

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

**AT KIGOMA**

**CIVIL REFERENCE NO. 1 OF 2022**

(Arising from High Court Taxation case no. 25 of 2021)

**MASAKA MUSSA .....APPLICANT**

**VERSUS**

**ROGERS ANDREW LUMENYELA..... 1<sup>ST</sup> RESPONDENT**

**KIGOMA/UJIJI MUNICIPAL COUNCIL .....2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**RULING**

19/9/2022 & 27/10/2022

**L.M. Mlacha,J**

This is a ruling on an application for reference made by the applicant, Masaka Mussa in respect of the decision of the Taxing officer (G.E.Mariki DR) in Taxation course No. 25 of 2021. The applicant was the first judgment debtor in the taxation. Rogers Andrew Lumenyela (hereinafter referred to as the first respondent) was the decree holder/applicant in the taxation. Kigoma/Ujiji Municipal Council and The Hon. Attorney General (hereinafter referred to as the second and third respondents respectively) were the second and third respondents respectively. The taxation originated in Land

Case No. 4 of 2020. In that case, the court (Matuma J) entered judgment for the first respondent with costs. Armed with the judgment and decree, the applicant lodged the application for taxation.

Having heard the parties and examined the law, the taxing officer taxed the bill of costs at Tshs 4,300,000/=. He proceeded to order that the applicant must pay 50% of the amount while the balance of 50% shall be paid by the second and third respondents jointly. The applicant did not see justice in the decision hence the reference to this court.

The reference was made under order 7 (1) and (2) of the Advocates Remuneration order GN 264 of 2015 and order XL1 rule 1 of the Civil Procedure Code Act, Cap 33 R.E. 2019. Parties did not question provision under which the reference was made. Their problem was on the award and the way the distribution was made.

Submitting for the applicant, Mr. Ignatus Kagashe told the court that the taxing officer ordered the applicant to pay half the amount of Tshs 4,300,000/= without assigning any reason. The other parties were ordered to share the other half i.e. each has to pay Tshs 1,075,000/= while the applicant was to pay twice this amount. Counsel proceeded to submit that

the taxing officer awarded Tshs. 3,000,000/= as instruction fees while the amount claimed was 6% of the decretal sum. Counsel said that the advocate of the first respondent charged contingency fees which is not allowed under regulation 81 of the Advocates (Professional Conduct and Etiquette) Regulations GN 118 of 2018. He called it contingency fees because there was no any evidence of part payment previously. He submitted that instruction fees must be paid at an early stage. He referred the court to **Kasera Airo and Agal Odongo v. Gerson Otoy Kimori**, Application for Reference No. 3/2020 (Galeba J.). He concluded that the taxing officer awarded Tshs 3,000,000/= without considering what the advocate had agreed with his client.

Counsel went on to submit that soon after the delivery of the judgment of this court, the applicant lodged an appeal to the Court of Appeal against the decision of this court made in Land Case No. 4 of 2020. They are now waiting for a hearing date. He told the court that so long as there was an appeal against the decision it was not correct for the taxing officer to receive and determine the application for taxation. He said that once there is a notice of appeal to the court of Appeal, this court ceases to have jurisdiction in the matter except an application for leave, application for a certificate on point

of Law and an application for execution. He referred the court to **Mitshushita Electric Company Ltd v. Charles Horge**, Civil Appeal No. 71/2001, **Walii Hassan Miyonga v. Aaron Kabonga**, Civil Reference No. 5 of 2021 (High Court Bukoba) and **Rose Mkeku (Administratrix of the estate of Simeo Mkeku) v. Parvez Shabirgin**, Miscellaneous Land Application No. 89 of 2021 (High Court Mwanza) as his authority.

It was the submission of Mr. Kabuguzi that the taxing officer was correct in the apportioning because the Attorney General is not a true party. He was just put in the case by operation of the law. He added the second and third respondents are basically one person so it could not be correct to order them to pay separately. Counsel proceeded to say that the court taxed 3.4m as contingency costs because Tshs 90,000,000/= was not pleaded. He went on to submit that the taxing officer did not base his taxation on the value of the land. He based it on order 61(1) of the Advocates Remuneration order 2015. He added that contingency was not a base of the decision. He said that his agreement with the client was Tshs 5.4m but this amount was reduced by the taxing officer in his discretion. Submitting a pending appeal, counsel submitted that the taxing officer had power to tax the bill of costs despite

the existence of the appeal because there is no Law preventing him to do so. He added that taxing per se has no effect in the appeal.

Submitting in reply on behalf of the second and third respondents, Mr. Anold Simeo told the court that there is no doubt that there is a notice of appeal to the Court of Appeal against the decision of the court preventing the taxing master to tax the bill of costs. He agreed with the counsel for the applicant that the taxation was done wrongly. He also agreed with him that there was no any document tendered showing payment of instruction fees making the award of 6% illegal.

Submitting in rejoinder, Mr. Kagashe stressed that the taxing officer ought to have given reasons for ordering the applicant to pay 50% of the award. On the agreement to pay Tshs. 5.4m, counsel had the view that this was an afterthought, not real. He added that order 61(1) has nothing to do with taxation.

I had time to read the cited legal provisions. I have also considered the submissions. I will start with the third point; whether it was correct to tax the bill of costs while there is a notice of appeal to the Court of Appeal. A notice of appeal initiates an appeal to the Court of Appeal and renders the

court without jurisdiction to do anything in the case except those things which are authorized by law. There are things which are authorized by law to be done making an exception to the general rule. They are three namely; an application for leave, an application for certifying a point of law and an application for execution. Taxation of the bill of costs is not one of them.

Those are the only scenarios known to me. I have not seen any law or precedent authoring the taxing officer to tax a bill of costs where there is a pending appeal. And the reasons are obvious. It is avoiding to complicate the matter for there are chances that the decree may be set aside on appeal. Wisdom of court demands that there should be no taxation. It should not be admitted and if already admitted, it should be struck out. The decree holder must be advised to reserve his guns and shoot when the time comes.

Next is on the apportionment of liability. This is rather simple for parties in a case are deemed to be equal. Their liability may can only be differentiated in the decree of court once the case is heard and judgment pronounced. The court may direct parties to pay costs differently according to their contribution in the subject matter of the suit. If there is no such a thing, all parties must be treated equally in the taxation of the bill of costs.

The Attorney General is not an artificial party. He is a party like any other party with rights and liabilities. He can be paid costs or ordered to pay costs. It follows that where the court has ordered payment of costs to the defendants who include the Attorney General as was in this case, the taxing officer must treat him like all others. That means that all the costs must be shared equally. The Attorney General must have his share just like other parties. It was therefore wrong, with respect to the taxing officer, to treat the Attorney General as a party inside the Municipal Council and order him to pay less.

Finally there is the question of what was awarded. There was an award for Tshs. 3,000,000/= as legal fees. This was item No. 1 in the Bill of costs. It is coached as follows: -

*"Advocates Legal fees for perusal, preparation of the plaint and representation of the Decree holder in the High Court in Civil Case No. 4 of 2020 (6% of the decretal sum of Tshs 90,000,000/=)"*  
*(Emphasis added).*

It was a claim for Tshs 5,400,000/= which was 6% of the decretal sum. It was taxed at Tshs 3,000,000/=. The issue is whether it was proper to charge

6% of the decretal sum something which appears as contingency charges which are illegal. Instruction fees have to be charged on the subject matter of the suit as reflected in the plaint based on the provided scales. It appears that there was no such a thing in this case. It was later based on the decretal sum. I agree that this was wrong making the award of Tshs. 3,000,000/= illegal. With respect once again, the taxing officer erred to tax instruction fees on the decretal sum. I think that if he had read the '*particulars*' closely, he could not have done so.

That said, the application is granted with an order vacating and setting aside the ruling of the taxing officer on the reasons given. It is ordered so. Costs to follow the event.



A handwritten signature in blue ink, appearing to read 'L.M. Mlacha'.

**L.M. Mlacha**

**Judge**

**27/10/2022**



**Court:** Ruling delivered. Right of Appeal Explained.



A handwritten signature in blue ink, appearing to read "L.M. Mlacha".

**L.M. Mlacha**

**Judge**

**27/10/2022**

ORIGINAL