

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

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**CIVIL REFERENCE NO. 02 OF 2022**

*(Arising from Bill of Costs No. 22/2021, of the High Court, before O.H. Kingwele-DR, arising from Misc. Civil Application No.19 of 2020)*

**CHARLES MARKO NAIBALA.....APPLICANT**

**Versus**

**LILIAN MARKO NAIBALA.....RESPONDENT**

**RULING**

*10/5/2023 & 02/06/2023*

**SIMFUKWE, J**

This reference is against the ruling of a Taxing Master, Hon. O.H. Kingwele- Deputy Registrar, in Bill of Costs No. 22 of 2021. The application has been filed under **Regulation 7 (1), (2), (3) & (4) of the Advocates Remuneration Order, G.N. No. 264 Of 2015** and any other enabling provisions of the Law. The application is supported by the affidavit deponed by the applicant's advocate Mr. Boniphace Engelberth, which was contested by the counter affidavit of Ms. Regina Onesmo Mwanri, the Respondent's advocate.

The respondent herein had presented before the court the Bill of Costs amounting to Tshs. 3,964,000/= for taxation. That amount was taxed at

Tshs. 2,184,000/= . Aggrieved by that ruling, the Applicant herein brought this application for reference seeking the following orders:

- 1. This court be pleased to revise a ruling entered by Hon. O.H. Kingwele, Tax Master vide Bill of Costs No.22 of 2021 dated 2<sup>nd</sup> day of March, 2022 in the High Court of United Republic of Tanzania at Moshi for granting bill of costs whilst the same it contains excessive claims contrary to the law and any other reliefs which this court shall deem fit and just to grant in favour of the applicant. (sic)*

During the hearing of the application, the Applicant was represented by Mr. Engelberth Boniphace, learned counsel while the respondent enjoyed the service of the learned counsel Ms. Regina Mwanri. The matter proceeded by way of written submissions.

Mr. Engelberth submitted among other things that before a taxing master awards an amount of instruction fees, he has to observe four principles as set down in the case of **VIP Engineering and Marketing Ltd vs CITIBANK Tanzania Limited, Civil Application No. 24 of 2019**, which quoted four guiding principles at page 11 of the judgment as was held in the case of **Premchand Raichad vs Quarry Services [1972] E.A** as follows:

- 1. That, costs shall not be allowed to rise to such a level as to confine access to the Courts to only the wealthy;*
- 2. That, the successful litigant ought to be fairly reimbursed for the costs he reasonably incurred;*

- 3. The general level of the remuneration of advocates must be such as to attract worth recruits to an Honorable profession and*
- 4. That, there must so far as is practicable be consistency in the awards made, both to do justice between one person and another and so that a person contemplating litigation can be advised by his advocates very approximately what, for the kind of the case contemplated is likely to be his potential liability for costs.*

Equating the above principles with the quantum of an instruction fee, Mr. Engelberth submitted that, in the Bill of Costs No. 22 of 2021 the claimed instruction Fee was Tshs. 2,000,000.00/= which is contrary to the aforesaid four guiding principles and also contrary to the provision of **item 1(m)(ii) of the 11<sup>th</sup> Schedule of the Advocates Remuneration Order** (supra). He argued that the Bill of Costs No. 22 of 2021 originated from Misc. Civil Application No. 19 of 2020 which according to the law, its instruction fee should be taxed at a rate of not more than Tshs 1,000,000.00/= as it emanates from a Miscellaneous Application.

It was reiterated that; costs shall not be allowed to rise to such level as to confine access to the Courts to only the wealthy. That, the successful litigant ought to be fairly reimbursed for the Costs he reasonably incurred and the general level of the remuneration of Advocates must be such as to attract worthy recruits to a profession as set out in the case of **VIP Engineering and Marketing Ltd vS Citibank Tanzania Limited** (supra).

Mr. Engelberth stressed that, the said amount of Tshs 2,000,000.00/= (two million) as Instruction Fee is excessive and the same ought to be taxed off as per the requirements of **Order 48 of the Advocates Remuneration Order** (supra). He added that, the instruction Fee is supposed to compensate adequately an Advocate for the work done in preparation and conduct of a case and not to enrich him. He buttressed the argument with the case of **Smith vs Buller (1875) 9 E9.473** which was cited in the case of **Rahim Hasham vs Alibhai Kaderbhai [1983] 1 T.L.R (R) 676** which held that:

*"Costs should not be excessive or oppressive but only such as are necessary for the conduct of litigation".*

The learned counsel formed an opinion that since the entire Bill of Costs No. 22 of 2021 was excessively claimed, the only remedy for such exaggerated bill of costs is found under the provision of **Order 48 of the Advocates Remuneration Order** (supra) which stipulates as follows:

*"Where more than one-sixth of the total amount of a Bill of Costs exclusive of Court fee is disallowed, the party presenting the Bill for Taxation shall not be entitled to the Costs of such Taxation."*

The learned counsel contended that, instruction fee which raised to such a level as to confine access to the courts to the wealthy only, is contrary to principles established in the case of **Premchand Raichad vs Quarry Services** (supra). He implored this court to revise a ruling entered in Bill of Costs No. 22/2021.

Taking into consideration the above cited authorities, Mr. Engelberth reiterated that the claimed amount is over and above the scales set out in the **Advocates Remuneration Order** (supra) and offends the principles set forth in the recent case of **Tanzania Rent A Car Limited**

**vs Peter Kimuhu, Civil Reference No. 9 of 2020**, Court of Appeal of Tanzania at Dar es Salaam.

In his conclusion, Mr. Engelberth prayed this court to allow this application with costs.

In her reply submission, on the outset, Ms. Regina adopted her counter affidavit to form part of their submission; and submitted that the arguments submitted by the learned counsel for the applicant is misconceived, frivolous and unfounded.

Replying the fifth and sixth paragraphs of the affidavit in support of the application which are in respect of the allegation that the amount of bill of costs granted to the respondent was excessive; Ms. Regina submitted that the amount which was awarded by the Taxing Master was proper and not excessive as insinuated by the learned counsel for the applicant. She continued to tell this court that generally awarding the bill of costs is the discretion of the Taxing Officer and the Court will always be reluctant to interfere with the same, unless it is proved that the Taxing Officer exercised his discretion unjudiciously or has acted upon a wrong principle or applied wrong consideration.

The learned counsel for the respondent insisted that, the Taxing Master awarded reasonable amount of Instruction fees and had taken into consideration the factors as set out in the case of **Attorney General vs Amos Shavu, Taxation Reference No. 2 of 2000** (unreported) in which the Court held that:

*"The basic principles/factors to be followed in assessing the costs in terms of instruction fees are based on the nature*

*of the case, complexity, the amount of research involved in the course of hearing and disposing of the case."*

Moreover, Ms. Regina explained that the Taxing Master was guided by the provision of **Order 12 (1) of the Advocate Remuneration Order** (supra) which provides as follows:

*"The taxing officer may allow such costs, charges and expenses as authorized in this order or appear to him to be necessary or proper for the attainment of justice".*

*Emphasis added*

It was contended by Ms. Regina that the Respondent's counsel prayed for instruction fees of Tshs 2,000,000/= which was contested by Mr. Engelberth who argued that the prescribed instruction fee was Tshs 1,000,000/=, which the Taxing Officer awarded to the respondent.

Ms. Regina continued to submit that, it is evident from the record that Misc. Civil Application No. 19/2020 was complicated and involved a lot of research, correspondences and took two years in court. (From 2020 up to 2021). She argued further that, the Respondent herein enjoyed legal services from a private Advocate and the said advocate was fully engaged from the commencement of the case to the end. Thus, the awarded costs of Tshs 1,000,000/= as instruction fees was reasonable and minimal since the respondent won the case and she incurred costs in prosecuting the case. That, being guided by the law and having considered the complexity of the case and time taken to finalize it, the Taxing Master awarded the said costs as it was set forth in the case of **Kitinda Kimaro vs Anthony Ngoo and Another, Civil Application No. 576/02 of 2018** (CA) at page 11 where it was held that:

*" ..... taking into account the complexity of the issues involved and the multiplicity of the proceedings (preliminary point of law prior to hearing of the appeal, the cross appeal, revision proceedings) and the numerous authorities filed. We exceptionally allow costs for two advocates. We think it is reasonable and proper under the circumstances. "*

The respondent's counsel highlighted that, in awarding costs to the respondent, the Taxing Master acted judiciously and in right principles as per **Order 12 (1) of the Advocates Remuneration Order**. That, in determining the quantum of the instruction fees, the Taxing Officer is guided by various principles. She cited the case of **Premchard Rainchad Ltd and another** (supra) to support her argument.

Ms. Regina condemned the applicant's counsel for failure to interpret the provision of **Order 48 of the Advocates Remuneration Order** (supra) and argued that, the said provision contains the proviso which provides 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 of one sixth."*

The learned counsel went on to submit that; the ruling of the taxing officer in the Bill of Costs No. 22 of 2021 is silent on whether or not the Taxing officer exercised such discretion. She elaborated that, there are two School of thoughts in determining **Order 48 of the Advocates Remuneration Order** (supra) as stated in the case of **Joachim Ndelembi vs Maulid M. Mshindo and 2 Others, Reference No. 13**

**of 2020** (HC) which referred to the case of **Julius Mwarabu vs. Ngao Godwin Losero, Civil Reference No. 4 of 2020**, High Court of Tanzania at Arusha, in which it was held that:

*" ... however, in my view that discretion should be applied in special circumstances. I am saying so simply because there is no dispute that the Applicant enjoyed the services from a private Advocate and not from legal aid or on pro bono basis."*

It was insisted that, in the instant matter, the Taxing Master taxed the instruction fees as per the requirement of the law and the costs were granted under his discretion. Reference was also made to the case of **Haji Athumani Issa vs Rweitama Mutatu [1992] TLR 372** (HC) which stated as follows:

*"The law about Taxation is this: That Judges will in most cases not interfere with questions of quantum, because these are regarded as matters with which the Taxing Officer is particularly fitted to deal with. But and that is a big 'but' the court could interfere if the taxing officer clearly acted unjudicially."*

It was opined by Ms. Regina that the decision of the Taxing master should remain undisturbed. She urged this court to dismiss this reference with costs as it aims to delay the ends of justice.

I have carefully considered the arguments put forward by the learned counsels of both parties. I think, the issue for determination is ***whether this application has merits***. Before resolving the raised issue; as rightly submitted by Ms. Regina for the respondent, I wish to state that, I am



aware that it is the discretion of the court to award costs but such discretion has to be exercised judiciously. Apart from the authorities cited by Ms. Regina, **section 30(1) of the Civil Procedure Code, Cap 33 R.E 2019** provides that:

*"30.-(1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law from the time being in force, **the costs of, and incidental to, all suits shall be in the discretion of the court** and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of such powers."*

Emphasis added

Under paragraph 5 and 6 of the affidavit supporting the application, the learned counsel of the applicant faulted the whole amount of costs awarded by the Taxing Master on allegation that the same was excessive. In his submission in chief, Mr. Engelberth faulted the amount awarded as instruction fee by arguing that, what was supposed to be awarded should not be more than Tshs 1,000,000/- as per **11<sup>th</sup> Schedule item (m)(ii) of the Advocates Remuneration Order** (supra).

Countering this argument, the learned counsel for the Respondent submitted that the Taxing master awarded Tshs 1,000,000/= as instruction fee. She stated that the amount was reasonable considering the fact that the matter was complicated, involved a lot of research, it

took two years in court and the respondent enjoyed the service of a private advocate. Thus, the Taxing Master acted judiciously.

According to the proceedings of the Bill of Costs, it may be noted that the instruction fee of Tshs. 1,000,000/= was suggested by Mr. Engelberth Boniphace who represented the applicant herein as the respondent herein claimed Tshs 2,000,000/- as an instruction fee. It is surprising that the same advocate is now challenging the instruction fee awarded by the Taxing Master. The Taxing Master at page 5 of his ruling in so far as instruction fee is concerned, stated that:

*"As suggested by Mr. Boniphace on the 1<sup>st</sup> Item, I tax the instruction fee for Tshs. 1,000,000/= the rest is taxed off."*

At page 3 of his reply submission in Bill of Costs No. 22/2021, 3<sup>rd</sup> paragraph, Mr. Engelbert submitted inter alia that:

*"...the same should be taxed at a rate of not more than Tsh 1,000,000.00. As long as the bill emanates from a Miscellaneous Application."*

Thereafter, the learned counsel for the applicant herein proceeded to quote **Item 1(m)(ii) of the 11<sup>th</sup> Schedule of the Advocates Remuneration Order, 2015** (supra) to cement his submission. With all due respect to Mr. Engelbert, it seems that he did not read properly the ruling of the Taxing Master. In this application, he challenged the prayed amount of Tshs 2,000,000/= as instruction fee, while the Taxing Master awarded Tshs 1,000,000/= which was suggested by himself. As a matter of law and practice, the learned counsel for the applicant is bound by the principle of estoppel. Oxford Dictionary defines ESTOPPEL **as the**

***principle which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person or by a previous pertinent judicial determination.*** In the premises, the grievances of the learned counsel for the applicant herein against the awarded instruction fee are frivolous and unfounded.

Concerning other awarded costs, I am of considered opinion that the same were granted reasonably. Thus, I find no reason for disturbing the costs which were awarded by the Taxing Master pursuant to the law.

In the event, the taxed amount of Tshs 2,184,000/= is hereby upheld. I thus dismiss this application with costs.

It is so ordered.

Dated and delivered at Moshi this 02<sup>nd</sup> day of June, 2023.



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S. H. SIMFUKWE  
JUDGE  
Signed by: S. H. SIMFUKWE

**02/06/2023**