

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

CIVIL REFERENCE NO. 20 OF 2023
(Originated from Civil case No. 33 of 2022)

ESTER JAMES MAGITA-----APPLICANT

Versus

BANK OF AFRICA TANZANIA LIMITED-----RESPONDENT

RULING

15th & 20th September, 2023

ITEMBA, J.

By the way of chamber summons the applicant moved this court under Order 7(1) of the Advocate Remuneration Order 2015, herein the Order, he prayed for the court to examine the ruling of the taxing Master in Taxation No. 01 of 2023 for the purpose of satisfying itself to its correctness, legality and its propriety. The application was supported by an affidavit sworn by Marwa Samwel advocate representing the applicant.

The application was by way of written submission. The applicant had the service of Mr. Marwa Samwel learned advocate and the respondent afforded the service of Ms. Rosemary Makori learned advocate.

On his submissions, Mr. Marwa claims that the Taxing Officer misinterpreted the provision of the law in reaching the decision. He avers that, the Taxing Master taxed costs under Item 7 of Schedule 9 to the



Order, of which it was wrong and misconceived to rely on that provision since the claim leading to said bill of costs was not of the contentious proceedings for the liquidated sum as envisaged by Ninth Schedule. Supporting his argument, he cited the case of **Tanzania Rent A Car Limited vs Peter Kimuhu** Civil Reference No.9 of 2020. He insisted that it is 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 a wrong Consideration. He also refers to the case of **Southern Highland Earthworks Company Ltd vs UAP Insurance Tanzania Limited** Taxation Reference No. 1 of 2021, which quoted the Black's Law Dictionary which defines liquidated sum as an amount contractually stipulated as reasonable estimation of actual damages to be recovered by one party if the other party breaches.

He went on that, in the light of the above cases, for the claim in the suit to fall under Schedule Nine of the Order then there must be a contractual obligation which provide for a liquidated sum which is an estimation of actual damages to be recovered by one party. He stated that the claim in the suit leading to the case at hand, the respondent was seeking an order that the mortgaged property located at Plot No. 15, Block "C", Nkende



Area, Tarime Township is null and void for want of spouse consent and an order to permanently restrain the decree holder from transferring or dealing in whatever manner. He insisted that, there is no breach of Contract between the decree holder and the judgement debtor so as to attract the liquidated sum as envisaged under schedule nine of the Order to attract TZS. 10,500,000/= as instruction fees. He insisted that since the matter was contentious one, and the proceedings were defended, according to Rule 41 of the Order, taxation of costs would have been done under Item 1 (d) of the Eleventh Schedule to the said Order whereby the sum considered by Taxing Master could be reasonable but not less than one million could be awarded.

He went on that the Registrar in the capacity of Taxing Master erred in law and fact for awarding TZS. 11,140,000/- as an instruction fee without considering governing legal and practical requirements. He refers to page 11 of the case of **Tanzania Rent a Car Limited** (Supra) where it was held that the taxing officer has been given wide latitude and discretion to determine taxing costs as it appears to him to be proper for attainment of justice. However, the said discretion should be exercised within the costs scales prescribed in the Rules and in addition, the taxing officer is also supposed to consider other factors such as the greater the amount of work involved the complexity of the case, the time taken up at



the hearing including attendances, correspondences, perusal and the consulted authorities or arguments. Supporting his arguments, he referred to **VIP Engineering and Marketing Ltd vs Citibank Tanzania Ltd**, Civil Application No. 24 Of 2019. He insisted that, he amount awarded at a tune of 10,500,000/= by the Taxing Master was not reasonable for not considering the work done, complexity of case, and the time up since the matter was disposed on preliminary objection conceded by the counsel for the plaintiff.

He also claims that, Taxing master awarded the bill of cost which was time barred. The bill of cost No. 1 of 2022 was filed online after sixty days have lapsed contrary to the requirement of the law. He cited Order 4 of the Order which provide that a decree holder may, within sixty days from the date of an order awarding costs, lodge an application for taxation by filling a bill of costs. Referring to the ruling in civil case No. 33 of 2022 which was delivered on 20th October, 2022, and taxation application which was filed online on 19th December, 2022, it is clear that sixty days had lapsed as it was supposed to end on 18th and the respondent was already out of time by one day. He claims that, the counsel for the respondent conceded that the application was out of time but the Taxing Master awarded costs. He, therefore, request this court to tax off all the improper amounts and remain with a fair and reasonable amount.



Responding to the applicant learned counsel submissions, Ms. Makori declined his averments holding that the taxing master was correct. Addressing on the first point of reference that the Taxing Officer misinterpreted the provision of the law in reaching the decision, she insisted that the Taxing Officer interpreted the provision according to the law as the bill of cost was a contentious proceeding. Referring to item 7 of 9th schedule of the Order, she maintained that, the Respondent in Civil Case No. 33 of 2022 disputed the claim brought before this Court and filed a written statement of defense, and the matter became contentious as per the proviso of item 7.

She submitted that the amount of TZS 10,500,000/= arises from the Mortgage agreement of TZS 359,000,000/=: secured by the landed property, plot No. 15 Kitalu C, Nkende, Tarime, and at the pleading the Applicant prayed that the mortgage of that property be null and void, which according to the 9th schedule of Advocate Remuneration Order Cap. 341 of 2015 categorically limits an Advocate to charge from 39% to 7%, and 3% of TZS 350,000,000/- which is TZS 10,500,000/=: which was properly taxed.

In supporting her argument, she refer this court to page 6 of the case of **George Mbuguzi and another vs. A.S. Maskini** 1980 T.L.R 53 which refers the case of **Premchand Raichand Ltd and another vs.**



Quarry Services of East Africa Ltd and others [1972] E.A 162 where it was observed by the Court of Appeal that the brief fee is based on the amount of work involved in preparing for the hearing, the difficulty and importance of the case and the amount involved.

Responding on the second point she maintained that the Taxing master was right to award TZS 11,140,000/= based on the legal and practical requirements. She insisted that the attendance charges, drafting charges and instruction fee were equally claimed at a minimum rate and were within the reasonable prescribed range as per item 1(a) of the 8th Schedule to the Advocate Remuneration Order 2015.

Submitting on the last point, she avers that it is true that the Bill of Cost is governed by the Advocate Remuneration Order GN. 263 of 2015. She went on stating that time limitation for filling the bill of costs is 60 days. The Judgment of the High court Civil case No. 33 of 2022 was delivered on 20th October 2022 where the bill of cost was filed on Monday 19th December 2022 whereas the deadline falls on Sunday 18th December 2023. Referring to Section 60(1)(e) of the Interpretation of Laws Act [Cap 1 R.E 2019], she insisted that the taxation was filed on time. She therefore prays this court to dismiss this application.

After the submissions by parties' learned counsels, I proceed to determine whether the application has merit. To start with, the applicant



raised a concern that the taxation application was time bared for it was filed out of a statutory time of 60 days. On the part of the respondent, she insisted that the application was filed on time. Going to the records, it is clear that the Judgment of the High court Civil case No. 33 of 2022 was delivered on 20th October 2022 and the bill of cost was filled on Monday 19th December 2022 whereas the deadline falls on Sunday 18th December 2023. As stated by the respondent learned counsel, this is tenable under section 60(1)(e) of the interpretation of laws Cap. 1 RE: 2019 which states that: -

*60.-(1) In computing time for the purposes of a written law-
(e) where the time limited for the doing of a thing expires
or falls upon an excluded day, the thing may be done on the
next day that is not an excluded day;*

That being a position of the law, and as the records portray that the taxation application was filed on Monday 19 December 2022, the application was within time.

This being a reference cause, a principle governing application for reference is reflected in the case of **Gautam Jayram Chavda vs Covell Mathews Partnership**, taxation Cause Reference No. 21 of 2004 where it was stated that; -



"Where there has been an error in principle the court will interfere, but question solely of quantum are regarded as matter which the taxing officer are particularly fitted to deal and the court will intervene only in exceptional circumstances".

Factors to be considered in altering the taxed amount, in accordance with, **Southern Highland Earthworks Company Ltd v UAP Insurance Ltd, Taxation** (supra) include suit amount, nature of the subject matter and its complexity, time taken for hearing and extent of research involved, parties' general behaviour and facilitation of expeditious disposal of case, public policy of affordability in litigation and maintenance of consistency in allowable quantum of costs.

It is also trite law that, a bill of costs only serves a purpose of compensating the decree holder for the actual sum incurred to prosecute or defend proceedings. Costs are not awarded to either punish the judgement debtor or to enrich the decree holder and or the advocate. See: **Doctore Malesa and 3 others vs. Mwanza City Council and Another**, reference No. 7 of 2021 (unreported) and **Premchand Rainchand Ltd and another v Quarry Services of East Africa Ltd and others** [1972] 1 EA 162.

Going to the pleadings and the submissions by the parties' learned counsels, it is clear that the Civil Case No. 33 of 2022 was defended, and it became contentious before it was dismissed by the way of preliminary objection for being filed in a wrong registry. The applicant claimed that the Taxing Officer misinterpreted the provision of the law by taxing costs under Item 7 of Schedule 9 to the Advocate Remuneration Order G.N No 263 of



2015, of which it was wrong since the claim leading to said bill of costs was not of the contentious proceedings for the liquidated sum.

It has been held by this court in many occasions that, the scales which are set in the 9th schedule of the 15 Order cater for contentious proceedings regarding the liquidated sum. The liquidated sum must be agreed by parties in advance. See: **Southern Highland Earthworks Company Ltd v UAP Insurance Ltd** (supra).

In determining whether the taxing master acted on a wrong principle or consideration, I proceed to weigh whether the cause of action falls under the definition of liquidated sum. As referred to by the applicant, the **Black's Law Dictionary** defined liquidated sum as : -

"...an amount contractually stipulated as reasonable estimation of actual damages to be recovered by one party if the other party breaches".

At page 2 of the ruling in Civil Case No. 33 of 2022, which extracted an expert from the plaint, it reads: -

"5. that, the plaintiff claims from the defendant jointly and severally is for an order that, the mortgaged property located at plot No. 15 Block C Nkende Area Tarime township is null and void abinitio for want of spouse consent and thus the same be discharged /redeemed from mortgage agreement between the 1st and 2nd defendant, order to



permanently restrain respondents from transferring or dealing in whatever manner with the disputed property..."

From the above extraction, there was no contractual relationship between the parties. Instead, the applicant was suing based on a mortgage agreement of TZS 350,000,000/= where their matrimonial property was placed as a security for such transaction. I find that the claim leading to the bill of costs was a contentious proceeding but not of a liquidated sum. The taxing master was to apply section 41 of the Order which govern the contentious proceedings which are not of a liquidated sum. As stated in **Tanzania Rent A Car Limited vs Peter Kimuhu** Civil Reference No.9 Of 2020, that the court only intervene when the taxing master has acted on a wrong principle or consideration, I will therefore intervene.

The Order provides for under section 41 on taxation of the contentious proceedings that: -

"41. Bills of costs incurred in a contentious proceeding under this part shall be taxable according to the rates prescribed in the 10th, 11th and 12th schedule's".

Going to the specified schedules, I find this could tenable under item 1(d) of 11th schedule to Advocate Remuneration Order GN. 263 of 2015 which stipulates that: -



"1(d)- where the proceedings are defended or to defend a proceedings: such sum as a taxing officer shall consider reasonable but not be less than 1,000,000/=."

I therefore hold that the taxing master applied a wrong section of law and the taxation of TZS. 10,500,000/= was wrongly computed therefore invalid. Considering the circumstances involved in this matter, I am persuaded to reduce the instruction fee to Tanzanian shillings Two Million (TZS 2,000,000/) the reasons being; the proceedings from which taxation emanated was neither based on liquidated sum nor complex case and the suit was not determined on merits. Further, appearance by the respondent's counsel was only within one month between March and April, 2023. Being persuaded by **Abeed Minazali Manji (Administrator of The Estate of The Late Nadir Minazali Manji) Vs The Registered Trustee of Daughters Of Maria Kipalapala**, Land Reference No.01 of 2023, High Court, Mwanza, it was held that: -

"In the interest of public policy, people should be allowed to access justice inexpensively; court justice should not be reserved only for the well-to-do people; and parties not to be penalized by the inactions or omissions of their respective advocates".



As it appears, fees for attendance and drafting of the Written Statement of Defence were awarded at a tune of TZS 640,000/ as it reflects on the bill of costs which I see no reason to disturb.

In fine, the application is allowed. The total taxed amount of TZS 10,500,000/= by the Taxing Master is reduced and adjusted to Tanzanian shillings Two Million Six Hundred and Forty Thousand only (TZS 2,640,000/=).


It is so ordered.

Dated at Mwanza this 20th day of September 2023


L. J. ITEMBA
JUDGE

Ruling delivered today, 20th September 2023, in the presence of Ms. Rosemary Makori counsel for the respondent also holding brief for Mr. Marwa Kesanta for the applicant.




L. J. ITEMBA
JUDGE