

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL REFERENCE NO. 1 OF 2022

(Originating from Bill of Costs No. 32 of 2020 of the High Court of Tanzania at Moshi)

ERENEDINA WILLIAM SWAI.....APPLICANT

Versus

ANDREA NEHEMIA SWAI.....1ST RESPONDENT

ANNA ANGA SWAI.....2ND RESPONDENT

RULING

28/3/2022 & 16/5/2022

SIMFUKWE, J.

The applicant herein Erenedina William Swai applied before this court for orders that:

- 1. The claims under the presented Bill of costs in Taxation Cause No. 32 of 2020 arising (sic) from Misc. Application No.24 of 2020 was excessive and not proved as required by the law.*
- 2. The Court to invoke the provision of Order 48 of the Advocates Remuneration Order, GN 264 of 2015 and find out that the Respondents are not entitled to any costs.*
- 3. That the costs of the application be in the cause; and*



4. Any other relief(s) as the Honorable Court may deem fit and just to grant

The application was preferred under **Rule 7 (1) and (2) of the Advocates Remuneration Order, 2015, GN No.264 of 2015**. It was supported by applicant's affidavit which was contested by the respondents' joint counter affidavit.

During the hearing of this reference, the applicant was unrepresented while the respondents enjoyed the service of Dorice Kinyoa, the learned counsel.

Submitting in respect of the 3rd paragraph of the applicant's affidavit, the applicant argued that the bill of costs as taxed by the Taxing officer was excessive and lacking the required proof pursuant to the laws of this country and thus the Respondents were not entitled to the same. She cited **section 29 (1) (a) of the Value Added Tax Act, Cap. 148 R.E 2019** and stated that the provision provides clearly that all practicing advocates are tax payers. The section provides that:

"29(1) Notwithstanding the provisions of section 28, a person shall be required to be registered for value added tax if-

(a) the person carries on an economic activity involving the supply of professional services in Mainland Tanzania, whether those professional services are provided by the person, a member or employee of that person; and....."

She also referred to **section 36 (1) of the Tax Administration Act, 2015** which provides that: -



"A Person who supplies goods| renders services or receives payments in respect of goods supplied or services rendered shall issue fiscal receipts or fiscal invoice by using electronic fiscal device."

The applicant averred that the respondents did not furnish any receipt to prove any cost incurred by them as presented under item 1 of the presented Bill of Costs in violation of provisions of the law as cited above and **Section 110 of the Evidence Act, Cap 6**. In support her argument, the applicant referred to the case of **Thinamy Entertainment Ltd, Resort World Ltd and Costa Ginnakopolous vs Dino Katsapas, Misc. Commercial Case No.86 of 2018**, High Court of Tanzania (Commercial Court), at Dar es Salaam, in which Hon.B. K Philip, J at page 6 to 7 of the Ruling held that:

*"To my understanding costs awarded to a party in a case are aimed at restituting (sic) a party to his/her original position by compensating him/ her the money he/she spent in prosecuting or defending a case in accordance with the laws. It follows therefore, that the principles of proof of claims are equally applicable in the bill of costs, that is, he who alleges has to prove. (See section 110 of the Tanzania Evidence Act, Cap 6 R.E 2002). I am of a settled view that a proof of any payments to an advocate has to be by submitting Electronic Fiscal Device receipts. ('EFD Receipts') (see section 36 (1) of the Tax Administration Act, 2015). In the case of **Professor Emmanuel A. Mjema Vs Managing Editor Dira ya Mtanzania Newspaper and two others, Reference No. 7***



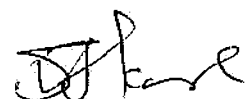
of 2017 at the High Court of Tanzania, Dar es Salaam, District Registry, my brother, Hon. Mgeta J, when taxing off the claims for instruction fees for failure to produce a EFD receipt as a proof for the same had this to say:

'It is a matter of law that all practicing advocates are registered VAT payers. (See section 29(1) of the value Added Tax, 2014). According to section 36(1) of the Tax Administration Act; 2015, a person who supplies goods, renders services or receives payment in respect of goods supplied or service rendered shall issue fiscal receipts or fiscal invoice by using electronic fiscal devices.

Any Act or manifestation of tax avoidance ought to be restricted, it follows, therefore, that such Advocates are required by law to issue EFD receipts upon payment for service rendered, claims on such payments shall be proved by submission of EFD receipt as evidence. In this case no such receipt was tendered; therefore, such claims remain unsubstantiated.

I accordingly tax it off."

Basing on this authority, it was the applicant's view that this court should also find out that the claims under Item 1 of the presented Bill of costs was unsubstantiated and the Respondents herein were not entitled to any amount of the same. That, the Claims under item 2, 3 and 4 of the presented



Bill of costs were supposed to be disallowed because such claims fall under the instruction fee in item 1.

In the alternative, the applicant opined that if at all the disallowed amount is above one-sixth to the total claimed amount in the bill of costs, then he called upon this court to invoke the provision of **Order 48 of the Advocates Remuneration Order**, (supra) and find out that the Respondents are not entitled to any cost.

She further referred to the case of **Regional Commissioner of Shinyanga Vs Bernard Msonga Sizasiza, Reference No. 1 of 2019** High Court of Tanzania, Shinyanga District Registry at Shinyanga, in which at page 8 last paragraph it was stated:

"I am persuaded by the above authority. Since in our case, the Taxing Master avoided the provisions of order 48, I am convinced that, the application by the applicants is justified. I hereby quash and set aside the Taxing Master's decision, allow the application and order that having disallowed above one-sixth of the claimed costs in the Taxation Cause No. 5 of 2018, respondents were not entitled to costs."

In his reply, the learned counsel for the respondents contested the first ground of reference in respect of the allegation that the amount of Bill of Costs to the Respondents was excessive and lacking a required proof. Ms. Dorice was of the view that the amount which was awarded by the Taxing Officer was proper and was not excessive as the Applicant tries to insinuate. She averred that generally, awarding the bill of costs is the discretion of



Taxing Officer and the Court will always be reluctant to interfere with the same, unless it is proved that the Taxing Officer exercised his discretion injudiciously or has acted upon a wrong principle or applied wrong consideration. She submitted further that the Taxing Officer in awarding such costs to the respondent acted judiciously and in right principles as it was in accordance with the **11th Schedule of the Advocates Remuneration Order, 2015,** and **Order 12(1) of the Advocates Remuneration Order, 2015.** It was stated further that the respondent's Advocate before the Taxing Officer asked for Instruction Fees of Tshs. 1,500,000/= and the Advocate for the Applicant herein replied to the effect that *"the instruction fee which has been fixed by the Eleventh Schedule of Advocates Remuneration Order, 2015 for prosecuting miscellaneous application is only One Million (Tshs. 1,000,000/=)"*

Ms Dorice argued further that it is clear that even the applicant's advocate conceded for the Respondents to be awarded that amount. Thus, the complaint by the applicant at this stage that the awarded amount is excessive is not proper and is misleading the Court.

Ms Dorice contended further that, the labours of the respondents' advocate who was engaged at various stages of the litigation, were not in vain as a matter of course. She said that the successful litigant ought to be fairly reimbursed for the costs he reasonably incurred. The taxing Officer was guided by the stated laws herein above to award the costs to the Respondent including the Instruction fees and all costs thereto. She thus commented that the amount which was awarded to the Respondents, in the circumstances of the said case was minimal and very reasonable.



Regarding the applicant's allegations that the respondent failed to produce the EFD receipts by citing **Tax Administration Act**, the Respondents' advocate disputed the same by arguing that it is frivolous and unfounded since it is not applicable in the situation at hand. She was of the view that such law is applied if there are taxation (sic) issues. She further argued that the EFD machine is designed to be used in business for efficient management, control systems and that the EFD receipts are relevant in tax matters as correctly observed by the Taxing Officer. It was Ms. Dorice's further argument that there is no provision in the **Advocates Remuneration Order, 2015** (supra) which requires proof of payment by production of EFD's receipts. She added that, EFD receipts may be relevant when there is a dispute as to whether one pays taxes to the Government or not. Thus, it is not applicable in the instant matter since the advocate's instruction fees after serving the client the Taxing Officer will be guided by the **Advocates Remuneration Act** and not **Tax Administration Act** as cited by the Applicant.

Moreover, the respondents' advocate submitted that, the question of EFD Receipts in Bill of Costs has been considered by the Court of Appeal in the Case of **Tanzania Rent a Car Limited Versus Peter Kimuhu, Civil Reference No.9 of 2020** (Unreported) in which it was held that: -

"In taxation of the bill of costs there is no need of proof of instruction fees by the presentation of EFD receipts..... Among others, is expected to determine the quantum of the said fees in accordance with the costs scales statutorily provided for..."

MS. Dorice challenged the cases cited by the applicant by arguing that the same are the decisions of the High Court of Tanzania for the years 2017 and 2018 and all the decisions are overridden by the current decisions of the Court of Appeal of the year 2021 cited above. She called upon the court to consider the same for reference and dismiss the application with costs.

Ms. Dorice also submitted that it is trite law that bill of costs is intended to reimburse a decree-holder of the costs that he or she incurred in prosecuting court proceedings. For that, she argued that the applicant is misleading this court for mixing up between the court in awarding the bill of costs and the revenues collection authority. Since it is clearly provided that the duty of the Taxing Officer in court as opposed to the tax officer of the revenue collection authority is to examine the amounts indicated in the Bill of costs and assess its compliance with the law which is the **Advocates Remuneration Order** which does not provide for the production of receipts in providing payment of instruction fees.

In addition, it was argued that according to **section 39 of GN 264 of 2015**, bill of costs should be drawn in accordance with the scales provided for under the schedule to the Order. Also, **section 46 of the Order** requires all bills of costs to be taxed on the prescribed scales. Ms. Dorice thus commented that the Taxing Officer abided with the law above in awarding the costs to the Respondents. Therefore, the learned advocate was of the view that non-production of the EFD Receipt by the Respondents should not be considered to be fatal since the **Advocates Remuneration Order** does not require instruction fees to be proved by EFD receipts.

A handwritten signature in black ink, appearing to be 'D. Dorice', is located in the bottom right corner of the page.

In conclusion, it was Ms. Dorice's prayer that the decision of the Taxing Officer should remain undisturbed and the Applicant should be compelled to pay the same to the Respondents. She also prayed for the court to dismiss this reference with costs as it aims to delay the ends of justice.

In her rejoinder, the applicant reiterated what she had submitted in chief. However, she insisted that it is a matter of the Nation Policy and vows of every leader of this Country that any act of tax evasion must be condemned and prohibited by everybody as a matter of patriotism.

The applicant also added **section 86 of the Tax Administration Act Cap. 148 R. E 2019** and argued that the same provides that failure to issue EFD receipts attract penal sanctions.

Responding to the case of **Tanzania Rent a Car Ltd** (supra), it was the applicant's opinion that the same should not be interpreted narrowly and should not be employed to bless any act of tax evasion. She said further that once payment is alleged to be paid, it follows that as a matter of general and accepted accounting procedures, the receipt must be there. Thus, it is different from a situation where the Advocate is claiming for unpaid amount which must be assessed by the court of which the cited authority may be applicable.

The applicant insisted that on Item 1 at page 1 of the Bill of Cost, it is clearly indicated that the Advocate received Tanzanian Shillings One million five hundred thousand (1,500,000/=) on 24/7/2020 as Instruction fees from her client but there is no any proof of receipt of the said amount. She argued

that common sense alone would suggest that there should be proof to support the claim otherwise the same is untrue and unsubstantiated.

I have carefully considered the arguments put forward by the parties, the issue for determination is one, *whether this application has merits.*

Before scrutinizing this issue, I wish to start with the obvious. It is the discretion of the Taxing Officer to award the bill of costs. However, as rightly submitted by the respondent's advocate it is established principle that in the application for reference, the High court should not interfere with the Bill of costs unless it is proved that the Taxing Officer acted injudiciously or contrary to the law in awarding the same.

After examining the grounds of reference as well as the submissions made by parties, the applicant's claim is that the bill of costs as taxed by the Taxing Officer is excessive and contrary to the law. This was presented under the 3rd paragraph of the applicant's affidavit.

It was the applicant's argument that there were no receipts furnished to prove the costs incurred. She insisted that EFD receipts were necessary to prove payment of instruction fee. She cited different authorities to substantiate the claim though the same were High Court cases. To the contrary the respondents' advocate cited the decision of the Court of Appeal in respect of EFD receipts, that the EFD receipt is not necessary to prove instruction fee. Strictly speaking, I am bound by the Court of Appeal decision in the case of **Tanzania Rent a Car Limited Versus Peter Kimuhu** (supra) since the same is authoritative authority which is binding to this court. Unlike to the decisions of the High Court which are persuasive.

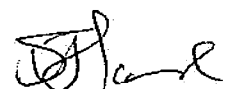
Basing on the authority of the Court of Appeal, it goes without saying that as far as the issue of EFD receipts is concerned, the position is that there is no need of issuing EFD receipts to prove the instruction fees paid to the advocate.

The next issue for determination is the applicant's claim that the taxed instruction fee was excessive. The instruction fee for application as provided for under **Item 11(1)(m) of the 11th Schedule to the Advocate Remuneration Order** (supra) is Tsh 1,000,000/-. As a matter of reference, the provisions read as follow:

"For applications, notices of motion or chamber applications, (including appeals from taxation) (i) Un-opposed....500,000/- (ii) Opposed.....1,000,000/- "

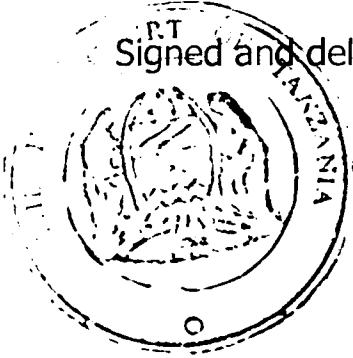
In the impugned Bill of costs, the respondents claimed Tshs 1,500,000/- as instruction fee for prosecuting the application for extension of time which was filed by the applicant herein before this court. However, the Taxing Officer taxed it off to Tshs 1,000,000/- which as per the cited item above, the instruction fee as taxed by the Taxing Officer was justified. Moreover, since it is undisputed fact that the respondents herein were represented by an advocate then it was necessary for the instruction fee to be paid. I thus find no reason for faulting the Taxing Officer's finding since the same was in accordance with the law.

Having found as such, I thus find no need of disturbing the bill of costs as taxed by the Taxing Officer. I therefore dismiss this application with no order as to costs.



It is so ordered.

Signed and delivered at Moshi this 16th day of May, 2022.




S. H. SIMFUKWE

JUDGE

16/05/2022