

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL REFERENCE NO. 06 OF 2022**

**MOHAMED BUILDERS LIMITED ..... APPLICANT**

**VERSUS**

**LAKE STEEL AND ALLIED PRODUCTS LIMITED ..... RESPONDENT**

Date of Last Order: 30.09.2022

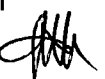
Date of Ruling. 21/10/2022

**RULING**

**MAGOIGA, J.**

This reference is yet another legal snag on interpretation of order 48 of the Advocates Remuneration Order, 2015 which prohibits excessive claim if one-sixth (1/6) of the total amount of a bill claimed is disallowed, the party presenting the bill of costs shall not be entitled to costs of such taxation and the proviso thereto.

The facts of this reference are not complicated. The respondent instituted Commercial case No. 89 of 2020 against the applicant which was decided in her favour with costs. Consequently, the respondent filed bill of costs claiming a total amount of Tshs.27,122,450/= but was taxed at the tune of Tshs.12,988,450/=. Aggrieved with the taxation by the Taxing Officer, the applicant filed this reference on the ground that much as the taxed off



amount is more than one-sixth of the amount claimed, then, the Taxing Officer was as per the order 48 of the Advocates Remuneration Order, 2015 to disallow the whole taxation, hence, this ruling asking the court to reverse the decision of the Taxing Officer.

The applicant is enjoying the legal services of Messrs. Nixon Tugara and Dickson Tugara, learned advocates, whereas the respondent is enjoying the legal services of Ms. Lulu Mbinga and Mr. Michael Kabekenga, learned advocates.

Arguing the application, Mr. Tugara told the court that, in the disputed taxation proceedings before Taxing Officer, the respondent claimed Tshs.27,122,450/ but eventually was awarded Tshs.12,988,480/= which if one minus court fees remained Tshs.6,404,450/= which, in his view, is more than one sixth( $1/6$ ) of the amount claimed. The learned advocate for the applicant went on to tell the court that, by calculation  $1/6$  of the amount claimed is Tshs.3,423,075/= and urged this court to find that the amount disallowed is more than  $1/6$  and as such implored this court find and hold that by virtue of order 48 of the Advocates Remuneration Order, 2015, the respondent is not entitled to any taxation for reasons of making excessive claim. The learned advocate for the applicant insisted that, this is a

requirement of the law and the Taxing Officer out to have dismissed the whole claim prayed. To buttress his point, Mr. Tugara cited the cases of JOHN MOMOSE CHEYO vs. STANBIC TANZANIA LIMITED, COMMERCIAL REFERENCE NO. 72 OF 2018, HC (DSM) (UNREPORTED) in which the amount disallowed was more than 1/6, then, the high Court revised the decision of the Taxing Officer for being excessive; the case of DR.DAVID LIVINGSTONE MEMORIAL AND BAGAMOYO ZOOLOGICAL SOCIETY PARK LIMITED vs. DODSAL HYROCARBONS AND POWER (TANZANIA PVT ) LIMITED, CIVIL REFFERENCE NO.18 OF 2020, HC (DSM) (UNREPORTED) in which taxed off amount was more than 1/6 and the whole taxation was reversed and lastly is the case of THE REGIONAL COMMISSIONER SHINYANGA vs. BENARD MSONGA SIZASIZA, CIVIL REFERENCE NO. 01 OF 2019 HC (SHINYANGA) (UNREPORTED) in which falls under the same fate of excessive claim and was reversed.

Ms. Mbinga, learned advocate for the respondent adopted her counter affidavit and argued that the costs to be disallowed were on such taxation and not taxation on the main suit. The learned advocate argued that the whole submissions by Mr. Tugara were misconceived and not what order 48 provides for. Ms. Mbinga went on to argue that in our circumstances of this

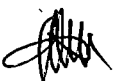
reference, they claimed Tshs.1,000,000/= for such taxation and were allowed Tshs.800,000/= hence not more than 1/6 of the claim.

Ms. Mbinga joined hands with the learned advocate for applicant that the objective of order 48 is to deter the decree holder from claiming excessive claims.

According to her, the Taxing Officer exercised her discretion well within the law and prayed that the instant reference be disallowed.

Mr. Kabekangwa, learned advocate for the respondent argued that the whole submissions by Mr. Tugara are misconceived and misconstrued the provisions of order 48 because what is to be gauged is the costs of such taxation and not the main suit. On that note, thus, concluded that even the cases cited were decided per incurium by failure to interpret properly the provision of order 48 and as such not binding on me. He urged the court to dismiss this reference.

In rejoinder, Mr. Tugara maintained his earlier submissions and added that the submissions by the learned advocates for the respondent are misleading because reading between the lines of the order 48 it refers to the whole taxation and reiterated his earlier prayers.



Having dispassionately considered the rivaling arguments for and against this reference, I am of the considered opinion that the born of contention between the learned advocates for parties' is, whether the one-sixth (1/6) is to be gauged from the main bill of costs or from the costs of taxing the said taxation.

For better resolving the rivaling arguments, let the provisions of order 48 assist this court. The said order provides that:

***Order 48. Where more than one sixth of the total amount of a bill of costs exclusive of court fees is disallowed, the party presenting the bill of costs for taxation shall not be entitled to the costs of such taxation.(Emphasis mine)***

***Provided that, at the discretion of the Taxing Officer any instruction fees claimed may be disregarded in the computation of the amount taxed of that fee in the computation of the one-sixth. (Emphasis mine).***

From the wording of the above provision of the law, which I find no ambiguity, I partly share the same view and considered stance by my learned brother and sisters' judges in their decisions cited by Mr. Tugara

that, of which I had time to read that, the consequences of claiming excessive claim renders the amount claimed in such taxation not to be granted. However, I partly part ways with my learned brother and sisters' judges that it affected the entire claim. My reasons for parting ways with their decisions on disbursements are; one, disbursements are as matter of principle not subjected to taxation because are known and if need be the Taxing Officer can use order 58 to ascertain their genuineness and the wording of order 48 excludes them for obvious reasons. Two, the proviso to order 48 as well excluded instruction fees because are claimed at rate stipulated at the schedules.

Guided by the above reasons, it is wrong and indeed injustice to reverse the whole decision of the Taxing Officer on reasons that the other amounts claimed were to be affected while indeed were not subject to taxation. In my further considered opinion, the drafters of the above provision of the law are clear as well that the only exception is on the disbursements and subject to discretion of the Taxing Officer instruction fees.

The proviso, to the order gives a second consideration that at the discretion of the Taxing Officer, any instruction fees claimed may be disregarded in the



computation of the amount taxed of in determining the amount of one-sixth subject of saying this bill of costs is excessive or not.

In this reference, there is no dispute that the purpose of order 48 is to deter any decree holder from using bill of costs to enrich himself or herself out of what is allowed by law and reimburse what he had used lawful in prosecuting or defending the case. The consequences are to other amounts which are taxed at the discretion of the Taxing Officer and not to disbursements and instruction fees where an advocate was engaged at a fees. Other interpretation outside the above stance, in my own string opinion is not what the drafters of the law intended.

With that back ground in mind and back to the reference, can it be said safely that the amount disallowed was above one-sixth of the amount claimed in exclusion of disbursements and instructions fees as guided by the wording of order 48? The answer to this question is simple because from the bill of costs claimed in exclusion of disbursements and instructions fees, is an aggregate of Tshs.961,650/= which its one-sixth is Tshs.160,275/=. Therefore, from the above computation, much as is clear, the amount of Tshs.750,000/= was disallowed which above Tshs.160,275/=: then, it is



obvious, the entire of Tshs.961,650/= falls under the consequential deterrence envisaged under order 48.

On that note, the arguments by Ms. Lulu Mbinga and Mr. Michael Kabekangwa, learned advocates for the respondent that the computation has to be on taxation of the bill of costs on the day of taxation is far from convincing me otherwise. Equally important to note, their arguments as well that the cited cases decided by my fellow judges were decided per in curium are far from convincing this court otherwise. Having considered the said order by reading between the line and along the lines of order 48, I find good reasons to differ with my fellow learned judges findings on this point in all respects that the entire taxation is affected.

The learned advocates for the respondents never made reference nor make a cross reference on the amount taxed off by the Taxing Officer, which is an indication that they knew what they claimed was not permitted by law.

In the fine and for the foregoing reasons, I find this reference partly merited only to the extent of Tshs.961,650/= and I proceed to set aside the decision of the Taxing Officer dated 31/05/2022 for amount of Tshs.21,650/= is taxed off for being offensive of order 48 of the Advocates Remuneration

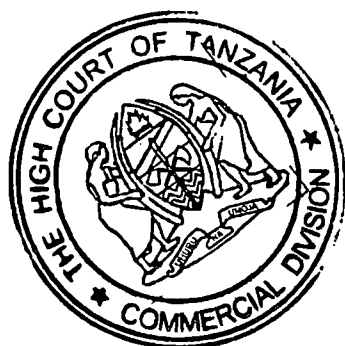




Order, 2015 and the amount on disbursements and instructions fees remained undisturbed for no reference was made on them with no order as to costs so as to bring this litigation to an end.

It is so ordered.

Dated at Dar es Salaam this 21<sup>st</sup> day of October, 2022.



A handwritten signature in black ink, consisting of a series of vertical, wavy lines that form a stylized 'M' or 'G' shape, followed by a long horizontal stroke that tapers to the right.

**S. M. MAGOIGA**

**JUDGE**

**21/10/2022**