

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**BUKOBA DISTRICT REGISTRY**

**AT BUKOBA**

**REFERENCE No. 5 OF 2022**

*(Arising from Taxation Cause No. 4 of 2021)*

**EQUITY FOR TANZANIA LIMITED..... APPLICANT**

**VERSUS**

**ODWINA CHRISTANDUS HAULE.....RESPONDENT**

**RULING**

*03/10/2022 & 31/10/2022*

*E.L. NGIGWANA, J.*

The applicant herein has brought this application for Reference by way of chamber summons made under Order 7 (1) of the Advocates Remuneration Order, 2015, supported by an affidavit sworn by the applicant's advocate Mr. George Pesha, seeking for the following orders;

- 1. That, this Honourable Court be pleased to quash and set aside the Ruling of the Taxing Master dated 04/08/2022 in Taxation Cause No. 4 of 2021.*
- 2. That, the Honourable Court be pleased to invoke the provision of Order 48 of the Advocates Remuneration Order, 2015 and find that the respondent is not entitled to any costs.*
- 3. Costs of the application.*
- 4. Any other order that the Honourable court may deem fit and just to grant.*

The respondent has contested the application by filing a counter affidavit,

Briefly, the facts giving rise to this application as per affidavit and other available records are as follows; on 23/09/2021, before the Resident Magistrate Court of Bukoba at Bukoba, the applicant herein filed Civil Application No. 13 of 2021 made under section 13 (4) (b) of the Financial Leasing Act, 2008 and section 95 of the Civil Procedure Code, [Cap. 33 R.E 2019], supported by an affidavit affirmed by one Jabir Mbegu, moving the court to grant an order for re-possession allowing the Applicant to repossess from the respondent tractor 80 HP-4WD, Model-New Holland with Registration No. T. 814 DLZ, disc plough Model 3 Discs, Disc Harrow, Model 22 Discs.

The respondent herein filed a counter affidavit contesting the application. She also raised a notice of first preliminary objections on point of law challenging the jurisdiction of the court to preside over and determine the Application alleging that the parties ousted its jurisdiction by submission to dispute settlement under Arbitration Act, Cap. 15 as enshrined in Clause 14 Part B of the Financial Lease Agreement. She also challenged the competence of the application alleging that there was no any pending suit in court between the parties, and that, the same was filed by the applicant without endorsement by a person drawing the documents in terms of section 43 and 44 of the Advocates Act Cap. 341 R:E 2019.

Upon hearing the preliminary objections, the court was satisfied that the Preliminary objection challenging the jurisdiction of the court was meritorious hence sustained. Consequently, Civil Application No. 13 of 2021 was dismissed with costs.

In that respect, the applicant now respondent through the legal services of Mr. Aaron Kabunga, learned advocate filed Taxation Cause No. 4 of 2021.

consisting of 5 items as follows; on item 1, the she **Tshs. 10,000,000/=** as advocate's fee for prosecuting Civil Application No.13 of 2021. In item 2, she claimed **Tshs. 1,000,000/=** as advocate fee for filing and prosecuting the Application for Bill of Costs. On item 3, she claimed **Tshs. 480,000/=** as attendance fee for the advocate and herself. On item 4, she claimed **Tshs 30,000/=** as filing fee and on item 5, any subsequent costs to be prayed during the hearing, all making a total of **Tshs. 11, 510,000/=**.

Upon hearing the parties on the application, the Taxing Master in her ruling delivered on 4/08/2022, awarded the respondent a total sum **Tshs.1, 530,000/=**. The rest were taxed off.

The applicant was aggrieved by the ruling, hence this reference. During the hearing of this application, the Applicant was represented by Mr. George Pesha, learned advocate while the respondent was represented by Mr. Frank Karoli, learned advocate.

In support of the application Mr. Pesha argued among other things that the Taxing Master taxed the bill **Tshs. 1,530,000/=** out of **Tshs. 11, 510,000/=** contrary to Order 48 of the Advocates Remuneration Order, 2015. He added that the amount claimed was totaling at Tshs. **11,510,000/=** and the amount awarded was Tshs. **1,530,000/=** therefore, **Tshs. 9,980,000/=** was taxed off, the amount which was more than one-sixth of the total amount of the Bill of costs.

Explaining the legal consequences of contravening Order 48 of the Advocates Remuneration Order, 2015, Mr. Pesha referred this court to three cases; **Tafisa General Enterprises Ltd versus Tanzania National Roads Agency**, Civil Reference No. 02 of 2020, **The Regional Commissioner of**

**Shinyanga versus Bernard Msonga Sizasiza**, Civil Reference No. 01 of 2019, and **Zitto Zuberi Kabwe and 2 Others versus Attorney General**, Misc. Civil Application No.15 of 2021 HC-Dsm (both Unreported) whereby in the trio, the order taxing the Bill of costs contrary to Order 48 was quashed and set aside.

Mr. Pesha added that any written law, whenever the term "shall" is used conferring a function, such a function must be performed and since that word was used in order 48; its compliance is not optional. He made reference to section 53 (2) of the Law of Interpretation Act, and the case of **Edward Otesoi versus Maingwa Mario**, Misc. Land Appeal No. 36 of 2019.

In reply, Mr. Frank submitted that order 48 of the Advocates Remuneration Order, 2015 was aimed to guide the Taxing Master when assessing costs incurred by the litigants. He agrees that the said order uses the word "shall" but added that, word "shall" does not in every case mean that the requirement is mandatory. He added that according to Order 46 of the Advocates Remuneration Order, 2015, costs are awarded as per scales provided for by the law and therefore the Taxing Master complied with the law. He admitted that the total amount which was claimed in the Bill of costs was **Tshs. 11, 510, 000/=**, but the Taxing Master taxed it at **Tshs. 1, 530, 000/=** and taxed off the rest.

As regards the position stressed in the cited authorities, Mr. Frank was of the view that the cases cited are not binding but persuasive. He challenged the learned counsel for the applicant for not raising an objection before the Taxing Master.

In his rejoinder, Mr. Pesha admitted that the cited cases are persuasive but the High court cannot depart from its previous decisions unless there are strong reasons to do so and learned counsel has not given reasons to convince the court to depart from its previous decisions. He reiterated that Order 48 was offended thus; the respondent was not entitled to costs. He ended up his submission urging this court to quash and set aside orders of the Taxing Master.

Having heard the advocates for both parties, and gone through the records, I must to state at the outset that it is worth noting that taxation reference would be entertained either on point of law or on the ground that the bill as taxed was manifestly excessive or inadequate. See: **Asea Brown Boveri Ltd versus Bawazir Glass Works Ltd and another** [2005]1 EA 17. In the matter at hand, the main issue for determination is not whether the Bill of costs taxed at **Tshs. 1,530,000/=** awarded was manifestly excessive or inadequate but whether subjecting the same amount under the interpretation of order 48 of the Advocates Remuneration Order, 2015, the respondent was entitled to the said sum.

In the matter at hand, the applicant's major complaint is that the Bill of costs was taxed contrary to order 48 of the Advocates Remuneration Order, 2015 which provides and I quote;

*"When more than one-sixth of the total amount of the Bill of costs exclusive of court fees is disallowed, the party presenting the bill for taxation shall not be entitled to 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 the computation of one-sixth.**"*

Desmith in his book titled Judicial Review of Administrative Action, 4<sup>th</sup> edition (1980) 278 defines the doctrine of judicial discretion as follows;

*"is the legal concept of discretion which implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of discretion but the performance of a duty. To say that somebody has discretion presupposes that there is no uniquely right answer to his problem."*

In the instant matter, the Taxing Master chose not exercise her discretion to disregard instruction fee in the computing one-sixth otherwise the record would have reflected that she exercised her discretion disregard the instruction fee in computing one sixth. The respondent filed a Bill of costs totaling at **Tshs. 11, 510,000/=** out of which the Taxing Master allowed only **Tshs. 1,530,000/=** and disallowed **Tshs. 9,980,000/=**.

Applying the herein above provision to matter at hand, one-sixth of **Tshs. 11,510,000/=** is **Tshs. 1,918,333/=** therefore, by taxing **Tshs. 1, 530,000/=** to the respondent while the disallowed amount is **Tshs. 9, 980, 000/=** which is more than one-sixth of the total amount of the Bill of costs which is **Tshs. 11,510,000/=**, it goes without saying that Order 48 of the Advocates Remuneration Order, 2015 was contravened. The legal implications contravening the said order was stated by this court in the hereunder cases;

In the case of **Zitto Zuberi Kabwe and 2 Others versus Attorney General (Supra)**, the respondent filed a Bill of costs of **Tshs. 79, 000,000/=**, among which the Taxing Master allowed only **Tshs. 5,377,700/=** and disallowed **Tshs. 73, 622,300/=** while one-sixth of the

claimed amount is **Tshs. 13, 1666, 666/=**. Therefore, the court had this to say;

*"It is obvious that the Bill of costs which was denied (disallowed) is more than one-sixth of the amount claimed. Hence the respondent was precluded from being awarded any costs."*

In the case of **The Regional Commissioner of Shinyanga versus Bernard Msonga Sizasiza, (Supra)** the respondent presented a Bill of Costs totaling at **Tshs. 30,650,000/=** out of which only **Tshs. 720,000/=** was taxed and the rest taxed off. The court had this to say;

*"The disallowed amount is obviously above one-sixth of the total claimed amount of in the Bill of costs. Having so taxed, the taxing Master ought to have taken into consideration the provisions of order 48 and declare the respondents (who were applicants then) are entitled to no costs."*

It is also worth noting that the general rule of law is that, this court is bound by its past decisions and the Precedents of the Court of Appeal. See **Salome Semwenda versus Musoma Municipal Council**, Land Case Appeal No.99 of 2021 HC at Musoma (Unreported).

I concur with the learned counsel for the applicant that Mr. Frank, advocate for the respondent advanced no reasons why this court should depart from its previous decisions. Since no compelling reasons to warrant the departure, I will not do so.

Now, taking the inspiration from the herein above decisions of this court, and the decisions of this court in other two cases; **Tafisa General Enterprises Ltd versus Tanzania National Roads Agency (Supra)** and, **John Memose Cheyo versus Stanbic Tanzania Limited**, Commercial reference

No. 72 of 2018 HC-CD, I concur with the applicant's advocate that Order 48 of the Advocates Remuneration Order, 2015 is clear, explicit and unambiguous on excessive claims and its legal implications. See also Elizabeth **Tito and Another versus Agness Erasto Malungwa**, Civil Reference No. 06 of 2022 HC at Mwanza (Unreported).

It is undisputed that Order 48 is coached in the mandatory form, therefore; in my view, and being guided by section 53 (2) of the law of Interpretation Act which provides that, where in any written law the word "shall" is used in conferring a function, such a word shall be interpreted to mean that the function so conferred must be performed, compliance of the said Order is not optional.

In the upshot, I find that this application is meritorious and therefore allowed. The decision of the Taxing Master dated 04/08/2022 is accordingly quashed and set aside. Each party shall bear its own costs.

Dated at Bukoba 31<sup>st</sup> day of October, 2022.



E. L. NGIGWANA  
JUDGE

31/10/2022.

**Court:** Ruling delivered this 31<sup>st</sup> day of October, 2022 in the presence of Mr. Augustino Paul, Principal Officer of the Applicant, Hon. E. M. Kamaleki, Judges Law Assistant and Ms. Sophia Fimbo, B/C.



E. L. NGIGWANA  
JUDGE

31/10/2022.