

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

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**TAXATION REFERENCE NO. 21 OF 2022**

(Arising from Taxation Cause No. 37 of 2019)

DELTA AFRICA LIMITED ..... APPLICANT

VERSUS

VODACOM TANZANIA PUBLIC LIMITED.....RESPONDENT

**RULING**

Date of last order: 20/04/2023

Date of Ruling: 09/06/2023

**NANGELA, J.**

This reference application was filed under Order 7 (1) and (2) of the Advocates Remuneration Order, G.N No. 264 of 2015 by way of a chamber summons supported by an affidavit of one Mohammed Araz. The Applicant is seeking to quash and set aside the decision of Honourable J. M. Minde, Taxing officer, delivered on the 29<sup>th</sup> of March 2022 in Taxation Cause No. 37 of 2019.

The Applicant is praying for the following orders:

1. That, this Honourable Court be pleased to set aside and quash the decision of Honourable J. M Minde Taxing Officer dated 29<sup>th</sup> of March 2022 styled as Taxation Cause No. 37 of 2019.
2. That, this Honourable Court be pleased to re-assess the costs award being huge without justification.
3. Costs to follow the event.
4. Any other relief this Honourable court deems fit and just to grant.

The respondent side contested the application by filing a counter affidavit which was sworn by Joseph Tungaraza. On the 9<sup>th</sup> of March 2023, all parties appeared before the court. The Applicant enjoyed the services of Mr. Noel Sanga, learned advocate, while the respondent side was represented by Mr. Gaspar Nyika.

Both parties agreed to dispose of the application by way of written submissions and this Court granted their prayer. A schedule of filing of the parties' respective submissions was issued and the parties have dutifully adhered to it.

In his submission, Mr. Sanga, the Applicant's advocate started by adopting the contents of the Applicant's supporting affidavit and contended that, the Taxing Officer awarded the Respondent TZS 23,569,415/= as instruction fee, because the matter took 3 (three) years to resolve. He maintained that such a reason was insufficient to warrant awarding such a colossal amount as instruction fees. He contended that, there is no evidence showing that the delay was a fault to be attributed to the Applicant.

He contended, therefore, that, the discretionary powers vested on the Taxing Officer were not exercised judiciously given that she arrives as a wrong conclusion. He submitted that, the issues for determination were simple as they involved breach of contract and, that, only two witnesses

were called on to testify in Court, hence, to award a sum of **TZS 23, 569, 415** as instruction fee was too high.

Mr. Sanga submitted further that, the Taxing Master awarded such a huge amount as instruction fees without any proof that the Respondent incurred the awarded costs, since, according to him, to be awarded, the same ought to have been proved. To cement his position, he placed reliance on the case of **Said s/o Ally vs. Haidari R. Mshiha** Civil Reference No. 1 of 2021.

Further to that, it was Mr. Sanga's submission that, as per the record of the Court, at page 4 paragraph 2, the Taxing Officer charged the transport costs at the tune of TZS 375,000/= for attendance in the **Commercial Case No. 95 of 2017** without any proof. He contended that; it is a well-known fact that, transport which has not been proved during the taxation, must be taxed off.

To support his assertion, he relied on the case of **Deo Kija vs. Bwata Msafiri**, HC Civil Reference No. 05 of 2020, HCT, Mwanza, whereby, the Court taxed off travelling costs due to lack of evidence that the Applicant domicile was

shifted after retirement. Mr. Sanga submitted that the Taxing Officer taxed the transport costs for the attending the Taxation Cause No. 37 of 2019 as prayed by the Respondent which is contrary to the provision of the law.

He argued that doing so was contrary to Order 55 (3) of the Advocates Remuneration Order 2015, which excludes fees for attending bill of costs as that is to be left blank to be fixed by the Taxing Officer. He contended that, instead, the Taxing Officer awarded TZS 1,000,000/= being costs for prosecuting the bill of costs, a fact which goes contrary to the mentioned order.

From the above premise, it was Mr. Sanga's submission that, as a matter of principle, taxation of a bill of costs is only aimed at reimbursing the winning part and not to punish the losing one. To back up that assertion, he cited and relied on the case of **Edmund Mgeni vs. Mjanja Nagagwa**, Taxation Civil Reference No. 01 of 2021, HCT, Mwanza. Finally, Mr. Sanga prayed that, this Court be pleased to set aside and quash the decision of Taxing Officer.

In response to the submissions made by Mr. Sanga, it was Mr. Nyika's submission that, the counsel for the Applicant has included in his submission, issues which were not in his affidavit. In that regard, he queried as to whether mere submission from the bar should be made admissible.

Mr. Nyika contended that, an affidavit or counter affidavit is evidence to be relied upon by the Court and, hence, the reasons which support the application must be reflected in the same. He submitted, however, that, in the present application, although the Applicant averred, at paragraph 8 of the supporting affidavit, that, the decision of Taxing Officer contained anomalies and irregularities, nevertheless, nowhere was any mentioning of those anomalies or irregularities was made.

Mr. Nyika submitted that, as a well-established principle, submissions are not evidence but rather elaborations or explanations regarding the evidence already tendered or received in Court. He contended, therefore, that, submissions are not intended to be a substitute for evidence. To support his view, he cited and relied on the case of **Tina**

**& Co. Limited and 2 others vs Eurafrikan Bank (T) Ltd now known as BOA Bank (T) Ltd**, Civil Application No. 86 of 2015, Court of Appeal of Tanzania, (DSM) (unreported).

According to Mr. Nyika, to be able to fault the decision of the Taxing Officer, the Applicant was required to clearly state all anomalies and irregularities complained of under oath in the supporting affidavit and, hence, the Applicant lacks the legs upon which to stand as the submissions from the bar cannot be allowed to stand.

Concerning the issue of instruction fees, Mr. Nyika submitted that, the awarding of instruction fee is within the discretion power of the Taxing Officer and the Court will interfere with the decision of the Taxing Officer only if the Taxing Officer exercised her discretion injudiciously or acted upon a wrong principle.

To bolster his submission, reliance was placed on the cited the cases of **Attorney General vs. Amos Shavu**, Taxation Reference No.2 of 2000, **Premchand Raichand Ltd & another vs. Quarry Services of East Africa Ltd & another** [1972] EA 162, **the East African Development**

**Bank vs. Blue Line Enterprises**, Civil Reference No.12 of 2006 which were cited with approval in the recent case of **Tanzania Rent a Car Limited vs. Peter Kimuhu**, Civil Reference No. 9 of 2020, Court of Appeal of Tanzania at Dar es salaam (unreported).

Mr. Nyika submitted, the Applicant Counsel's assertions that the case was a simple matter regarding breach of contract and that, only two witnesses were testified and, yet, the Taxing Officer awarded TZS 23,567,415 as instruction fees, as a purely an erroneous assertion. In his view, that was not the only factor considered by the Taxing Officer and, that, as it is well known, Taxation of Bill of costs is governed by the Advocate Remuneration Order 2015 and decided cases.

Mr. Nyika contended that, the Taxing Officer is at liberty to allow charges, costs, and expenses as it appears to him/her as necessary for the attainment of justice. He relied on the case of **Attorney General vs. Amos Shavu** (supra) in support of his submission.



In that respective case, the Court pointed out the various factors to take on board when awarding instruction fee. The factors include the complexity of the suit in question, the time taken to dispose of the matter, the extent of research required, as well as the parties' general behaviors and facilitation of expeditious disposal of the matter. Mr. Nyika did also call to his aid the case of **Premchand Raichand Ltd and another vs. Quarry Services of East Africa Ltd and others** [1972] E.A 162.

He submitted further that, considering the nature of the main suit and the work employed to pursue the matter, the averment by the Applicant that, the amount awarded was huge, lacks weight and this Court cannot be called upon to revise the decision of the Taxing Officer. He contended that, as a matter of fact, the Respondent employed enough time in preparation and energy in defending the claims of over TZS. 996,407,791/=. He relied on the case of **Premchand Richard Ltd** (supra) and the case of **C.B Ndege vs. E.O Alia & AG [1988] TLR** to support his submission.

Concerning the issue of proof, Mr. Nyika submitted that, it is a well settled principle that, in proving instruction fee, the decree holder has no obligation to bring receipt to prove the amount claimed. He relied on the case of **Tanzania Rent a Car Limited**(supra), and distinguished the case **Said s/o Ally** (supra).

Mr. Nyika submitted that, concerning the issue of attendance costs, the amount of TZS 375,000/= which was awarded as transport cost by the Taxing master, was arrived at by a mere looking at the distance from the office of the Decree Holder to the Commercial Court and an award of TZS. 15,000/= for every appearance was entered.

He submitted that, in considering the award of such amount, what the Taxing officer is required to do is to use the costs scale statutorily provide and with other factors and no need of receipt especially one went with his own transport unless he used taxi. He again cited the case of **Tanzania Rent a Car Ltd** (supra) whereby the Court of Appeal cited with approval its own decision in the case of **Hotel**

**Travertine Ltd and 2 Others vs. National Bank of Commerce, [2006] TLR 133.**

From the arguments presented here above, it was Mr. Nyika's submission that, under Order 58 (1) of the Advocate Remuneration Order, 2015, the law provides that, vouchers and receipt charged in the bill of costs shall be retendered or produced during the taxation only when required to do so by the Taxing Officer. In view of that, he contended that, the issue of producing voucher and receipts remained in the discretion of the Taxing Officer and not otherwise.

Besides, it was Mr. Nyika's submission that, according to Order 55 (3) of the Advocate Remuneration Order, 2015 fees for attending taxation should not be included in the body of the bill of cost but the same should appear at the end and be blank for completion of the Taxing Master. He submitted that, in the Taxation Cause No. 37 of 2019, there was no item showing the costs for pursuing the Taxation Cause No.37 of 2019. He stated, that, instead, the amount was claimed separately since they did not form part of the costs awarded in Commercial Case No. 95 of 2017.

In that circumstance, Mr. Nyika contended that, to entertain the reference one must show that there is a point of law, principles or manifested unjudicial act but in this present matter before this Court, the Applicant has failed to show any of such matters. He relied on the case of **Asea Brown Boveri Ltd vs. Bawazir Glass Works Ltd and another**, 2005 E.A and that of **Tanzania Rent a Car Limited vs. Peter Kihumu** (supra) and urged this Court to dismiss the entire application with cost.

A rejoinder submission was filed by Mr. Dickson Sanga and the same was served upon the Respondents. In his rejoinder Mr. Sanga reiterated his contention that, the cost of instruction fee amounting to TZS 23,569,415/= as well as the amount in respect of transport and disbursement costs, were awarded without justification and were baseless. He rejoined further that; the Applicant did disclose the reasons for such a view in the supporting affidavit including the anomalies complained of one being that the main case took 3 years, but that fact was not due to any fault on the part of the Applicant but rather due to other unavoidable circumstances.

He submitted further that, on the issue of producing receipt on proving instruction fee, much as he agrees that attaching of receipt was not necessary, what was required was proof of the claimed costs to the satisfaction of the Court as well elaborated in the case of **Said s/o Ally vs. Haidari R. Mshiha** (supra).

Mr. Sanga contended and still insisted that; even the Taxing Officer did agree with the submission, as page 4 of the record would reveal, at paragraph 1, that the main case was a very simple one but still Taxing Officer awarded instruction fee to the tune of TZS 23,569,415/= which was a colossal amount.

Besides, Mr. Sanga rejoined that, even though the Taxing Officer applied the scales provided for by law, her decision was made contrary to the law because no party moved the Court to that effect. To cement his contention, he placed reliance on the case of **Bryceson Mwambope vs. Simina Ikenda**, Civil Reference No. 17 of 2019, HCT, Dar es salaam. In that case, the Court was of the view that:

“a court cannot make a new case altogether and grant relief neither prayed for in the plaint nor flowing naturally from the grounds of claims stated in the plaint.”

Mr. Sanga maintained further that, as per the record at page 5 paragraph 1, the Respondent did pray to be awarded TZS 1,000,000/= as costs attending Taxation Cause No. 37 of 2019 and the Taxing officer awarded it as prayed. In his view, such an award was contrary to the provision of the law under Order 55 (3) of the Advocates remunerations Order, 2015. With all that having been laid bare, he urged this Court to re-assess the costs awarded and proceed to grant the application, quash the Taxing Officer’s decision, and set it aside.

I have considered all the rival submissions made by the learned counsels for the parties herein. The contentious argument and dissatisfactions about instruction fees awarded by a Taxing Officer and taxation of bills of cost generally, are not novel issues. As this Court stated in the case of **Amos Njile Lili vs. Amana Bank Ltd and Another**, Reference

Appl. No. 1 of 2021, (HC) (unreported), Courts have in the past dealt with such matters and set out conditions upon which a taxation reference application should be dealt with by the Court in which it is filed.

In **Asea Brown Boveri Ltd vs. Bawazir Glass Works Ltd and another** [2005] 1 EA 17, for instance, 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.”

Similarly, in the case of **VIP Engineering & Marketing Ltd vs. Citibank Tanzania Limited** (Civil Application 24 of 2019) [2021] TZCA 112 (Neutral Citation), citing the case of **Premchand Raichand Ltd and another vs. Quarry Services of East Africa Ltd and others (No. 3)** [1972] 1 EA 162, the Court of Appeal of Tanzania stated, 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."

In the present case, the Applicant is challenging the amount the Taxing Officer awarded as instruction fees arguing that, given the nature of the case, that amount (which is TZS 23,569,415/=) was excessive. It should be noted that, the Taxing Officer enjoys a wide margin of appreciation when determining a Bill of Costs. The question I am obliged to answer, therefore, is whether the Taxing Officer exercised her discretion injudiciously or acted upon a wrong principle or applied a wrong consideration.



In my view, after looking at the decision impugned by the Applicant and the submissions made before this Court, I do not agree with the submissions made by Mr. Sanga that the Taxing Officer erred in awarding TZS 23,569,415/-. In the first place, the Taxing Officer arrived at that decision after trimming down the earlier amount of TZS 40,000,000/- which she found to be on the high side and, in exercise of her discretion, she arrived at the currently impugned TZS 23,569,415/= and assigned reasons to that effect.

In the earlier cited case of **Tanzania Rent a Car Limited** (supra) the Court of Appeal of Tanzania commented on award of instruction fees and stated that:

"The award of instruction fees is peculiarly within the discretion of a taxing officer and the Court will always be reluctant to interfere with his decision, unless it is proved that the taxing officer exercised his discretion injudiciously or has acted upon a wrong principle or applied wrong consideration."

Nowhere was the learned counsel for the Applicant established with sound reasons that the Taxing Officer was unable to exercise her discretion judiciously in arriving at such an amount. In view of that, I for one would not interfere with what she adjudged as the correct amount for instruction fees prayed for.

As regard the issue of charging TZS 1000,000/= as costs of prosecuting the Bill of Cost (Taxation Cause No.37 of 2019) indeed it my finding that, the same was wrongly awarded since they were prayed and granted in contravention of Order 55 (3) of the Advocates Remuneration Order, 2015. It ought not be included in the Bill of Cost.

For that reason, I do agree with the submissions of Mr. Sanga on that point and proceed to strike out that amount since it was wrongly pleaded and erroneously granted. In the upshot and, save for the TZS 1,000,000/=, the amount wrongly prayed for and erroneously granted, the Applicant's prayer to have the entire decision of the Taxing Master quashed, set aside and replaced with a fresh assessment is

hereby denied. In view of the above, this Court settles for the following:

1. That, the amount equal to TZS 23,569,415/= charged as instruction fees by the Taxing Officer was rightly arrived at by the Taxing Officer and nothing to fault her decision on that.
2. That, the amount equal to TZS 1000,000/- prayed for as costs for attending Taxation Cause No.37 of 2019 was wrongly prayed for and erroneously granted, and, hence, such an award is hereby struck out and set aside.
3. That, based on the underlying circumstances of this matter, each party should bear its own costs.

**DATED at DAR-ES-SALAAM, THIS 09<sup>TH</sup> DAY OF JUNE 2023**



*John Nangela*

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**DEO JOHN NANGELA**  
**JUDGE**

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