

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA

MISC. LAND APPLICATION CASE NO. 89 OF 2021

(Arising from Bill of costs No. 12 of 2021 in the High Court Mwanza sub-registry)

ROSE MKEKU (*the administratrix of the estate of the late Simon Mkeku*) **APPLICANT**

VERSUS

PARVEZ SHABBIRDIN **RESPONDENT**

JUDGMENT

23^d March & 5th May, 2022

Kahyoza, J.:

Parvez Shabbirdin (Pervez) filed a bill of costs against **Rose Mkeku** (*the administratrix of the estate of the late Simon Mkeku*) (**Rose**) claiming Tzs.19,760,000/=. The taxing officer taxed it at Tzs. 13,270,000/=.

Aggrieved, **Rose** instituted reference proceedings to impugn the taxing officer's award. Rose's application for reference is anchored on seven grounds of complaint. The applicant's grounds of complaint raise three issues as follows-

- 1) whether the award is justifiable for want of evidence to proof expenditure;
- 2) whether was appropriate for the bill of costs to be taxed while the applicant intends to appeal to the Court of Appeal; and
- 3) Whether the instruction fees was justified without proving payment.

I now answer the issues raised by the application for reference. The applicant appeared in person while Mr. Mwanaupanga learned advocate appeared for the respondent. I will refer to the brief submissions while answering the issues.

Was the award justifiable without evidence to proof expenditure?

Parvez claimed three categories of costs; **one**, instruction fees; **two**, attendance costs; and three, disbursement. I will commence with disbursement costs. **Parvez** claimed Tzs. 420,000/= The taxing officer awarded the claimed amount. As stated by the taxing officer the amount claimed as disbursement need no evidence to prove them. They are costs incurred for filing documents in court. They proved by receipts issued to the parties and copies kept in the court file. The law of evidence requires parties to prove facts which are in their dominion.

A second category of costs is costs for attending court for hearing and otherwise. **Parvez** claimed either Tzs. 50,000/= or 100,000/= for appearance. The taxing officer awarded Tzs. 50,000/= for mention and Tzs. 100,000/= for hearing regardless of time spent. Costs are awarded at the discretion of the taxing officer. The appellate court may only interfere if and only if, the taxing officer abused his discretion. The taxing officer awarded Tzs. 100,000/= for attending for hearing or receiving the ruling. The **Advocates Remuneration Order**, G.N. No 263/2015 requires bills of costs to be taxed at prescribed scale. It states-

46. All bills 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 by the scale or refuses to allow costs or allows costs at a lower rate than that provided by the scale.

There is no scale for hearing or mention. The scale provided is that the costs for attending the court for hearing for the first 15 minutes is Tzs. 50,000/=. It means if a party attends court either for hearing or mention and spends not more than 15 minutes his entitlement is Tzs. 50,000/=. See item 3 (though it named 23) of the Eight Schedule to the **Advocates Remuneration Order**. Thus, the determinant factor is time spent and

not the purpose of attending court. **Parvez's** advocate had a duty to prove that he spent more than 15 minutes and not he attended court for hearing. The taxing officer applied wrong principle in awarding the costs for attendance. He taxed costs for attendance not based on the time spent but on the purpose of attending the court. I examined the record, unfortunately, I did not find evidence to prove that **Parvez's** advocate spent more than 15 minutes. I will reduce the costs for appearance to Tzs. 50,000/= per appearance. For that reason, the amount of Tzs. 1,850,000/= the taxing officer awarded is on the high side. As **Parvez's** advocate made 28 appearances, I award him Tzs. **1,400,000/=** as costs of attendance. I wish to emphasize that costs of attendance are taxed basing on the provided scale. The decree holder is not required to tender evidence to prove that he spent the amount.

A third category of costs of **Parvez's** claim is instruction fees. I wish to state at the outset that it is a settled principle of taxation that the winner must be reimbursed for all costs legally incurred. See **Premchand Raichand Limited & another vs. Quarry Services of East Africa Limited and another** (1972) E.A 162. However, it should be noted that costs are not awarded to punish the looser and enrich the winner. The

position, which was pronounced in the case of **Wambura Chacha Vs. Samson Chorwa** [1973] LRT No. 4 where the court held that;

"The purpose of taxation is to reimburse the successful party and not to punish the looser or enrich the successful".

Given the above principles of taxation, it is clear that instruction fees are awarded to compensate adequately an advocate for the work done in preparation and conduct of a case and not to enrich him. Taxing officer, in determining the quantum payable as instruction fees, must consider factors such as the amount of work involved, the complexity of the case, the time taken up at the hearing including attendances, correspondences, perusals and the consulted authorities or arguments. There is no requirement to prove to prove payment of instruction fees by tendering receipt. This position was taken by the Court of Appeal in **Tanzania Rent A Car Limited V, Peter Kimuhu** Civil Reference No. 9 of 2020 (CAT unreported).

Having answered the issue that the respondent was not required to prove that he made payments, the next question is whether the amount is justified. It is a general rule that the award of instruction fees is peculiarly within the discretion of a taxing officer and the Court will always be

reluctant to interfere with his decision, unless it is proved that the taxing officer exercised his discretion injudiciously or has acted upon a wrong principle or applied wrong consideration. See the **Attorney General v. Amos Shavu**, Taxation Reference No. 2 of 2000. The respondent claimed Tzs. 18,000,000/= as instruction fee and the taxing officer awarded him Tzs. 11,000,000/=.

In taxing the instruction fee, the taxing officer considered the time spent, which was approximately two years. He also considered the value of the subject matter and the fact that the amount claimed was not liquidated sum. Unfortunately, the taxing officer did not consider the complexity of the matter. It is obvious that the matter was not so complex. It did not require intense research. The taxing officer did not take into consideration the principle stated in **Smith v. Buller** (1875) 19 E9.473, cited in **Rahim Hasham v. Alibhai Kaderbhai** (1938) 1 T.L.R. (R) 676, where the Court observed that, "**Costs should not be excessive or oppressive but only such as are necessary for the conduct of the litigation.**" It is obvious that had the taxing officer considered the complexity of the matter he would have found that the matter was not complex and taxed item No. 1 at a reasonable amount. I set aside the taxed amount on account of the

taxing officer's failure to apply the principle of taxation and award Tzs. 7,000,000/=.

Was the taxing office justified tax the bill of costs while Rose had indicated her intention to appeal?

Rose did not submit regarding this issue. Pervez's advocate submitted that the fact that Rose intended to appeal to the Court of Appeal did not barred the taxing officer to tax the bill of costs.

I am in total agreement Pervez's advocate submission that there is no law that an appeal to the Court of Appeal stays taxation of the bill of costs. Item 4 of the **Advocates Remuneration Order**, provides that bill of costs shall be filed within 60 days from the date of the order awarding costs. It states

"4. A decree holder may, within sixty days from the date of an order awarding costs, lodge an application for taxation by filing a bill of costs prepared in a manner provided for under Order 55."

Once the bill of costs is filed it must be taxed unless the court resolves to await the outcome of the appeal. If the law maker wanted mandatorily to make an intention to appeal or an appeal to the Court of Appeal to stay the proceedings for taxation of costs it would have said so. I cannot fault the taxing officer for taxing the bill of costs despite the applicant's intention to

appeal. I am alive of the decision of the Court of Appeal in **Matsushita Electric Co. Ltd V Charles George t/a C.G. Travers**, Civil Appl.No.71 of 2001 (unreported) and many others that: -

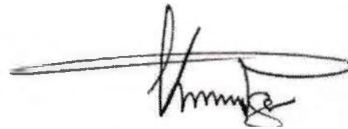
"Once a Notice of Appeal is filed under Rule 76 (now Rule 83 (1) of the Rules) then this Court is seized of the matter in exclusion of the High Court except for applications specifically provided for, such as leave to appeal or provision of a certificate of law".

The decision in **Matsushita Electric Co. Ltd** does not bar a decree holder to file and prosecute a bill of costs. The bill of costs are proceedings which by their nature are instituted after the judgment or the ruling is pronounced. Failure to file the bill of costs within 60 days renders it time barred. As stated above, I do not find any miscarriage of justice to tax the bill of costs once filed, even when there is a pending appeal to the Court of Appeal. I will add that after the bill of costs is taxed, the decree holder may go ahead and enforce the award unless the Court of Appeal stays the execution of the decree of this Court. Consequently, I dismiss Rose's complaint that the taxing officer erred to tax the bill of costs while there was a pending appeal or intention to appeal.

The reference has partly succeeded, I set aside the taxing officer's award of Tzs. 13, 270, 000/= and substitute the same with an award of Tzs. 8, 820,000/= for reasons stated above.

It is ordered accordingly.

DATED at Mwanza this 5th day of May, 2022.



J. R. Kahyoza
JUDGE
5/5/2022

Court: Judgment delivered in the presence of Rose Mkeku, the applicant and Mr. Mwanaupanga, the respondent's advocate. B/C Ms. Martina (RMA) Present.



J. R. Kahyoza
JUDGE
5/5/2022