

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(MBEYA SUB- REGISTRY)
AT MBEYA

LAND REFERENCE NO. 2 OF 2023

(From the decision of the High Court of Tanzania at Mbeya in Bill of Costs
No. 35 of 2021)

NMB BANK PLC..... APPLICANT

VERSUS

SHIMILANGWADA ESTATE COMPANY LTD.....RESPONDENT

RULING

Date of last Order: 20/07/2023

Date of Ruling: 07/11/2023

NDUNGURU, J.

The applicant herein lodged the instant reference calling upon this Court to inspect and revise the decision of the taxing master in the Taxation Cause No. 35 of 2021 and award the costs according to the scale provides in the Advocates Remuneration Order, 2015. The application has been made under the provisions of Order 7 (1) and (2) of the Advocates

Remuneration Order, 2015 G.N. No. 264 of 2015. It is supported by an affidavit deposed by one, Heri Nyambo, the applicant's principal officer. The respondent challenged the applicant's application through counter affidavit sworn by one, George Herman Nzunda, the respondent's principal officer.

The brief facts of this matter are that: The respondent, Shimilangwada Estate Company Ltd, filed Land Case No. 8 of 2021 before this Court against the applicant, NMB Bank Plc. The record also shows that; the matter was withdrawn by the respondent but with leave to re-file. Then, the suit was marked withdrawn with costs. The applicant lodged a bill of costs before the Taxing Master through Taxation Cause No. 35 of 2021 in which the applicant claimed a total amount of Tshs. 233,255,585.9/=. The said claim for costs was heard and finally taxed at a tune of Tshs. 21,550,000/=. Aggrieved by the decision of the taxing master, hence the applicant lodged the present reference.

On the date of the hearing of the application, the applicant was represented by Mr. Baraka Mbwilo, learned advocate whereas the respondent enjoyed the service of Ms. Mary Gatuna, learned advocate.

Upon the request of the parties, this Court allowed the parties to argue this application by way of written submissions and they complied with the scheduling order of this Court.

In support of the application, Mr. Mbwilo prayed to adopt the affidavit supporting the application and continued to argue that; according to Order 46 of the Advocates Remuneration Order, 2015 G.N. No. 264 of 2015 taxing officer ought to have taxed the bill of costs based on the prescribed scale as presented by the applicant. He added that, failure to do so mean the taxing officer exercised his discretionary power improperly. To back up his contention, he referred the Court to the case of **Edisa Bais v Frester Investment Co. Ltd**, Misc. Civil Reference No. 01 of 2022, HC at Bukoba (unreported) to the effect that the taxing master can tax off excess amount if he finds the amount charge is beyond the prescribed scale.

He also submitted that, in the Taxation Cause No. 35 of 2021, the applicant claimed a total amount of Tshs. 231,805,585/= as the instruction fees which is 3% of the total amount of Tshs. 7,726,833.33/= in which the respondent claimed against the applicant in the Land Case No. 08 of 2021 before this Court. To cement his submissions, he cited item 8 of the 9th

Schedule to the Advocates Remuneration Order, 2015 G.N. No. 264 of 2015 which provide the scale of fees for contentious proceedings for liquidated sum in original and appellate jurisdiction for claim exceeding 400,000,000/= . He continued to argue that, the taxing officer was unfair to tax item 1 Tshs. 20,000,000/= out of Tshs. 231,805,585/= which the applicant has incurred to pay as instruction fees.

Again, Mr. Mbwilo argued that, the instruction fees do not depend on the stage of the case had reached, hence withdrawal of the suit by the respondent does not affect instruction fees. To reinforce his submissions, he cited the case of **First American Bank of Kenya v Shah & another**, Civil Suit No. 22255 of 2000 (2002) Vol. 1 E.A.L.R 64 to the effect that the better position was that the instruction fees was independent and static item, not affected by the stage a suit had reached.

He also relied on the case of **Diamond Trust Bank Tanzania Limited v Puma Energy Tanzania**, Commercial Reference No. 6 of 2020, HC (Commercial Division) at DSM (unreported) to the effect that the decree holder was awarded costs despite the fact that the matter was dismissed for want of prosecution. He went on to submit that, in

determining the quantum of an instruction fees to be paid, the taxing officer is required to consider the guideline principle stated in the case of **Premchand Raichand Ltd & another v Quarry Services of East Africa Ltd & others** (No.3) (1972) 1 E.A.

Mr. Mbwilo further sought to fault the decision of the taxing officer in giving Tshs. 50,000/= out of Tshs. 100,000/= per each items from item 3 up to 7 without assigning any reason. He added that, the counsel for the applicant spent more than 15 minutes while defending the Land Case No. 08 of 2021. He concluded by urging this Court to allow this application with costs.

In reply, Ms. Gatuna prayed to adopt the respondent's counter affidavit and proceed to submit that; the taxing officer contravenes the provision of Order 48 of the Advocates Remuneration Order, 2015 G.N. No. 264 of 2015. She also argued that, according to Order 48, taxing officer was supposed to disallow the total bill of cost after taxing off more than one-sixth of the total bill presented. She went on to submit that, although Order 46 of the Advocates Remuneration Order, 2015 G.N. No. 264 of 2015, allow the bills to be taxed on the prescribed scale, the same

provision mandate Judge to use discretional powers to refuse all costs presented in the bill.

She prayed this Court to disregard the observation advanced by the counsel for the applicant that the taxing master ought to tax the presented bill according to the prescribed scale save for the excess one which must be taxed and the case of **Edisa Bais** (supra) on the reason that apart from Order 46, still the Court have powers to consider other factors. While she counters the issue of the respondent to withdraw her case, Ms. Gatuna argued that; the same matter is still pending before this Court after filed by the applicant and the respondent raised counter claim over the same matter. She added that, the taxed amount is very excessive by considering the fact that the same matter is still pending before this Court.

She continued to submit that, in determining the amount of the instruction fees to be paid, the taxing officer is not only based on the statutory scale rather is required to consider other factors such as the greater amount of work involved, the complexity of the case, the time taken up to the hearing. To bolster her argument, she referred the Court to

the number of cases including the case of **Tanzania Rent A Car Limited v Peter Kimuhu**, Civil Reference No. 9 of 2020, CAT (unreported).

She further distinguished the case of First **American Bank of Kenya** (supra) cited by the counsel for the applicant on the reasons that; first, the cited case cannot bound this Court and second, there is a Tanzania Court of Appeal decision which changed the position by adding other factors to be considered by the Court in assess instruction fees. She went on to submit that, they only oppose the decision of taxing officer to tax item 8 up to 15 as presented at Tshs. 100,000/= per each item while the time spent was less than 15 minutes. She cited item 23 (a) of the 8th Schedule to the Advocates Remuneration Order, 2015 G.N. No. 264 of 2015 to cement her submissions. Finally, she prayed the Court to dismiss the taxed amount or the same be reduced to a minimal amount.

In his rejoinder, Mr. Mbwilo reiterated his submission in chief. He also argued that, what is submitted by the counsel for the respondent from page 2 up to paragraph 3 of page 3 in the reply submission was not pleaded by the respondent's principal officer in the counter affidavit filed before this Court. Then, he prayed this Court to ignore the said pages in

the respondent's reply submission. To cement his contentions, he referred the Court to the case of **James Funke Ngwagilo v Attorney General** (2004) TLR 161, to the effect that, the parties are bound by their own pleadings.

He also insisted that, the case of **Edisa Bais** (supra) should be considered and the taxing officer ought to tax the bill as presented save to the excess fees. He went on to submit that, if the respondent was unhappy with the amount taxed, she supposed to challenge it through reference and not otherwise. He continued to argue that, the counsel for the respondent failed to resist as to why this application should not be granted. In conclusion, he reiterated his earlier prayer.

Having considered the opposing submissions from the parties, the Court's record and pleadings filed in this Court, the pertinent issue for determination is whether the application has merit or not.

Before I endeavor to determine the merit or demerit of the application, I find it imperative to address the concern raised by the counsel for the respondent that the taxing officer contravenes the provision of Order 48 of the Advocates Remuneration Order, 2015 G.N. No. 264 of 2015. On the

other hand, counsel for the applicant submitted that the same was not pleaded by the respondent in the counter affidavit and prayed the Court to ignore it. In the first place, I agree with Mr. Mbwilo that, the parties are bound by their own pleadings. See the case of **Yara Tanzania Limited v Charles Aloyce Msemwa & 2 others**, Commercial Case No. HC (Commercial Division) at DSM (unreported). But the parties are not precluded to raise the legal issue during the oral argument or in the submissions. In the premises, counsel for the respondent was right to raise the same in her submission in reply.

For easy of reference I see it is very crucial to reproduce the provision of Order 48 which provides that:

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

In the light of the above cited provision to the matter at hand, one-sixth of Tshs. 233,255,585.9/= is Tshs. 38,875,930/=, but the proviso requires, at the discretion of the taxing officer to disregard instruction fee in computing one-sixth. The same position is well elaborated in the case of **Hamis Athumani Hamis & 2 others v Macfarlane Msechu & another**, Reference No. 21 of 2020, HC (Land Division) at DSM (unreported) where it was held that, Order 48 of the G.N No. 264 of 2015 is pegged with conditions that the total amount of the bill of costs must be exclusive of Court fees and the taxing master's discretion is also at issue. This means that in the matter at hand the applicant claimed Tshs, 231.805,585.92/= as instruction fee, the taxing officer would have disregarded it then the amount for computation of one-sixth would have been Tshs. 1,449,999.98/= which makes one-sixth to Tshs. 194,621,321.58/=. Basing on the amount which was taxed (i.e. Tshs. 1,550,000/=) it is clear that Tshs. 241,666.66/= was taxed off which is less than one-sixth of the claimed amount in the bill of costs. I therefore find that, the taxing officer did not contravene the provision of Order 48.

Having so done, I now move to consider the merit or demerit of the application. It must be noted that, the taxation of costs is not a mathematical exercise but it is a matter of opinion, the Court will not interfere with award merely because it thinks the award somewhat too high or too low: it will interfere if the award is so high or so low as to amount to an injustice to one party or another. See the case of **Registered Trustees of the Cashewnut Industry Development Fund v Cashewnut Board of Tanzania**, Civil Reference No. 4 of 2007, CAT at DSM (unreported).

Regarding to Tshs. 20,000,000/= as instruction fee, counsel for the applicant proposed that taxing officer should have assessed the instruction basing on the scale which are set in the 9th Schedule 8th item to the Advocates Remuneration Order, 2015 G.N. No. 264 of 2015. However, the 9th Schedule relates to the scale of fees for contentious proceedings for liquidated sum. A claim for liquidated sum is different from a claim for specific damages which were presented in the suit which prompted the bill of costs leading to the instant reference. A liquidated sum must be agreed by parties in advance and it should be included in a contract.

The Black's Law Dictionary 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; also, if the parties to contract have agreed on liquidated damages, the sum fixed is the measure of damages for a breach. See **Southern Highland Earthworks Company Ltd v UAP Insurance Tanzania Ltd**, Taxation Reference No. 01 OF 2021, HC at Songea (unreported). In the instant case, the claim was for specific damages totaling Tshs. 7,726,852,864/= arising from loss suffered by the respondent as attributed by the applicant's faults. Also, in the instant case, counsel for the applicant did not show whether there was a contractual obligation for a liquidated sum in case of breach of either of the parties. Apparently, the claim was not for a liquidated sum as envisaged under Schedule nine of the Order.

More so, the law is very clear on the instruction fees for contentious proceedings before the High Court. As per Order 41 clearly provides that the bill of costs in contentious proceedings this part shall be taxable according to the rate prescribed in the tenth, eleventh, and twelfth Schedule to the Order. Indeed, the eleventh schedule does specifically

provide for proceedings before the High Court, Subordinate Courts, and tribunals. Item 1 (d) of the 11th Schedule to the Order requires the taxing officer to consider such a sum but not less than Tshs. 1,000,000/=. Also, I agree with Ms. Gatuna that, the taxing officer is required to consider other factors such as the amount of work involved, nature of the suit, the complexity of the case, time taken up at the hearing including attendance, correspondence, perusal consulted authorities or argument.

It is on record that the said Land Case No. 08 of 2021 before this Court was not heard on merits. It was withdrawn by the respondent at the preliminary stage. In my considered view, the said case was not complex as it was withdrawn, in observance of the principle of consistency, I am of the settled view, the instruction fee of Tshs. 20,000,000/= awarded to the applicant still was excessive and amounts to an injustice to the respondent. I therefore substitute the Tshs. 20,000,000/= awarded by the taxing officer with Tshs, 3,000,000/= as instruction in accordance with item 1 (d) of the 11th Schedule to the Order.

In relation to taxed amount of Tshs. 800,000/= being attendance fee under item 8-15 of the bill of costs, I am of the view that, the decision of

the taxing officer was fair and reasonable on the reason that the respondent did not dispute it before. I therefore find that the respondent's arguments as it is an afterthought at this stage. Further, I confirm the sum of Tshs. 250,000/= being attendance fees for item 3-7, Tshs. 350,000/= being the costs for prosecuting the bill of costs, and Tshs. 150,000/= being disbursement costs. On that regards, I hereby grant Tshs. 4,550,000/= which is hereby taxed as a total taxed amount.

In the upshot, this reference is dismissed to the extent stated above.
In the circumstances of this case, I make no order as to costs.

It is so ordered.




D.B. NDUNGURU

JUDGE

07/11/2023