

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL REFERENCE NO.14 OF 2020

(Arising from Civil Case (Bill of Costs) No.133 of 2017, Hon. J.C. Tiganga, DR)

OCTOPUS ENGINEERING LIMITED.....APPLICANT

VERSUS

SPENCOS SERVICES LIMITED.....RESPONDENT

RULING

Date of last Order: 19/09/2022

Date of Ruling: 7/10/2022

POMO, J

This reference is preferred by the Applicant upon being aggrieved with the decision by the taxing master in Civil Case (Bill of Costs) No.133 of 2017 High Court at Dar es Salaam, the decision which was delivered on 12th day of December,2019 Hon. J.C. Tiganga, DR (as he then was). Basically, the Applicant was out of time thus through Misc. Civil Application



No. 37 of 2020 which was decided on 01.10.2020 Hon. **A.K. Rwezila, J** she was granted leave to file the present reference out of time.

The brief background to the matter is that, the Applicant filed a suit, Civil Case No. 133 of 2017 in this court against the respondent herein. The suit ended up being struck out with costs on 31st of May, 2018 Hon. Munisi, J. It is that dismissal order of this court which led into the filing of the said Civil Case (Bill of Costs) No.133 of 2019. The bill of costs filed was of Tshs 12,180,000/- (twelve million, one hundred and eighty thousand only) which turned out to be taxed at Tshs 5,180,000/- in the following manner. That is to say Tshs 4,000,000/- is the instruction fee, Tshs 120,000/- is the attendance fee, Tsh 60,000/- is the disbursement, and lastly Tshs 1,000,000/- is the instruction fee of the bill of costs.

It is that findings by the taxing master which has moved the Applicant to file this Civil Reference No.14 of 2020 under **Order 7(1) and (2) of the Advocates Remuneration Order, GN, No. 263 of 2015**. The Application is supported by an affidavit deponed by Dickson Tugara, the learned advocate for the Applicant. It is the Applicant's prayer in the chamber summons that this court be pleased to make reference,



and set aside the decision in civil case (bill of costs) No.133 of 2017 and also is praying the Application be granted with costs.

This reference is strenuously resisted by the respondent through her counter affidavit deponed by Florian Frances, learned counsel for the Respondent.

When this matter came for hearing on 19th September, 2022, the Applicant was represented by Yohana Ayall, learned advocate while the Respondent enjoyed the service of Florian Francis, the learned counsel.

Submitting in support of the Application, Mr. Ayall contended that in taxing the bill of costs, the Taxing Master taxed it basing on the 12th schedule to the Advocates Remuneration Order, 2015 GN. No.263/2015 (the **Order**) which was, according to him, a misconception of the law. Amplifying his argument, he referred the court to page 6 of the impugned ruling where the taxing master stated that: -

'The case at hand, its costs are provided under the 12th schedule to the Advocates Remunerations Order GN. No. 264 under this schedule the instruction fess has to be paid in

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terms of percentages ranging from 3% - 7% but the Applicant has charged 5%'. End of quote

Mr. Ayall argued that the above referred schedule deals with Bankruptcy which is not the case here.

Again, he submitted that the amount of Tshs 5,180,000/- granted by the taxing master out of Tshs 12,180,000/- of the presented bill of costs is after taxing off Tshs 7,000,000/-. Mr Ayall contends that, when more than one – sixth of the total amount of a bill was taxed off then the respondent was entitled to nothing. In supporting his submission he cited **Order 48 of the Advocates Remunerations Order, GN No.263/2015** and further referred this court to the decisions of this court in **JOHN MEMOSE CHEYO VS STANBIC TANZANIA LTD, COMMERCIAL REFERENCE NO. 72 OF 2018, HIGH COURT AT DAR ES SALAAM (UNREPORTED)** P.4; **SOUTHERN HIGHLAND EARTHWORKS COMPANY LTD VS UAP INSURANCE TANZANIA LTD, TAXATION REFERENCE NO.01 OF 2021 HIGH COURT AT SONGEA (UNREPORTED)** at P. 8 and lastly **MOHAMED SALMIN VS JUMANNE OMARY MAPESA, CIVIL APPLICATION NO.4 OF 2014 CAT AT DODOMA (UNREPORTED)** at

p.3. and concluded by adopting the affidavit in support of chamber summons.

Responding to the submission, the learned counsel for the Respondent adopted the counter affidavit. It was his contention that what the counsel for the Applicant submitted are mere statement from the bar as they are not founded in the affidavit supporting the application. In support of his argument he referred this court to the court of appeal decision in **HASSAN KAPERA MTUMBA (Administrator of the estate the late KAPERA MTUMBA) VS SALIM SULEIMAN HAMDU, CIVIL APPLICATION NO.505/12 OF 2017 CAT AT TANGA (UNREPORTED) at p.13.**

Mr Francis further argued that the allegations that the amount taxed is over one - sixth is not true. What the respondent applied for was Tshs 12,180,000/- but was taxed to Tshs 5,180,000/-. Calculating the one-sixth of the Tshs 12,180,000/- is Tsh. 2,030,000/- which is less than the awarded amount of Tshs 5,180,000/- hence well within the meaning of **Order 48 of the Advocates Remunerations Order, GN No. 265 of 2015.** He then argued that the contention that the amount taxed off is above one-sixth of the claimed amount is wrong. He concluded his



argument by submitting that the cited cases are distinguishable as the scenario in them is different to the one we have here.

Again, Mr. Francis argued that Order 48 does not operate automatically rather subject to the proviso thereto. The taxing master is vested with discretionary power of either to apply the proviso to Order 48 of the **Order** or deny the bill as presented. He then cited the decision of this court in **Julius Mwarabu Vs Ngao Godwin Lesero, Civil Reference No. 4 of 2020 High Court at Arusha (unreported)**.

As to the application of **9th Schedule of the Advocates Remunerations Order, 2015, GN 265 of 2015**, Mr. Francis argued that it is the applicable schedule due to the nature of the claim resulting into the bill of costs, that is the dismissed suit, Civil Case No.133 of 2017 of this court. The nature of the claim was on the basis of breach of contract hence liquidated sum.

In his rejoinder, Mr. Ayall argued that his submission is not from the bar rather is based on their affidavit paragraph 4 in particular. Thus, he argued, the cited case of **Kapera (Supra)** is distinguishable.

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As to the calculation of the one-sixth leading to disallowing the entitlement of the amount taxed, Mr. Ayall was of the different view from the one taken by Mr. Francis, advocate in that should the amount taxed off be greater than one-sixth of the claimed amount then is when you become dis-entitled the bill as a whole. He added that since the one-sixth of the Tsh 12,180,000/- claimed in the bill of costs is 2,030,000/- while the amount taxed off is Tsh. 7,000,000/- the amount which is greater than the one-sixth amount, then it was a fit case to apply Order 48 of the Advocates Remunerations Order to disallow the whole respondent's bill of costs.

Having heard the rival arguments in support and against the Application, the issues which arise are, **one**, between 9th and 12th Schedules both of the Advocates Remuneration Order, 2015 which one did the taxing master apply in taxing the Respondent's bill of costs? and **two**, having taxed the bill from the claimed Tshs 12,180,000/- to Tshs 5,180,000/- the amount of Tshs 7,000,000/- being taxed off then was the amount taxed off greater than the one-sixth or less? And if so, was it right for the taxing master not to disallow the whole bill per the **Order 48 of the Advocates Remunerations Order, 2015?**



On the first issue, while the Applicant submits the taxing master to have applied the 12th schedule of the Advocates Remunerations Order, 2015 in taxing the bill of costs, the counsel for the Respondent argued to the contrary in that the schedule used in taxing the bill is the 9th schedule and not the 12th schedule.

This court is in agreement with what is submitted by Mr. Francis that the taxing master used the 9th Schedule and not the 12th schedule to the Advocates Remuneration Order, 2015. This is discerned from the mode taken in calculating the amount to be awarded. From the above reproduced part of the taxing master decision, which is page 6 last but one paragraph, the taxing master stated thus: -

*The case at hand, its costs are provided under the 12th schedule to the Advocates Remunerations Order GN. No. 264 **under this schedule the instruction fess has to be paid in terms of percentages ranging from 3% - 7% but the Applicant has charged 5%.***

End of quote

Reading that excerpt of the findings by the taxing master it is nothing but affirmation by him of the respondent's submission in support of the bill of costs narrated at page 2 of the decision. The same reads: -



'In support of the Bill of costs especially the instruction fees Miss Kavola Semu, Learned Counsel for the Applicant submitted that the instruction fees of Tshs.12,000,000/- was charged on the basis of the general damage of Tshs.248,101,359/- which falls under item 7 of the 9th Schedule, which provides for instruction fees to be 3%-7%. He submitted that Tshs 12,000,000/- is just 5% of the general damages claimed. She cited a lot of cases to support her argument, she prayed that the instruction fee be taxed as prayed'. End of quote

The taxing master, in concluding his findings on the claimed amount of Tshs 12,000,000/- assigned the reason for the findings (see 1st paragraph of page 7 of the decision). That part reads as follows: -

'The Applicant cannot in any way charge for the maximum amount of instruction fees. I thus tax Tshs 4,000,000/- which is 2% of the claimed amount in the suit". End of quote

Therefore, reading the substance of that piece of findings by the taxing master literally it meant nothing but the **9th Schedule to the Advocates Remuneration Order,2015** and **not the 12th Schedule**. The referred 12th schedule words appearing in that excerpt was only a

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typographical error which has nothing to do with the basis upon which the taxing master findings to what is payable in respect of the Respondent's claimed Tshs 12,000,000/- in the bill of costs.

The second issue, which is as to which side the amount taxed off, Tshs 7,000,000/- taxed of is to be placed in respect of the one-sixth stipulated under **Order 48 of the Advocates Remunerations Order, 2015?** The learned advocates are both in agreement that the one-sixth of the Tshs 12,180,000/- is Tsh. 2,030,000/-. Their difference is what the amount mean in interpreting the one-sixth the said Order 48.

In resolving this issue, it is worthy reproducing here the said Order 48 of the Advocates Remunerations Order, 2015. It reads as follows: -

*'48. - When **more than one-sixth** of the total amount of costs exclusive of court fees is disallowed, the part presenting the bill for taxation shall not be entitled to the costs of such taxation*

*Provided that, at the discretion of the taxing officer any instruction fee claimed, **may be disregarded in the computation of the amount taxed of that fee in the computation the one-sixth***'. End of quote

Contrary to the perception taken by Mr. Francis, this court find that the correct interpretation of the **Tshs 7,000,000/-** taxed of is that, as correctly so argued by Mr. Ayall, the amount so taxed of is **more than one-sixth** of the claimed amount of money Tsh 12,180,000/-.

What then was the right path to be taken by the taxing master upon taxing off the Respondent's bill of costs far beyond one-sixth of the claimed amount? The said **Order 48 of the Advocates Remunerations Order, 2015** reproduced above, plainly dis-entitle the party presenting the bill to the costs of such taxation. Therefore, the taxing master having disallowed more than one-sixth of the amount claimed he was duty bound in his decision to take into account the provision of **Order 48 of the Advocates Remunerations Order, 2015** which insist that the party presenting such a bill is not entitled to such costs of taxation. This stance has consistently so held by this court, among others, are the decisions cited by the Applicant, to wit, **Dr. David Livingstone Mamorial and Bagamoyo Zoological Society Park Limited Vs Dosal Hydrocarbons and Power (Tanzania PVT) Limited, Civil Reference No.18 of 2020, High Court at Dar es Salaam (unreported)** page 9 paragraph 2 & 3 and that of **John Momose Cheyo Vs Stanbic Tanzania Ltd,**

**Commercial Reference No.72 of 2018 High Court at Dar es Salaam
(unreported) page 4 paragraph 2.**

Since the taxing master decision awarding the Respondent the bill of costs to the tune of **Tsh 5,180,000/- was in contravention of Order 48 of the Advocates Remunerations Order,2015**, having disallowed over one-sixth of the claimed amount in the bill of costs, it is the findings of this court that the reference herein has merit and is hereby allowed. The decision of the taxing master is hereby quashed and set aside for being reached in violation of the said Order 48. Furthermore, the court hereby orders that the respondent is entitled to nothing in her bill of costs on the reason that the disallowed claimed amount is over one-sixth of the claimed amount in the bill of costs. Each party to bear its own costs.

It is so ordered.

Right of Appeal explained

Dated at Dar es Salaam this 7th day of October, 2022




Musa K. Pomo

Judge

This ruling is delivered on this 5th October, 2022 in presence Yohana Ayall advocate assisted by Ngolo Balele, advocate for the Appellant and Nenduvoto Mollel, advocate for the Respondent.




Musa K. Pomo

Judge

7/10/2022