IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRIC REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO.642 OF 2020

JUMA MGANGA LUKOBORA.....1ST APPLICANT
ZEINA MSUYA.....2ND APPLICANT
MWANAHAMISI SWAVILA.....3RD APPLICANT
ABDULRAHMAN HAJI MWADIN HAJI.....4TH APPLICANT
CONSTATINE MASAMAKI.....5TH APPLICANT
EDMUND MKENDA.....6TH APPLICANT
DANIEL MFINANGA.....7TH APPLICANT
ELLA MATHIAS CHAULA.....8TH APPLICANT

VERSUS

TANZANIA MEDICINE AND MEDICAL DEVICES AUTHORITY (TMDA).....1ST RESPONDENT

PHARMACY COUNCIL.....2ND RESPONDENT

MINISTRY OF PRESIDENT'S OFFICE, REGIONAL ADMINISTRATION AND LOCAL GOVERNMNENT (TAMISEMI).....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

RULING

Date of last order: *22/06/2021*
Date of Ruling: *03/09/2021*

MLYAMBINA, J.

In the present case, I am faced with the *inter alia* definitive issues; *whether the Government, as a winning party to a civil case, is principally entitled to costs.* If yes, *what should be the criterion of awarding instructions fees to the Government as a winning party?* And *where should*

such money be deposited? In an attempt to address the raised lucid issues, the Court will consider and weigh all that stated by the Applicant in favour of the refusal to grant costs, which was challenged by the Respondent, with particular reference to justification as to why the Government is entitled to costs.

In nutshell, the substantive arguments by the Applicant were three. *One*, the Government does not pay any fees in filling any document in Court. *Two*, the State Attorney get paid by the Government from the taxes which are collected from tax payers like the Applicants. *Three*, what the State Attorneys does is "public duty".

The Respondents were of position that the Government should be awarded costs the same as private persons. The reason being that, as a matter of law and facts, costs should be awarded to a winning or successful party at the discretionary powers of the presiding Judge or Magistrate upon determining the nature of the proceedings themselves.

Consistently with the afore main arguments, I think it is helpful and important to note that the starting point in my analysis of the issue will base on the rationale for Advocates fees and renumeration. Advocates fees and remuneration in Tanzania are regulated by *The Advocates Remuneration Order*.[1] This Order applies for the remuneration of an Advocate by a client in contentious and non-contentious matters, for taxation thereof and the taxation of costs between a party and another

[1] GN. No. 263 of 2015

party in matters in the High Court and in Courts subordinate to the High Court, Arbitral Tribunals and Tribunals from which appeals lie to the Court of Appeal.[2]

Apart from described fees in the Schedules for the specific assignments relating to taking instructions, under *Rule 15 of the Advocates Remuneration Order,*[3] an Advocate is entitled for compensation in business of exceptional importance or unusual complexity, to receive as against his client, a special fee in addition to the remuneration as prescribed in the said Order. *Rule 15 of The Advocates Remuneration Order,*[4] provides that:

> The Taxing Officer shall, in assessing the special fee, consider among others:
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> (a) the nature of the place and the circumstances in which the business or part thereof is transacted;
> (b) the nature and extent of the pecuniary or other interest involved; and
> (c) the nature and quality of labour and responsibility entailed.

As regards to scale of fees in respect of business the remuneration for which is not otherwise prescribed, *the Eighth Schedule to the Order,*[5] provides for fees on instructions, drawing and perusing of documents and

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[2] *Ibid,* Rule 2

[3] *Ibid*

[4] GN. No. 263 of 2015 *Op cit.* Also, see *inter alia* Section 61 of the Fair Competition Act, 2003 (Act No. 8 of 2003)

[5] *Ibid,* GN. No. 263 of 2015

Court attendance of the matter including other logistical issues concerning such matter. On instructions, the Order provides that such fee for instructions may be payable regarding the care and labour required, the number and length of the papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interests of the parties, complexity of the matter and all other circumstances of the case, as it may be fair and reasonable, so that due allowance shall be given for other charges raised under the Schedule.[6]

However, as a general rule, costs follow events. A successful party in civil legal proceedings must recover costs of litigation from unsuccessful party. More so, the successful party should not be deprived costs except for *"good cause"* or justifiable grounds or unless special circumstances exist for doing so. This legal proposition is found in **Mulla's the Code of Civil Procedure**,[7] which provides as quoted *verbatim* hereunder:

> The general rule is that costs shall follow the event unless the Court, for good reason, otherwise orders. This means that the successful party is entitled to costs unless he is guilty of misconduct or *there is some other good cause for not awarding costs to him.* The Court may not only consider the conduct of the party in the actual litigation, but the matters which led up to the litigation.

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[6] Paragraph 1 of the Eighth Schedule of GN No. 263 of 2015

[7] 12th Edition of 1953, p. 150

Mulla's the Code of Civil Procedure[8] was quoted with approval by Biron, J (as he then was) in the case of **Hussein Janmohamed & Sons v. Twentsche Overseas Trading Co. Ltd**[9] and by his Lordship Ndika J.A in the case of **DB Shapriya & Company Limited v. Regional Manager, Tanroads Lindi,**[10] as well as the provisions of *Section 30 (1) and (2) of the Civil Procedure Code,*[11] On this general rule, Biron, J. (as he then was) in the case of **Hussein Janmohamed & Sons,**[12] observed as follows:

> ... as remarked, the general rule is that *costs should follow the event and the successful party should not be deprived of them except for good cause. (Emphasis mine)*

Also, the legal proposition stated hereinabove is reflected in the case of **Fish Processors Ltd. v. Eusto K. Ntagalinda,**[13] and **Impressa Ing Fortunato Federice v. Nabwire,**[14] **Harun Mwau and Others v. Attorney-General and Others,**[15] and **Re Ebuneiri Waisswa Kafuko (Deceased).**[16] These judicial precedents were cited with approval in the case of **Republic v. Independent Electoral and Boundaries**

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[8] *Ibid*
[9] [1967] EA 287
[10] Civil Reference No.1 of 2018, Court of Appeal of Tanzania, at Dar es Salaam (unreported)
[11] Cap. 33 (R.E. 2019)
[12] (1967) E.A 287 *Op cit* p. 290
[13] Civil Application No. 6 of 2013, Court of Appeal of Tanzania at Mwanza (unreported)
[14] [2001] 2 EA 383 (Supreme Court of Uganda)
[15] Petition No. 65 of 2011, High Court of Kenya at Nairobi
[16] HCMA No. 81 of 1993, High Court of Uganda at Kampala

Commission Ex-Parte Mohamed Ibrahim Abdi & Others.[17] The authorities cited above demonstrate that the question of costs is a compulsory right to any successful party in any civil litigation. Any denial therefrom must be substantiated with good reasons. I am conscious, however, that one must be astute to possible environment which may lead to denial of costs. Award of costs is entirely in the discretion of the Court and this is the imports of provisions of *Section 30 (2) of the Civil Procedure Code,*[18] as judicially considered by the High Court in the case of **Nkaile Tozo v. Phillimon Musa Mwashilanga**[19] in which the Court had this to say:

> ... the awarding of costs is not automatic. In other words, they are not awarded as to the successful party as a matter of course. Costs are entirely in the discretion of the Court and they are awarded according to the facts and circumstances of each case. Although this discretion is a very wide one like in all matters in which Courts have been invested with discretion in awarding or denying a party his costs must be exercised judicially and not by caprice...

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[17] Misc. Application No. 344 of 2017, High Court of Kenya Judicial Review Division

[18] Cap 33 *Op cit*

[19] (2002) TLR 276

In the case of **Mohamed Salmini v. Jumanne Omary Mapesa**,[20] the Court had this to say:

> As a general rule, costs are awarded at the discretion of the Court. But the discretion is judicial and has to be exercised upon established principles, and not arbitrarily or capriciously. One of the established principles is that, costs would usually follow the event, unless there are reasonable grounds for depriving a successful party of his costs. A successful party could lose his costs if the said costs were incurred improperly or without reasonable cause, or by the misconduct of the party or his Advocate.

The High Court (Judicial Review Division) of Kenya *as per* Odunga, J. (as he then was) in the case of **Independent Electoral and Boundaries Commission Ex-Parte Mohamed Ibrahim Abdi & Others**,[21] enunciated the factors which the Court should take into account in refusing to grant costs to successful party in the legal proceedings in the following terms:

> In determining the issue of costs, the Court is entitled to look at *inter alia the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which the proceedings*

[20] Civil Application No 4 of 2014, Court of Appeal of Tanzania at Dodoma, (unreported)
[21] Misc. Application No. 344 of 2017, *Op cit,* at paragraph 17 p. 4

were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to *Article 159 (2) (c) of the Constitution.*[22] In other word the Court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation, the eventual termination thereof and the likely consequences of the order for costs. (Emphasis applied)

In India, the principle underlying levy of costs was explained in **Manindra Chandra Nandi v. Aswini Kumar Acharaya**, thus:[23]

We must remember that whatever the origin of costs might have been, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected, or, as Lord Coke puts it, for whatever appears to the Court to be the legal expenses incurred by the party in prosecuting his suit or his defence... *The theory on which costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him, and to a defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental*

[22] Cap 2, 1977
[23] ILR (1921) 48 Cal. 427

damages allowed to indemnify a party against the expense of successfully vindicating his rights in Court and consequently the party to blame pays costs to the party without fault. These principles apply, not merely in the award of costs, but also in the award of extra allowance or special costs. Courts are authorized to allow such special allowances, not to inflict a penalty on the un-successful party, but to indemnify the successful litigant for actual expenses necessarily or reasonably incurred in what are designated as important cases or difficult and extraordinary cases. (Emphasis added)

Even if the Court is of view that costs should not be granted, it has a duty to state reasons. Denial of costs without giving reasons renders the decision challengeable. In the case of **Bahati Moshi Masabile T/A Ndono Filing Station v. Camel Oil (T)**,[24] the Court had this to observe:

If the Court is of the view that costs should not be granted, it must state sufficient or concrete reasons except in circumstances where the Court have no reasons of giving reasons. Here I mean that; although reason-giving is a must requirement in judicial decisions, it is often in tension with other values of the judicial process, such as sincerity of the decision maker, guidance to the

[24] Civil Appeal No 216 of 2018, High Court of Tanzania at Dar es Salaam District Registry (unreported)

society and the Court itself, and efficiency in decision making process. Reason-giving must be balanced against these competing values to account for fairness in judicial decision.

The essence of giving reasons in judicial decision are *inter alia* five: *One*, reasons makes litigants to know the extent of how their arguments have been understood and analysed by the Court. *Two*, reasons foster judicial accountability by minimizing arbitrariness. *Three*, reasons facilitate certainty in law by assisting members of legal fraternity and the general public to know how cases of similar nature may be decided. *Four*, reasons are the basis for the appellate Court to know if the decision was with apparent error. *Five*, reasons make litigants to know the Magistrate or Judges basis of the decision. (Emphasis added)

The duty to give reason is mandated under *Section 30 (2) of Civil Procedure Code*[25] which states that:

Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.[26]

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[25] Cap 33 *Op cit*

[26] *Ibid*

The rationale towards granting costs was stated in among other cases the case of **Bahati Moshi Masabile T/A Ndono Filing Station**,[27] in which the Court stated:

> Costs serve among other purposes, to bar parties from filing hopeless cases. There are two reasons:
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> *First,* upon losing the case the loser will pay costs of the case. This weakens the loser financially. *Second,* award of costs puts the wining party at his /her financial position prior been sued as far as costs of the case are concerned. The reason been that the wining party has to be refunded all the costs incurred during the trial of the case.

In addition, I consider that the decisions in the case of **DB Shapriya & Company Limited**[28] and the case of **Mohamed Salmini**[29] provides a cogent guidance and explanation of the proper approach in cases of granting or refusing to grant costs. I equally find persuaded with the reasoning of my brethren Odunga, J. (as he then was) in the case of **Independent Electoral and Boundaries Commission Ex-Parte Mohamed Ibrahim Abdi & Others**[30] on the factors to be taken into consideration by the Court in granting or refusing to grant costs. I would add that, the Court has to consider the social, cultural and economic

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[27] *Ibid*

[28] Civil Reference No.1 of 2018, *Op cit*

[29] Civil Application No 4 of 2014, *Op cit*

[30] Misc. Application No. 344 of 2017 High Court of Kenya at Nairobi (eKLR)

reasons while exercising its discretion powers. The rationale behind should be to bring fairness and justice between the parties.

Regardless of the afore demonstrated general principles encompassing grant or refusal of costs, the Attorney General, the Director of Public Prosecutions, the Solicitor General, Parliamentary Draftsmen and State Attorneys and any person duly qualified in the Office of the Attorney General, the National Prosecutions Service; the Office of the Solicitor General; the Legal Secretary Income Tax Department and any Solicitor in any District Council or Township Authority are regarded as Advocates for the purposes of legal practice as Officers of the Court. However, the current legislation governing Advocates remunerations do not specifically cover for the fees or remuneration to the State Attorneys handling the cases for the Government on behalf of Attorney General or Director of Public Prosecution. That lacunae needs be addressed in our laws.

Nonetheless, I do keep in mind the warning given by Benjamin N. Cardozo in the book titled: **The Nature of the Judicial Process** that:[31]

> The Judge even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is

[31] Yale University Press -1921 Edition P. 114 as cited in *Vinod Seth v. Devinder Bajaj & Another, Civil Appeal No.4891 of 2010, Supreme Court of India*

> to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in social life.

Though alerted with the afore warning of the legal mind, I find duty bound to fill the existing legal lacunae on granting costs to the Government as a wining party, in particular, where should such amount be paid and other legal loopholes incidental to taxation of costs.

It is not in dispute that the Government or State cannot handle any legal dispute in Court or Quasi-judicial Tribunal including the Arbitral Tribunals without incurring some costs which obviously are spent from public monies. With that note, I will therefore turn to the consideration on; *whether the Government as a winning party deserves to be granted costs.*

At the outset, I consider there is no force in Mr Charles' submission that the Government should not be entitled costs on mere reasons of not paying any fees in filling any document in Court, State Attorney getting paid by the Government from the Taxes which are collected from tax payers, and the State Attorneys doing Public duty. Instead, I find there is a legal force and fairness in the Respondents' s arguments on the following thirteen reasons:

One, currently, pursuant to *Sections 5 (2) and 17 of the Office of the Attorney General (Discharge of Duties) Act*,[32] all civil cases involving the Government are handled by the Attorney General as the Head of the Bar

[32] Cap 268, (R. E. 2019)

through the Solicitor General. Under *Section 6A (1) of the Government Proceedings Act,*[33] The Attorney General shall, through the Solicitor General, have the right to intervene in any suit or matter instituted by or against the Ministries, Local Government Authorities, Independent Departments and Other Government Institutions.

It was envisaged following restructuring of the Office of The Attorney General,[34] the Attorney General will continue with his constitutional advisory and supervisory mandates[35] while the Solicitor General and the Director of Public Prosecution will take care for all civil litigation and criminal cases respectively.

As regards to the civil or arbitration proceedings, there is no doubt that it is the Ministries or Public Institutions which generate the cases from their daily functions or mandates including the execution of public projects. Obviously, assignment of the cases from any Government Ministry, Department or Institution to the Office of Solicitor General, creates Advocate - clients relationship. In the circumstances, the Office of Solicitor General would handle the cases like any other law firm and in this, the Office of Solicitor General is the statutory public law firm. As the work done by the Advocates has similar weight with that of State Attorneys, it is obvious that there should be award of cost on instruction fees and other remuneration to the State Attorneys.

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[33] Cap 5 (R. E. 2019)

[34] Government Notices Nos. 48,49 and 50 of 2018

[35] Article 59 and 59A of the Constitution of the United Republic of Tanzania of 1977, as amended and Cap 268 (R. E. 2019)

Two, pursuant to *Section 3 (1) of the Government Proceedings Act,*[36] the Government is subjected to all those liabilities in contract, quasi-contract, detinue, tort and in other respects to which it would be subject if it were a private person of full age and capacity and as such, any claim arising therefrom may be enforced against the Government in accordance with the provisions of the said Act. Furthermore, *Section 12 of the Government Proceedings Act*[37] provides that:

> in any civil proceedings by or against the Government the Court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between private persons and otherwise to give such appropriate relief as the case may require.

From the above two provision of the Government Proceedings Act,[38] it is quite clear that whereas the Government can be liable like any private person, equally, the Government is also entitled to compensation like any a private person in the civil litigation including entitlement for compensation for instruction fees to attend Government cases.

Three, in every civil lawsuit at least two parties are involved, a Plaintiff making a claim and a Defendant resisting it. In order to participate in a lawsuit as a Plaintiff or as a Defendant, a party must have the capacity to sue or being sued and must be a "proper" party (i.e., have standing

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[36] Cap. 5 *Op cit*
[37] *Ibid*
[38] *Ibid*

before the Court). In this case, the Government agency or Office has been sued and the Attorney General joined as a necessary party. In law, the Government in all proceedings before the Court of law is regarded the same as a private person. Therefore, all right and liability affects all in the same manner. This has been provided under *Section 3 and 4 of The Government Proceedings Act*[39] which provides:

> 3.-(1) Subject to the provisions of this Act and any other written law, *the Government shall be subject to all proceedings relating to liabilities in contract, quasi-contract, detinue, tort and in other respects to which it would be subject if it were a private person of full age and capacity and any claim arising there from may be enforced against the Government in accordance with the provisions of this Act.*
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> (2) N/A
>
> (3) Where the Government is bound by a statutory duty which is binding also upon persons other than the Government and its officers, then the Government shall, subject to the provisions of this Act, in respect of a failure to comply with that duty, be subject to all those liabilities in tort to which it would be so subject if it were a private person of full age and capacity.

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[39] Cap 5 *Op cit*

4. *Where the Government is subject to any liability by virtue of this Part, the law relating to indemnity and contribution shall be enforceable by or against the Government in respect of the liability to which it is so subject as if the Government were a private person of full age and capacity.* (Emphasis mine)

The above provision of the law connotes that when Parties are in proceedings before the Court of law acquire the same status, no one is in disadvantaged position over the other. The duty of the Advocate is to represent his client who is a private person and the duty of State Attorney is to represent the Government in Court of law as provided *under Section 8 (1) (f) of The Office of Attorney General (Discharge of Duties) Act,*[40] which provides among others the duties of State Attorney is to:

> Represent the Government in Court of Law and Tribunals in any suit or matter to which the Government is a Party or has process.

In view of the mandates of the Office of Solicitor General as stated under *Order 4 (1) of the Office of the Solicitor General (Establishment) Order, 2018,*[41] the engagement of the Office in the conduct of litigation or arbitration does not differ from those of the private Advocates. Since the handling of civil or arbitral proceedings involves professional commitments, regardless designation of the persons involved, it is indeed that instruction

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[40] Cap 268 *Op cit*

[41] GN No. 50 of 2018

fees need to be awarded to the State Attorneys conducting litigation or arbitration cases for or on behalf of the Government.

Four, Section 5 (2) of The Office of Attorney General (Discharge of Duties) Act,[42] states that:

> The Attorney General by virtue of his office is the head of the bar and shall take precedent in Court in all matters whenever he appears.

The above imply that all jobs or activities done by the private Advocate in relation to represent their client in Court of law are also done by the State Attorney in representing Government in Courts of law. For that matter, when the case is handled by the State Attorneys employed by the Government of the United Republic of Tanzania does not mean that the Government is not entitled for costs awarded to the Government on the basis that State Attorneys do a Public duty or are being paid by the Government from tax payer money. It should be borne in mind that the Tax payers' money paid to the State Attorneys need to be accounted for. Denying costs to the matters involving the Government is like allowing unfounded flood gate litigation against the Government.

Five, the Advocates Remuneration Order,[43] is made from *the Advocate Act.*[44] *Order 3* provides that:[45]

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[42] Cap 268 *Op cit*
[43] G.N No 263 of 2015 *Op cit*
[44] Cap 341 (R.E. 2019)
[45] *Ibid*

> Every Officer to whom this section applies shall, in connection with duties of his office, be entitled to practice as an Advocate in the High Court or in any Court subordinate thereto constituted under the Magistrates 'Courts Act and to perform any of the functions which, in England, may be performed by a member of the Bar as such or by a solicitor of the Supreme Court of Judicature as such, and provided, be subject to the provisions of this Act.
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> The Officers to whom this section applies are:
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> (a) The Attorney General, the Director of the Public Prosecutions, the Solicitor General, ... (emphasis added)

Six, it appears correct that all State Attorneys including those employed in the Office of Solicitor General and its subsidiaries are covered under the Advocates Act.[46] The State Attorneys are practicing like any other Advocates, the different being Attorneys' practice is limited to save interests of the Government only and their practicing certificates are suspended on that reason. Advocates do private practice using their practicing certificates.

Seven, the State Attorneys, just like Advocates spends time and money to make preparations of the hearing of the same. In the process, the cost of time spent by the Respondents in doing research, stationeries, transport and *per diem* allowances for the officer from one place to another, for this

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[46] *Ibid*

case from Dodoma to Dar es Salaam for discussing the matter with State Attorney in Solicitor's General Office has to be awarded in successful litigation. There is no reason of depriving the Respondent/ Government their reasonable costs incurred upon successful proof or defence of the civil case.

Eight, it is not a requirement to produce receipts to prove cost incurred as presented in the Bill of Costs. In the case of **M/S Buckreef Gold Company Ltd v. M/S Taxplan Associates Ltd and Another**,[47] the Court had this to observe:

> On EFDs receipts, I would like to define what is EFD (Electronic Fiscal Device) is. EFD is a machine designed for use in business for efficient management control of area of sales analysis and stock control systems and which conforms to the requirements specified by law. As correctly observed by the Taxing Officer, EFD receipts are more relevant in tax matters. *There is no provision in Advocate Remuneration Order, 2015*[48] *which requires proof of payment by production of EFDs receipts. EFDs receipts may be relevant when there is a dispute as to whether one pays taxes or Government renews or not.* That was not the issue. (Emphasis applied)

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[47] Misc. Commercial Reference No. 3 of 2017, High Court of Tanzania, Commercial Division at Dar es Salaam (unreported) p. 6

[48] GN No 263 of 2015 *Op cit*

I must stress at this juncture that a Court of law is not a revenue collection institution. Its object is to do justice to the disputing litigants upon affording both of them an opportunity to be heard on every issue. This applies to both private persons and Government as equal parties to the case.

Nine, lack of instruction fee to the State Attorneys do not bar them from claiming reasonable costs upon successful litigation. In the light of the **Premchand Raichand Ltd and Another case**,[49] it is a principle not by any means to be whittled down that the successful litigant, be a corporate entity, natural person or a Government, ought to be fairly reimbursed for the costs reasonably incurred in litigation. It is my settled view, that the Government as a party, cannot be excluded from fair reimbursement of costs except by a justified clear order of the Court. That is what I call a "**costs fundamental rule**" from which I would not for my part sanction any departure. Costs must be fairly attributed to a winning party regardless of status, whether is a Government or artificial person or natural person. Indeed, filing of the pleadings by the Solicitor or State Attorney on behalf of the Government is enough indication that he has instruction. In the Ugandan case of **Hon. Abiku Jessica v. Eriyo Jessica Osuna**,[50] my brethren Hon. Justice Stephen Mubiru stated *inter alia*:

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[49] (No.3) [1972] 1 E.A. 162

[50] Miscellaneous Civil Application No. 4 and 37 of 2015, High Court of Uganda at Kampala (2018) UGHCFD 27

> Filing of pleadings on her behalf was sufficient proof of the Advocate-client relationship, an indication that Counsel was under instructions.

Ten, costs are awarded for Indemnification, Costs provides adequate indemnity to the successful litigant for expenditure incurred by him for the litigation. It necessitates the award of actual costs of litigation as contrasted from nominal fixed or unrealistic costs.[51]

Eleven, cost serves the purposes of deterrence, since potential litigants should be encouraged to think carefully before engaging the civil justice system and should be encouraged to refrain from taking unnecessary steps within that system. This is because costs deter vexatious, frivolous and speculative litigations or defence.[52] So, whoever taking advantage of keeping frivolous and meritless claims causing the problem of backlog of cases must be deterred by award of costs. In fact, backlog of cases does not permit early disposal of suits, causes more disturbances to the other party and wastage of time.

Twelve, cost encourages early settlement of disputes. The reason being that the provision of costs is an incentive for each litigant to adopt Alternative Dispute Resolution process and arrive at a settlement before trial commences.[53]

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[51] Vinod Seth v. Devinder Bajaj & Another, Civil Appeal No.4891 of 2010, Supreme Court of India

[52] *Ibid*

[53] *Ibid*

Thirteen, Costs ensure that the provisions of the Code, the Evidence Act and other laws governing procedures are scrupulously and strictly complied with and that parties do not adopt delaying tactics or mislead the Court.[54]

Needless, a person contemplating litigation against any party including the Government should be properly advised by his Advocates very approximately, for the kind of case contemplated, is likely to be his potential liability for costs and malicious prosecution in civil cases as held in the case of **Chesco Kihwelo v. Pyrethrum Company of Tanzania Limited**.[55] As such, the process of shifting of costs and fees acts as a deterrent to litigation against any party including the Government.

It is the observation of this Court that the provisions relating to costs should not however obstruct access to Courts and justice. Under no circumstances the costs should be a deterrent, to a citizen with a genuine or bonafide claim, or to any person belonging to the weaker sections whose rights have been affected by any person including the Government, from approaching the Courts.[56]

Having determined that the Government through State Attorneys handling the Government's cases is entitled for costs, the only issue remains, will be as to; *what criteria or principle shall be applied when assessing instruction fees to the Government.*

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[54] *Ibid*

[55] Civil Appeal No. 11 of 2019, High Court of Tanzania, Iringa Registry (unreported)

[56] *Ibid*

The Court of Appeal of Kenya in the case of **Joreth Ltd v. Kigano & Associates**[57] outlined the principle as follows:

> We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a Bill of Costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.

In a Kenyan case of **Peter Muthoka and Another v. Ochieng and 3 Others NRB,**[58] the Court of Appeal expounded further on its decision in the **Joreth Case**[59] as follows:

> It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject

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[57] [2002] 1 EA 92

[58] CA Civil Appeal No. 328 of 2017 [2019] eKLR

[59] [2002] 1 EA 92, *Op cit*

value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the Court. Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement. It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the Taxing Officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the

> three. It is not open to the Taxing Officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive. [Emphasis added).

In line with the aforesaid decision, since taxation is being done after the judgment, the first port of call in ascertaining the value of the subject matter shall be the judgment.

In the matter of the Advocates Act[60] and in the matter of Advocates (Taxation of Costs, Appeals and Reference) Regulations[61] and in the matter of Taxation Appeal between **Manharlal Thakker v. Bahati Mont and Kibugo Enterprises**,[62] my brethren Justice Stephen Musota stated that:

> Instruction fees should be based on the amount of work involved in preparing for the hearing, the difficulty and importance of the case and the amount involved and allowed a 10% instruction fees based on the value of the subject matter.

In another Ugandan case of **Makumbi and Another v. Sole Electrics (U) Ltd**,[63] Honourable Justice Manyindo DCJ, JSC (as he then was) set out the general principles of taxation. In that case, the

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[60] Cap 267 of 1970

[61] SI 267 – 5

[62] Misc. Appeal No.188 of 2013 High Court of Uganda at Kampala, Civil Division

[63] (1990–1994) 1 EA 306

Taxing Master taxed the fees and disbursements, including the Commercial Transaction Levy at Ugandan shillings 13,854,000/=. Upon appeal, Manyindo DCJ JCS observed:

> A mere production of a long list of authorities does not necessarily mean that there was protracted research by Counsel and that an Advocate should not be reimbursed for what he has not spent.

The Court went on to observe at pages 310 – 311 that:

> The principles governing taxation of costs by a Taxing Master are well settled. *First*, the instruction fee should cover the Advocates' work, including taking instructions as well as other work necessary for presenting the case for trial or appeal, as the case may be. *Second*, there is no legal requirement for awarding the Appellant a higher brief fee than the Respondent, but it would be proper to award the Appellant's Counsel a slightly higher fee since he or she has the responsibility to advise his or her client to challenge the decision. *Third*, there is no mathematical or magic formula to be used by the Taxing Master to arrive at a precise figure. Each case has to be decided on its own merit and circumstances. For example, a lengthy or complicated case involving lengthy preparations and research will attract high fees. In a *fourth*, variable decree, the amount of the subject matter involved may

> have a bearing. *Fifth*, the Taxing Master has discretion in the matter of taxation but he must exercise the discretion judicially and not whimsically. *Sixth*, while a successful litigant should be fairly reimbursed the costs he has incurred, the Taxing Master owes it to the public to ensure that costs do not rise above a reasonable level so as to deny the poor access to Court. However, the level of remuneration must be such as to attract recruits to the profession. *Seventh*, so far as practicable there should be consistency in the awards made. (See **Raichand v. Quarry Services of East Africa Limited and Others**,[64] **Nalumansi v. Lule**,[65] **Hashjam v. Zanab**[66] and **Kabanda v. Kananura Melvin Melvin Consulting Engineers**.[67]

Honourable Odoki JSC (as he then was) in the case of **Attorney General v. Uganda Blanket Manufacturers**[68] observed that:

> The intention of the rules is to strike the right balance between the need to allow Advocates adequate remuneration for their work and the need to reduce the

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[64] [1972] E.A. 162

[65] Civil Application Number 12 of 1992, Supreme Court of Uganda at Kampala

[66] [1957] EA 9 255

[67] Civil Application Number 24 of 1993, Supreme Court of Uganda at Kampala

[68] Civil Application No. 17 of 1993, Supreme Court of Uganda

> costs to a reasonable level so as to protect the public from excessive fees...the spirit behind the rules is to provide some general guidance to what is a reasonable level of Advocates' fees.

In the cited **Tanzania Rent A Car Limited**,[69] where the Applicant opposed the Bill of Costs on the ground that the Respondent failed to prove that he paid the said amount as instruction fees and that the said amount was excessive and unreasonable, her Ladyship Kerefu J.A held that the award of instruction fees is peculiarly within the discretion of a Taxing Officer.

Among others, the Court referred to the decision in **Premchand Raichand Ltd and Another v. Quarry Services of East Africa Ltd and Others**[70] whereas the erstwhile Court of Appeal for Eastern Africa laid down four guiding principles which have to be considered when determining the quantum of an instruction fee. These are; *First*, that costs shall not be allowed to rise to such a level as to confine access to the Courts to only the wealthy; *second*, that the successful litigant ought to be fairly reimbursed for the costs he reasonably incurred; *thirdly*, the general level of the remuneration of Advocates must be such as to attract worthy recruits to any honourable profession; and *fourthly*, that there must, so far as practicable, be consistency in the awards made, both to do justice between one person and another and so that a person contemplating

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[69] Civil Reference No. 9 of 2020 (unreported)
[70] [1972] 1 E.A. 162 *Op cit*

litigation can be advised by his Advocates very approximately, for the kind of case contemplated, is likely to be his potential liability for costs. These principles were restated by the Court in **The Attorney General v. Amos Shavu.**[71]

In the cited case of **Tanzania Rent A Car Limited**,[72] it was determined that although the Taxing Officer has been given wide latitude and discretion to determine taxing costs as it appears to him to be proper for attainment of justice, the said discretion should be exercised within the cost scales prescribed in the Rules. In addition, the Taxing Officer is also supposed to consider other factors such as the greater the amount of work involved, the complexity of the case, the time taken up at the hearing including attendances, correspondences, perusals and the consulted authorities or arguments.

It was further added in the light of the decision in **Hotel Travertine Ltd v. National Bank of 6 Commerce**,[73] that in taxation of Bill of Costs there is no need of proof of instruction fees by presentation of receipts, vouchers and/or remuneration agreement because the Taxing Officer, among others, is expected to determine the quantum of the said fees in accordance with the cost scales statutorily provided for together with the factors enumerated in the said case. It is in the discretion of the Taxing Officer in considering and awarding compensation for instruction fees which is reasonable.

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[71] Taxation Reference No. 2 of 2000

[72] Civil Reference No. 9 of 2020 *Op cit*

[73] Taxation Civil Reference No. 9 of 2006

In the cited case of **Tanzania Rent A Car Limited**[74] the Court of Appeal held as follows:

> I wish to start by stating that, it is trite law that instruction fees is supposed to compensate adequately an Advocate for the work done in preparation and conduct of a case and not to enrich him. In **Smith v. Buller**,[75] cited in **Rahim Hasham v. Alibhai Kaderbhai**,[76] the Court observed that, Costs should not be excessive or oppressive but only such as are necessary for the conduct of the litigation.

In any event, *Rule 7 (1) Court Fees Rules, 2018*[77] requires the losing party as against the Government to refund amount of fees which would have been payable if the suit was against a private person. *Rule 7 (1)* (*supra*) provides:

> Fees shall not be payable by the United Republic or the Government in respect of proceedings instituted by or against the Government:
>
> > Provided that, a judgment in favour of the Government for costs shall, unless the court otherwise directs, include the amount of fees

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[74] Civil Reference No. 9 of 2020 *Op cit*
[75] (1875) 19 E9.473
[76] (1938) 1 T.L.R. (R) 676
[77] G.N. No. 247 of 2008

which would have been payable if the proceedings had been instituted by or against a private person.

In other jurisdiction like India, fees and remuneration of the Law Officers and State Attorneys for handling legal proceedings on behalf of the Government are clearly provided for in the Law. In India, under *the Law Officers (Conditions of Service) Rules, 1987 as amended in 2015*[78] has conferred the President of India to make the rules, regulating the remuneration, duties and other terms and conditions of the Attorney-General for India, the Solicitor-General for India and the Additional Solicitor-General for India (Law Officers of India).

The duties of the Attorney-General, Solicitor-General and the Additional Solicitor-General for India as stated in *Rule 5 of the Law Officers (Conditions of Service) Rules, 1987*[79]are as follows:

(a) to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may from time to time, be referred or assigned to him by the Government of India.

(b) to appear, whenever required, in the Supreme Court or in any High Court on behalf of the

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[78] Available at www.legitquest.com the notification is available at legalaffairs.gov.in (Lastly accessed on 2nd September, 2021)

[79] *Ibid*

Government of India in cases (including suits, writ petitions, appeal and other proceedings) in which the Government of India is concerned as a party or is otherwise interested;

(c) to represent the Government of India in any reference made by the President to the Supreme Court under *Article 143 of the Constitution*;[80] and

(d) to discharge such other functions as are conferred on a Law Officer by or under the Constitution or any other Law for the time being in force.

Among other things, *Rule 7 (1) of the Law Officer (Conditions of Service) Rules, 1987*[81] provides that for the performance of the duties mentioned in *Rule 5*,[82] a Law Officer shall be paid;

(a) a retainer, except during the period of his leave, (i) in the case of the Attorney-General for India, of rupees Seventy Five thousand per month; (ii) in the case of the Solicitor-General for India, of rupees Sixty thousand per month' and (iii) in the case of the Additional Solicitor-General for India, of rupees Forty Five thousand per month; and

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[80] As on 9th September, 2020 available at legislative.gov.in

[81] Available at www.legitquest.com The notification is available at legalaffairs.gov.in (Lastly accessed on 2nd September, 2021)

[82] *Ibid*

(b) N/A;

(c) a fee for appearance and other work on behalf of the Government of India in cases before the Supreme Court, various High Courts, Commissions of Inquiry/Tribunals etc., on the scales provided in the Schedule to the Rules.

The Rates of fees payable for appearance and other in cases before the High Courts, Supreme Court or a Tribunal or a Commission of Inquiry are as follows:[83]

(i) Suits, writ petitions, appeals and references under Article 143. Rs.24,000/- per case per day;

(ii) Special leave petitions and other applications Rs.15,000/- per case per day.

(iii) Settling pleadings (including Affidavits) Rs.7,500/- per pleading

(iv) Settling statement of case Rs.9,000/- per case.

(v) For giving opinions in statement of case sent by the Ministry of Law Rs.15,000/- per case.

(vi) For written submissions before the Supreme Court, High Court and Commissions of Inquiry/Tribunals Rs.15,000/-

(vii) Appearance in Court Outside New Delhi Rs.60,000/-

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[83] See Rule 7 (c) available at www.legitquest.com The notification is available at legalaffairs.gov.in (Lastly accessed on 2nd September, 2021)

The above rates have been amended from time to time, including the 2015 amendment. This approach could be adopted in our jurisdiction to assist the Court in easily determining remuneration entitlement for the Law Officers and State Attorneys.

On reasonable basis, the instruction fees to the Government should be awarded directly to the relevant Office which is involved in the conduct of a particular legal proceeding and in this case, the Attorney General or the Officer of Solicitor General as the case may be. The fees and other related costs should be recovered as public revenue as it is in other productive sectors whereby the Government recovers revenues by way of taxes, duties, fees, levies or penalties.

To facilitate for the case management in the Public sector, the Government may consider for the establishment of **The Special Litigation Fund (SLF)** whose source may include costs payable to the Government from the successful litigation or arbitration proceedings. Through that system, the law can provide for the conditions governing issuance of formal instructions and retainer of the Officer of Solicitor General or Attorney General in the handling of the cases involving the Government. The said special fund will also operate to support for the capacity building of the lawyers in both public and private sector as far as legal practices is concerned.

The establishment of the Special Litigation Fund can be learned from various sectors or professional as follows:

(i) The Road Fund as established in *the Roads and Fuel Tolls Act*[84] whose mains source include, monies collected as roads and fuel tolls imposed on diesel and petrol, transit fees, heavy vehicle licences, vehicle overloading fees, or from any other source at the rate or rates to be determined by Parliament from time to time;

(ii) Tanzania Forest Fund established by *the Forest Act*[85] under Sections 79 to 83,[86] as a mechanism to provide long term, reliable and sustainable financial support to Forest Conservation and Sustainable Forest Management (SFM) in the Country;

(iii) The Fisheries Research Development Fund established *under Section 25 (1) of the Tanzania Fisheries Research Institute Act*[87] to facilitate and support fisheries research and such other functions of the Institute;

(iv) The Contractors Assistance Fund (CAF) established by the Contractors Registration Board in 2002 with objective of provision of bid bonds and advance payment guarantees to small contractors.[88]

(v) The Construction Industry Development Fund (CIDF) established in 2002 under the National Construction Council to provide short-term

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[84] Cap 220 (R.E. 2019)
[85] Cap 323 (R.E. 2002)
[86] *Ibid*
[87] Cap 280 (Act No. 16 of 2016)
[88] Visit https://crb.go.tz/CoreFunction/DevelopmentOfContractors (Lastly accessed on 2nd September, 2021)

working capital to contractors, consultants and materials manufacturer.[89]

Before winding up the analysis on the question of costs, by way of parenthesis, I will in nutshell attempt to answer eight other incidental controversial issues associated with taxation of Bill of Costs.

First, whether the Taxing Officer may dismiss the Bill of Costs for none appearance of the Decree Holder or parties on the date of the hearing. It is the findings of the Court that the Advocates Remuneration Order[90] is silent. Indeed, taxation in itself is not a trial. Hearing is only meant for justification. Therefore, the Taxing Officer is only required to peruse and tax upon receipt of the Bill of Cost accordingly. As Long as the Bill of Costs is lodged timely, the Taxing Officer has to proceed. If the intent of the legislature was to dismiss the Bill of Costs for nonattendance, it could have said so expressly.

It is the further findings of the Court that one cannot borrow a provision from the Civil Procedure Code Principal legislation to Advocates Remuneration Order which are mere rules. If the legislature had intended that in case of lacuna in the Advocates Remuneration Order,[91] recourse should be made to the Civil Procedure Code, it could have stated so in

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[89] See Section 14 of the National Construction Council Act, (R. E. 2008) available at https://www.ncc.go.tz/uploads/publications/sw1516089549-nccAct.pdf (Lastly accessed on 2nd September, 2021)

[90] GN. 263 of 2015 *Op cit*

[91] *Ibid*

expressly in its provisions. One of examples of the laws which bears such import is the District Land and Housing Tribunal Courts Act,[92] which specifically says if there is a *lacuna* in that Act, the Civil Procedure Code,[93] shall be applied in the trial before the District Land and Housing Tribunal. *Section 51 of the Land Disputes Courts Act*[94] provides:

> (1) In the exercise of its jurisdictions, the High Court shall apply the Civil Procedure Code and the Evidence Act and may, regardless of any other laws governing production and admissibility of evidence, accept such evidence and proof which appears to be worthy of belief.
>
> (2) The District Land and Housing Tribunals shall apply the Regulations made under section 56 and *where there is inadequacy in those Regulations it shall apply the Civil Procedure Code.*[95] (Emphasis added)

In the light of the afore findings, and bearing in mind that there is no provision entitling the Taxing Officer to dismiss the Bill of Costs, if the Decree Holder is absent, the Taxing Officer has to proceed considering the Bill of Cost as presented.

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[92] Act No. 2 of 2002 (R.E. 2019)
[93] Cap 33 *Op cit*
[94] Act No. 2 of 2002 *Op cit*
[95] Cap 33 *Op cit*

Second, whether the Taxing Officer has Jurisdiction to set aside the dismissal order made by him/herself or made by another Taxing Officer. It must be appreciated that Bill of Costs is for execution of the granted costs. It is therefore my found view that, if the Taxing Officer has no power to dismiss the Bill of Costs, equally, he cannot have power to set aside the dismissed Bill of Costs regardless of it being erroneously dismissed. The only available remedy is to go for reference which will give a broader interpretation on that legal point of appeal. The guiding law on this aspect is *Order VII (1) of Advocates Remuneration Order*,[96] which provides that:

> *Any Party aggrieved by the decision of Taxing Officer may file a Reference before the Judge of the High Court of Tanzania within 21 days.*

On the footing of the afore position of law, even the Civil Procedure Code cannot be resorted to while there are specific provision of the Advocates Remuneration Order.[97] The available remedy by the Decree Holder whose Bill of Costs is dismissed for his/her none appearance is to file reference before the Judge of the High Court of Tanzania.

Third, whether it is necessary to prove charges in the Bill of Costs by production of receipts as evidence, in the presence of scale charges in The Advocate and Remuneration Order.[98] Under *Order 58 of the Advocates Remuneration Order*,[99] receipts are required only for two purposes. *One*, for disbursement charged in the Bill of Costs; and *two*, only where the

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[96] GN. 263 of 2015 *Op cit*

[97] G.N. No 263 of 2015 *Op cit*

[98] *Ibid*

[99] *Ibid*

same are required by the Taxing Officer to be presented in Court. In the case of **Onesmo Nangole v. Dr. Stephen Lemomo Kiruswa,**[100] it was held *inter alia* that:

> *Where the words of statute are clear and unambiguous, then judicial inquiry is complete and no interpolations of the Court is required otherwise the Court is prone to enter into prohibited territory, the legislative power of parliament.*

The same position was reached by the Court of Appeal in the case of **BP Tanzania v. Commissioner General of TRA**.[101]

Further, under *Order 55 of the Advocates Remuneration Order,*[102] the Taxing Master, through his discretion, may require the production of a document. But such document is needed for the purposes of satisfaction. However, such document must be within the ambit of the matter and it must be placed for satisfaction of the other party for inspection purposes to meet fairness.

Fourth, whether instruction fee includes all other activities like attendances, drawing of documents, consultation costs, transport allowances, substance extra by the Advocate. Instruction fee is charged for Legal representation in the Court. There are activities of which the Advocates Remuneration

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[100] Civil Appeal No. 117 of 2017, Court of Appeal of Tanzania at Dar es Salaam (unreported)

[101] Civil Appeal No. 125 of 2015, Court of Appeal of Tanzania at Dar es Salaam (unreported)

[102] G.N. No. 263 of 2015 *Op cit*

Order[103] has provided for specific fees scale. It includes but not limited to drawing pleadings and affidavits. Needless, there are cases which have answered as to what constitutes instruction fees, to include the case of **George Mbuguzi v. A.S. Maskini;**[104] **Ujagar Singh v. Mbeya Cooperative Union;**[105] **Joreth Limited v. Kigano and Associates.**[106]

Fifth, who is to be paid amounts taxed in the Bill of Costs? Advocate or the Client/Decree holder. For the Government, I have already issued the position. For other persons, the Advocates Remuneration Order[107] is not express on that issue. However, practice and general logic requires the taxed amount to be paid to the client on account of three reasons: *One*, it is presumed that the Advocate was paid instruction fees at the beginning and other costs during continuing of the case. Otherwise, if the Advocate uses his own money in representing his client it will amount to Cham pantry which is unethical. *Two*, Costs are granted to the Party. Advocate is not a Party to the suit. *Three*, *Order IV of the Advocates Remuneration Order*,[108] entitles the Decree Holder only to file Bill of Costs. There is no any provision of the law that entitle a representing Advocate to file Bill of Costs. *Order IV* provides:[109]

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[103] *Ibid*
[104] (1980) T.L.R 53
[105] (1968) H.C.D. 173
[106] (2002) 1 EA 92 *Op cit*
[107] GN.N.263 of 2015 *Op cit*
[108] *Ibid*
[109] *Ibid*

> A decree holder may, within sixty days from the date of an order awarding costs, lodge an application for taxation by filing a Bill of Costs prepared in a manner provided for under Order 55.

However, there are other two points to be noted here. *One*, the Bill of Cost have to be paid through Advocate Client Account and not in Advocates personal account. Thereafter, the Advocate is required to transfer such amount to the Client. This provision was meant to protect the Advocate to incur personal costs for the Client. *Two*, Advocate can file taxation against his own client if he refuses to pay him or have dispute on the amount. Such taxation can be filed under *Order XLII of the Advocates Remuneration Order*.[110]

Sixth, whether the Taxing Officer may hear an application for extension of time to file an application for taxation of costs. It is the firm view of this Court that Taxation Proceedings are within the ambit of the Taxing Officer. Therefore, the Taxing Officer may hear the application for extension of time to condone the delay. The guiding principles on such application are the usual one, to wit advancing sufficient reasons and accounting for each day of delay. The applicable provision on this aspect is *Section 14 (1) of the Law of Limitation Act* which provides:[111]

> Notwithstanding the provisions of this Act, *the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of* an appeal *or an*

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[110] *Ibid*

[111] Cap 89 (R.E. 2019)

> *application*, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application. (Emphasis added)

The issue becomes; whether a Bill of Costs is an application? The answer is found under *Order IV of the Advocates Remuneration Order,*[112] which is on application for taxation.[113] It requires a decree holder, within sixty days from the date of an order awarding costs, to lodge an application for taxation by filing a Bill of Costs prepared in a manner provided for under Order 55.

Seventh, what are the criteria to be considered by the Taxing Officer in assessing the costs for attending taxation under *Order 55 (3) of the Advocates Remuneration Order.*[114] The general criterion which guide Taxing Master in assessing and taxing Bill of Costs generally and costs for attending Bill of Costs proceeding in particular is the judicious discretion of Taxing Officer. The basis of this criterion is the provisions of *Order 12 of the Advocates Remuneration Order,*[115] and case law including the cited cases of **Amos Shavu**;[116] **Pardhan**;[117] **George Mbuguzi**.[118]

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[112] G.N. No. 263 of 2015 *Op cit*
[113] *Ibid*
[114] *Ibid*
[115] G.N. No. 263 of 2015 *Op cit*
[116] Taxation Reference No. 2 of 2000 *Op cit*
[117] (1969) 1 EA 528 *Op cit*
[118] (1980) TLR 53 *Op cit*

The discretionary power of Taxing Master is taken to have been exercised judiciously where Taxing Master apply the accurate legal principles regulating Bill of Costs and the costs are reasonable in sense that the costs is not unreasonably too high or unreasonably too low and legal authorities for this legal proposition including the cited cases of **Hotel Travertine Ltd**[119] and **Premchand Raichand Ltd and Another**,[120] among others.

Eighth, what is the procedure of obtaining the additional costs by the order of a Judge under *the Advocates Remuneration Order?*[121] There are three categories. The First category is under *Order 46 of the Advocates Remuneration Order, 2015.*[122] It contemplates when the Advocate charges over and above the scale prescribed by *the Advocates Remuneration Order.*[123] On this category, the Judge must issue a Certificate (certify) that there are special reasons to allow additional costs which is over and above the prescribed scale under the Advocates Remuneration Order.[124] Also, under this category, the Judge may order the Advocate be paid below the scale.

The second category is under *Section 54 of the Advocates Act*[125] which allows an Advocate and his Client to enter agreement to charge his client

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[119] Civil Reference No. 9 of 2006 *Op cit*
[120] (1972) EA 162 *Op cit*
[121] *Ibid*
[122] *Ibid*
[123] *Ibid*
[124] *Ibid*
[125] *Ibid*

otherwise an amount not stated in the scale. This is an exception under *Order 47 of the Advocates Remuneration Order.*[126] Under this category, the Advocate must file an application for adjudication of remuneration agreement against the Client. Such application has to be determined by the Taxing Officer. In determining such application there are must be special grounds. In determining whether special grounds exist, the Taxing Officer must consider; the nature of the case, importance of the case, complexity of the case, sensitivity of the case and urgency of the case.

The third category is governed under *Order 49 of the Advocates Remuneration Order,*[127] which allows a Client to hire more than one Advocate.[128] Ordinarily, each Advocate must be paid as per scale. But that may lead to improper costs. The procedure under this category is similar to the first category. There must be a Certificate issued by the Judge but on this category, it must be issued at the trial. Also, there must be special reasons. The Judge at the trial must take into account on the amount involved in the case, relief awarded, the nature of the case, importance or difficultness of the case.

With the above analysis on costs issue, I will procced to determine the other two issues arising out of the *plea in limine litis* raised by the Respondents: *One*, whether the application is bad in law for lack of authorisation from the persons required to be represented. *Two*, whether

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126 *Ibid*

127 *Ibid*

128 *Ibid*

the Application is misconceived and bad in law for misjoinder of 3rd Respondent.

It must be noted that the Applicants in this application filed Chamber Summons supported by an Affidavit of Juma Mganga Lukobora, Zeina Msuya, Mwanahamisi Swavila, and Abdulrahman Haji Mwadini on behalf of the rest of the Applicants. The application was made under *Order I Rule 8 and section 95 of the Civil Procedure Code,*[129] praying before this Court for the main order of leave to institute a representative suit to sue for themselves and on behalf of 111 Other Persons.

In support of the first herein above issue, Ms Lydia Mcharo learned State Attorney submitted that the application bears annexture *J1* which provides the list of names with their signature. In view of the learned State Attorney, the same is an authorisation preferred but it does not fit the requirement of *Order I Rule 8 of the Civil Procedure Code.*[130] She argued that, under *Order I Rule 8 of the Code,*[131] the Rule requires the Applicants to give notice to other members to be represented and there must be a grant of permission.

Ms. Lydia Mcharo went on submitting that *Order I Rule 8 of the Civil Procedure Code,*[132] also requires common interest in the suit to be filed. There is no minutes of memorandum to show if they convened a meeting

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[129] Cap 33 *Op cit*
[130] *Ibid*
[131] *Ibid*
[132] *Ibid*

which authorized the Applicants. According to her, their willingness can be found if there was a meeting before and not after filling of the Application and "*Orodha ya Wamiliki wa Dawa Muhimu"* cannot suit that. To bolster up her argument, Ms. Lydia Mcharo cited the case of **Hamza Omari Pandamilango v. Namera Group of Industries (T) Limited**,[133] in which it was held:

There must be a list of names signed by the Applicants.

In reply, the Applicants' Counsel Mr. Charles Alex submitted that the Preliminary objection has been raised per *incur ium* of the position of the law regulating Representative suit. He was of the view that criteria for authorization is under *Order I Rule 8 of the Civil Procedure Code.*[134] According to Mr. Charles Alex, memorandum of meeting is not the requirement rather the requirement is the list signed by the Applicants and those to be represented. Mr. Charles Alex, referred the Court to the cited the case of **Hamza Omari Pandamilango**[135] He went on to cite the case of **Abdallah Mohamed Msakandeo & Others v. City Commission of Dar es Salaam and 2 Others**,[136] in which it was held:

Let me now add that the applicants were required to establish further that those numerous persons were indeed willing to join the suit because in the event the suit failed the defendant should then proceed to recover his costs from them. Necessarily, therefore those

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[133] Misc. Land Case No 664 of 2017 High Court of Tanzania, Land Division, p. 4

[134] Cap 33 *Op cit*

[135] *Ibid*

[136] High Court of Tanzania at Dar es Salaam 1998 (TLR) p. 444

numerous persons must not only be identifiable, each of them should append his signature against his name and the list of such persons should be an annexture to the application. Failure to do so will offend the clear provisions of Order 1 Rule 8 of the Civil Procedure Code.

Mr. Charles Alex argued that there were no issues of prior notice before the Application nor issue of memorandum of minutes. He was of the view that the common interest is reflected in their Affidavit and not the list. According to him their common interest is to obtain the leave to file representative suit as reflected in their Affidavit.

In a short rejoinder, Ms. Lydia Mcharo learned State Attorney reiterated her submission in chief and added that the list is not enough there must be strong proof that the Applicants were authorized by the rests to file representation. She maintained that a mere saying in the Affidavit that "we have common interest" is not enough to say that everyone is willing to be represented.

After going through the submissions for and against this objection, I will start by quoting *Order I Rule 8 of the Civil Procedure Code*,[137] which provides that:

Where there are numerous person having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit

[137] Cap 33 *Op cit*

> *of all persons so interested; but the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.*

From the wording of the above provision, it is clear that, there must be a document proving that those parties exist and they have instructed the Applicants to sue on their behalf. The rationale behind *Order I Rule 8 of the Civil Procedure Code*[138] is well explained in the case of **Abdillah Juma v. Salum Athumani.**[139] The Court had this to say:

> *Although it is perfectly correct to say that persons on whose behalf a representative suit is instituted are not parties to the proceedings, it is necessary that their identities be known to the Court. The necessity arises from two principal reasons. Firstly, in terms of Order I Rule 8 of the Code,*[140] *the Court is under duty to give notice of the institution of the suit to all such persons. Secondly, the doctrine of res judicata applies to all such persons. Thus, none of them can institute fresh proceedings for the same relief. As already pointed out,*

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[138] *Ibid*

[139] (1986) TLR 240

[140] Cap 33 *Op cit*

the identities of the ten persons on whose behalf the Respondent purported to institute the proceedings in the Primary Court were not disclosed to the Court. It was not enough in law to disclose that those persons were the Respondent's fellow villagers.

In my view, the errors into which the Primary Court strayed in this case are so serious as to vitiate the proceedings conducted before it. I would, therefore, allow the appeal and set aside the decisions of both Courts below.

In the instance application, the Applicants attached a list of members (Annexture J1) namely, "Orodha ya Wamiliki wa Duka za Dawa muhimu za Binadamu (ADDO)" who also signed in the said list. However, nothing in annexture J1 suggest that the Applicants were appointed by those members to be their representatives in any suit. In the cited case of **Hamza Omari Pangamilango,**[141] the case which was referred by parties in their submissions, it was observed that:

In the present application there is also nothing on record to show that the alleged 49 people are in existence and have instructed the Applicants to sue on their behalf.

Applying the above authority in line with the present case, it is apparent that the later falls short of the mandatory requirement of authorization as

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[141] Misc. Land Application No 664 of 2017 *Op cit*

provided for under *Order I Rule 8 of the Civil Procedure Code*.[142] The reason is that a list alone is not enough to prove authorization. There should be a document suggesting that, parties appointed the Applicants to represent them.

In the event therefore, I am in line with the learned State Attorney argument that, the mere saying in the Affidavit that we have common interest, or attaching a list of names with signatures alone is not enough to prove that everyone is willing to be represented. Thus, the first issue is answered in the affirmative.

On the second issue, Ms. Lydia Mcharo learned State Attorney submitted that there is misjoinder of TAMISEMI. She argued that the 1st and 2nd Respondents are autonomous bodies. She further submitted that TAMISEMI does not govern daily activities of the 1st and 2nd Respondent, rather it is the Ministry of Health. She therefore prayed that this application be dismissed with cost.

Responding on the misjoinder point of objection, Mr. Charles learned Counsel for the Applicants submitted that under *Order I Rule 9 of the Civil Procedure Code*,[143] misjoinder of parties is not fatal. In view of Counsel Charles, there is no misjoinder because even the third Respondent is doing things contrary to the Applicants interest as stated in the Affidavit. According to him, cause of action should not be raised in the application for

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[142] Cap 33 *Op cit*

[143] Cap 33 *Op cit*

leave to file a representative suit. He concluded that the two preliminary objections have no basis.

In the light of the above parties' arguments, I do accept the Respondent's submission, to which I think there are at least three reasons. *One*, it is a real fact that the third Respondent does not govern day to day activities of the 1st and 2nd Respondent. *Two*, as correctly submitted by the learned State Attorney, the day-to-day activities of the 1st and 2nd Respondents are governed by the Ministry of Health. *Three*, it will be noticed that misjoinder of parties as per *Order I Rule 9 of the Civil Procedure Code is not fatal.*[144] *Order I Rule 9* provides that:[145]

> *A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it.*

Under the Civil Procedure Code, the remedy for joining a wrong party in a proceeding is clearly provided for under *Order I Rule 10 (2) of the Civil Procedure Code.*[146] It is to struck out the name of the wrongly joined party. *Order I Rule 10 of the Civil Procedure Code*[147] provides that:

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[144] *Ibid*
[145] *Ibid*
[146] *Ibid*
[147] *Ibid*

(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff the Court may at any stage of the suit, if satisfied that the suit has been so instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) The Court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

Further *Order VI Rule 17 of the Civil Procedure Code*[148] provides that:

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[148] *Ibid*

> *The Court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the* purpose of determining the real questions in controversy between the parties.

Nevertheless, the law in Tanzania does not allow pre- emptying a raised preliminary objection. This has been explained in a number of cases. In the case of **Thabit Ramadhani Maziku & Another v. Amina Khamis Tyela & Another,**[149] it was held that:

> *Once an objection is raised one cannot apply to amend otherwise it will amount to pre-empting Respondent's preliminary objection, it is a trite law that under Order VI Rule 17 of the civil procedure Code,*[150] *the Applicants had a right to amend pleadings at any stage of the suit. However, that right ceased when the preliminary objection was taken against her by the Respondent.*

Similarly, in the case of **Shabani Fundi v. Leonard Clement**[151] in which the Court held:

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[149] Civil Appeal No 98 of 2011 Court of Appeal of Tanzania at Zanzibar (unreported)
[150] Cap 33 *Op cit*
[151] Civil Appeal No 38 of 2011 Court of Appeal of Tanzania at Dar es Salaam (unreported)

Acceding to Mr Ngudungi's prayer will be tantamount to preempting the PO which course of action, upon a plethora of authorities is illegal; the Court will not tolerate the practice of an advocate trying to preempt a preliminary objection or by trying to rectify the error complained of.

Applying the above position in the present case, it is obvious that, the Applicants cannot change the third Respondent after the preliminary objection was raised by the Respondent. The remedy is to struck out the name of the 3rd Respondent.

The Applicants' Counsel has argued that the cause of action should not be raised in the application for leave to file a representative suit. I find such argument to be simplistic. If leave is granted against a wrong party, it means the suit will be filed against the same wrong party. The Court cannot be an instrument of condoning illegality. Above all, the purpose for preliminary objection is to save time of the Court. This was well explained in the case of **Bank of Tanzania Ltd v. Devran P. Valambia,**[152] the Court observed:

The aim of a preliminary objection is to save the time of the Court and of the parties by not going into the merits of the application because there is a point of law that will dispose of the matter summarily.

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[152] Civil Application No 15 of 2002, Court of Appeal of Tanzania at Dar es Salaam (unreported)

With the afore repute, the preliminary objection was properly raised at this stage. Institution of proceedings in Court against wrongful parties renders the application incompetent. Consequently, the preliminary points of objections are hereby sustained. The application stands struck out with costs. Order accordingly.

Y. J. MLYAMBINA

JUDGE

03/09/2021

Ruling delivered and dated 3rd day of September, 2021 in the presence of the 4th and 7th Applicants in person and in the absence of the 1st, 2nd, 3rd, 5th, 6th, and 8th Applicants. Also, in the presence of George Mandepo, learned Principal State Attorney and Mcharo Deborah, learned State Attorney and Deogratias Kikenya, State Attorney Trainee for the Respondents.

Y. J. MLYAMBINA

JUDGE

03/09/2021