

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

AT SONGEA

TAXATION REFERENCE NO. 01 OF 2021

(From Civil Bill of Cost No. 03 of 2021 which originated from Civil Case No. 05 of 2019 at the High Court of Tanzania at Songea)

SOUTHERN HIGHLAND EARTHWORKS COMPANY LTD APPLICANT

Versus

UAP INSURANCE TANZANIA LTDRESPONDENT

RULING

Date of Last Order: 11/11/2021.

Date of Judgment: 08/02/2022.

BEFORE: S.C. MOSHI, J.

The taxation reference arises from the ruling of the Taxing Officer, Deputy Registrar Mr. M. A. Malewo in Bill of cost No. 03 of 2021. It has been preferred under Order 7(1) and (2) of the Advocate Remuneration Order GN. No. 263 of 2015(The Order). The application was brought by way of a chamber summons supported by an affidavit of Omary Ndemo, who is applicant's Principal Officer.

The brief facts of the case are that, the applicant entered into a comprehensive insurance contract with the respondent through her broker, CRDB Bank. The contract was to cover the risk of accident of his motor vehicle make Scania with registration number T 285 BAT and a trailer with registration number T345 BAE. The contract was for twelve

months starting from 6th September 2016 to 05th September 2017. On 27th the motor vehicle and trailer were involved in an accident while on transit from Songea to Dar es salaam. The respondent was informed about it and the estimated costs for maintenance was pegged at Tshs. 25,120,000/=. However, the respondent refuted the estimated costs for maintenance; hence the applicant filed a suit, a judgment was entered in his favor, and he was awarded costs. Later the applicant raised a Bill of Costs vide Civil Bill of Cost No. 03 of 2021, the bill consisted of 25 items and the grand total was Tshs. 15,748,860/=. The Taxing Officer heard and determined the matter before him, he taxed the costs at Tshs. 2,310,000/=. The applicant was aggrieved by the ruling, consequently he filed this reference praying for the following orders: -

- 1. That, this honorable court be pleased to call therecords and make reference on the bill of cost No. 03/2021 so as to ascertain the correctness of the decision of the taxing master.*
- 2. Costs of this application to be provided for.*
- 3. Any other reliefs (s) this Honorable Court may deem fit and just to grant.*

During hearing of this application, the applicant was represented by Mr. Dickson Ndunguru, advocate. The respondent defaulted appearance despite being served; hence the application was heard *ex parte*.

In support of the application, Mr. Nduguru argued *inter alia* that, the Taxing Master applied wrong principles and laws by taxing one million instead of 12,998,120/=. He said that, according to the Law of taxation of Bill of Costs specifically order 46 says that all bill of costs shall be taxed on the prescribed scale, unless a Judge of the High Court for special reasons to be certified allows costs in addition to the costs provided to the scale or refuses to allow costs at the lower rates than that provided by the scale.

He argued that, the applicant in Civil Case No.5 of 2019 claimed Tshs. 433,294,000/= as specific damage. According to 9th schedule item 8, the scale of fees for contentious proceedings of a claim of over Tshs.400,000,000/= is 3%. He contended that, since the claimed amount was Tshs.433,294,000/=, its 3% was 12,998,820/=.

He also argued that, the Taxing Master did not apply the correct law and principles, he instead applied the 11th schedule item one "K" which provide that , to sue or defend in any case not provided in 11th schedule, the amount taxed is to be one million.

He further argued that, he is alive with the law that a Taxing officer may tax less than the prescribed fee on two grounds. One if the case ended at mediation or the defendant has admitted the claim as early as possible or in the circumstances where the case ends with preliminary objection, that it didn't go to a full trial. He said that, the case subject to this reference went to a full trial, the plaintiff's case had four witnesses, and the defence side was heard. He said that if the court is to consider the skills and time spent it will find that the Taxing Master applied wrong principles and wrong law.

I have given due consideration to the submission made by Mr. Ndunguru, the issue to be determined is whether the reference has merit. It is settled law that, if a taxation reference is to be entertained by the court, the same must be based on a point of law or on the ground that the bill as taxed was manifestly excessive or inadequate. See the case of **Asea Brown Boveri Ltd vs. Bawaziri Glass Works Ltd and another** [2005] 1 EA 17.

It is also an agreed general principle that the exercise of the Taxing Officer's discretion, cannot be easily interfered with by the court unless there are exceptional grounds. See the case of **Gautam Jayram Chavda vs. Covell Mathews Partnership**, Taxation Ref. No. 21 of

2004, Court of Appeal sitting at Dar es salaam, (Unreported) where it was held thus:-

"Where there has been an error, in principle, the court will interfere but the questions 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."

The factors to be considered by the Taxing Master in awarding, rejecting or reducing the amount of the award sought include

- i. The suit amount,*
- ii. Nature of the subject matter*
- iii. Complexity of the suit*
- iv. Time taken for hearing; extent of research involved*
- v. Parties' general behavior and facilitation of expeditious disposal of the case*
- vi. Public policy by ensuring that allowable court, that litigation should be affordable; and*
- vii. Maintenance of consistency in quantum of costs allowable court; that litigation should be affordable; and*

viii. Maintenance of consistency in quantum of costs allowable.

See the case of Gautam **Jayram Chavda vs. Covell Mathews Partnership**(Supra), **National Bank of Commerce vs. Kapinga & Co. Advocate**, Civil Reference No. 04 of 2003, High Court at Dar es salaam and **EcoBank Tanzania Limited vs Double A Company Limited and 3 Others**, Commercial Reference No. 02 of 2019, High Court of Tanzania Commercial Division (Unreported).

Now, the immediate issue that falls under consideration is whether the applicant has exhibited such exceptional circumstances to warrant interference with the decision of the Taxing officer or whether the Taxing officer failed to exercise his discretion judicially or exercised it improperly.

Usually, it is the value of the claim as stated in the body of the suit which should be the basis of charging the instruction fees in accordance with the prescribed scale, see the case of **Masolele General Agencies vs. African Inland Church Tanzania** [1994] T.L.R 192, where the Court of Appeal held that a claim of whatever one think one is entitled to, is made in the body of the suit.

The suit which prompted the filing of the Bill of costs in question falls under contentious proceedings, see Rule 40 (2) (a) of the Advocates Remuneration Order, 2015 (GN No.263) which reads thus:

Contentious business shall include:

- (a) *Proceedings in the High Court of Tanzania and all subordinate to the High Court where an advocate is allowed.*

Whereas R.41 of the Order reads that, the Bill of costs in contentious proceedings under this part shall be taxable according to the rates prescribed in the tenth, eleventh and twelfth schedule to this order. The eleventh schedule does specifically provide for proceedings before the High court, subordinate courts and tribunals.

Having analyzed the facts of the case and the law, it is my view that the taxing officer did not err in law as suggested by Mr. Ndunguru. Again, at page four of the ruling, the taxing officer explained the basis for his decision, that the decree holder did not exhibit any complex issue involved in the proceeding.

With due respect to Mr. Ndunguru, it is my view that his line of argument is misconceived. He proposed that the taxing officer should have assessed the costs basing on the scales which are set in the 9th schedule 8th item. However, the 9th schedule relates to scale of fees for

contentious proceedings for liquidated sum. A claim for liquidated sum is different from a claim for specific damages which were presented in the suit which prompted the bill of costs leading to the instant reference. A liquidated sum must be agreed by parties in advance by parties, and it should be included in a contract. **Osborn's Concise Law dictionary, eight Edition** defines liquidated damages to be a genuine covenanted pre-estimate of damages for an anticipated breach of contract, as contrasted with a penalty. The sum fixed as liquidated damages is recoverable and **Black's Law Dictionary** defines liquidated sum as *an amount contractually stipulated as reasonable estimation of actual damages to be recovered by one party if the other party breaches; also, if the parties to contract have agreed on liquidated damages, the sum fixed is the measure of damages for a breach.* As indicated earlier, the claim in the suit was for specific damages totaling T.shs. 433,294,000/= arising from various claims which included costs for repairing the motor vehicle, costs for insuring the tractor and trailer, Sumatra fees, TRA tax, drivers salary, lifting and transporting damaged cars and damages for nonuse of the motor vehicle. In the case at hand, the decree holder did not show whether there was a contractual obligation for a liquidated sum in case of breach of either of the parties. Apparently, the claim was not for a liquidated sum as envisaged under schedule nine of the

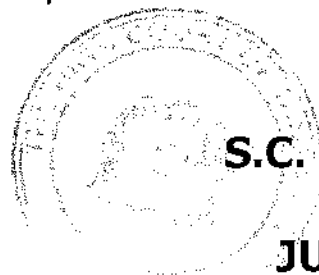
Order. For the reasons thereof; I see no reason to disturb the taxing officer's decision.

Consequently, the Application for Reference is dismissed accordingly.

No orders as to costs as the Reference proceeded ex parte.

It is so ordered.

Right of Appeal Explained.

 *S.C. Moshi*
S.C. MOSHI
JUDGE

08/02/2022