

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)
AT DAR ES SALAAM**

REFERENCE NO. 9 OF 2023

(Arising from the decision of the Taxing Officer Fimbo- DR dated 23rd May 2023 in
Taxation No. 51 of 2023)

M. A. CARGO TRUCKERS AND

FORWARDERS CO. LIMITED APPLICANT

VERSUS

WILSON SAIMON NGUI RESPONDENT

RULING

27th Oct & 2nd Nov, 2023

KIREKIANO, J.:

The applicant herein was the defendant in Civil Case No. 86/2022. On 13/02/2023 the suit was withdrawn and this court awarded cost to the defendant now the applicants in this application. In taxation case no. 51/2023, the applicant herein filed a bill of cost amounting to 24,720,000/= the taxing officer Fimbo – Deputy Registrar taxed the bill at 2,540,000

The applicant under orders 7 (1) and (2) of the **Advocate Remuneration Order GN 264/2015** seeks to challenge the assessment by the taxing officer on the following grounds: -

"The bill was unreasonably taxed on the low side and inordinately too low compared to the work done and cost incurred by the applicant".

The brief facts leading to this application are that when the applicant herein was served in civil case no. 86/2022, The applicant who was a defendant prepared and filed his written statement of defense together with preliminary objection on propriety on filing the suit at Dar Es Salaam Sub registry. It appears that the respondent conceded and requested to withdraw the case. This court made an order awarding costs to the defendant now the applicant in this application.

The applicant thus filed the bill of the amount of Tshs. 24,720,000/= . In particular, the applicant claimed Tshs. 23,450,000/= as instruction fees pegging the same under 9th schedule item 7 of the Order.

The respondent did not appear to contest the bill. In her ruling, the learned taxing officer considered that the case was pending in court for less than a year and was withdrawn before "anything". She thus reasoned that, cost should not be excessive or oppressive but such as necessary for the conduct of litigation and proceeded to Tax instruction fees at Tshs 2,000,000 costs in taxation cause Tsh 300,000 as instruction fees in the

impugned taxation cause, Tshs 220,000 as attendance fees and Tshs 20,000 as disbursement.

At the hearing, the applicant was represented by Mr. Theodore Primus while the respondent was represented by Mr. Paulo Mtui.

Mr. Primus's submissions were brief and focused. He submitted that the instruction fees ought to have been taxed within the range provided under 9th Schedule item 7 of the order. He said the applicant was instructed, and he then made preparations and filed a written statement of defense and preliminary objection before the respondent withdrew the case in court. Mr. Theodore Primus thus argued that the reasons by the taxing officer that the case did not stay in court for long did not justify her departure from the scale that is 3% to 7% of the claims (Tshs. 335,000,000/=) given item 7 of the ninth schedule of the Order.

As such the amount awarded in the taxation cause ought to be Tshs. 500,000/= since the same was not contested. This is according to item M of the eleventh schedule.

On his part, Mr. Mtui for the respondent argued that the matter ended in preliminaries, there was no research done by the applicant and the

respondent thus decided to withdraw the suit and filed it in another registry. In his view even the awarded amount of Tshs. 2,000,000/= was excessive for the respondent.

As such the award of Tshs. 300,000/= as the cost in the taxation cause was also fair, he thus asked this court to dismiss this application.

In his brief rejoinder, Mr. Primus submitted that the case was after the applicant the defendant had filed a written statement of defense and preliminary objection thus research was done.

From the submission by the parties, their point of departure is on the amount of instruction fees awarded both in the defending Civil Case No. 86/2022 and the Taxation Cause No. 51/2023. The pressing issue is thus whether the amount of Tshs. 2,000,000/= awarded as instruction fees were reasonable.

The general practice in these kinds of applications appreciates the rule that taxing officers' decisions are discretionary. This Court can interfere only if the taxing officer exercised discretion injudiciously. There is plenty of judicial decisions to that effect including **Haji Athumani Issa v Rweitama**

Mutatu, [1992] TLR 372 (HC), this Court **Masanche, J** (as he then was) held,

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

The rationale of this principle was also elaborated by this court (Mwambengele J (as he then was) in ***NIC Bank Tanzania Limited vs Patrick Edward Moshi and another Misc Com Application NO. 327 OF 2015*** where he cited the decision in ***Pardhan Vs Osman, [1969] 1 EA 528*** that;

*"... judges, lacking the experience of taxing Officers, will not interfere with the quantum allowed as an instruction fee upon taxation unless it is **manifestly so high or so low that it calls for interference**"*

While assessing whether the taxing officer assessed the bill judiciously it is apposite to appreciate the facts surrounding her assessment. The respondent wrongly filed his plaint in this sub-registry, instead of filing the

same at the Morogoro sub-registry. When the applicant herein was served, he noted this anomaly and filed his written statement of defense and preliminary objection. The respondent conceded and withdrew that suit and according to the respondent's counsel, he proceeded to file the same at Morogoro Sub Registry. There is no contention on this fact.

It was in this state of affairs that the taxing officer considered that The 2,000,000 as instruction fees was fair. It is to be noted here that, the applicant's claim was 335,000,000 hence the scale would be as rightly submitted by Mr. Primus, the ninth Schedule item 7, that is; 3% to 7 %. Mr Mtui's line of argument is that the dispute suit did not proceed instead it was withdrawn and filed in another registry where parties are litigating.

I am alive to this court decision on the principles of awarding instruction fees that is National ***Bank of Commerce v Kapinga & Co. Advocate, Civil Reference No. 4 of 2003, High Court at DSM (unreported)***. This court gave an illustrative outline for consideration by the Taxing officers, thus; the suit amounts, the nature of the subject matter, Complexity of the suit, time taken for hearing, extent of research involved, parties' general behavior, and facilitation of expeditious disposal of the case, public policy by ensuring that allowable cost are fair that litigation

should be affordable; and maintenance of consistency in quantum of costs allowable.

The learned taxing officer considered the time the case remained in court and the fact that the case did not only end at preliminary but was withdrawn by the respondent to be filed in another sub-registry. I subscribe to the respondent's counsel submission that; this fact deserves consideration.

I say so because, in the end the case will be finally determined in the proper registry and costs shall as a matter of principle follow the event. Going by the applicant's counsel's view awarding the whole of the scale in a matter that was ultimately refiled will be clumsy and sets a thine lane between reimbursing a part and doing injustice to another. In the assessment of fees in these scenarios, a part may, in the end, be awarded cost twice.

Nevertheless, it is appreciated that the defendant now the applicant did his research in preparing the defense and noting the anomaly in place of suing which fairly speaking ought to be noted by the plaintiff (the

respondent in this application. Consideration has also been made to the fact that the respondent conceded and withdrew the suit.

In rather a similar circumstance, which I have considered on the consistency of this court when considering the scale under item 11th Schedule item "M" this court in **Elizabeth Timothy Balali (Reference 22 of 2020) [2021] <https://tanzlii.org> (Mwenegoha J)** was facing a similar circumstance where the proceedings ended at the preliminary stage.

It was held

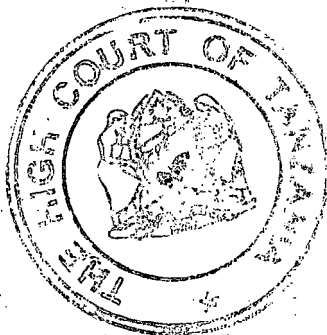
I find the amount of Tshs,9,000,000/= taxed as instruction fees to be unreasonable as the matter was concluded at the preliminary stage and the suit was only within the Court premise for less than four months. This court went on to reduce the instruction fees to 5,000,000.

In taxation, of bill of cost, the time when the proceedings were protracted in court should carefully and broadly be construed depending circumstances of each case. The spirit in the case of the **Bank of Commerce** was to consider general behavior and facilitation of expeditious disposal of the case. Negative aspects and lack of diligence that end up delaying

proceeding should equally be taken on board but not as rewarding aspect. In this application I consider Tshs 5000,000 for instruction fees will be fair.

Lastly, on instruction fees in the taxation cause, given order 48 of the Advocate Remuneration order GN 264 of 2015, since not even one-sixth of the claim was taxed on then further order ought not to be made.

In the end, I vary the amount of instruction fees from 2,000,000 to 5,000,000. The award of Tshs 300,000 as instruction fees in the bill of cost is taxed off the rest of the award is undisturbed making the amount to be taken on at 5,220,000. It is so ordered.




A. J. KIREKIANO

JUDGE

02/11/2023

COURT: Ruling delivered in chambers in absence of the applicant and in presence of the respondent.

Sgd: A. J. KIREKIANO

JUDGE

02/11/2023