

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF  
TANZANIA  
(COMMERCIAL DIVISION)  
AT MWANZA  
REFERENCE APPL. No.01 OF 2021**

AMOS NJILE LILI..... APPLICANT

**VERSUS**

AMANA BANK LIMITED .....1<sup>st</sup> RESPONDENT

S.L.ISANGI AUCTION  
MART & COURT BROKER.....2<sup>nd</sup> RESPONDENT

Last Order: 03/06/2022  
Date of Ruling 10/06/2022

**RULING**

**NANGELA, J.:**

This reference application was filed in this Court by way of a chamber summons, under Order 7(1) of the Advocates Remuneration Order, 2015, GN. No. 264 of 2015. The Chamber summons was supported by an affidavit of Mr Amos Njile Lili.

The Applicant is seeking for the following orders of this Court:

1. That, this Honourable Court be pleased to set aside the decision of Hon. J.M Kareyamaha, Taxing Officer, dated 30<sup>th</sup> October 2020, in the Bill of Costs No.04 of 2020.
2. Costs.

3. Any other and further orders as this Honourable Court deems just and equitable to grant.

The Respondent has contested the Application by filing a counter affidavit. On the 03<sup>rd</sup> day of June 2022, the parties were made to appear before this Court for the hearing of the application. In terms of appearances, the Applicant enjoyed the services of Mr Benson Florence, learned Advocate, and Ms Beatrice Paul Meivukie, a learned advocate as well, represented the Respondents.

At the hearing on the reference application, Mr Benson prayed to adopt the affidavit in support of the application as forming part of his submissions. He submitted that, the Applicant's contention against the ruling of the Taxing Officer is based on the basis of the fact that, the Taxing Officer exercised his discretion injudiciously and with wrong considerations.

He contended that, instead of relying on and applying the 11<sup>th</sup> Schedule, Item (1) (m) (ii) of the G.N. No. 264 of 2015, the Taxing Officer relied on the 9<sup>th</sup> Schedule as the basis for taxation of the instruction fees, hence, acted contrary to what the law prescribes. In view of that, it was Mr Benson's submission that, there was misdirection on the part of the Taxing Officer, which resulted into excessive and unjust results as he taxed the item at **TZS 8,000,000/-**.

Mr Benson told this Court further that, according to Order 41 of the Advocates Remuneration Orders of the 2015, GN. No.

264 of 2015, Bills of costs incurred in contentious proceedings must be taxed at their appropriate and prescribed rates in the 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> schedules to the Order. For that matter, he contended that, the Order excludes the 9<sup>th</sup> schedule which the Taxing Officer relied on, thereby failing to exercise his powers judiciously.

Mr Benson submitted further that, in the course of awarding costs, the principle is that, costs to the winning party are meant to reinstate him/her to the original position by disbursing the costs he incurred in prosecuting the case and not to enrich him. He contended that, the amount awarded by the Taxing Officer as instruction fees, did not intend to reinstate but to enrich the Respondent, and, for that matter it must be taxed in accordance with the requirements of the law, particularly, the 11<sup>th</sup> Schedule Item 1 (m) (ii) of the Advocates Remuneration Orders of the 2015, GN. No. 264 of 2015.

In his further submission, Mr Benson contended as a second ground that, the Taxing Officer had failed to take into consideration and apply the principle of consistency in the award he made in respect of the instruction fees for defending an application. Drawing from the Bill of Costs No.12 of 2018 between the same parties herein, and which the Taxing Officer had taxed instructions fees on the basis of Item 1(m) (ii) of the 11<sup>th</sup> Schedule to the Advocates Remuneration Orders of the 2015, GN. No. 264 of 2015, taxing it at **TZS 1,000,000/=**, Mr Benson contended that, the Taxing Officer was not consistent in exercising his discretion because, in a different Bill of Costs No.

4 of 2020, which involved the very same parties, the same Taxing Officer applied the 9<sup>th</sup> Schedule as the basis for taxing instruction fees. In view of that, Mr Benson contended that, the Taxing Officer had failed to apply the principle of consistency.

On his third point, Mr Benson submitted that, the Taxing Officer had applied wrong considerations in taxing the instruction fees, whereby, on page 4 of the ruling in the Bill of Costs No.12 of 2018, he held that the costs incurred during Misc. Commercial Application No.12 of 2018, are the ones awarded by the Court and are the same to be reimbursed and, that, he dismissed the contention that, the calculations must reflect the amount claimed in the main case.

Mr Benson wondered how possible was it that, in the Bill of Costs No.4 of 2020 by the same parties, the same Taxing Officer applied the amount claimed in the main case as the bases for consideration and calculation of instruction fees incurred to defend the Misc. Commercial Application No.4 of 2020. He contended, on the basis of such a fact that, such was a proof that, there was a wrong consideration on his part and, this Court should be pleased to overrule the decision of the Taxing Officer.

Mr Benson attacked paragraph 4 of the Respondent's counter affidavit, stating that, that paragraph contains untruthful averments. To further support his submission, he referred to this Court the case of **Tanzania Rent a Car Ltd vs. Peter Kimuhu**, Civil Ref.No.9 of 2020; (CAT) (unreported) at Page 4 arguing that, since the matter was not complex, the amount of TZS

8,000,000/ was excessive and the Taxing Officer did not do justice to the case.

In response to the Applicant counsel's submissions, Ms Beatrice prayed to adopt her counter affidavit as forming part of her submissions. She told this Court that, the Taxing Officer acted perfectly within the requirements of the law and was right in awarding TZS 8,000,000/- as instruction fees because that was in accordance with the dictates of the 9<sup>th</sup> Schedule to the Advocates Remuneration Orders of the 2015, GN. No. 264 of 2015.

According to Ms Beatrice, Item No.1 of the 11<sup>th</sup> Schedule to the Advocates Remuneration Orders of the 2015, GN. No. 264 of 2015, talks of instruction fees on matters or cases to which the Misc. Commercial Application No.4 of 2020 did not fall. She contended that, the applications mention in Item No.1 (m) (ii) of the 11<sup>th</sup> Schedule to the Advocates Remuneration Orders of the 2015, GN. No. 264 of 2015, are those which emanates from the categories falling under Item No.1 and, that, in respect of the Misc. Commercial Application No.4 of 2020, the proper guidance, thus, was under the 8<sup>th</sup> and the 9<sup>th</sup> Schedules.

Under the 8<sup>th</sup> Schedule, she contended, Item 1 thereof gives guidance on instructions fees and the 9<sup>th</sup> Schedule to the Advocates Remuneration Orders of the 2015, GN. No. 264 of 2015 gives the scales or the percentages (%). She contended, therefore, that, on the basis of such %, the Taxing Officer taxed the Bill of Costs in line with the requirements of the law.

Ms Beatrice conceded, however, that, in both **Bills of Cost No.4 of 2020 and No.12 of 2018**, the Taxing Officer was not consistent in his decisions. She contended, however, that, despite of such a concession, that does not mean that the 11<sup>th</sup> Schedule to the Advocates Remuneration Orders of the 2015, GN. No. 264 of 2015 was applicable. As regards paragraph 4 of her affidavit, she contended that, there was no reason to have it expunged because it was stating the truth since the preliminary objections were contented in Court. She urged this Court, therefore, to dismiss this Reference Application with costs.

In a brief rejoinder Mr Benson reiterated his earlier submission in chief. He rejoined further that, it was utterly incorrect to use the 9<sup>th</sup> Schedule to the Advocates Remuneration Orders of the 2015, GN. No. 264 of 2015 because the value of the subject matter was the “**Application**” and not the main case which was for **TZS 600,000,000/-**. As such, the application being not the main suit, it was not worth that amount and the use of that amount as an indicator was erroneous. He further rejoined that, since it has been conceded that the Taxing Officer lacked consistent, it means that he was unable to exercise his discretion judiciously and the current Reference Application should be granted.

I have dispassionately considered the submissions made by the learned counsels for the parties herein. Courts have in the past set out conditions upon which a taxation reference would be entertained by the Court in which reference application is filed.

**In Asea Brown Boveri Ltd vs. Bawazir Glass Works Ltd and another** [2005] 1 EA 17, the Court was of the view that:

“[a] taxation reference would be entertained either on a point of law or on the ground that the bill as taxed was manifestly excessive or inadequate.

In the South African case of **Visser vs. Gubb** 1981 (3) SA 753 (C) 754H – 755C, the Court did also set another principle, which is of general application even in our jurisdiction, regarding the possible interference with the exercise of the taxing officer’s discretion. It was stated that:

“The court will not interfere with the exercise of such discretion unless it appears that the taxing Officer 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 Officer was clearly wrong, but will only do so if it is in the same position as, or a better position than, the taxing Officer to determine the point in issue. ...” (Emphasis added).

The above principle was also soundly reflected in the Court of Appeal decision in the case of **VIP Engineering & Marketing Ltd vs. Citibank Tanzania Limited** (Civil Application 24 of 2019) [2021] TZCA 112 (Neutral Citation). The Court stated, citing the case of **Premchand Raichand Ltd**

**and another vs. Quarry Services of East Africa Ltd and others (No. 3) [1972] 1 EA 162, 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."

See also the cases of **Anand Satyavan Chande and Another vs. Exim Bank**, Taxation Reference No.1 of 2020, (unreported) and that of **Silvaho John vs. Magdalen Shaun**, Civil Ref. No. 7 of 2019 (unreported), where it was reiterated with emphasis, that, exercise of the Taxing Officer's discretion, cannot be easily interfered with by the Court, unless there, are exceptional, grounds.

It is worth noting, however, that, powers exercised on the basis of discretion, are powers that must be exercised judiciously and not on caprice, whim, likes or dislikes. Such a principle was set from time immemorial where over centuries ago, courts long emphasized that discretion should be exercised in accordance with sound and reasonable judicial principles. In **Rookey's Case** [77 ER 209; (1597) 5 Co.Rep.99], for instance, the King's Bench division of the Court in England was of the sound view that:-

"Discretion is a science, not to act arbitrarily according to men's will and



private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradicts or overturns the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with.”

Furthermore, **Osborn vs. Bank of the United States**, 22 U. S. 738 [1824], Chief Justice John Marshall (as he then was), writing on judicial power, stated as follows, on the subject:-

“Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.”

In our own jurisdiction, the cases of **Yusufu Same & Another vs. Hadija Yusufu**, Civil Appeal No. 1 of 2002 (Unreported) and **Lyamuya Construction Company Ltd vs. Board of Registered Trustee of Young Women's Christian**

**Association of Tanzania**, Civil Application No.2 of 2010, (Unreported) have generally commented on how discretion need to be judiciously exercised. It is worth noting, however, there is no hard and fast rule regarding judicious exercise of discretion. It must be guided, however, by the principles of justice, equity and common sense.

In a matter of the kind as the one at hand, which is about exercise of discretion in determining instruction fees in a Bill of Costs, it is expected that exercise of such discretion by a Taxing Officer, will be within the ambit of the costs scales prescribed by the Rules so that, the same are not used to enrich but rather to compensate or reimburse the advocates for the works they have executed in the preparation and conduct of the case in Court.

Now, turning back to the reference at hand, the Applicant has raised various concerns over how the Taxing Officer exercised his discretion arguing that, he did not exercise it judiciously. The Applicant's counsel's argument was pegged on the applicability of the 11<sup>th</sup> Schedule, Item (1) (m) (ii) of the 2015, G.N. No. 264 of 2015, *viz-a-vis* the 9<sup>th</sup> Schedule of the same G.N. No.264 of 2015, as the basis for taxation of the instruction fees.

It was argued that, since he applied the latter instead of the former, the Taxing Officer acted contrary to what the law prescribes. As it may be noted from the cases of **Asea Brown Boveri Ltd** (supra), **Visser** (supra) or that of **VIP Engineering** (supra), such a complaints would constitute a valid ground which

would warrant interference by the Court with the Taxing Officer's exercise of discretionary powers. But, was the law wrongly applied?

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."

In the case of **Arusha Hardware and 2Others vs. Exim Bank Tanzania Limited**, Misc Commercial Application No.2 of 2021 (unreported), this Court, citing the case of **Premchand Raichand Ltd and another** (supra), which was referred with approval by the Court of Appeal in the **Tanzania Rent A Car's case** (supra) noted that, when determining the quantum of an instruction fee the following principles need to be considered.

**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 s/he 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.”

In the case of **ECO Bank Tanzania Ltd vs. Double “A” Company Ltd & Others**, Commercial Reference No. 2 of 2019, this Court did cite more other factors. Such factors 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*, just to mention but a few of them. The question that flows from all such considerations is whether the Taxing Officer directed his mind to those factors. To respond to that, one has to look at the decision itself.

I have given a look at the ruling of the Taxing Officer in Bill of Costs No.4 of 2020 and also his earlier ruling (though not part of this Reference, but relating to the same parties (i.e., Bill of Costs No.12 of 2019)). The question that arises from such an examination is where there are grounds for me to interfere with his exercise of discretion in awarding the fees in Bill of Cost No.4 of 2020 which is the subject of this ruling. I think there are grounds, and I will demonstrate.

In the first place, I would agree with Mr. Benson that the Taxing Officer was not consistent. As stated in the case of **Premchand Raichand Ltd and another** (supra), a case which was authoritatively cited by the Court of Appeal in the case of **Tanzania Rent a Car** (supra) and **VIP Engineering** (supra), as far as practicable there should be consistency in the awards of

instruction fees. His ruling in the Bill of Costs No.4 of 2020 and his earlier one in respect of the very same parties, in the Bill of Costs No.12 of 2019 are a mismatch.

By not being able to consistently adhere to his earlier approach adopted in taxing instruction fees under the Bill of Costs No.12 of 2019, when he was taxing the subsequent Bill of Costs No.4 of 2020 in respect of the very same parties, he threw the parties into the limbo of uncertainty. Essentially, that should not be the intention of any decision maker because, in awarding instruction fees, consideration should be had to the fact that, the same must be consistent and predictable. For that reason, the Taxing Officer's exercise of discretion in that regard was injudicious.

Secondly, as I look at the entire ruling, I see nowhere time was devoted in assessing the matter in light of the already guiding factors given by the authoritative decisions such as the case of **Premchand Raichand Ltd and another** (supra), which was authoritatively cited by the Court of Appeal in the case of **Tanzania Rent a Car** (supra) as well that of **ECO Bank Tanzania Ltd vs. Double "A" Company Ltd & Others** (supra).

In the case of **Tanzania Rent a Car Ltd vs. Peter Kimuhu**, Civil Ref.No.9 of 2020; (CAT) (unreported) the Court of was of a further view, and indeed instructively on the matters of assessment of quantum payable as instruction fees, that:

"in taxation of bill of costs ... **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." (Emphasis added).**

In his ruling, however, the Taxing Officer relied and approved the scales given in Schedule 8 and 9 of the G.N. No. 264 of 2015 as the basis for taxation of the instruction fees. This is noticeable on pages 5 to 6 of the ruling of the Taxing Officer. His bases of calculation was the amount involved in the main suit which was **TZS 600,000,000** for which a 3% of it would be **TZS 10,000,000/=**. However, he reasoned that, since the matter did not go to its full trial but ended at the preliminary stage, hence, the amount was to be lowered to **TZS 8,000,000/=**.

Mr Benson has faulted him on that point arguing that, the Taxing Officer incorrectly applied the 9<sup>th</sup> Schedule to the Advocates Remuneration Orders of the 2015, GN. No. 264 of 2015 while the value of the subject matter was the "Application" and not the main case which was for **TZS 600,000,000/-**. For that matter, he contended that, the appropriate schedule to use should have been the 11<sup>th</sup> Schedule, Item (1) (m) (ii) of the 2015, G.N. No. 264 of 2015.

Order 41 of the 2015, G.N. No. 264 of 2015 is instructive that bills of costs incurred **in contentious proceedings** under Part IV of the Advocates Remuneration Order, shall be taxable according to the rates prescribed **in the Tenth, Eleventh and Twelfth Schedules** to the Order. According to Order 40 (2)(a) contentious proceedings include proceedings in the High Court of

Tanzania and all courts subordinate to the High Court where an advocate is allowed to appear.

Essentially, the 8<sup>th</sup> Schedule to the 2015, G.N. No. 264 of 2015 which Ms Beatrice alluded to earlier in her submission, is not applicable to contentious but to non-contentions matters. The 9<sup>th</sup> Schedule to the 2015, G.N. No. 264 of 2015 is applied basically for contentious proceedings for liquidated sum in original and appellate jurisdiction, and, as may be noted in the 12<sup>th</sup> Schedule to the 2015, G.N. No. 264 of 2015, item No.1 thereof, instruction fees regarding proceedings under that schedule, will be gauged under the 9<sup>th</sup> Schedule.

Now, in our matter at hand, as correctly stated by Mr Benson, the Bill of Costs No.4 of 2020 was not emanating from the main suit. It originated from the Misc. Commercial Application No.4 of 2020. This application did not proceed to a full hearing but ended at the preliminary stage following a successful mounting of a notice of objection which was upheld by this Court. As submitted by Mr Benson, therefore, it was erroneous to apply the 9<sup>th</sup> Schedule to the to the 2015, G.N. No. 264 of 2015 as if the costs emanated from the main suit while in fact the cost emanated from an application arising out of it.

As correctly submitted by Mr Benson, the appropriate scales that ought to have been used are those provided for under Item No. 1 (m) (ii) of the 11<sup>th</sup> Schedule to the 2015, G.N. No. 264 of 2015. The same provides:

“1. Instruction Fees: The fee for instructions in the suit shall be as prescribed in these orders:

(m) For applications, notices of motion or chamber applications, (including appeals from taxation)

(i) ...

(ii) **Opposed 1,000,000/=**

From the foregoing, it follows that the Taxing Officer misdirected himself and applied a wrong scale in taxing the instruction fees while the same ought to have been taxed in line with the scales provided for under Item No. 1 (m) (ii) of the 11<sup>th</sup> Schedule to the 2015, G.N. No. 264 of 2015. In my view, had the Taxing Officer applied the principle of consistency and taking into account that the matter before the Court was not complex but ended at a preliminary stage as he correctly observed, he would not have stumbled into the mire that warranted an intervention by this Court in respect of how he exercised his discretion.

In view of the above, this reference application should be allowed and the award of **TZS 8,000,000** as instruction fees is held to be erroneously charged under a wrong scale. The same is set aside and substituted for **TZS 1, 000, 000/-** as per the requirements of Item No. 1 (m) (ii) of the 11<sup>th</sup> Schedule to the 2015, G.N. No. 264 of 2015.

In the upshot of all that, therefore, this Court settles for the following orders, that:

1. This reference application is hereby allowed.



2. The amount of **TZS 8,000,000** charged as instruction fees is held to be erroneously charged under a wrong scale and is hereby set aside and substituted for with **TZS 1,000,000/-** as per the requirements of Item No. 1 (m) (ii) of the 11<sup>th</sup> Schedule to the 2015, G.N. No. 264 of 2015.
3. Cost to follow event.

It is so ordered

**DATED at MWANZA, THIS 10<sup>TH</sup> DAY OF  
JUNE 2022**



A handwritten signature in black ink, appearing to read "Hon. John Nangela".

**HON JOHN NANGELA  
JUDGE**