

**IN THE HIGH COURT OF TANZANIA**  
**(COMMERCIAL DIVISION)**  
**AT DAR ES SALAAM**

**MISCELLANEOUS COMMERCIAL APPLICATION NO. 216 OF 2016**  
**(Arising from Commercial Case No. 11 of 2012)**

**RUSTAMALI ABDALLAH FAZAL &  
MOHAMED FAYAZ RUSTAMALI t/a ..... APPLICANTS/D. HOLDERS  
SIMBA PIPELINE PRODUCTS**

**VERSUS**

**PANGEA MINERALS LIMITED ..... RESPONDENT/J. DEBTOR**

16<sup>th</sup> November & 22<sup>nd</sup> December, 2016

**RULING**

**MWAMBEGELE, J.:**

The applicants Rustamali Abdallah Fazal and Mohamed Fayaz Rustamali t/a Simba Pipeline Products (henceforth "the decree holders") and the respondent Pangea Minerals Limited (henceforth "the judgment debtor") were, respectively, plaintiffs and defendant in Commercial Case No. 11 of 2012. That case was decided for the plaintiffs. Later, the decree holder filed a bill of costs claiming a total amount of Tshs. 71,371,839.06. In a ruling of 31.08.2016, the Taxing Officer of this court (A. H. Msumi – Taxing Officer) taxed that bill at Tshs. 15,471,170/81. The rest of the amount was taxed off. This irked the decree holders. They have thus, by way of chamber summons,

made a reference to this court under, essentially, the provisions of Paragraph 7 (1) & (2) of the Advocates Remuneration Order, 2015 – GN No. 264 of 2015. The application is supported by an affidavit of Sylvatus Sylvanus Mayenga, an officer of this court and courts subordinate hereto, save for the Primary Court. The grounds for reference are enumerated at para 6 of the affidavit. They go thus:

1. The Honourable Registrar erred in law and in fact by determining the bill of costs presented without seeking aid and putting weight to the proceeding of the main case and therefore reaching to the unjust conclusion as a result taxed the bill at the minimal sum;
2. Upon being admitted by the Taxing Officer that a considerable amount of labour was employed by nature by the applicant in conducting both the main and the counterclaim and upon being justified that the matter was of complex nature, it was an error on both facts and law for the Taxing Officer to tax both instruction fees at the tune of Tshs. 11,818,127/75 contrary to Paragraph 15 (a) to (c) to the Advocates Remuneration Order, GN No. 264 of 2015;
3. The Taxing Officer erred in law and in fact by taxing off items 61 to 68 of the bill of costs and reach to a conclusion that are part of the instructions fee contrary to what is provided by items of the Eighth Schedule to the Advocates Remuneration Order, GN No. 264 of 2015;
4. The Taxing Officer erred in law and in fact by ignoring or confusing proceedings altogether by his failure to rule that the main case being largely conducted at Mwanza Registry and in the presence of proof of both air tickets and other costs involved, the applicants were justifiable to be awarded the amount as presented in items 14 to 60;

5. The Taxing Officer applied wrongly his overriding discretion by reducing an award to an unreasonable figure and more particularly by ignoring the submissions by the applicants;
6. The Taxing Officer erred in law and in fact by his failure to give consideration to the nature of the matter, its length and the subject matter of it; and
7. The Taxing Officer erred in law and in fact by giving erroneous interpretation of the term principal sum as a result failed to rule that the interest on the unpaid invoices was litigated and also forms part of the principal sum.

By an agreement of the parties which was blessed by the court, this application was disposed of by way of written submissions. The court fixed the submissions schedule with which the parties have complied.

Arguing for the reference, Mr. Sylivatus Sylvivanus Mayenga, for the decree holder consolidated the first and fourth, and the second and sixth grounds. The third and seventh grounds of reference were argued separately.

On the first and fourth grounds of reference, the learned counsel kicked off by stating that the award of costs are discretionary but that the same should be exercised judiciously not arbitrarily without due regard to the rules. He submits that the record of the case has it that the case was instituted on 09.11.2012 and finalized on 22.04.2016, that it was lodged in Mwanza and later transferred to Dar es Salaam and therefore the attendance was made in two different registries, the air tickets and hotel bills were properly presented, among others. He thus submits that the costs in items 14 to 60 concerning attendance were supposed to be taxed as presented. The learned counsel

has made a heavy reliance on Richard Kuloba's **Judicial Hints on Civil Procedure**, 2<sup>nd</sup> Edition, Law Africa, at p. 117, to buttress his propositions.

On the second and sixth grounds, the learned counsel submits that it was well noted by the Taxing Officer that the main suit the subject of the bill of costs was complex and a lot of labour had been employed in its prosecution. He contends that the file is voluminous and a lot of annextures were filed and later admitted in evidence, that several preliminary objections were raised and a lot of efforts were used in disposing them. That, the plaint and counterclaim were professionally prosecuted and defended. A lot of research was done at every stage and various authorities were relied upon by the plaintiffs. That the case involved hearing by filing witnesses' statements plus exhibits intended which involved a lot of labour. In the premises, the learned counsel for the decree holder argues that it was unfair for the Taxing Officer to treat the fees chargeable by invoking the 9<sup>th</sup> Schedule of the Advocates Remuneration Order, 2015. According to him, the circumstances of the matter, fees to be charged were exceptional and therefore it was upon the taxing Officer to consider the import of Paragraph 15 (a) to (c) of the Advocates Remuneration Order, 2015.

Under paragraph 15 (a) to (c) of the Advocates Remuneration Order, 2015, he submits, the Taxing Officer is mandatorily required to take into account the three considerations (a) to (c) enumerated under the Paragraph. Again, the learned counsel referred to Richard Kuloba's **Judicial Hints on Civil Procedure**, at p. 136 to buttress the proposition that the Taxing Officer, in exercising his discretion, must take into consideration the general conduct of proceedings including the preparation of the case in particular, the authorities studied and canvassed and the facts, files and documents collected.

On the third ground, the learned counsel submits that Tshs. 546,550/= were claimed under items 61 to 68 covering costs for printing and photocopying of pleadings. The learned counsel submits that these items are chargeable under item 2 of the 8<sup>th</sup> Schedule to the Advocates Remuneration Order, 2015 as separate from instruction fee. The same mistake was committed in respect of items 3, 4, 5 and 6 of the bill of costs, he argues. Again, the learned quotes p. 132 of **Judicial Hints on Civil Procedure** for the point that the Taxation Officer, while awarding instruction fee, must bear in mind and he has to consider the other fee allowed in the bill and which have been duly awarded other than disbursements in respect of the work to which any such allowance applies. He therefore states that drafting of the documents and disbursements cannot be dumped under one head of instruction but that they are a separate and distinctive work performed.

The fifth ground has not been argued. On the last ground, the decree holder complains that the Taxing Officer erred in law and in fact by giving erroneous interpretation of the term principal sum as a result failed to rule that the interest on the unpaid invoices was litigated and also forms part of the principal sum. He argues that the Taxing Officer treated the sum of Tshs. 94,652,180/= as a liquidated sum but that he was required to include the unpaid invoices as part of the principal sum. He relies on **Judicial Hints on Civil Procedure** to contend that where the successfully party was deprived of goods or money by reason of a wrongful act on the part of the defendant, the party who has been deprived of use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest.

On the basis of the foregoing, the learned counsel for the decree holder beckons this court to rectify the taxed bill accordingly.

Responding, the learned counsel for the judgment debtor, submits in respect of grounds one and four of reference that the Taxing Officer gave weight to the proceedings in the main suit and exercise the discretion to tax the bill judiciously. He argues that according to the 8<sup>th</sup> Schedule, item 23 (c) and (g) of the Advocates Remuneration Order, 2015, the decree holder ought to have clearly and specifically shown the breakdown of his expenses in the case. The he failed to establish what exactly were the costs incurred in each transaction and the exact time spent in the courts; that is, appearances in Mwanza and Dar es Salaam. There having been uncertainty, the learned counsel argues, the Taxing Officer, in the light of Paragraph 12 (1) of the Advocates Remuneration Order, 2015 had a discretion to allow or not to allow such costs.

On the second and sixth grounds the learned counsel for the judgment debtor contends that the Taxing Officer taxed the bill at the tune of Tshs. 11,818,127/75 basing on Paragraph 12 (1) of the Advocates Remuneration Order, 2015. He argues that the Taxing Officer, in the light of Paragraph 15 (a) to (c) which must always be read together with Paragraph 12 (1) of the Advocates Remuneration Order, 2015, did consider all the circumstances surrounding the case, including its nature, length and subject matter and reached a fair decision which is well founded.

Regarding the third ground, the learned counsel contended that the learned Taxing Officer was correct in holding that items 61 to 68 form part of instruction fee. He made reference to ***George Mbuguzi Vs A. S. Maskini*** [1980] TLR 53 and Paragraph 12 (1) of the Advocates Remuneration Order, 2015 to support this proposition.

On the last ground, the learned counsel for the judgment debtor submits that total amount claimed in the plaint was Tshs. 94,652,180/= and therefore the Taxing Officer was correct to peg the calculations on that amount.

Having summarized the learned rival arguments by both learned counsel for the parties, the ball is now in my court to determine grounds for reference as put by the learned counsel for the decree holder. I shall face them in the manner presented by the learned counsel for the decree holder as well as in the manner rebutted by the learned counsel for the judgment debtor.

Before confronting the grounds for reference, let me state at this juncture that taxation powers are discretionary upon the Taxing Officer and a court will not interfere unless it is satisfied that the same was based on a wrong principle -- see *Pardhan Vs Osman*, [1969] 1 EA 528 (HCT) and *George Mbuguzi* (supra). The reason why such powers, especially on the quantum of instruction fees, should be left within the empire of the Taxing Officer was explained with sufficient lucidity by this court (Hamlyn, J.) in the *Pardhan* case (supra) as follows:

"... 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 by reason of some misdirection having occurred or some wrong principle having been adopted."

The same principle is applicable in the Court of Appeal – see: **Gautam Jayram Chavda Vs Covell Mathews Partnership** Taxation Reference No. 21 of 2004 (unreported).

Having laid the basis for my decision, let me now revert to the grounds for reference.

In the first and fourth grounds as consolidated in their arguments before me, the learned counsel for the decree holder complains that the Taxing Officer erred in law and in fact in ignoring the glaring fact that the proceedings of the mains suit were at Mwanza and in Dar es Salaam and that he did not seek any aid in the proceedings of the main case. On this premise, it is the contention of the decree holder that it was justifiable to be awarded the amount as presented in items 14 to 60. The learned Taxing Officer, divided claims under these items into two groups: attendance in court for purposes of filing documents and appearance in court in compliance with court orders. The approach taken in my view was quite correct. The first category appeared under items 14, 17, 22, 24, 34, 37, 51, and 58. In arriving at the conclusion that these form part of the instruction fee, the learned Taxing Officer relied on the following passage by Webb C. J. in **The Matter of the Stamp Ordinance, 1931 and in The matter of The Companies Ordinance, 1931 and the Bohemba Mines Limited** Misc. App. 1 of 1940 quoted by Bramble J. in **Sianga Vs Elias** (1972) HCD n. 66 and recited by Samatta, J. (as he then was – he later became Justice of Appeal and Chief Justice of Tanzania) in **George Mbuguzi** (supra) p. 56:

“In my opinion the word “instructions” in our rules should not be construed as if it were a term of art, but should be construed in relation to the

conditions and circumstance of the country in which those rules are to be operate. Here an advocate is both solicitor and barrister, and the meaning that has been given and in my judgment rightly given, to the words "Fees for instructions" was that they are intended to cover, not merely the attendance of a solicitor when he takes his clients instructions, but all his work, other than that which is elsewhere specially provided for, in looking up the law and preparing the case for trial; in other words they correspond rightly to the fee marked on counsel's brief."

The learned Taxing Officer also taxed off items 14, 17, 22, 24, 34, 37, 51, and 58 under the pretext that instruction fees should not be narrowly interpreted to mean consultation fee. With utmost due respect to the learned Taxing Officer, I think, he misconstrued the tenor and purport of the statement of Webb, CJ in *the Bohemba Mines Limited*. I read nothing from the quote as to suggest that the costs incurred in attending court are part of the instruction fee. If my reading of the quote is correct, which I think it is, Webb CJ had in mind work in looking up the law and preparing the case for trial which correspond to the professional work of an advocate for which he has been paid as instruction fee. I do not read the quote to include transport expenses incurred in attending the court as part of instruction fee.

The foregoing said, it is my considered opinion that the learned Taxing Officer erred in putting items 14, 17, 22, 24, 34, 37, 51, and 58 as falling under the scope and purview of instruction fee. In the premises, I find and hold that

the decree holder was entitled to be awarded items presented under items 14, 17, 22, 24, 34, 37, 51, and 58. These items made a subtotal of Tshs. 3,338,734/= [3,219,734/=] which I grant the decree holder.

Regarding the second category of attendance, the learned Taxing Officer has stated in his ruling that the learned counsel for the decree holder told the court that they included air tickets to Mwanza and hotel costs. However, the learned Taxing Officer was attracted by the arguments brought to the fore by the learned counsel for the judgment debtor to the effect that no specific cost for a particular activity was provided. He added that it could be more convenient if the learned counsel for the decree holder showed which appearances were done in Mwanza and which in Dar es Salaam. Instead, all of them showed under a blanket statement of "appearing in court for Ruling". There was also an unexplained variation of figures in respect of the same appearance/attendance; for example items 18 under which Tshs. 800,000/ was claimed and items 19 and 20 under which Tshs. 545,000/= is claimed for each. This ailment coupled with the fact that the decree holder failed to point out the exact time spent in court and in the light of **Wambura Chacha Vs Samson Chorwa** (1973) LRT No. 4 in which it was stated that a litigant ought to be fairly reimbursed for the costs which he incurred and given the uncertainties which the decree holder did not clear, the learned Taxing Officer taxed Tshs. 30,000/= per each item. The rest of the amount was taxed off.

I have given due consideration to this complaint. I have read the taxation proceedings as well as the ruling of the Taxation Officer. I think the learned Taxing Officer was justified to tax the bill under these items as he did. The Bill of Costs under these items was not quite explicitly presented by the learned counsel for the applicant and this has been addressed by the learned

Taxing Officer quite aptly at p. 8 of the ruling. As can be deciphered at pp. 7 and 8 of the Mr. Mayenga for the decree holder intimated to the court that the court attendances and appearances were made in Mwanza and Dar es Salaam but did not specify which appearances or attendances were done in which city. Neither did the counsel for the decree holders specify time spent in those appearances. As correctly stated by the learned Taxing Officer, what the learned counsel did was to lump up the items under the head "attendance in court". At the hearing of the taxation, the learned counsel for the decree holders did not make himself amply clear on this. He is recorded as saying:

"As the pleadings provide, this matter originated from Mwanza. The firm is based in Dar es Salaam, it was necessary to send a representative at Mwanza sub-registry. In most cases, the mode of transport used by the plaintiff's counsel was travel by flight and while waiting for the conduct of the matter it involved staying at hotels. Those circumstances necessitated costs. It is evidenced by various air tickets and tax invoices from different hotels. It is justifiable that the amount claimed in each item is justifiable. It is my humble submission that the amount claimed in items 14 to 60 be taxed as presented."

What was submitted by the learned counsel for the decree holders, as already said, lacked details. What he did is to lump the items together coupled with air tickets and tax invoices leaving the court to pick and choose which items corresponded with which air tickets and tax invoices. This act of leaving the

court to pick the chuff from the grain exhibited irresponsibility on the part of the counsel for the decree holders. He is himself to blame. It was not the court's duty to sort out which appearances were at Mwanza sub-registry and which ones in Dar es Salaam. The court record just shows the case was instituted at Mwanza sub-registry but the *coram* does not show which appearances were done at Mwanza and which ones at Dar es Salaam. In the absence of clarifications from the decree holder it would be unsafe and perhaps occasion injustice on the part of the judgment debtor to tax the amounts as presented. In the premises, the court rightly exercised its discretion to grant the TShs. 30,000/= *pro rata* and I do not find any justification to meddle with the discretion of the Taxing Master.

The second and sixth grounds are a complaint on the taxing of both instruction fees at the total tune of TShs. 11,818,127/75 without due regard to nature, length and subject matter of the main suit.

I have read the ruling of the Taxing Officer between the lines. At page 3 of the ruling, the Taxing Officer made it amply clear that the suit was neither simple nor complicated. Basing on item 6 of the 9<sup>th</sup> Schedule to the Advocates Remuneration Order, 2015, the learned Taxing Officer stated, quite correctly in my view, that the amount of TShs. 94,652,180/= claimed in the plaint attracted a charge of between 5% and 8%. Having considered the nature of the main suit, the learned Taxing Officer found 5% to be reasonable and taxed the amount at TShs. 4,732,609/= basing on that percentage. The same treatment was accorded to the counterclaim to which TShs. 7,085/518/75 was awarded. Respectfully, I think, the Taxing Officer, having found the case to be neither simple nor complex, by making a finding that 5% was reasonable, he did not exercise his discretion judicially. By the phrase

"the suit was neither simple nor complicated", it seems to me, the learned Taxing Officer meant the suit lied somewhere in between simple and complicated suit. Basing on that, the discretion would have been properly exercised if the percentage was pegged somewhere in between 5% and 8%. Pegging it at 5% which is the minimum threshold provided under item 6 of the 9<sup>th</sup> Schedule to the Advocates Remuneration Order, 2015, would have been apposite if he found the suit to be simple. To do what he did amounted to a misdirection befitting interference of this court. Having given due consideration to the circumstances of the main case, I think 6½% would have been appropriate for instruction fee on the suit. I therefore alter the Tshs. 4,732,609/= awarded as 5% of the principal sum to 6,239,170/=; which is 6½% of the principal sum.

The same principle is applicable in respect of the counterclaim. The awarded amount of Tshs. 7,085,518/75 which was 5% of the principal sum of the counterclaim is replaced with Tshs. 9,211,174/38 which is 6½% of the principal sum.

Next for consideration is the third ground which is a complaint regarding taxing off items 61 to 68 of the bill of costs because, according to the Taxing Officer, they were part of the instruction fee. These items covered the printing and photocopying of various document in the suit. The Taxing Officer taxed off these expenses because they are or supposed to be covered by the instruction fee in the light of **George Mbuguzi** (supra). I have read **George Mbuguzi** and have found nowhere suggesting that such kind of expenses form part of the instruction fee. In my view, the Taxing officer ought not to have treated these items; that is, items 61, 62, 63, 64, 65, 66, 67 and 68 as part of the instruction fee. These are expenses incurred

normally paid from the client's account separate from the instruction fee paid to an advocate. In the premises, I find and hold that the Taxing Officer erred in principle in taxing these items off. The decree holders were therefore entitled to a total of Tshs. 546,550/= under these items.

The last ground for consideration is a complaint the subject of the seventh ground which is to the effect that the Taxing Officer erred in law and in fact by giving erroneous interpretation of the term principal sum as a result failed to rule that the interest on the unpaid invoices was litigated and also forms part of the principal sum. The learned counsel for the decree holder contends that the learned Taxing Officer ought to have considered interest on unpaid invoices as part of the principal sum. Respectfully, I find myself unable to swim the current of the learned counsel for the decree holder on this contention. I find and hold interpretation given to the principal sum by the Taxing Officer is but correct.

In sum, in addition to the Tshs. 1,110,000/= granted *pro rata* and Tshs. 2,543,043/06 which was taxed as presented under items 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 13B, the decree holder is also entitled to:

1. Instruction fee of Tshs. 6,239,170/=; which is 6½% of the principal sum;
2. Instruction fee of Tshs. 9,211,174/38 which is 6½% of the principal sum of the counterclaim;
3. Tshs. 3,338,734/= presented under items 14, 17, 22, 24, 34, 37, 51, and 58; and
4. Tshs. 546,550/= presented under items 61, 62, 63, 64, 65, 66, 67 and 68.

In the end of it all, this reference stands allowed to the extent shown above with costs.

Order accordingly.

DATED at DAR ES SALAAM this 22<sup>nd</sup> day of December, 2016.

**J. C. M. MWAMBEGELE**  
JUDGE