# IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
# (COMMERCIAL DIVISION)
# AT DAR-ES-SALAAM

## CONSOLIDATED TAXATION
## REFERENCE NO.02 & 03 OF 2020

*(Arising from the decision Comm. Cause No.48 of 2019, and Taxation Cause No.94 of 2019)*

**THE JUBILEE INSURANCE COMPANY OF TANZANIA LTD..... APPLICANT /RESPONDENT**

**VERSUS**

**VODACOM TANZANIA PUBLIC LTD COMPANY.....RESPONDENT/APPLICANT**

*Last Order, 20/07/2020.*
*Ruling, 09/10/2020.*

## RULING

**NANGELA, J.:**

The matter at hand came before me as a Reference Application by virtue of Order 7 (2) of the Advocates Remuneration Order, G.N. 264 of 2015. By way of a background, on 08th October 2019, this Court (Hon. Fikirini, J) dismissed, with costs, *Commercial Case No.48 of 2019.* In that suit, the **Applicant/ Respondent** (hereafter to be referred to as **"the Applicant"**) was a Defendant, while the **Respondent/Applicant** (referred hereto as the **"Respondent"**) was a Plaintiff. Following that dismissal, the Applicant/Respondent filed a bill of costs in *Taxation Cause No.94 of 2019,* against the Respondent/Applicant, claiming for costs in a grand total sum of TZS 101,500,000/-.

In the bill of costs, which comprised of four parts, Item No.1 under Part A was instruction fees charged at TZS 85,000,000 (VAT –exclusive) while under sub-Item 2 (a) of part that part, the applicant claimed for TZS 390,000/- as brief fee for drawing bill of cost for 7 folios. In Part B of the bill, the Applicant claimed a total of TZS 650,000/- as costs of attendance. In part C, TZS 80,000/- were charged as disbursements while in Part D, TZS 20,000/= were charged as communication refund.

Upon hearing of the parties, the Taxing Master taxed the bill at a total of TZS 50,080,000/=, which comprised of TZS 50,000,000, being instruction fees and TZS 80,000 as disbursements and the rest of the claims amounting to TZS 50, 690,000/- were taxed off. The Taxing Master seems to have reasoned that the Applicant did not deserve the full fees because the matter had only ended at stage of a preliminary objection, and, therefore, the fees needed to be reduced to reflect effort and work put by the Applicant to defend the case.

Aggrieved by the decision of the Taxing Master, Hon. Mushi, Deputy Registrar, and acting under Rule 7(1) and (2) of the Advocates Remuneration Order, G. N. No. 264 of 2015 the Applicant filed *taxation reference No.2 of 2020* in this Court on 3rd of June 2020.

In that reference application, which was by way of a Chamber Summons supported by an affidavit of Mr. Audax Kahendaguza Vedasto, the Applicant sought for the following orders, that:

> 1. The Honourable Judge of this Court be pleased to make an order increasing the amount of costs in favour of the Applicant from the sum of Tanzanian Shillings (TZS) Fifty Million and Eighty Thousand (50,080,000) awarded by the Honourable Deputy Registrar in Taxation Cause No.94 of 2019 on 15th May, 2020 to either TZS 172,012,500/= or, in the alternative, to TZS 100,690,000/=.

2. The costs of this application be provided in favour of the Applicant.
3. Any other relief which the Honourable Court may deem fit to grant in favour of the Applicant.

On the other hand, on 5th June 2020, the Respondent also filed *taxation reference No.3 of 2020.* The reference application which was by way of Chamber Summons was supported by an affidavit of Ms. Jacqueline Kalaze and the Respondent sought for the following orders, namely, that:

1. The Honourable Court be pleased to reverse and set aside the decision of the Taxing Master issued on the 15th May 2020 in the Taxation Cause No.94 of 2019 and proceed to tax the Bill of Costs in accordance with the law.
2. An order as to of this Reference.
3. Any other relief(s) that the Honourable Court may deem fit and just to grant.

Both reference applications were called for orders on the 20th July 2020. On the material date, the Applicant was represented by Mr. Audax Vedasto, learned advocate while the Respondent enjoyed the services of Ms Samah Salah. On that particular date, Mr Vedasto prayed for an order to consolidate the two reference applications given that the two reference applications originate from the same decision of the Taxing Master.

Besides, while the Applicant seeks for the reversal of the decision of the Taxing Master and an increase of the amount of instruction fees taxed from TZS 50,080,000/- to TZS 100,690,000/-; the Respondent is challenging the decision of the Taxing Master and prays for a reduction of the amount taxed as instruction fees for being not commensurate with the work and effort put by the Applicant to defend the suit.

In view of the above, this Court granted the prayer and made an order that the two applications shall be referred henceforth as **"Consolidated Taxation Reference Application No.2 and No.3 of 2020"**. Parties were also ordered to dispose it by way of filing written

submission and they duly filed their respective submissions in accordance with the order of this Court.

I will, therefore, consider their respective submissions and their affidavits in the course of determining this Consolidated Taxation References. In his submissions, the learned counsel for the Applicant submitted that, although the present matter involves References Appl. Nos.2& 3 of 2020, it is only Reference Application No.2 which is in order in which the Applicant seeks for an enhanced amount of TZS 100,690,000 or in the alternative TZS 172,012,500. In his submission, the learned counsel for the Applicant abandoned the alternative claim of TZS 172,012,500. The Applicant abandoned this claim on the basis of the decision of the Court of Appeal in the case of **Cooper Motors v AICC [1991] TLR 165,** where the court faulted the High Court for awarding more than what was prayed for in the suit.

Challenging the appropriateness of Reference Application No.3, the learned counsel for the Applicant submitted that it was out of order and purposeless. He contended that, the Respondent does not specify what at the end she wants the Court to award in the events it agrees with her complaints in that Reference Application No.3. He noted that, the prayer in the Chamber summons is that the Judge be pleased to *"tax the Bill of Costs in accordance with the law"*, and, therefore, leaves the Court to specify for her what she requests, weigh it and decide it.

The learned counsel for the Applicant further submitted that, a prayer that 'the bill be taxed *"in accordance with the law"'* is no prayer at all. He contends that, every claim that is brought before the Court is expected to be decided in accordance with the law. He referred to this Court the case of **Zacharia Milalo v Onesmo Mboma [1983] TLR 240** to buttress his submission on that point.

Further references were made, by way of analogy in the case of **AICC v Edward [1989] TLR 154,** concerning the need to state reliefs sought in a Plaint, failure of which renders a Plaint defective, and the case **Cooper Motors v AICC [1991] TLR 165** where the Court of Appeal held that a court cannot give more special damages than what was prayed for. In view of that, the learned counsel for the Applicant asks how a court would be able to know it has given the Applicant more than what she prayed for, if the Applicant does not specify how much the Court would have ordered to constitute what she sees to be a lawful figure?

As regards the decision of the Taxing Master the learned counsel for the Applicant faulted it arguing that he extended discretion to matters specifically fixed. He argued that, the Applicant had claimed TZS 85,000,000/- (which, with VAT inclusive which is TZS 15,300,000/- amounts to TZS 100,300,000/-), and, that, this was less than 3% based on the liquidated sum in the suit which was dismissed. The learned counsel for the Applicant argued that, a 3% claim as fees would have been TZS 170,812,500/= and, that, the TZS 85,000,000/- was just 1.5 % and TZS 100,300,000/- (VAT inclusive) was just 1.7%.

According to the Applicant's learned counsel, the agreement to pay the instruction fees was to the effect that the fees would be payable in 4 instalments. He submitted that, the Applicant attached two (2) EFD receipts each amounting to TZS 23,600,000/- which were paid with VAT (inclusive). He contended that, by the time the taxation cause was filed, the two other instalments were yet to be paid. It was also the submission of the learned counsel for the Applicant that, the claim presented before the Taxing Master had a prescribed scale governing it which is paragraph 8 of the 9th Schedule to the Advocates Remuneration Order, GN 264 of 2015 which charges 3% for liquidated sum which is over 400,000,000/-.

He submitted that, while the law had allowed a 3% charge which would have been TZS 170,812,500/= or at worst, TZS 85,000,000 (+ 15,300,000 VAT (18%) hence TZS 100,300,000/-), the Taxing Master awarded only TZS 50,000,000/-(VAT inclusive) only because the case ended on a preliminary objection and, that, he has discretion to apply the scale prescribed or otherwise under Order 12(1) of the Order. He faulted the Taxing Master on that point and referred this Court to page 8 and 9 of the decision of the Taxing Master. On those pages the Taxing Master stated as follows:

> "Under rule 12(1)...the taxing officer may allow such costs... as authorized in the order or appear to him to be necessary or proper for the attainment o justice....The applicant charge instruction fees based approximately on liquidated sum claimed in the plaint, but parties were not heard on such claim to form proper base of application of paragraph 8 of the 9th Schedule, in which amount exceeding 400,000,000/- is subject to 3% of liquidated sum."

He conceded, however, that; Rule 12 (1) contains some discretion of the part of the Taxing Master, but argued that, such discretion is not discretion not to allow 'such costs, charges and expenses' as are specifically prescribed but discretion to determine fit costs payable in all cases where there is no specific scale given. He referred to this Court the Court of Appeal decision in the case of **National Microfinance Bank v Leila Mringo & Others (Civil Appeal No.30 of 2018) [2020] TZCA 240; [20 May 2020 TANZLII]**, where it was stated that, *the word '**or**' separating two options means that the two options are exclusive of each other –that, what is contained in one option cannot be part of the next option.*

The learned counsel for the Applicant submitted that, not in all matters where costs are payable that the Chief Justice prescribed for their scale. He mention a few examples, such as interpleader suit and third party notice, arguing that, all such instances are cases which the clause *"or (such*

*costs, charges, etc) (as) appear to him to be necessary or proper for the attainment of justice*" in Order 12(1) intends to cover.

He submitted further that, the CJ's wording, which ordained 3% in paragraph 8 of the 9th Schedule to the Advocates Remuneration Order, GN 264 of 2015, paragraph 8 of the 9th Schedule to the Advocates Remuneration Order, GN 264 of 2015 for liquidated claims of over 400 million, are binding. He referred this Court to Order 39 of GN 264 of 2015 which provides that:

> "39: Bills of costs shall be drawn in accordance with scales...in the Schedules."

It was further submitted that, under paragraph 8 of the 9th Schedule there is a proviso that '*where the defendant does not dispute the claim and does not file a defence, the scale ... should be 2/3 of the fees above*'. According to the learned counsel for the Applicant, the CJ, *first*, defined cases that he saw to be simple to justify a departure downwards as those where the defendant does not dispute the claim and does not file defence and *second*, set out the downward figure as 'two thirds of the fees above' (which in this case would be 170,812,500 x2/3= **113,875,000**/).

He contended that, no additional instances or rate would be taken away from the 3% rule under the legal maxim *expressio unius est exclusio alterius*. In view of that, he argued that, even cases which end at the stage of preliminary objection are simple cases for which 3% rule should not be given and that TZS 50,000,000/=, which is far less than 1/3 of the TZS 170,812,500/- (the 3%), the Taxing Master was in fact not exercising discretion but was amending the 9th Schedule (in its proviso) hence overthrowing the CJ's order.

In his further submission, the learned counsel for the Applicant argued that, the Taxing Master uplifted the subsidiary legislation over the

principle legislation. He contended that, construing Order 12(1) of GN 264 of 2015 as meaning that the taxing officer has option to ignore the scales specifically prescribed by the CJ and apply what he himself sees proper, it will mean that GN 264 of 2015 which prescribes fees has a higher authority than section 49 of the Advocates Act, Cap.141 [R.E.2019]. This, he argued, would be contrary to section 36(1) of Cap.1 [R.E 2019]. The Applicant also contended that, the taxing master altered the court order from *'the defendant to pay costs, to costs be shared by both parties.'*

The learned counsel for the Applicant referred to page 9 of the decision of taxing master, where it was stated as follows:

> *"Costs allowed... are intended to reimburse a party the costs incurred...and not to enrich a party awarded costs."*

It was contended that the taxing master failed to abide by that position of his, and awarded the Applicant TZS 50 Million while the Applicant had attached the agreement with his advocate in which he committed to pay the advocate TZS 85 Million (VAT exclusive) and had paid TZS 40 million evidenced by EFD receipts and invoice.

This Court was referred to the case of **Ujagar Singh v The Mbeya Cooperative Union (1968) HCD No.173**, where Biron, J. stated that, *"an instruction fee is for the work done in preparing a case before trial, it is irrelevant whether the trial itself would or would not be long or tedious."* He concluded, therefore, that, a person who pays an advocate anything not exceeding 3% of the liquidated claim of over TZs 400 million cannot be said to have over charged or incurred excessive costs.

The learned counsel for the Applicant further faulted the decision of the Taxing Master on the ground that he left behind the *Remuneration Order* which, though *Order 2* requires him to apply it, and jumped over to the *Court of Appeal Rules*. He argued that, the case of **Attorney General v**

**Amos Shavu, Taxation Ref. No.2 of 2000**, which the Taxing Master relied on was inapplicable. In view of that, he contended that the case cited was not supporting but opposed his decision since the Court of Appeal faulted the taxing master of the Court of Appeal for applying the Advocates Remuneration Rules which prescribes 3% fee in certain claims as opposed to those in the Court of Appeal which are decided on the basis of the taxing master's discretion.

Finally, the learned counsel for the Applicant faulted the taxing master's decision to deny the Applicant the folio costs claimed. On this, it was argued that, the TZS 390,000/= which was claimed by the Applicant as a brief fee for drawing the bill of costs. It was contended that such a claim was based on paragraph 2(a) of the 8th Schedule to the Order. The paragraph refereed allows 30,000 per one folio, and, the term "folio" is defined by Order 3 to mean *"100 words, and a single figure or group of figures up to five in number or an item in account, shall...be as one word."*

It was contended that, there was no dispute that the bill of costs drawn had 13 folios, hence, TZS 390,000 (i.e., 13x30, 000). However, the learned counsel argued that, the taxing master erred by taxed off the item on the ground that the term **"folio"** applied to pleadings only since the definition does not prescribe for such a restricted approach.

It was also the Applicant's contention that the denial of TZS 650,000 as fees for attendance and 80,000 for communication on the basis that they are part of instruction fees was erroneous because instruction fees as per the case **Ujagar Singh v The Mbeya Cooperative Union (supra)**, relates to *"fee is for the work done in preparing a case before trial, it is irrelevant whether the trial itself would or would not be long or tedious."* He argued that, the 8th Schedule has three items:

1. instruction fee

(ii) Drawing and Perusing

(iii) Attendance, and that, in attendance, figures are given as

(a) TZS 50,000/- for attending in ordinary case for 15min or part thereof.

(b) TZS 20,000/- on routine telephone calls for 3minutes. For the above reasons, he prayed that the fees be raised to **TZS 100,690,000/-**.

On the other hand, and in reply to the argument that there has been a failure to specify the relief sought in Reference No.3 of 2020, the Respondent submitted that, the Respondent has made it clear in its Chamber summons that the prayers made are for the Court to reverse and set aside the decision of the Taxing Master in *Taxation Cause No.94 of 2019* and proceed to tax the bill as per the law. This, it was argued, is fully in order since, at the end it is the Court's discretion to determine the amount of costs which is reasonable and commensurate with the efforts and work put to defend the case (citing **Attorney General v Amos Shavu** (supra)).

The learned counsel for the Respondent submitted that, the decisions referred to by the Applicant (i.e., **Zacharia Milalo v Onesmo Mboma** (supra); **Cooper Motors v AICC** (supra) and **Doris Minja v DTB & Others, Comm. Appl. No.398 of 2017) [2018] TZHCComD 102; [09 July 2018 TANZLII]** are wholly distinguishable. As regards the principle of taxation of bill of costs, the Respondent submitted that, it is a general rule, that, the allowance for instruction fees is a matter peculiarly in the taxing officer's discretion and the courts are reluctant to interfere into that discretion unless it was exercised injudiciously ((citing **Attorney General v Amos Shavu** (supra)).

She invited this Court to interfere with the Taxing Master's decision arguing that the award of TZS 50,000,000/- was so high and amount to

injustice to the Respondent as it goes contrary to the principle that costs should be commensurate to the work and effort put to defend the case.

In support of her submission, this Court was referred to the cases of **Attorney General v Amos Shavu** (supra), **Kapinga and Co. Advocates v National Bank of Commerce, Civil Appeal No.8 of 2011, CAT, DSM** (unreported), **East Africa Development Bank v Blueline Enterprises Ltd, Civil Ref.No.12 of 2006, CAT, DSM** (unreported), **ZTE Corporation v Benson Information Informatics Ltd t/a Smart, Comm.Ref.No.61 of 2018** (unreported) and **C.B. Ndege v E.O Aliva and AG [1988] TLR 91.** It was argued that, these cited cases, emphasized on the need for instruction fees to be commensurate with the work done. She submitted that, in **Kapinga and Co. Advocates v National Bank of Commerce** (supra), **ZTE Corporation v Benson Information Informatics Ltd** (supra) and **Attorney General v Amos Shavu** (supra), the fees were significantly reduced.

Besides, it was argued that, since the Commercial Cause No. 48 of 2019 never proceeded to trial; the cases above apply squarely to the instant Reference Application. Therefore, she called upon the Court to consider the facts disclosed in *paragraphs 9, 10 and 11 of the affidavit of the Respondent* and, contended that, on the basis of the same principle there is no reasons why the Court should enhance the amount awarded because what was awarded was still unjust and not commensurate with the efforts, time and work put by the Respondent to defend the matter.

In her further reply, the learned counsel for the Respondent stated that, rules 12(1) and 39 of GN 264 of 2015 do not restrict the Taxing Master's discretion. She argued that way, on the ground that, as it was in the repealed Remuneration and Taxation of Costs rules, the principles set out in the cited cases, including the Court of Appeal decision in **Kapinga**

**and Co. Advocates v National Bank of Commerce** (supra) which considers the then rules, have remained intact, that, the remuneration has to be commensurate to the effort, time and work done in the matter.

As regards the drawing of the bill of costs, communication and attendance, it was the submission of the learned counsel for the Respondent that, the taxing master was correct since such forms part of the instruction fees. She cited and relied on the decisions of this Court in the cases of **ZTE Corporation v Benson Information Informatics Ltd** (supra) and **Awadh Abdallah v Wengert Windrose Safaris (T), Misc. Comm. Appl. No. 68 of 2014 (unreported)**.

Finally, the learned counsel for the Respondent responded, to the allegation that the Taxing Master erred when he relied on **Attorney General v Amos Shavu** (supra). She submitted that, there was nothing wrong because the principles set out in **Amos Shavu's** case applies across the board and have been cited with approval in other matters dealing with remuneration Order 2015 and the repealed Advocates Remuneration and Taxation Costs Rules. She concluded by urging this Court to make a finding that the Taxing Master erred in granting the Applicant TZS 50,000,000/= as instruction fees because such amount was not commensurate to the work and effort put to defend the case. On the same wave-length, she argued that there are no justifications for uplifting the instruction fees and other costs to TZS 100,690,000/=.

In a rejoinder submission, the learned counsel for the Applicant submitted, in relation to Reference No.3 of 2020, that, that Reference Application is baseless. He emphasized that, what a relief clause does is to state the amount which an Applicant is entitled to, and it is for the Court to decide at the end. Referring to the Taxing master's, decision who held that TZS 50,000,000/- was fair and reasonable, it was rejoined that, the

aggrieved person challenging that decision has to state what should have been the reasonable figure, otherwise it will be rotating on the same point and faulting the Taxing Master for nothing. He argued that, the way it is, the Reference No.3 of 2020 leaves the opposing party unable to defend its position as it conceals the point of inquiry.

He rejoined further that, the principles which the Respondent argues ought to have guided the Taxing Master are the very same principles the Taxing Master used, as shown in page 9 of the ruling. For that reason, he insisted that Reference Application No.3 of 2020 has no purpose or legs upon which to stand. As regards the Reference Application No.2 of 2020, he contended that it has not been challenged substantively, thus reiterating his submission in chief: *i.e.*, that the taxing master erred in law.

I have given careful considerations to the rival submissions made by the learned counsel for the parties. Essentially, from the Applicant's submission (which are responded to by the Respondent); there are two main concerns that have been raised:

(i) that, the Reference Application No.3 of 2020 is with no purpose for not specifying the relief sought in the Chamber Summons,

(ii) that the taxing master erred in law for:

  (a) extending his discretion to matters specifically fixed;

  (b) uplifting subsidiary over principle legislation;

  (c) saying that the rules are meant to reimburse the winner and yet practically not reimbursing him,

  (d) in effect, altering the order made by the trial judge

  (e) applying the Court of Appeal Rules, which are not applicable in this High Court as the Advocates Remuneration Order is the one meant to be applied and

(f) Denying the applicant the folio costs and communication costs claimed.

I will, therefore, consider the considerations listed herein above in the form of issues that need to be attended in the course of resolving this *Consolidated Reference Application No.2 and 3 of 2020.*

**THE FIRST ISSUES** to resolve is: ***Whether the Reference Application No.3 of 2020 is with no purpose for not specifying the relief sought in the Chamber Summons.***

As it may be observed in their submissions, while the Applicant argues that the Reference Application is purposeless for not of disclosing the specific relief being sought, the Respondent argues in the opposite noting that the Chamber summons filed by the Respondent (as an applicant in that *Reference Application No.3 of 2020*) has disclosed the relief being sought.

I have looked at *Reference Application No.3 of 2020.* As stated earlier herein above, one of the prayers sought in the Chamber Summons is, that:

> 'The Honourable Court be pleased to reverse and set aside the decision of the Taxing Master issued on the 15th May 2020 in the Taxation Cause No.94 of 2019 and proceed to tax the Bill of Costs in accordance with the law.'

The Applicant's argument is that, looking at the above prayer, the same is purposeless as it does not state what, at the end, is the appropriate amount to be awarded if the TZS 50,080,000 awarded by the Taxing Master should be reversed and set aside.

In my view, the submission by the Applicant's learned counsel on that point is merited. The Respondent (*Applicant in Taxation Ref.No.3 of 2020*) ought to be specific as regards what amount should have been awarded if the Respondent argues that the award of TZS 50,080,000/=, which the Taxing Master held to be fair and reasonable, was unfair and

unreasonable. Without moving the Court by stating what exactly in the eyes of the Respondent should have been fair and reasonable amount, is to conceal the point of inquiry and thus making the application aimless. Consequently, even though what was filed in this Court is a Taxation Reference, and not an appeal as it was the case in **Zacharia Milalo v Onesmo Mboma [1983] TLR 240**, still, what was stated in that case is a sound principle of law, i.e., that: *"Unless an appellant specifies the relief desired the court cannot proceed to hear the appeal for want of purpose."*

Besides, I also find that, while in her argument in support of the Reference Application No.3 of 2020 the learned counsel for the maintains that the award of TZS 50,000,000/- was contrary to the principle that costs should be commensurate to the work and effort put to defend the case; on the other hand, looking at page 9 of the ruling, I find that, the principle which she alleges were not applied by the Taxing Master, are the very ones relied upon by the Taxing Master to reduce the amount claimed by the Applicant.

In particular, on that page 9 of the ruling, the Taxing Master stated that:

> "Costs allowed... are intended to reimburse a party the costs incurred...and not to enrich a party awarded costs.... No dispute, the suit was concluded at a preliminary stage. Basic principles/factors to be followed in assessing the costs in terms of instruction fees are based on the nature of the case, its complexity; the amount of research involved as per decision of A.G. V Amos Shavu (supra). "

In view of the above, I find that, from the Respondent's submissions and even the prayer reflected in the Chamber Summons, the Reference Application No. 3 is purposeless and, hence, devoid of merits. This Court, therefore, cannot consider it. That being said, the remaining points of consideration (as listed herein above), will be considered as issues touching

the Reference Application No.2 of 2020. One of them (to be considered herein as **the SECOND ISSUE for determination**) is: ***whether the taxing master erred in law for extending his discretion to matters specifically fixed.***

In his attempt to justify his quest for an enhancement of the award made by the Taxing Master, the learned counsel for the Applicant has attacked the Taxing Master's decision on the ground that the Taxing Master had erred in law by exercising discretion on matters for which the law has already fixed the amount or rates to be applied. He maintained that the Taxing Master interpreted order 12(1) erroneously, because, although the Taxing master has some discretion to exercise, such *"discretion is not discretion not to allow 'such costs, charges and expenses' as are specifically prescribed'* ***but*** *'discretion to determine fit costs payable in all cases where there is no specific scale given."* He further contended that under order 39 of GN 264of 2015, the bills of costs shall be drawn in accordance with the scales provided in the Schedules.

On the other hand, the learned counsel for the Respondent has opposed that submission arguing that, as a matter of principles, the allowance for instruction fees is a matter peculiarly in the taxing officer's discretion and the courts are reluctant to interfere into that discretion unless it was exercised injudiciously. Essentially, the position stated by the Respondent is a correct one. It has been reiterated in a number of cases including the Court of Appeal decision in the case of **Attorney General v Amosi Shavu** (supra). In that case the Court followed what was reiterated in the cases of **Rashid Hashim v Alibhai Kaderbhai (1938) 1T.L.R (R) 676** and **Premchand Raichand v Quarry Services of East Africa Ltd [1972] E.A 162.**

Similarly, in **Haji Athumani Issa v Rweitama Mutatu 1992 TLR 372 (HC),** this Court (Masanche, J (as he then was)) held that:

> "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 master is particularly fitted to deal with. But, and that is a big 'but', the court could interfere if the taxing master clearly acted unjudicially."

Besides, the above stated principle is not unique to our jurisdiction. It applies in a similar manner elsewhere. In **Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and others (No. 3) [1972] 1 EA 162**, the Court of Appeal of Kenya was of the view that:

> "the taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer...."

I have taken the liberty of looking at Order 12(1) of GN 264 of 2015 provides and, I tend to disagree with the submission made by the learned counsel for the Applicant that the taxing master erred in law for extending his discretion to matters specifically fixed.

Order 12(1) of GN 264 of 2015 provides as follows, that:

> "The taxing officer **may** allow such costs, charges and expenses as authorised in this Order or appear to him to be necessary or proper for the attainment of justice." (**Emphasis added**)

As it may be seen in the above quoted Order 12(1) of GN 264 of 2015, and as correctly submitted by the learned counsel for the Respondent, the Taxing Officer's discretion is unrestricted. The word "**may**" which signifies exercise of discretion on the part of the Taxing Master precedes all other acts he is permitted to take care of in the course of exercising that discretion. This include his exercise of discretion *in respect of such costs, charges and expenses as authorised in the Order,* **or** *(such costs, charges etc) as appear to him to be necessary or proper for the attainment of justice.*

In view of that clear position of the Order 12 (1) of G.N 264 of 2015, I find nothing erroneous on the part of the Taxing Master in relation to his

interpretation of Order 12(1). What I may add here, in my view, is that, it is the learned counsel for the Applicant who failed to correctly interpret Order 12(1) of GN 264 of 2015. If follows, therefore, that, the second issue is answered in the negative.

With that in mind, it follows that, the case of **National Microfinance Bank v Leila Mringo & Others (Civil Appeal No.30 of 2018) [2020] TZCA 240; [20 May 2020 TANZLII]** referred to this Court, is wholly inapplicable in this instant case.

**THE THIRD ISSUE** which arises from the concerns raised by the learned counsel for the Applicant is: ***Whether the Taxing Master erred in law for uplifting subsidiary over principle legislation.***

In his submission, the learned counsel for the applicant contended that, in construing Order 12(1) of GN 264 of 2015 as meaning that the taxing officer has option to ignore the scales specifically prescribed by the CJ and apply what the Taxing Officer sees himself to be proper, it will mean that GN 264 of 2015 which prescribes fees has a higher authority than section 49 of the Advocates Act, Cap.141 [R.E.2019]. This, he argued, would be contrary to section 36(1) of Cap.1 [R.E 2019].

On the other hand, it is my firm view that, the answer to this third issue is already subsumed in the response to the second issue. Since I have made a finding that the interpretation given by the Taxing Master is correct given what Order 12(1) of GN 264 of 2015 provides, there can be no question that he uplifted the subsidiary legislation above the principle legislation. The third issue is therefore responded to in the negative.

**THE FOURTH ISSUE** which arises from the concerns raised by the learned counsel for the Applicant is: ***Whether the Taxing Master erred in law in saying that the rules are meant to reimburse the winner and yet practically not reimbursing him.*** In my view, the answer to this issue

is in the negative. It cannot be said, therefore, that, the Taxing Master ***"practically did not reimbursing the winner"***.

I hold so because, essentially, as stated by the Taxing Master, the rules applicable to taxation of bills of cost are meant to reimburse the winner for the costs incurred and not otherwise. For that reason, it was stated in **Balwantrai D Bhatt v Ajeet Singh and Another [1962] 1 EA 103**, that: *"A bill of costs is a factual statement of services rendered and disbursements made ..."* Secondly, as it was stated in the case of **Attorney General v Amosi Shavu** (supra), the law has given discretion to the Taxing Officer to be applied when assessing the bills of costs presented before him, and, his exercise of such discretion cannot be interfered with unless it is demonstrated that he exercised it unjudicially.

As I stated in the course of addressing the second issue, in the instant case, the Taxing Master correctly interpreted Order 12(1) of GN 264 of 2015 to the effect that it gave him discretion *in respect of such costs, charges and expenses as authorised in the Order, or (such costs, charges etc) as appear to him to be necessary or proper for the attainment of justice.* Having considered the discretion vested upon him under Order 12 (1) of GN 264 of 2015, he made a finding that:

> "The applicant charge instruction fees based approximately on liquidated sum claimed in the plaint, but parties were not heard on such claim to form proper base of application of paragraph 8 of the 9th Schedule, in which amount exceeding 400,000,000/- is subject to 3% of liquidated sum."

I am of a firm view that, the above fact was an appropriate factor to take into consideration when he was called upon to exercise his discretion under Order 12(1) of the G.N 264 of 2015. In exercising his discretion and taking into account the nature of the preliminary objection which he found not to be a complex issue, he was of the opinion that the amount of TZS

100,690,000 charged was unreasonably excessive and awarded TZS 50,000,000/- instead, hence taxing off TZS 50, 690,000/-.

For that reason, it cannot be said with certainty that, the Taxing Master ***"practically did not reimbursing the winner"***. It would be a different case if one was arguing that what was awarded was inadequate. However, as for the fourth issue, I am of a firm view that the Taxing Master made an assessment and set out what, in his opinion, was the reasonable reimbursable amount.

**THE FIFTH ISSUE** which arises from the concerns raised by the learned counsel for the Applicant is: ***Whether, in effect, the Taxing Master altered the order made by the trial judge from 'the defendant to pay costs' to 'costs to be shared by both parties'.***

As indicated herein, the concerns in the fifth issue is that, having stated that costs are allowed to reimburse a party's costs incurred, the Taxing Master failed to award the Applicant what was claimed, despite there being proof in the form of the *agreement of the Applicant and his Advocate, the Invoice* as well as *EFD receipts* to the effect that TZS 40million plus VAT of TZS 7,200,000 had already been paid as per the agreement, Invoice and EFD Receipts attached. Generally, it is a cardinal principle, as it was stated by the Court of Appeal in the case of **East African Development Bank v Blueline Enterprises Limited [2006] 2 EA 51 (CAT)**, that, *"costs, indisputably, follow the event in favour of the winning party"*. It is also trite that a winning part must itemize and justify his claims constituting costs when he presents a bill of costs for taxation. He must indicate what service was rendered and what disbursements were made.

In this instant case, the learned counsel for the Applicant has contended that, despite its justifications regarding the instruction fees paid, or agreed to be paid, yet he was paid costs amounting to TZS 50million

instead of TZS 100,300,000/. He feels that the amount awarded has occasioned an injustice to the Applicant, as the Applicant will only recover half its costs.

As I indicated herein above, in the case of **Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and others (No. 3) [1972] 1 EA 162**, it was held, interalia, that:

> "the taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: **it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.**" (Emphasis added).

The position above was also pointed out in **Asea Brown Boveri Ltd v Bawazir Glass Works Ltd and another [2005] 1 EA 17.** In light of that legal position and, considering the submission made in respect of the fifth issue, can it be said that the award was too low as to amount to an injustice to the Applicant, hence warning this Court to interfere with it?

Observably, the learned counsel for the Applicant in this instant case seems to suggest that, the as bill as taxed, was inadequate. However, I do not think that the award was too low or inadequate to occasion an injustice to the Applicant. I hold so because, while it is true that the Applicant submitted before the Taxing Master a claim total of TZS 85,000,000/- (VAT Exclusive) which it is contended were incurred as instruction fees, the only actual payments evidenced by EFD receipts were of total of TZS 40million (inclusive of VAT of TZS 7,200,000). The Taxing Master awarded a total of TZS 50,080,000/- which, in his assessment considered to be fair and reasonable in the circumstance of the case. There is no evidence that the remaining amounts were ever paid.

As I stated earlier, Court are always reluctant to interfere in matters of quantum. In view of that, I find that the Taxing Master's award was not too low to occasion any injustice to the Applicant. The fifth issue should also be responded to in the negative.

**THE SIXTH ISSUE** which arises from the concerns raised by the learned counsel for the Applicant is: ***Whether the Taxing Master applied the Court of Appeal Rules, which are not applicable in this High Court as the Advocates Remuneration Order is the one meant to be applied.***

It has been alleged that the Taxing Master relied on the Court of Appeal Rules instead of the Advocate Remuneration Order, GN 264 of 2015 which is applicable in the High Court. As stated earlier, he has faulted reliance on the case of **Attorney General v Amos Shavu, Taxation Ref. No.2 of 2000**, arguing that its principles are in applicable in the High Court. As correctly submitted by the learned counsel for the Respondent, the principles set out in **Amos Shavu's** case are general principles applicable across the board when a Taxing Officer is exercising his discretion.

As I said earlier, Order 12(1) of the Advocates Remuneration Order, G.N 264 of 2015 gives the Taxing Master power to exercise discretion when he is assessing bills of costs and, some of the factors he has to taken in include the general principles already laid down by the Courts of record. As such, I see nothing wrong and the Taxing Master did not use the Court of Appeal Rules as suggested. The Sixth issue is thus responded to in the negative.

**THE SEVEN (LAST) ISSUE** which arises from the concerns raised by the learned counsel for the Applicant is: **Whether the Taxing Master**

**erred in law by denying the applicant the folio costs and communication costs claimed.**

According to the learned counsel for the Applicant, the Taxing Master erred. He argued that, the 8th Schedule has three items: *i.e.*, (i) instruction fee (ii) drawing and perusing and (iii) court attendance. He contended that the separate figure of TZS 390,000 claimed in respect of these should not have been taxed off. On the other hand, the counsel for the Respondent opposed such a view arguing that such items fall within the ambit of instruction fees. In my view, the learned counsel for the Respondent has a point in her submission. The Taxing Master cannot be faulted since all such amount on the three items forms part of the instruction fees. The decisions of this Court in the cases of **ZTE Corporation v Benson Information Informatics Ltd** (supra) and **Awadh Abdallah v Wengert Windrose Safaris (T), Misc. Comm. Appl. No. 68 of 2014 (unreported)**, support that position.

In my view, the case cited by the learned counsel for the Applicant (i.e., **Ujagar Singh v The Mbeya Cooperative Union** (supra)), does not support his position but rather the position advanced by the Respondent that, the amount paid for the three items form part of the instruction fees paid. In that case, it was stated that *"fee is for the work done in **preparing a case** before trial ..."* I am indeed persuaded by the decision of the Supreme Court of Uganda in the case of **Patrick Makumbi versus Sole Electric (U) Ltd, Civil Appeal Number 11 of 1994**, where the Supreme Court held that, instruction fees should cover the advocates work as well as other work necessary for presenting the case for trial. In view of that, find that drawing the bill, perusing and attendance in court will definitely form part of the instruction fee. For that reason, the seventh issue is, therefore, responded to in the negative.

Having dealt with all issues raised herein, I find that the Reference Application No.2 of 2020 cannot succeed. Since I have ruled that the Reference Application No.3 of 2020 was lacked a true sense of purpose, and, the two Applications having been consolidated and argued together as Consolidated Reference Applications No.2 and 3 of 2020, this Court settles for the following orders, that:

1. The Consolidated Reference Application No.2 and 3 of 2020 is hereby dismissed.
2. The Dismissal is with no order as to costs, meaning that each party shall bear its own costs.

*It is so ordered.*

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**DEO JOHN NANGELA**
**JUDGE,**
**High Court of the United Republic of Tanzania**
**(Commercial Division)**
**09 /10 /2020**

Ruling delivered on this 9th October, 2020 in the presence of Ms Caroline Ngairo, Advocate for Respondent/Applicant also holding brief for Mr Audax Kahendaguza, Advocate for the Applicant/Respondent.

*Right of appeal explained.*

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**Ms. Magdalena Mtandu**
**Deputy Registrar**
**High Court of the United Republic of Tanzania**
**(Commercial Division)**
**09 /10 /2020**