

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA**

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM

COMMERCIAL REFERENCE NO.09 OF 2022

(Originating from the Decision in Taxation Cause No.76 of 2020 dated 8/7/2022)

JUNIOR CONSTRUCTION CO.LTD.....1ST APPLICANT

SULEIMAN MASOUD SULEIMAN.....2ND APPLICANT

NCHAMBI'S TRANSPORTERS LTD.....3RD APPLICANT

VERSUS

MANTRAC TANZANIA LIMITEDRESPONDENT

RULING

Last Order: 12th October 2022

Date of Ruling 07th December 2022

NANGELA, J.:

This ruling arises from an application filed by way of chamber summons supported by an affidavit of Raphael Rwezahula, the Applicants' learned counsel. The chamber summons was filed under Order 7 (1) and (2) of the Advocates Remuneration Order, 2015, GN. No. 263/2015. The Applicants are seeking for the following Orders:

1. That, this Honourable Court be pleased to interfere and reverse the order of the Taxing Officer in Taxation Cause No.76 of 2020 delivered on 8th July 2022, by taxing off the amount which was

awarded contrary to the established and prescribed principles under the law.

2. Costs of this Application be provided for by the Respondent.
3. Any other and further orders as this Court may be pleased to grant.

The Respondent has contested this application by filing a counter affidavit. On the 07th September 2022 the parties appeared before me and were directed to dispose of the matter by way of written submissions. A schedule of filing was given and they complied.

Briefly stated, the Respondent through Commercial case No.10 of 2017, successfully sued the Applicants for recovery of USD 4,611,627.00 from unpaid post-dated cheques initially paid by the 1st Applicant to settle debt for machines supplied to the Applicants. A further payment of costs was ordered on top.

Subsequently, a Taxation Cause No. 76 of 2020 was filed by seeking for reimbursement of TZS 10,350,000.00 and USD138,348.81, the amount being instruction fee, attendance in Court and disbursement. The said Application was heard and the Taxing Officer awarded a total sum of TZS 102,974,809/= as instruction fees, court attendance and disbursement. The Applicants were aggrieved and, hence, this reference application.

Submitting in support of the application, Mr. Raphael Rwezahula, the learned advocate appearing for the Applicants

adopted the facts of this matter and the Applicant's supporting affidavit and the affidavit in reply as forming part of his main submission. In his submission, Mr Rwezahula has faulted the Taxing Officer's decision to award TZS 102,974,809 as instruction fees, court attendance and disbursement to the Respondent. He contended that, the award was made without taking into account the peculiar facts and circumstances of the Commercial suit from which the Respondent was awarded costs.

He maintained that the costs awarded were contrary to established principles under the law governing taxation proceedings and, that, the amount awarded was inappropriate, irrational, excessive and the Taxing Officer's discretion was injudiciously exercised. To back up his submissions, reliance was placed on the case of **Premchand Raichand Ltd & Another vs. Quarry Services of East Africa Ltd** [1972]¹ EA162 regarding the factors which a Taxing Officer needs to take into account when deciding on the quantum of instruction fees to grant.

He also relied on the Court of Appeal decision in **Kitinda Kimaro vs, Anthony Ngoo & Another**, Civil Application No.576/02 of 2008 in which the principles in **Premchand's case** (supra) were reiterated to the extent that the powers of a taxing officer must be judiciously exercised. Mr Rwezahula submitted that, the Respondent was claiming for a recovery of USD 4,611,627.00 and the Court entered judgement upon admission

of USD 3,091,864.16, equal to 67% of the entire claim. He contended that, the disputed amount which went on full trial was only USD 1,519, 762.84, which, according to him, was equal to only 27% of the entire claim.

Mr. Rwezahula submitted that, the Taxing Officer's decision failed to justify for the higher sum claimed by the Respondent and awarded by her since both did not provide any detail as regards the complexity, novelty, responsibility, industry, skill or urgency which would have justified a higher compensation of TZS 92,244,809/= as instruction fee.

He contended that, as trite law, when a taxing officer is to award costs, s/he must be mindful of not awarding an amount which would impede access to justice or tend to punish the Defendant for his right to defend a suit. It was his submission, therefore, that, the TZS 92,244,809/=awarded as instruction fee is excessive and impede justice and punishes the Applicants for exercising their right to defend the suit.

As regards the Court attendant charges, it was Mr. Rwezahula's submission that, the TZS 420,000/- awarded was contrary to the established legal principles governing taxation of costs because, the advocate's costs of attending Court to prosecute or defend suits is covered within the instruction fees.

To back up his position, reliance was placed on the case of **Jubilee Insurance Company of Tanzania vs. Vodacom Tanzania PLC**, Consolidated Taxation Ref. No. 2 and 3 of 2020

(unreported). He contended that, awarding the Respondent costs for Court attendance as well as instruction fees amounted to double award. In view of the above, he has urged this Court to grant the orders prayed for.

Responding to the submission made by Mr Rwezahula, it was the submission of Mr. Nobert Tarimo, the counsel for the Respondent that, the Respondent filed the Taxation Case No,76 of 2018 with a view to be reimbursed all costs incurred in prosecuting Commercial case No.10 of 2017. He submitted that, upon hearing, the Taxing Officer awarded TZS 92,244,809/= as instruction fees; TZS 420,000/= as Court attendance fees and TZS 10,310,000 as Court fees.

According to him, thus, the Taxing Officer acted properly and with no error on her party. He distinguished the decision of **Kitinda Kimaro (supra)** and contended, as regards the Case of **Premchand (supra)** that, the allowance of instruction fee is a matter peculiarly in the Taxing Officer's discretion and Courts are reluctant to interfere where such discretion is exercised.

He also relied on the Ugandan Supreme Court's decision in the case of **Uganda vs. Banco Arabe Espanol**, Civil Application No.29 of 1999. In that case, the Court was of the view that, one of the pertinent principles applicable to review of taxation is that, save for exceptional circumstances, a judge will not interfere with the assessment of what the Taxing Officer considers a reasonable fee.

In view of the above, Mr. Nobert contended that, the alleged failure on the part of the Taxing Officer to demonstrate any justifiable reason as to why she awarded the amount as instruction fees is baseless since the Taxing Officer used the amount of USD 1,519,762.84 which went to the full trial and considered the applicable scales. He maintained that, the Taxing Officer did act judiciously and within Order 12(1) of the Advocate's Remuneration Orders, 2015 in discharging her noble duty and cannot, therefore, be faulted.

As regards the issue of attendance fees and the case of Jubilee Insurance (supra), it was Mr. Nobert's submission that, the same is distinguishable to the facts on the ground and, hence, inapplicable as it included drawing and perusal fees.

He submitted that, in the present case, it is only Court attendance fees which were awarded in accordance with item 23 (a) of the Eighth Schedule to the Orders and the Counsel for the Applicants raised no objections. He submitted that, as per the said schedule, attendance fee payable in ordinary cases, per 15 minutes or part thereof is TZS 50,000/- but the taxing Officer only taxed it at TZS 10,000.

Referring this Court to the case of **Edisa Bais vs. Frester Investment Co. Ltd**, Misc. Civil Ref. No.01 of 2022, Mr. Nobert contended that, it would have been erroneous to tax off the whole amount while attendance by the Applicant and his Advocate in Court was not objected and the claimed amount as

court attendance fee was in accordance with the fee scale provided for in the Order. For those reasons, he urged this Court to dismiss this application with costs.

By way of rejoinder submissions, the Applicants' learned counsel filed his rejoinder stating that, the costs awarded infringes the principles stated in **Premchand's case (supra)**. He rejoined that, the award of TZS 92,244,809/- as instruction fees defeats the general purpose of taxation which is to reasonably reimburse the successful party and not to punish the loser or enrich the successful party. He relied on the case of **Wambura Chacha vs. Smason Chorwa** [1973] LRT No.4.

He rejoined further that, the Taxing Officer failed to relate the principles to the circumstances and the proceedings in the Commercial Case No. 10 of 2017 and, hence, the submission that the matter was complex is unfounded. In view of that, he urged this Court to grant this application, and appropriately tax off the amount in respect of instruction fees and Court attendance in accordance with the principles governing taxation proceedings.

I have given a due consideration to the rival submissions by the learned counsel for the parties herein. The issue to consider is whether the Taxing Officer exercised her discretion judiciously when considering whether or not she should tax off the instruction fees and Court attendance as presented before her.

Essentially, it is an agreed principle that, instruction fees must be commensurate with the work for which they are to be charged. A tedious work will definitely attract much. The cases of **Attorney General vs. Amos Shavu, Taxation Ref. No.2 of 2000, (unreported); Kapinga and Co. Advocates vs. National Bank of Commerce, Civil Appeal No.8 of 2011, CAT, DSM (unreported), East Africa Development Bank vs. Blueline Enterprises Ltd, Civil Ref.No.12 of 2006, CAT, DSM (unreported), ZTE Corporation vs. Benson Information Informatics Ltd t/a Smart, Comm.Ref.No.61 of 2018 (unreported) and C.B. Ndege vs. E.O Aliva and AG [1988] TLR 91** have together laid emphasis on the need for instruction fees to be commensurate with the effort, time and the work done.

In the case of **Attorney General vs. Amos Shavu** (supra) it was held that, the 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 in the course of hearing and disposing of the case at hand. In that case, the Court followed what was reiterated in the cases of **Rashid Hashim vs. Alibhai Kaderbhai (1938) 1T.L.R (R) 676** and **Premchand Raichand vs. Quarry Services of East Africa Ltd [1972] E.A 162.**

In principle, in matters of taxation of costs, a Taxing Officer enjoys wide discretion as it may be discernible in Order 12 (1) of GN 264 of 2015 which 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**)

Ordinarily, Courts do not enjoy a free hand in interfering with a Taxing Officer’s decision arrived at in the course of exercise of discretion bestowed upon him or her. In **Premchand Raichand’s case (Supra)**, 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....”

The only permissible room of intervening in that decision, however, is when it is established that she or he acted injudiciously. This was stated in the case of **Haji Athumani Issa vs. 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.”

From the above understanding, the issue now to tackle is whether the Taxing Officer, given the circumstances of the matters before me, acted or exercised her discretion injudiciously. The Applicants have argued that, she did not act prudently in accordance with the principles governing taxation proceedings as enunciated in the **Premchand Raincand’s case** (supra). The Respondent held a contrary view, that, nothing fell short on the part of the Taxing Officer.

Looking at the facts of the case from which the application arose, i.e., Commercial case No.10 of 2017, it is an indisputable fact that about three quarter of the initial claims were admitted by the Applicants (by then Defendants) and only a quarter of the whole claim (i.e., USD 1,519,762.84) proceeded to the trial and judgement was given in favour of the Respondent. It is also not disputed that TZS 92,244,809/= were claimed as instruction fees and TZS 420,000/- as Court attended fees.

In his submission, the learned counsel for the Respondent was of the view that, the amount awarded as instruction fees was based on the claim for USD 1,519,762.84 after the Taxing

Officer had excluded the USD 3,091,864.16 when taxing the instruction fees. He contended that, had she done otherwise and apply the applicable scales, the same would have resulted to an award of USD 138,348.81 and not USD 40,000 (which is equal TZS 92,244,809/=).

In my view, I tend to be in agreement with the submission of the learned counsel for the Respondent that, the taxing of Item No.1 (instruction fees) was reasonable and I see no reason for interfering with the Taxing Officer's decision. I hold it to be so because, in her decision, as may be observed in page 3 of her ruling, the Taxing Officer did consider the fact that although the matter took 3 years in Court, some part of the whole claim was admitted at the very earlier stages of the suit and a judgment on admission was entered. She also considered the key factors such as the nature and complexity of the matter and on that basis taxed Item No.1 at TZS 92,244,809/-. Her exercise of discretion cannot, thus, be assailed as she took into account the very principles lamented about by the Applicant's counsel.

As regards the Court attendance fees, it has been the position of this Court in the case of **Jubilee Insurance** (supra) that, attendance in Court will definitely be part of the instruction fees agreed upon between a client and her/his advocate. In view of that, such amount ought to have been taxed off. The amount of TZS 420,000 as Court attendance is, thus, taxed off since, attending Court for the purpose of defending the client's interests

or case, was the business for which the counsel for the Respondent was paid for and/or supposed to be paid for. That is what he was exactly instructed to do, i.e., to defend the interests of his client in the Court.

In the upshot of the above, this application is partly granted, in as far as the taxing off of the Court attendance fees is concerned, and, denied in respect of the interventions called upon to unsettle or revise the amount awarded as instruction fees. That amount is hereby upheld as correctly arrived at and, hence, reasonable in the circumstance. That being said, I make no orders as to costs.

It is so ordered.

**DATED AT DAR-ES-SALAAM ON THIS 07TH DAY OF
DECEMBER 2022**



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DEO JOHN NANGELA
JUDGE