, Cap 341. Section 53 deals with remuneration agreements in non-contentious business whereas section 54 deals with remuneration on contention businesses and provides as follows:

> 54. Whether or not any order is in force under section 49 an advocate may make an agreement in writing with his client as to his remuneration in respect of any contentious business done or to be done by him, providing that he shall be remunerated either by a gross sum or by salary, or otherwise.

As this provision is couched in permissive terms, it has always been understood that an advocate and his client are at liberty to enter into a remuneration agreement or proceed without one in which case, the fees scale provided for under Schedule IX (Scale of Fees for Contentious Proceedings for Liquidated Sum in Original and Appellate Jurisdiction) to both the 1991 Rules and the Advocates Order, 2015, apply. The absence of a remuneration agreement neither prejudices any of the parties nor robs the advocate of his remuneration for the work done which is a basic right. This said, I find and hold that the finding by the Taxing Officer that,

the fee claimed must be in accordance with the remuneration agreement and that *since there was no agreement, the claim for remuneration was more of equity than legal*, was misplaced as the applicant sought to rely on the statutory prescribed fee scale which is a legally acceptable practice.

As to the complaint that, the Taxing officer lucidly erred by failure to make distinction between costs and instruction fees; I subscribe to the decision of this court in **Kalunga and Company Advocates v NBC** (supra) in which Mandia J, provided the following lucid interpretation of the two terms as they apply in relation to advocates remuneration:

> "Rule 2 of the 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 is fees? in this regard Black's Law Dictionary, Seventh Edition defines fees thus:-
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> > "*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"*
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> The definition employs an American nomenclature for a legal practitioner 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 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 515/9, it is observed that the Rules have

> twelve schedules. Scheduled 1 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 schedule I to X and costs in schedule XI the rules intended to that these subjects separately. They should therefore not be mixed."

Although this finding was derived from the 1991 Rules which are no longer in force, it is still applicable because, in spite of some additions, substitutions and change of name, the objective of the Advocates Remuneration Order, 2015 is substantially similar to the objectives of the 1991 Rules and so is the modalities for remuneration. Paragraph 2 of the Advocates Remuneration Order 2015, clearly shows that the Order serves two main objectives namely: providing for remuneration of an advocate by a client in contentious and non-contentious matters for taxation purposes and the taxation of costs between a party and another party. Similarity is also notable with respect to the nomenclature of the Schedule. Just as the 1991 Rules, the Advocates Remuneration Order has a total of twelve schedules, the first ten (Schedule 1 to 10) contain scales of fees chargeable in various types of proceedings; Schedule X is on costs of proceedings in the High Court, subordinate courts and tribunals. In this view, I find merit in Mr. Mwakasege's argument as to the need for distinction between these two items.

Looking at the bill of costs filed in Misc. Civil Application No.2010, and the ruling of the Taxing Officer, I have observed that, the Bill of Costs had 101 items and in the second item, the claimed an instruction fee of Tshs 3,030,000,000/= styled as 3% of Tshs 101, 000,000,000.00 and the rest

of items contained other costs. The two items were charged different whereby the instruction fees was reduced from Tshs 3,030,000,000 to Tshs 25,000,000/= whereas the costs were taxed at Tshs 1,084,000/= comprising of Tshs 840,000/= for court attendance and disbursements at Tshs 240,000/=. To that extent, I decline to invitation to fault the Taxing officer for failure to distinguish the two items.

Regarding the application of the **Attorney General v Amosi Shavu** (supra) I find no problem in the Taxing Officers reliance on the general principles articulated in this decision with regard to his discretionary powers in assessing the taxable amount which appear to be a settled practise in numerous jurisdictions, including ours. The principle as derived from the decision of the East African Court of Appeal in **Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd and Another** [1972] EA 162, underpins that, although it is crucial that advocates should be adequately remunerated, and the level of such remuneration must be such as to attract recruits to the profession, the costs should not be allowed to rise to such a level as to impend access to justice by confining access to the courts to the wealthy.

In my reading of **Attorney General v Amosi Shavu** (supra), I have observed that, having cited **Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd and Another** (supra) and numerous other cases such as **Singa v Elias** (1972) H.C.D and **George Mbugus v A.S. Maskini** [1980] T.LR 53, the Court of Appeal concluded that the amount of the suit is not the exclusive factor for consideration by the Taxing Officer. It is only one of those factors which the Taxing Officer

should consider in determining what is a fair and reasonable fee in the circumstances of particular case. Such factors as the complexity of the matter, the time spent in the hearing or arguments and the research involves are also relevant.

The principle above, has in my understanding, remained to be a good law. With the promulgation of the Advocates Remuneration Order, it has now become part of the statutory law as it has been expressly incorporated in Order 12 which vests the Taxing Officer with discretionary powers in determining the payable costs, charges and expenses. The principle also impliedly accommodated by Order 13 which only bars advocate from accepting remuneration over and above the prescribed scale which impliedly means that they can accept a fee lesser than the prescribed fee scale if the circumstances so allow or demand.

The above notwithstanding, I find the finding of Taxing Officer to be erroneous owing to the misdirection as to the remuneration agreement which I have already thoroughly explained and due absence of other plausible reason or justification on how he arrived at the figure of Tshs 25,000,000/=. It is general rule that, judicial discretion where exercised should be based on sound reasons which should clearly be shown. More so in this case where the exercise of the discretion encroaches on basis right to remuneration for work done by the counsel. In the absence of clear explanation to back up the figure it appears as if the Tshs 25,000,000/= awarded as instruction fee was just been plucked from the air which is inconstant with the cardinal rules in the exercise of judicial discretion.

Based on what I have demonstrated, I find no need to go to the complaints raised by the Sugar Board of Tanzania and the prayer for a further reduction of the fee as I have already addressed them in the course of determining the points above.

In the view thereof, I quash and set aside the decision of the Taxing Officer in Misc. Civil Application No. 18/2010 and remit back the file to the Deputy Registrar of this Registry and direct that it be placed before another Taxing Officer for a proper and expeditious determination of the bill of cost. Since there were cross references, I find it to be in the interest of justice that the cost be shared by each of the parties bearing its respective costs.

Order, accordingly.

DATED at DAR ES SALAAM this 27th day of August 2021.

02/09/2021

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE