IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT ARUSHA

MISC. COMMERCIAL APPLICATION NO. 2 OF 2021

(C/F Taxation Cause No.8 of 2019, Arising pot of Comm. Case No.20 of 2011)

ARUSHA HARDWARE TRADERS LTD.....1ST APPLICANT

ELLYSON KIRENGA SWAY.....2ND APPLICANT

SIKUDHANI MWENDA SWAY.....3RD APPLICANT

VERSUS

M/S EXIM BANK TANZANIA LIMITED.....RESPONDENT

Last order: 30th August, 2021
Date of Ruling: 3rd September, 2021

RULING

NANGELA, J.

This is a taxation reference arising from a ruling of the Taxing Officer, Hon. Mr. Nkwabi, J. F (as he then was), in a taxation cause No.8 of 2019. It has been preferred under Order 7 rule (1) and (2) of the Advocates Remuneration Order, 2015, GN. No. 263 of 2015. The application was filed by way of a chamber summons supported by an affidavit of Mr. ELLYSON KIRENGA SWAY, the 2nd Applicant herein.

Before I proceed further into the nitty-gritty of this reference application, let me set out its facts, albeit in brief. Sometime in the year 2011, the Applicants were Plaintiffs in

Commercial Case No.20 of 2011, suing the Respondent herein. A decision was obtained at first (Mansoor J) but it was overturned in 2015 by the Court of Appeal with a directive that a *de novo* hearing should follow. The suit was thereafter heard, and Mr Justice Amour, J., determined it in favour of the Applicants. Later, the Applicants raised a Bill of Costs vide a **Taxation Cause No.8 of 2019.**

On the 28th May 2020, the Taxing Officer, the Deputy Registrar, Hon. Mr. Nkwabi, JF, (as he then was), heard and determined the matter before him, taxing the whole of it at **TZS 870,000/=**. Following that ruling, the Applicants were aggrieved. To demonstrate their dissatisfaction they filed this reference praying for the following orders:

1. That, this Honorable Court be pleased to apply its mind to interpreter the points of law and issues of fact from the decision of the Taxing Officer in Taxation Cause No.8 of 2019 pronounced by Hon. Nkwabi, J.F on 28th May 2020.
2. Any other or further relief as this Honourable Court may deem just to grant.
3. Costs of this application be provided for.

On the 30th August 2021, the parties appeared before me. Mr. Emmanuel Sood, learned advocate, represented the Applicants and Mr. Wilbard Massawe appeared for the Respondent. The matter was argued by way oral submissions.

I will summarize, therefore, the respective submissions made by the learned counsels for the parties herein, albeit in brief. Submitting in support of the reference application and, relying on the affidavit in support of the application, Mr. Sood raised three grounds upon which the reference is anchored. He argued, as his first ground, that, the Taxing Officer determined the matter on the basis of laws and regulations which were not in force when the **Commercial Case No.20 of 2011** was instituted before the Court and a larger part of it was already under way. As such, Mr. Sood submitted that, it was wrong for the Taxing Officer to tax off item No.1 and 2 of the Bill of Costs on the ground that the Applicants herein did not submit EFD (*Electronic Fiscal Device*) receipts as proof regarding those items.

Mr. Sood was of the view that, it was improper, on the part of the Taxing Officer, to apply the law retrospectively seeing that the matter commenced in the years 2011. He submitted that, the legal position, as recently clarified by the Court of Appeal of Tanzania in the case of **Tanzania Rent-A Car Ltd vs. Peter Kimunhu**, Civil Appl. No.210/01 of 2019)

[2019]TZCA560; (07 August, 2019) is that, EFD receipts are not needed in proving instruction fees.

Mr. Sood relied also on the case of **ECO Bank Tanzania Ltd v Double "A" Company Ltd & Others,** Commercial Reference No. 2 of 2019. He submitted that, the case listed the factors which ought to be considered when dealing with the issue of instruction fees. According to Mr. Sood, since the suit amount had the value of about **TZS 1 billion,** if one applies the scale rates provided for under the 9th Schedule of the Advocates' Remuneration Order, GN No.263 of 2015, a valid conclusion would be that, the cost amounting to **TZS 35,000,000** as instruction fees, were justified and well within the scales.

As regards the claim constituting item No.2, which was based on the Respondent's counterclaims amounting to **TZS 154 million,** it was Mr. Sood's contention that, according to the 9th Schedule of the Advocates' Remuneration Order, GN No.263 of 2015, the scales ranges from 3% to 7%, a fact which makes a claim of **TZS 17 million** to be justifiable as well. He contended that, complexity of the matter and the time it took before its conclusion (which was eight years), was yet another reason that justifies the presented Bill of Costs. He contended, therefore, that, the Taxing Officer did not take into account all such factors when determining the amount billed as instruction fees.

To support his submission that the Taxing Officer erred for not taking such factors into account, Mr. Sood placed reliance on the decision of this Court in the case of **Anand Satyavan Chande and Another vs. Exim Bank,** Taxation Reference No.1 of 2020, (unreported) (at page 15,paragraph 2). He concluded, therefore, that, on the basis of the authorities relied upon, it will be clear to this Court, that, the Taxing Officer failed to exercise his discretion properly, and, for that matter, this Court should determine the appropriateness of the instruction fees in accordance with the applicable law.

As second ground advanced by the Applicants, Mr. Sood submitted that, the Taxing Officer taxed- off items No.3 to 26 of the Bill of Costs unjustifiably. Those particular items catered for costs of attending the case in Court. Mr. Sood submitted that, as it may be observed from page 7, item number 8 was taxed-off due to lack of proof of EFD receipts and non-appearance, a fact which Mr. Sood held to be a misconception. Referring the Court to page 6 of the typed proceedings, he argued that it was clearly shown that, on the particular date in relation to that item in the Bill, the Plaintiff is shown to have been represented in Court.

He relied once again on the case of **Tanzania Rent a Car** (supra); arguing that there was no need to ask for EFD receipts as proof. He submitted further that, since the Taxing Officer relied on Rule 58 (1) Advocates' Remuneration Order,

GN No.263 of 2015, the receipts would have been submitted had there been a request to do so. As such, he argued, since the Taxing Officer did not make any of such inquiry, it was wrong for the Taxing Officer to tax-off item No.3 of the Bill of Costs.

Mr. Sood was also of the view that, the Taxing Officer's decision to tax-off the amount indicated as disbursements under items 28-38 was also erroneously done. He contended that, such a decision was unjustified even if the Taxing Officer based his decision on Order 48 of the Advocates' Remuneration Order, GN No.263 of 2015.

Mr. Sood contended that, the Taxing Officer should not have taxed-off such items given that; a sixth of the bill was already taxed-off. He submitted that, the decision was misconceived because the Applicants attended the court proceedings at all material dates, and that, the Court should have assured itself about that fact from the available court records alone. He maintained that, reference to Order 48 of the Advocates' Remuneration Order, GN No.263 of 2015, was irrelevant.

In view of all such observations, Mr. Sood was of the view that, much as Order 12 (1) of the Advocates' Remuneration Order, GN No.263 of 2015, provides that taxation of the Bill of Costs is within the discretion of the Taxing Officer, and that,

the Court will not interfere with the decision of the Taxing Officer unless it was reached at injudiciously, the Applicants are of the view that the Taxing Officer in respect of this matter acted injudiciously. Reliance was placed on the case of **Jubilee Insurance Company of Tanzania Ltd vs. Vodacom Tanzania PLC Ltd,** Reference No.02 & 03 of 2020 to support the Applicants contention.

Mr. Wilbard Massawe, learned counsel for the Respondent opposed the prayers and submissions made by Mr. Sood, arguing that, Mr. Sood has utterly missed the mark as he has failed to take into account order 72 of the Advocates' Remuneration Order, GN No.263 of 2015. Mr Massawe was of the view that, Order 72 of the Advocates' Remuneration Order, GN No.263 of 2015, has that effect, as it applies to all proceedings, previously pending and ongoing.

He submitted that, much as he concedes that an Act of Parliament should not be applied retrospectively; there is a difference once it specifically hanen a provision haven such an effect. Mr. Massawe relied on the decision of the Court of Appeal in the case of **Freeman Aikaeli Mbowe and Another vs. Alex O. Lema,** Civil Appeal No.84 of 2001 (unreported) and the case of **Lalawino vs. Karatu District Council,** Civil Appl.No.132 of 2018 (unreported).

Mr. Massawe observed further that, the Advocates' Remuneration Order, GN No. 263 of 2015, does not have a manner of proving claims submitted or claimed under a Bill of Costs. He contended, however, that, as a matter of practice, a successful litigant will always lodge a Bill of Costs before a Taxing Officer with necessary supporting documents. He referred to Order 72 (a) of the Advocates' Remuneration Order, GN No.263 of 2015 which allows the earlier practices to be applied where practicable.

Mr. Massawe argued that, the decision of the Taxing Officer was not only based on the need for proof of EFD receipts as argued by Mr. Sood. He maintained that, according to paragraph 4 of page 7of the ruling of the Taxing Officer, the Taxing Officer taxed-off the items due to lack of proof. He argued that, the Bill of Costs had only bare figure not supported by any material upon which the Taxing Officer could have acted upon to exercise his discretion. Relying on section 110 of the Evidence Act, Cap.6 R.E 2019, Mr Massawe contended that, the case of **Tanzania Rent A Car Ltd** (supra) did not expressly render inapplicable that provision's requirement that, he who alleges must prove.

He contended further that, the Court of Appeal did not overrule the earlier position held in the cases of **Juma Makiya vs. Hamis Mohamedi,** [1985] T.L.R.39 or **EMS Chacha t/a Mwanza Mechanical Engineering vs. Katibu wa Wilaya**

ya Magu and Chama cha Mapinduzi Magu [1983] T.L.R 344, which altogether require that, claims for costs must be supported by documentary or reliable evidence.

He contended, for instance, that, in the **EMS Chacha's** case (supra), transport fees were taxed off by the Court due to lack of supporting evidence. It was his conclusion, therefore, that, the need to prove costs is still part of requirements in taxation of Bill of Costs.

Mr. Massawe submitted further that, as per the law, the ground upon which a decision of the Taxing Officer may be faulted is only when it is proved that he acted injudiciously in the course of exercising his discretion or where he wrongly applied the law. He was of the view, however, that, throughout the affidavit supporting the application, the Applicants have not been able to demonstrate the relevance of such principles or the exceptional circumstances warranting the interference of the Taxing Officer's decision. Instead, he argued, the Applicants are only challenging the quantum of costs to be paid.

He contended, further, that, most of what was stated by the learned counsel for the Applicant was not averred in the pleadings. In that regard, he relied on the case of **TUICO Mbeya Cement Ltd vs. Mbeya Cement Co. Ltd and NIC (T) Ltd** [2005] T.L.R 41 in which the Court held that submission are not evidence. In view of such reasoning, he

invited this Court to disregard the arguments raised by the learned counsel for the Applicants, including those regarding the complexity of the matter.

Reliance was place on the case of **Bahari Oilfields Services EPZ Ltd vs. Peter Wilson,** Civil Appeal No.157 of 2020 (CAT) (unreported), where the Court was of the view that, the principle that parties are bound by their pleadings extends to ground of appeal in an appeal. Mr Massawe maintained that a reference to this Court is a form of an appeal and thus the principle applies to it.

Mr. Massawe submitted the, at the time when the Taxing Officer taxed the bill of costs, the decision of the Court of Appeal in **Tanzania Rent a Car** (supra) was not in place. For that matter, it was his submission that, the Taxing Officer cannot be faulted since he was guided by the legal position as it applied at the time. He contended, and relying on the case of **Freeman Aikaeli Mbowe** (supra) that, the decision cannot be applied retrospectively. He maintained, therefore, that, the issue of taxation of bill of costs as it stood was properly dealt with until when the Court of Appeal issued a new position in the **Tanzania Rent a Car** decision (supra).

As regards whether the Taxing Officer's exercise of discretion can be easily interfered with, Mr Massawe relied on the decision of this Court in **Silvano John vs. Magdalena**

Shauri, Civil Ref. No. 7 of 2019 (unreported). He contended that, the issue of quantum is an exclusive domain of the Taxing Officer. He submitted that, in this reference, the applicants have not attached anything as proof in support of the fees that they are praying for, and, therefore, the application should be dismissed.

As regards the claims for reimbursement, Mr Massawe relied on the case of **Masolele General Agencies vs. African Inland Church Tanzania** [1994] T.L.R 192 (CAT). He argued that, reimbursement being a payback cannot just be paid without proof of what was expended, and, for that matter, the Taxing Officer cannot be faulted. He referred to this Court, a Kenyan decision in the case of **Mumias Sugar Company Ltd vs. Professor Tom Ojioenda & Associates,** [2019] eKLR.

As regards the 3% scale applied to item No.1 of the bill of costs, Mr Massawe contended that the basis for instruction fees is the judgment and the pleadings as well as Order 41 of the Advocates' Remuneration Order, GN No.263 of 2015. He referred to this Court the case of **Uru Shimbwe Rural Primary Cooperative Society vs. Mercy Chuwa,** Consolidated Civil Ref.No.1 & 3 of 2019.

Mr. Massawe noted that, all contentious proceedings are governed by the 10th, 11th and 12th schedule of the Advocates' Remuneration Order, GN No.263 of 2015 and, that, it is only liquidated sums which fall under the 9th schedule. He argued,

however, that, the 1st and 2nd prayers in the Plaint and the judgment were of declaratory nature and thus cannot be governed by the 9th schedule. He contended, therefore, that, the applicable schedule was the Schedule 11 paragraph (k) which fixes the quantum fee at **TZS 1,000,000.**

Mr. Sood made a brief rejoinder. He reiterated his earlier submission and added that, Order 72 of the Advocates' Remuneration Order; GN No.263 of 2015 does not have a retrospective effect in its application. As regards the case of **Tanzania Rent A Car** (supra), he contended that, the Court of Appeal did not specify the timing regarding when the EFD receipts were required and when they ceased to be required. As regards the need for supporting documents to support a claim of disbursement, he rejoined that, such documents or vouchers are not a necessity due to the fact that Court attendances are manifest in the court records.

Finally, as regards the issue of applicability of schedule 11(k) as opposed to the 9th Schedule of the Advocates' Remuneration Order, GN No.263 of 2015, Mr. Sood rejoined that, advocate's charges are based on the amount claimed and not on the reliefs sought. For that matter, he maintained that the applicable schedule was schedule 9 and not 11 (k). He therefore prayed that the orders sought by the Applicant be granted.

I have dispassionately given due considerations to the rival submission ably made by both counsels for the parties and, I am grateful for the industry. In the case of **Masolele General Agencies vs. African Inland Church Tanzania** [1994] T.L.R 192, the Court of Appeal of Tanzania was of the view that:

> "A bill of costs is nothing more than tabulated costs incurred by a party in the conduct of a case and which he seeks to be reimbursed by the other party. It is never 'a claim of whatever one thinks one is entitled to'. A claim of whatever one thinks one is entitled to, is made in the body of the suit."

It is also a settled law that, if a taxation reference is to be entertained by the Court, the same must be based on a point of law or on the ground that the bill, as taxed, was manifestly excessive or inadequate. The case of **Asea Brown Boveri Ltd v Bawazir Glass Works Ltd and another [2005] 1 EA 17**, provides for such guidance.

Likewise, it is an agreed general principle that the exercise of the Taxing Officer's discretion, cannot be easily interfered with by the Court unless there are exceptional grounds. Such was the observation of this Court in the case of **Anand Satyavan Chande and Another** (supra). In that

case, this Court accepted a view that, Court's interference will only be necessary where:

> "it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue. ..."

A similar legal position was stated also by this Court in the case of **Silvano John vs. Magdalena Shauri, Civil Ref. No. 7 of 2019 (unreported).** In that case, Masara, J., while referring to the Court of Appeal decision in **Gautam Chavda vs. Covell Mathews Partnership, Taxation Ref. No. 21 of 2004**, noted that:

> "where there has been an error, in principle, the Court will interfere,

> but the questions of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the Court will intervene only in exceptional circumstances."

From such guiding principles, the main issue which I am confronted with and, hence, demanding my attention, is whether the Applicants have exhibited such exceptional circumstances to warrant interference in the decisions of the Taxing Officer or whether the Taxing Officer failed to exercised his discretion judicially or exercised it improperly.

I have looked at the affidavit (in particular paragraphs 5, 6 and 7 thereof) and the submission made by the learned counsel for the Applicants. Briefly stated, the Applicants have raised two issues therein: (i) the issue of reliance on retrospective application of laws and the requirement for EFD receipt in assessment of the quantum of instruction fees; and (ii), the issue of lack of justifiable reasons in the decisions of the Taxing Officer. Therefore, the submissions made by Mr Sood can still be anchored on these issues. In view of that, it means, therefore, that, the views held by Mr Massawe that the submissions are not based on the pleadings cannot stand.

Having said that, let me revert to the main issues I raised herein above. In his submission, the Applicants have faulted the Taxing Officer's decision to tax off the whole of items No.1

and 2 in respect of instruction fees, on the ground that the claims were not supported by EFD receipts. I do agree with Mr. Massawe that, the Taxing Officer's base was not just a lack of EFD receipts, but also on the "no receipts at all" basis. But, be that as it may, the question that follows is whether he properly and judiciously exercised his discretion.

In this application, both parties have relied on the Court of Appeal decision in the case of **Tanzania Rent A Car's case** (supra). In that decision, which was issued on the 6th of April 2021, in respect of a reference case arising from an appeal No.84 of 2012, the Court of Appeal was of the view that:

> " in taxation of bill of costs there is no need of proof of instruction fees by presentation of receipts, vouchers and/or remuneration agreement because the taxing officer, among others, is expected to determine the quantum of the said fees in accordance with the cost scales statutorily provided for together with the factors enumerated above."

As it may be noted in the above decision, it is clear that the issue of presentation of receipts of whatever nature "**in respect of instruction fees**", cannot, as of now, be fronted as a basis for rejecting a claim for instruction fees when submitted under a Bill of Costs. Apart from such observations, it

is also clear, and, I do agree with Mr Sood's submission, that, the Court did not refer anywhere to the previously differing positions held by this Court, regarding the need to submit an EFD receipts as evidence if instruction fees are to be taxed as presented. It suffices to note, however, that, such an issue, is now settled.

From his submissions, however, Mr Massawe raised a point that, at the time when the Taxing Officer was considering and determining the Taxation Reference No.8 of 2019 (i.e., the 28th May 2020), the authority relied upon by Mr Sood was not in existent and, that, it cannot be applied retrospectively. He argued, instead, that, the Taxing Officer was guided by the existing precedents which were valid up to that moment and which could not be disturbed. He relied on the case of **Freeman Aikael Mbowe** (supra) to support his submission.

In **Mbowe's case**, the Court of Appeal (Lugakingira, J.A (as he then was) expressed a view that:

> "The general rule is that such precedents should not be disturbed, unless it is necessary to do so, regard being had to the consequences of doing so. As Lord Reid said in Campbell College, Belfast vs. Commission of Valuation [1947]1WLR 912, 918,
> *'In arranging their affairs people are entitled to rely on a decision which appears to have gone*

> *unchallenged, and it would require some exceptional* reason *to justify a reversal if it appeared that, that was likely to create any serious embarrassment for those who acted on the faith of what seemed to be settled law.*"

I am in full agreement with Mr Massawe that, the position of the law when the Taxing Officer decided the Taxation Reference No 8 of 2019 was not that which was expressed by the Court of Appeal decision in the **Tanzania Rent A Car's case** (supra). Rather, it was on the basis of what was considered to be settled law at the time. That fact is well observed, if one looks at the proceedings of that reference and what parties raised in the course of the arguments and the Court's deliberations.

For instance, at page 8 of the proceedings, and page 5 of the Ruling, a discussion ensued regarding the applicability of the opposing positions held by this Court, first in the case of **Bukreef Gold Ltd vs. Tax Plan Associates & Another**, Misc.Com. Reference No.3 of 2017 (unreported)) and second in the case of **Prof. Emmanuel A. Mjema vs. Managing Editor Dira ya Mtanzania Newspaper and 2 Others,** Ref. No.7 of 2017, (unreported) **(followed also in Thinamy Entertainment Ltd & 2 Others vs. Dino Katsapas,** Misc. Comm. Case No.86 of 2018, (HC) (Unreported); **First World Investment Court Brokers vs. Buckreef Gold Company**

Ltd, Misc. Comm. Ref.No.1 of 2019 (HC) Comm. Dvsn Arusha) (unreported).

At the end of the day, the Taxing Officer concluded, at page 5 of the ruling, that, the decree holder was not exonerated from proving by receipts. To back up his position he seems to have been influenced by the existing decisions in the case of **Juma Mkita vs. Mohamed** [1984] TLR 53 where the Court held that a claim for costs necessitated proof by way of documentary or reliable oral evidence.

However, that fact, notwithstanding, does not resolve one pertinent question which needs to be responded to in light of the submissions and the pleadings made by the Applicants. The question is, that, even if it is correct that the Taxing Officer was bound to follow that which seemed to be the settled law, did he follow it appropriately and, thus, exercised his discretion judiciously?

Mr. Sood seems to be contending that, the Taxing Officer did not exercise his discretion judiciously. Relying on the decision of this Court in the case **ECO Bank Tanzania Ltd** (supra), he argued that, the Taxing Officer did not take into account the relevant factors that ought to have been taken on board in the course of assessing the instruction fees. In my view, looking at the ruling of the Taxing Officer, I find truth in Mr. Sood's submission. It is clear to me that, aside from the issue of EFD receipts or other proof which was said to be

lacking, the Taxing officer did not ask for or look at other factors which needed to be taken on board as well.

It is perhaps important to remind ourselves what the defunct East Africa Court of Appeal stated in the case of **Premchand Raichand Ltd and another vs. Quarry Services of East Africa Ltd and others** (No. 3) [1972] 1 EA 162 which, was reiterated by the Court of Appeal in the **Tanzania Rent A Car's case** (supra). In the **Premchand's case** (supra), the Court was of the view that, when determining the quantum of an instruction fee the following principles need to be considered. These are:

> "**First,** that costs be not allowed to rise to such a level as to confine access to the courts to the wealthy; **second,** that a successful litigant ought to be fairly reimbursed for the costs the has had to incur; **thirdly,** that the general level of remuneration of advocates must be such as to attract recruits to the profession; and **fourthly,** that so far as practicable there should be consistency in the awards made, both to do justice between one person and another and so that a person contemplating litigation can be advised by his advocates

> very approximately what, for the kind of case contemplated, is likely to be his potential liability for costs."

Moreover, in **ECO Bank Tanzania Ltd** (supra), this Court enumerated other factors that need to be looked at. These include, the suit amount involved, the nature of the subject matter, greater amount of work involved, the complexity of the case, and the time taken for hearing of the case, to mention but a few of such factors.

As I stated earlier, looking at the ruling of the Taxing Officer, I do not find any place where he directed his mind to such factors. To me, that was a gross error because, had he directed his mind to such a wider thinking, he would have arrived at a fair and reasonable assessment of the instruction fees, even in the absence of the EFD receipts, and more so, because the prescribed scales would have guided him as well. Since he did not, this Court finds the submission by Mr. Sood on that point to be justified.

But, will that conclusion end the discussion and justify the claims under items 1 and 2 of the Bill of Costs? My answer to that is a resounding "**NO**". That being said, how should one go about it? Looking at the submissions made before me, it is clear that, parties are not disputing the fact that instruction fees are to be determined in accordance with the prescribed cost scales.

The only dispute here is whether the applicable schedule in the 9th Schedule or the 11th Schedule, item (k) of the Advocates' Remuneration Order, GN No.263 of 2015.

According to Mr. Sood, the suit amount claimed was for about **TZS 1 billion.** Hence, if one applies the scale provided for under the 9th Schedule of the Advocates' Remuneration Order, GN No.263 of 2015, a valid conclusion would lead to the amount claimed under the item 1 of the Bill of Costs, **TZS 35,000,000** as instruction fees were justified and well within the scales.

I am reminded of what the Court of Appeal said in the **Masolele's case** (supra). In that case, the Court of Appeal stated that, "*[a] claim of whatever one thinks one is entitled to, is made in the body of the suit.*"

Much as I agree that it is the value of the claim as stated in the body of the suit which should be the basis of charging the instruction fees in accordance with the prescribed scales and not the reliefs sought, however, as I look at the Plaint filed in Court by the Applicants (Plaintiffs), there is nowhere is it indicated that the value of the Plaintiffs claim was about **TZS 1 billion**, as argued by Mr. Sood, to warrant the applicability of the 9th Schedule to the Advocates' Remuneration Order, GN No.263 of 2015.

On the contrary, I do agree with Mr. Massawe that, the proceedings being merely contentions proceedings, Order 41 of the Advocates' Remuneration Order, GN No.263 of 2015, and the Schedule 11 (k) was the appropriate scale upon which the costs should have been squared.

It follows, therefore, that, since the Taxing officer taxed off Item No.1 of the Bill of Costs without due regard to all other relevant factors which ought to have been taken on board, and given that costs presented by the Applicants ought not to have been squared under the 9th Schedule of the Advocates' Remuneration Order, GN No.263 of 2015, but rather under the 11th Schedule, paragraph (k), the Applicants were entitled to a sum of **TZS 1,000,000/=** as instruction fees.

As regard Item No.2 of the Bill of Costs, the same was taxed off by the Taxing Officer for lack of EFD receipts to support it. This item was raised on the basis of the Respondent's counterclaim amounting to **TZS 154 million**. In my view, the same line reasoning given here above regarding Item No.1 (which was also taxed off by the Taxing Officer), will apply to the 2nd Item in the Bill of Costs, save, as correctly argued by Mr. Sood, that, this item was to be squared under the 9th Schedule of the Advocates' Remuneration Order, GN No.263 of 2015 and not under paragraph (k) of the 11th Schedule as argued by Mr. Massawe. I will explain further.

Under that 9th schedule, the scales range from 3% to 7% for liquidated sum. In the Bill of Costs, however, the Applicants claimed for **TZS 17,000,000.** It is worth noting, however, that, according to Order 46 of the GN No. 263 of 2015, it is clear that, all bills of costs are to be taxed on their prescribed scales. If a scale of 3% on the amount claimed was to be apply on the item, it would not yielded to a sum of **TZS 17,000,000** which M.r Sood argues to be justified. Instead, the mount of **TZS 4,620,000/=** would have been justified as instruction fees.

Consequently, since as earlier noted, the Taxing Officer failed to take into account other considerations other than that of mere lack of EFD receipts, I am of the view that the item should not have been taxed off. Rather, the same should have been reasonably assessed as per the prescribed scale, of which under the 9th Schedule, and applying a **3%** as indicated above, an amount equal to **TZS 4,620,000** would have been justified as instruction fees to defend the counter claim and not **TZS 17,000,000** as charged in the bill of costs.

The final issue is whether the Taxing Officer was justified to tax off **items 3-26** which were in regard to costs for attendance. As I pointed out earlier, the decision of the Taxing Officer cannot be lightly interfered with. However, in **Gautam Chavda's case** (supra) it was noted, that, "*where there has been an error, in principle, the Court will interfere.*"

As it might be noted from the ruling, items 3-26 were taxed off on the basis that there was lack of EFD receipts to support the Court attendance. In my humble view, I also find that such a decision was based on an error. The error is based on the fact that, it is not always possible, especially if one relied on personal transport to reach at the Court premises, that, he or she will have an EFD receipt.

Such an observation was once considered by the Court of Appeal in the case of **Hotel Travetine Ltd vs. National Bank of Commerce**, Taxation Civil Reference No.9 of 2006 (unreported), and a requirement for proof by receipt set aside.

In that particular case, the Court of Appeal observed as follows:

> "This claim too was taxed off because there was no receipt attached. That amount was reasonable and there can hardly be a receipt unless one went to the Court by a taxi. **But if one uses one's car that can be difficult to account with a receipt.** So I will allow that claim." (Emphasis added).

Considering the above authoritative decision of the Court of Appeal, which was in place well before the **Tanzania Rent a Car decision** (supra), I would, for the same reasons as those observed in the **Hotel Travertine case** (supra), make a

finding that, the items 3-27 of the bill of costs ought to have been allowed. In their total, the items 3-27 present costs amounting to **TZS 11,200,000/=** which, in my view, ought the have been awarded, had the Taxing master taken into account what the Court of Appeal observed in the **Hotel Travertine case** (supra).

In the circumstances, therefore, and without disturbing the items which were not challenged, I would partly allow the Applicants' reference application and make orders as hereunder: -

1. That, the Applicants are entitled instruction fees amounting to **TZS 5,620,000/** in respect of **Items 1 and 2** of the Bill of Costs.
2. That, **Items 3-27** of the Bill of Costs were erroneously taxed off and ought to have been awarded to a tune of **TZS 11,200,000/=**. The Applicants are thus entitled to that amount.
3. That, costs of this application follow the event.

It is so ordered.

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DEO JOHN NANGELA
JUDGE

High Court of the United Republic of Tanzania
(Commercial Division)
03 / 09 /2021