

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

TAXATION CIVIL REFERENCE NO. 01 OF 2021

(Arising from the decision of Taxing Officer, M.A. MOYO-DR. in the Bill of Cost No. 61 Of 2017, dated the 25th day of June, 2019)

EDMUND NGENI.....APPLICANT/JUDGMENT DEBTOR

VERSUS

MJANJA NAGAGWA.....RESPONDENT/DECREE HOLDER

RULING

Last of Order: 07/09 2021

Date of Ruling: 22/09/2021

F. K. MANYANDA, J.

This Application has been preferred under Order 7(1) and (2) of the Advocates Remuneration Order, 2015, GN No. 264 of 2015. The Applicant is moving the Court to grant orders that: -

- 1. This court be pleased to examine by reference the decision of the taxing master dated 30th July, 2019, in Bill of Costs No. 61 of 2017 before, M.A MOYO, Deputy Registrar to see its legality and fairness of taxation.*

2. Costs be in due course.

The Application is by way of chamber summons supported by the affidavit deponed by Edwin Alon, the learned advocate for the Applicant. The Respondent contested the application by filing a counter affidavit deponed by himself.

The brief facts leading to this application as gathered from the affidavits of the parties and the record available can be summarized as follows: The Applicant preferred HC. Civil Case No. 15 of 2014 against the Respondent claiming for compensation for malicious prosecution. The case was dismissed by this Court before, Hon. Makaramba, J. on 04/8/2017. The Respondent filed Taxation Cause No. 61 of 2017 before the Deputy Registrar claiming to be paid Tshs. 34,191,000/= as costs for prosecuting the case before this Court, out of which Tshs. 30,000,000/= being instruction fee.

In her ruling delivered on 25.6.2019, the Taxing Officer awarded the Respondent cost to the tune of Tshs. 15,000,000/= for instruction fees and Tshs. 4,129,500/= making a total of Tshs. 19,190,500/= on the other three

aspects that's to say, instruction fees, travelling and accommodation fees along with disbursement.

The Applicant was dissatisfied, hence filed the instant reference seeking to challenge the decision of the Taxing Officer and moving the Court to examine the legality and fairness of the Bill of Cost as presented.

That on 30.6.2021, at the hearing of this application, the Applicant was represented by Steven Aron and Steven Mhoja, the learned advocates while the Respondent was nowhere to be seen and without any sufficient reasons presented before the court. The counsel representing the Applicant raised a concern and prayed to proceed *ex parte* because the Respondent was fully aware about the date of hearing and being absent its only means that he, chose not to be heard. In that regard the Court after going through the records granted the prayer and hearing proceeded *ex parte*.

Submitting in support of the application, Mr. Aron began by explaining that the taxing officer erred in taxing according to item 8 of the 9th Schedule, of the Advocates Remuneration Order, 2015, GN No. 264 of 2015. He contested the instruction fees on the Civil Case No. 15 of 2014 which

amounted to Tshs. 30,000,000/=, while the Respondent failed to submit any EFD receipt instead he provided hand written receipt which, at the time, was against the laws regarding tax and finance, and some receipt showed different dates to those on the court record.

That 9th Schedule deals with contentious proceeding in liquidated sum while the proper was item k of the 11th schedule, so the taxing master erred in applying item 8 of the 9th schedule instead of item k of 11th schedule.

On the other hand, Mr. Mhoja elaborated on Section 80A, of the **Income Tax Act** as amended by Section 27 of the **Finance Act**, No. 8 of 2012, arguing that it was expected the Respondent to produce an EFD receipt and not otherwise, so the taxing master erred by disregarding the legal requirement.

I have duly considered the affidavits of the parties and the submissions of the counsel for the applicant. At the outset, I need to state that the principle governing applications for reference is the one reflected in the case of ***Gautam Jayram Chavda Vs. Covell Mathews Partnership***, Taxation

Reference No. 21. 2004 (unreported), in which the Court of Appeal cited the decision of the defunct Court of Appeal for Eastern Africa to the effect that:-

"Where there has been an error in principle the Court will interfere, but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the Court will intervene only in exceptional circumstances",

As of now, the principle of law on taxation is that the Taxing Officer is allowed only those costs which would in his opinion have been incurred by the applicant. Having gone through the Applicant's affidavit as well as the submission in support of the application, and the counter affidavit of the Respondent, there is nothing showing that there was adherence of Section 80A as amended under Section 27(1) of the **Finance Act**, No. 8 of 2012. I take notice that the said provision has now been repealed by Act No. 10 of 2015. That provision read as follows: -

"A person who sells goods, render services or receives payment in respect of goods sold or services rendered the value of which is not less than Five Thousand Shillings, shall

issue Fiscal Receipt or Fiscal invoice by using electronic fiscal device.”

In this matter since the taxed amount for instruction fees amounted to the tune of Tsh. 30,000,000/=, then, it is crystal clear that EFD receipt was a mandatory requirement.

However, EFD receipt is not among the requirement for purposes of taxation of bill of cost. What is required is the actual amount incurred by the decree holder. It is trite law that EFD receipts are only proof that the concerned person paid tax, which is not an issue here.

This is not a virgin position of the law, as it has been provided by several decisions of the courts of record. For instance, in the case of **M/S Bukreef Gold Company Limited vs. Taxplan Associates Ltd. Misc. Commercial Reference No. 3 of 2017** (unreported), before Hon. Mruma, J. (unreported), it was stated as follows: -

“.....that EFD receipts are relevant in tax matter where a dispute is to whether one pays taxes or government revenue which was not the case in this matter”.

Also, in the case of **Salehe Habib Salehe vs. Manjit Gurmukh Singh & Another**, Reference No. 7 of 2019 (unreported), before Hon. Makani, J. It was stated that: -

"The argument claiming presentation of EFD receipt and non-compliance by the decree holder of the Tax Administration Act and VAT Act in taxation of bill of costs cannot stand, the said piece of legislations are useful in regulating tax matters and would come into play when and only if, for instance an advocate's tax book are not in order as assessed by the regulator, that is TRA."

The case of **Melkiory Mallya vs. Rose Peter Massawe**, Civil Reference No. 62 of 2019, before Hon. Robert, J. stated that: -

"The law governing taxation of costs is the Advocates Remuneration Order, 2015 which is made under section 49(3) of the Advocates Act, Cap. 341. Taxation of costs in contentious proceedings is governed by the rates prescribed in the schedules to the Order. The cited law does not prescribe how payment of charges in respect of services offered by an Advocate should be proved. Similarly, the cited law does not require the use of EFD receipts in taxation proceedings as a proof of payment or of validity of the payment receipts to be taxed."

In fact, my understanding of Order 58(1) of the Advocates Remuneration Order, 2015, is that it requires receipts or vouchers for all disbursements charged in a bill of costs to be produced at taxation only if required by the Taxing Officer with an exception of witness allowances and expenses which are supported by a statement signed by an Advocate.

It is my further understanding of the law that, award of costs is at the discretion of the court and the costs awarded may include fees, charges, disbursements, expenses and remuneration. Also awarding cost is not a punishment to the losing part but rather is to reimburse the winning part in line with all legal requirements.

In this matter, as stated above, on the issue of schedules, schedule 9 provides taxation on contentious proceeding in liquidated sum in original and appellate jurisdiction. The case at our hand is about malicious prosecution, which is an unliquidated claim. A question that arises is, will it fall under schedules for liquidated sum? The answer is in negative because liquidated sum is a compensatory figure for a breach of a contract, based on an

estimated or actual losses resulting from damages for breach of the concerned contract.

In this regard it is true that our case doesn't fall under the 9th schedule. On the other hand, Schedule 11 provides for costs of proceedings in the High Court, subordinate courts and tribunals specifically to say, to present, oppose, support winding up of Company, dissolution of marriage, ancillary relief, custody, garnishee proceeding and prerogative orders, lastly to sue or defend in any case not provided for above. Moreover, a look at item (k) of schedule 11 reveals that it doesn't not provide for a specific amount to be taxed but rather direct reference to be made at the above item. Looking the immediate above item, it is item (j) which provides that such sum as the Taxing Officer shall consider reasonable but not more than Tshs. 1,000,000/=.

It is the finding of this Court that item (j) it was a proper provision of law for the taxing master to be guided with.

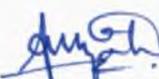
In the result, an order of the Taxing Officer awarding cost at the tune of Tshs. 19,190,500/= by applying item 8 of the 9th schedule was unlawful.

In the upshot, and for reasons stated above, I do hereby hold that the amount of Tshs. 19,190,500/= awarded to the Decree holder is unlawful, and is hereby quashed and set aside, in lieu thereof, I do hereby substitute it with the amount of Tshs. 1,000,000/= per guidance under item (k) of the 11th schedule.

I don't see any reason for disturbing the taxed amount of Tshs. 4,129,500/= in respect of other items 2 to 11 in the Bill of Tax. Finally, the total taxed amount becomes Tshs. 5,191,500/= I make no orders as to costs.

It is ordered.




F. K. MANYANDA
JUDGE
22/09/2021