

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISC. COMMERCIAL REFERENCE NO. 08 OF 2022
(Arising from Taxation Cause No.111 of 2018)**

**YARA TANZANIA LIMITEDAPPLICANT
VERSUS
D.B SHAPRIYA & CO. LIMITED RESPONDENT**

RULING

Last order: 27th April, 2023
Ruling: 31th May, 2023

NANGELA, J.

This reference application arises from Taxation Cause No.111 of 2018 whose underlying case was the Misc. Commercial Application No. 92 of 2016. The Applicant is seeking for the following Orders:

1. That, this Honourable Court be pleased to issue an Order reversing and setting aside the ruling of the Taxing Officer (Hon. Minde, DR) dated 7th June 2022 in Taxation Cause No. 111 of 2018, and

appropriately, fairly and legally tax the bill of costs presented by the Applicant.

2. The Cost of this application be provided for; and
3. Any other relief that this Honourable Court deems just and equitable to grant.

Initially, when the parties appeared before me, the Respondent had raised preliminary objections which were disposed of in a ruling dated 28th October 2022. Following the hearing and determination preliminary legal issues, this Court directed the parties to argue the main application by way of filing written submission. They duly filed such submission and hence this final ruling of the Court.

In his submission in support of the application, the Applicant's counsel, Mr. Nuhu Mkumbukwa, adopted the contents of the affidavit filed in this Court to support the application to form part of his submission. He submitted that, there are three grounds upon which the decision of the Taxing Officer is subjected to challenge.

According to Mr. Mkumbukwa, the first ground is that, the Taxing Officer erred in not treating Misc. Commercial Application No.92 of 2016 as an application and tax the instruction fee at 1,000,000/- only as per Item 1(m)(ii) of the 11th Schedule to the Advocate Remuneration Orders, 2015, and erred in taxing instruction fees at TZS 5,000,000.

He contended that, it is on record that, the dismissed Misc. Commercial Application No.92 of 2016, was nothing but a petition for stay of Commercial Case No.37 of 2016 which was by then pending before this Court, the same having been filed under the Arbitration Act, Cap.15 to have the Commercial Case No.37 of 2016 stayed pending reference to arbitration as per the arbitration clause.

He also argued that, it was after the said dismissal when the Respondent herein filed the Taxation Cause No.111 of 2018, the ruling which is the subject of this Reference Application. On that account, Mr. Mkumbukwa was of the view that, the Misc. Commercial Application being a petition, and more so being founded under the Arbitration Act, Cap.15, was a mere

application for which the Item 1 (m) (ii) of the *11th Schedule to the Advocate Remuneration Orders 2015* ought to be applied to tax the instruction fees instead of Item 1(d) of the *11th Schedule to the Advocate Remuneration Orders 2015*.

He submitted further that; the Taxing Officer was in error by applying Item 1(d) of the *11th Schedule to the Advocate Remuneration Orders 2015* to tax the instruction fees due to the fact that, the provision of Item 1(d) invoked by the Taxing Officer if read holistically, is silent as to which proceedings is being referred to which, once opposed is to be taxed at such rate of TZS 5,000,000/.

To bolster his submission regarding the status of a petition as an application to the Court, he relied on the case of **Tanzania Marketing Board vs. Cogecot Cotton Company SA**, [1997] T.L.R. 165 which held that, a petition made under rule 5 and 6 of the Arbitration Rule is an “application” rather than a suit. On that ground, Mr. Mkumbukwa urged this Court to make a finding that, the Taxing Officer erred in taxing instruction fees at TZS 5,000,000/- and, thus, set aside her decision in its entirety.

Concerning the second ground of argument, Mr. Mkumbukwa contended that, the Taxing Officer erred in not disallowing the entire Taxation Cause No.111 of 2018 as it went beyond the 1/6 contrary to Order 48 of the Advocates Remuneration Orders, 2015. It was his submission that, as per the available record, the Bill of Cost was taxed to the tune of TZS 5,230,000/= while the entire Bill ought to have been taxed in the tune of TZS 11,700,000/=:, meaning that, TZS 6,470,000 needs to be taxed off.

He contended that in October 2018, the exchange rate was 1US\$ equal to TZS 2288. As such, he contended that, since the total Bill of Cost presented for taxation was for US\$ 5000 and TZS 230,000/- then, a simple arithmetic would be equal to TZS 11,440, only and if TZS 230,000 are added, the same will be equal to TZS 11,700,000 as the total Bill of Costs presented before the Taxing Officer.

It was Mr. Mkumbukwa's submission that, since it was TZS 5,230,000 which were allowed, the Taxing Officer disallowed TZS 6,470,000 out of TZS 11,700,000/- meaning that, the TZS

6,457,000 is more than $\frac{1}{6}$ of TZS 11,700,000. He stated that, mathematically, $\frac{1}{6}$ of 11,000,000 is TZS 1,950,000, meaning that, in line with Order 48 of the Advocate Remuneration Orders, more than $\frac{1}{6}$ of the entire Bill was to be disallowed, and, hence, the entire bill was to be disallowed.

He referred to this Court the case of **The Regional Commissioner of Shinyanga vs. Bernard Sizasiza**, Civil Reference No.1 of 2019 where at page 7 and 8 of the ruling, the Court quashed and set aside the taxing officer's decision, allowed the application and ordered that, having disallowed above one-sixth of the claimed costs in Taxation Cause No.5 of 2018, Respondents were not entitled to costs.

He contended that, a similar approach was also taken in the case of **Dr. Livingstone Memorial and Bagamoyo Zoological Society Park Ltd vs. Dodsai Hydrocarbons and Power (T) PVT Ltd**, Civil Ref. No. 18 of 2018. As such, he urged this Court to adopt a similar approach and disallow the bill of costs in terms of Order 48 of the Advocate Remuneration Orders, 2015 or in the

alternative, the instruction fees be taxed at TZS 1,000,000 as per the prescribed 11th Schedule Item 1(m)(ii).

Responding to the submission filed by the Applicant's counsel, Mr. Norbert Didas Tarimo, commenced his submission by adopting the counter affidavit filed in this Court to form part of his submission. The learned counsel for the Respondent submitted that, the argument that the Taxing Officer ought to have relied on items 1(m)(ii) of the 11th Schedule of the Advocates Remuneration Order, 2015 is a misdirection and misses the mark. He argued that, the Taxing Officer acted judiciously in exercise of her discretion and applied the general principles governing taxation of Bill of Costs by applying Item 1 (d) of the 11th Schedule to the Advocates Remuneration Orders.

He contended that, as admitted by the learned counsel for the Applicant, the **Misc. Commercial Application No.92 of 2016** was a Petition seeking for orders to stay **Commercial Case No.37 of 2016**. In his views, what was filed under the Misc. Commercial Application No.92 of 2016 was neither a Notice of Motion, Chamber Summons nor the Application under the Order

XLIII Rule 2 of the Civil Procedure Code, Cap.33 R.E 2019, but rather a Petition filed under section 6 of the Arbitration Act, Cap.15 R.E 2002. He concluded, therefore, that, the application in question should fall. He distinguished the case of **Tanzania Crop Marketing Board** (supra) arguing that, the same dealt with a different issue as it was a contention as to whether the Petition was a suit founded on Judgement. He also distinguished to cited case on the ground that, it dealt with an issue of limitation.

Mr. Tarimo argued that, on a similar note, the Misc. Commercial Application No.92 of 2016 was filed as a Petition, hence Item 1 (m) (ii) of the 11th Schedule to the Advocates Remuneration Orders is not applicable because the same was neither an application nor a Notice of Motion. He argued further that, as regards the guiding principles of taxing Bills of Costs, it is settled that, the allowance of instruction fees is a matter peculiarly in the Taxing Officer's discretion and Courts are reluctant to interfere.

To support his contention, he relied on the cases of **Premchand Raichand Ltd vs. Quarry Services of Eat Africa Ltd and Others**, [1972] 1 EA 162 and **Uganda vs. Banco Arabe Espaniol**, Supreme Court Civil Application No. 29 of 1999. He urged this Court to make a finding that the Taxing Officer rightly applied the prescribed scales and gave justifications for that.

As regards the 2nd ground, he contended that, the same is baseless as it has been raised out of context and an afterthought as it does not feature in the chamber summons or affidavit of the Applicant. He contended that, such was not argued before the Taxing Officer as well and this Court should not entertain it. He distinguished the cases of **Dr. David Livingstone** (supra) and **the RC of Shinyanga** (supra) arguing that, such were brought under Order 7 (1) and 48 of the Advocates Remuneration Orders, 2015 while the present application is brought under Order 7 (1) and (2) of the Orders.

He contended that, what guided the Taxing Officer was Order 46 and not Order 48 of the Advocates Remuneration

Orders. To strengthen his submission, he relied on the case of **Hamis Athumani Hamis and 2 Others vs. Macfarlane and Another**, Ref. No.21 of 2020, HC Land Division, at DSM (unreported) where it was held that, Order 48 of the GN.No.264 of 2015 is pegged with conditions that the total amount of the bill of costs must be exclusive of Court fees and the Taxing Master's discretion is also at issue.

Mr. Tarimo submitted that, as per the law, the ground upon which the decision of the Taxing Officer may be faulted is only when it is provided that she acted injudiciously in the course of exercising her discretion or where she wrongly applied the law. He contended that, the Applicant's affidavit has not been able to demonstrate the relevance of such a principle or the exceptional circumstance warranting the need to interfere with the exercise of the Taxing Officer's discretion.

He urged this Court, therefore, to dismiss this application as the Taxing Officer acted correctly within the ambit of Order 12(1) of the Advocates Remuneration Orders, GN. No. 264 of 2015.

Having gone through the rival submissions, the issue to be addressed is whether the application before me has any merit to warrant the granting of the orders sought by the Applicant. First, it is my view, as correctly stated by the learned counsel for the Respondent that, the 2nd ground regarding the applicability of the 1/6th rule under Order 48 of the Advocates Remuneration Orders, GN. No. 264 of 2015 is out of place. As it was held in the case of **Hamis Athumani Hamis and 2 Others** (supra), for the Order to apply, the Court fees should not have been inclusive in the computed arithmetic as the Applicant Counsel herein has done.

That, being said, the bone of contention remains the first ground regarding whether the Taxing Officer was to apply Item 1(m) (ii) of the 11th Schedule to the Advocates Remuneration Orders, GN. No. 264 of 2015 or Item 1(d).

In his submissions, Mr. Mkumbukwa has argued that, the right Scale to be relied upon was that falling under Item 1(m) (ii) of the 11th Schedule to the Advocates Remuneration Orders, GN. No. 264 of 2015, the reason being that, the Misc. Commercial Application No. 92 of 2016 was in the nature of an application if

one considers what a "Petition" is as defined by the Court of Appeal in the case of **Tanzania Marketing Board** (supra). Mr. Nobert has argued differently stating that, the Misc. Commercial Application No.92 of 2016 was neither an application by way of Chamber summons under Order XLIII of the CPC nor a 'Notice of Motion' and, hence, it is not appropriate to tax it under Item 1 (m) (ii) of the 11th Schedule to the Advocates Remuneration Orders, GN. No. 264 of 2015.

Item No. 1 (m) (ii) of the 11th Schedule to the 2015, G.N. No. 264 of 2015 provides as follows:

"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/=.

(Emphasis added)

Looking at the above cited provision, the issue that follows is whether a "Petition" falls under "applications" as argued by Mr. Mkumbukwa to warrant being taxed in accordance with the scale provided for under **Item No. 1 (m) (ii) of the 11th Schedule to the 2015, G.N. No. 264 of 2015.**

Essentially, in the context of law, and as it was stated in the case of **Tanzania Marketing Board** (supra), a petition is a form of an application in writing made to a Court for judicial determination of matters that lies within its jurisdiction.

In view of the above, it is my findings that, the applicable scale to be applied should have been **Item No. 1 (m) (ii) of the 11th Schedule to the 2015, G.N. No. 264 of 2015.** With such a finding, I hereby quash and set aside the decision of the Taxing Officer and, in substitute, thereof, the amount payable as instruction fees under the Bill of Costs should be **TZS 1,000,000.00** as per the Item No. 1 (m) (ii) of the 11th Schedule to the Advocates Remuneration Order 2015, G.N. No. 264 of 2015.

Order accordingly.

**DATED AT DAR-ES-SALAAM ON THIS 31ST DAY
OF MAY 2023**



.....
DEO JOHN NANGELA
JUDGE

ORIGINAL