

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL REFERENCE NO. 17 OF 2022

*(Arising from the ruling of the Taxing Officer in Taxation Cause No. 11 of 2022
delivered on 16th September 2022 by Honourable M.B. Mpaze, DR)*

BETWEEN

SIKEM REAL ESTATE DEVELOPERS LIMITEDAPPLICANT

VERSUS

SERENGETI BREWERIES LTD.....RESPONDENT

RULING

Date of last order:23/11/2022

Date of ruling:17/02/2023

AGATHO, J.:

The applicant brought the application at hand persuading this Court to vary the decision of taxing officer Hon. Mpanze Deputy Registrar in the Bill of Costs No. 112 of 2022 delivered on 11/09/2022 on five grounds:

1. That the Hon. Taxing officer erred for failure to tax item one regarding instruction fees as to the total claim reflected in the decree was not TSH. 1,091,566,812.36 but TSH. 4,492,078,693/= whose 3% is TSH. 134,000,000/=.
2. That the Hon. Taxing officer erred for taxing appearance in court for hearing of the case less than TSH. 300,000/= as paid by the Applicant.
3. That the Hon. Taxing officer erred in law when she taxed off disbursement costs for photocopies and electronic filing charges as item 42 and 43 whose proof was presented in the Court.

4. That the Hon. Taxing officer erred in law when she taxed off disbursements costs for witnesses expenses under items 45 up to 55 whose proof was presented in the Court.
5. That the Hon. Taxing officer erred in law when she taxed off instruction and attending taxation proceedings.

In protesting the reference application, the respondent filed counter affidavit. It worth noting that both parties were under legal representation. Whereas Ms. Jackline Kulwa appeared for the Applicant, Mr. Erick Denga represented the Respondent. The reference application was heard orally.

But before examining the submissions by the parties, I should clarify few points. The reference application at hand is governed by the Advocates Remuneration Order, GN. No. 264 of 2015, which is the law on taxation proceedings.

In taxation, the taxing officer has wide discretionary powers. But such powers must be exercised judiciously and in accordance with the law. The said powers can be interfered by this Court's in very limited circumstances. Namely, (1) where there is unreasonable taxation either high or low taxation or unjustifiable taxing off an item. (2) Where the taxing officer failed to observe the law. In **Haji Athumani Issa v. R. Rweitama Mutatu [1992] TLR 372 at page 373** it 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 injudiciously. (See the case of **Haidan Bin Mohamed Elmandry and others v. Khadija Binti Ali Bin Salen [1956] 23 E.A.C.A.313**).*

Now turning to the submissions by learned advocates, starting with the Applicant's counsel who began her submission by praying to adopt the affidavit sworn by Simon Julius Gatuna the managing director of the applicant in support of the application to form part of the submission.

Regarding the first ground, she submitted that it is reflected in the ruling of the taxing officer that when she was taxing the instruction fees (item 1) she considered the claimed amount as TZS. 1,191,566,821.36 and this is reflected on page 5 of the ruling. The counsel stated that in the ruling the taxing officer guided herself and awarded the applicant 3% of the amount which is contrary to the proceedings and judgment of the court.

The counsel was of the view that the decree on pages 1 and 2 clearly shows that the claim of the plaintiff against the defendant was for payment of TZS. 4,491,887,127.91. The counsel further submitted that the Taxing officer when applying the same principle of 3% she ought to have taxed the amount as presented as it was lower than the actual amount of 3% which is TZS. 134,756,613.84. But the applicant presented TZS. 134,000,000/= only as instruction fees. She went on submitting that the actual amount to be taxed was TZS 134,000,000/= and not TZS 35,747,004.64 awarded as instruction fee. It was the Applicant's prayer that the Court uplift the amount to reflect the actual amount.

In opposing the first ground, Mr Denga, the Respondent's counsel submitted that the taxing officer rightly pegged the 3% formula in calculating the instruction fee from TZS 1,191,566,812.36. According to the learned counsel, the TZS 1,191,566,812.36 was for specific damages

which the Applicant claimed or suffered, and which was granted by the trial judge. To him the rest of the amount as stated by the Applicant's counsel in her submission are accelerated costs or losses from the breach of contract. On this point Mr Denga referred to the decree attached in the reference application that the said subsequent figures take into consideration both penal or punitive interests and accrued interest. He opined that the amount for the foregoing categories cannot be added on top of special damages that was granted by the trial judge so that the 3% formula can be pegged from the said sum. In alternative, and without prejudice to what he submitted earlier Mr Denga cautioned the Court in this application that it is not vested or availed with a copy of the plaint in Commercial Case No. 3 of 2020 to appreciate the stated amount pleaded by the Applicant's counsel during her submission in chief. Mr Denga intriguingly submitted that any attempt to do so now amount to submission by the counsel from the bar which is not admissible. To that end he submitted that the taxing officer correctly awarded instruction fee by pegging the 3% formula on TZS. 1,191, 566,812.36. In his view, the first ground of reference lacks merit and it should be dismissed.

Ms. Kulwa, the Applicant's counsel re-joined on the issue of instruction fee, which the respondent's counsel said to be the discretion of the court and he cemented that with the case of **Pardhan v Osman [1969] EA 528**. The Applicant's counsel opposed that stance and she was of view that was the position before the promulgation of the Advocates Remuneration Orders of 2015. She added that there are circumstances where the law guides the Court when determining the application for bill of costs. The same was also reflected even in the impugned ruling at page 4 when the taxing officer wanted to compute the amount of instruction

fee, she directly stated the specific provision which guided her to determine the said instruction fee. And she cited the 9th schedule item 8 of the Advocates Remuneration Orders of 2015. Therefore, Ms. Kulwa was of the view that the position of **Pardhan v Osman [1969] EA 528** is inapplicable in the circumstances of the present case.

Along that she protested the submission of Mr Denga that the principle used to tax the amount claimed of TZS. 1,191,566,812.36 was correct because it was the specific damages claimed by the Applicant. Ms. Kulwa argued that saying so is to mislead the court as even if one reads the decree of the court, the amount which was split in three forms, was specific damages claimed by the Applicant and which was proved during hearing of the Commercial Case No. 3 of 2020. She also said even the wording of the amount split was specifically shown as specific damages. It was the submission of the Applicant's counsel that the amount claimed was TZS 4, 491,887,127.93. And she prayed that the Applicant be awarded the 3% amount which is TSH. 134,000,000/= as presented.

As for the first ground, let me start with the Respondent's counsel caution to the Court that in this application it is not vested or availed with a copy of the plaint in Commercial Case No. 3 of 2020 to appreciate the stated amount pleaded by the counsel during her submission in chief. He intriguingly submitted that any attempt to do so now amount to submission by the counsel from the bar which is not admissible. I should briefly say that there nothing precluding the Court from examining the proceedings of taxation to make an informed decision.

Now, the issue that divides the parties in as far as the first ground is concerned is whether it was proper for the taxing officer to tax 3% of TZS

1,191,566,821.36 being specific damages (the liquidated sum) claimed and granted to the Applicant by the trial judge. That was taxed as TZS 35,747,004.64/=. But looking at the decree on page 1 and 2 the amount claimed and granted were:

(2) A total of TZS 1,191, 566, 821.36 being specific damages

(3) A total of TZS 1,055,000,000/= being specific damages suffered by the Plaintiff in terms of the recalled bank guarantee, plus its accrued penal interest.

(4) A total of TZS 2,244, 320, 315.55 being accrued interest before the filing of the suit.

In my view the taxation relates to the amount claim and granted. It should not include the interest. From that it follows that the taxed amount of TZS 35,747,004.64/= is 3% of TZS 1,191, 566, 821.36 claimed and granted as specific damages. It is visible that the taxing officer did not tax TZS 1,055,000,000/= which was specific damages claimed and awarded due to suffering by the Plaintiff in terms of the recalled bank guarantee, plus its accrued penal interest. Perhaps a confusion was that the said amount was not just the specific damages, it included the accrued penal interest. But it is difficult to know exactly how much the interest in that context was. Nevertheless, the benefit of doubt should have been given to the Applicant because the amount embedded specific damages. Consequently, I proceed to tax 3% of sum total of TZS 1,191, 566, 821.36 and 1,055,000,000/=. The sum is thus TZS 2,246,566,821.36 whose 3% is TZS 67,397,004.54. Therefore, I tax the aforesaid amount at TZS 67,397,004.54. I however, and to some extent concur with taxing officer in not taxing interest.

Turning to the second ground, it states that appearance in court for hearing where the taxing officer taxed less than TZS 300,000/= for hearing as reflected at page 5 of the Ruling. And the basis of the taxing officer doing so was that the Applicant did not prove the actual time they spent in court. Ms. Kulwa, the Applicant's counsel for the Applicant submitted that the proceedings before this court are recorded. And since the file was before the taxing officer, she ought to have cleared the doubt by ascertaining the time spent during hearing as the hearing conducted took more than six hours. She submitted further that guided by item 3(a) of the 8th schedule of the Advocates Remuneration Order G.N. 264 of 2015 which provides for attendance in ordinary cases per 15minutes it is TZS 50,000/=. She added in her submission that the amount charged of TZS. 300,000/= for each hearing is reasonable amount looking at the nature of the case. She said it took more than 6 hours for hearing session. She concluded the second ground by praying that the amount be lifted up and the TZS 300,000/ be granted.

Mr Denga, the Respondent's counsel contested the second ground, that the taxing officer erred in law for taxing less than TSH. 300,000/= for the attendance during hearing. He submitted that the taxing officer did more than fair to grant TZS 1,900,000/= for attendance during hearing while the Applicant never entered appearance to justify the costs. The counsel referred to page 5 paragraph 3 of the ruling where the taxing officer stated:

"As the decree holder did not appear and prove actual time, which was spent in court, but as there is no dispute that the parties attended in Court, I will allow the attendance fees as follows..."

The learned counsel continued to submit that even if the decree holder did not appear in court during hearing of Taxation Cause No. 112 of 2022 still the taxing officer was generous enough to grant her attendance costs. He prayed that the Court be pleased not to disturb the amount granted and proceed to find ground two also lacking merit.

The Applicant's counsel in her rejoinder had a contrasting view to that of the Respondent's counsel who found the amount of TZS 100,000/= awarded for attendance during hearing was fair because the counsel for the Applicant failed to appear. Ms. Kulwa submitted that the taxing officer is vested with jurisdiction to proceed with taxation even if the parties' default to appear. She cited Order 68 of the Advocates Remuneration Order to support her stance. She added that since the Applicant presented the bill of costs then it was within the mandate of taxing officer to award the amount presented in conformity with the records before her. She concluded this point by praying to reiterate what was submitted in the submission in chief that TZS 300,000/= be granted.

Let me begin to analyse the rival submission on the second ground by ironing out two points. First, on consequence of non-appearance in taxation proceedings, and second, a need for proving the costs claimed. As for consequence of non-appearance in taxation proceedings, Order 11(a) of Advocates Remuneration Order is loud that:

"Where the advocate who has been served with notice to appear during taxation proceedings defaults to appear then the taxing officer shall issue an order forfeiting the fees entitled to the advocate for drawing the bill of costs and attending taxation or for paying any unnecessary or improper

expenses for which such an advocate caused the other party to incur and he may proceed ex parte with such taxation."

In my view what is gathered from the above provision of the law and reflecting on the present case, the taxing officer should have *inter alia* given an order forfeiting the fees payable to the advocate for drawing of the bill of costs and attending taxation. Therefore, the taxing officer was indeed generous to the Applicant. As for the second point on a need for proving the costs claimed, while it is true that in taxation proceedings receipts may not be demanded to prove the expenses incurred including instruction fees, it is vital that there should be some sort of justification for any costs claimed. It is elementary that he who alleges must prove. See Section 110 of the Evidence Act [Cap 6 R.E. 2019]. The act of the Applicant's counsel shifting the burden of proof to the Court that the taxing officer ought to have consulted the electronic recording of proceedings to check how many hours were spent in the hearing proceedings of the suit is unwarranted invitation that could turn the Court into a busy body that steps into the shoes of the Applicant. Therefore, the submission by the Applicant's counsel on this point is a confirmation that the Applicant abdicated her obligation to substantiate the costs claimed. In lieu of what has been stated, I find the taxing of TZS 100,000 for items 6,7,15,16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, and 31 not only reasonable but also lenient and generous. That surely ought to have been appreciated by the Applicant. In the premises the prayer to vary taxing officer's stand on the second ground is declined.

Regarding the third ground, that the taxing officer erred in law when she taxed off photocopies and e-filing charges under items 42 and 43 of the Bill of costs, Ms. Kulwa, the Applicant counsel submitted that the pleadings

in Commercial Case No. 03 of 2020 contained a lot of documents divided in bundles/volumes and the system of filing the suit before the Court requires the same documents to be scanned and uploaded on to the system. For that matter, the Applicant incurred costs for photocopying and scanning the said documents. Thus, the Applicant prayed that the same be allowed and the court be pleased to award her the claimed amount as reflected on items 42 and 43 of the bill of costs.

Interestingly, the Respondent faulted the third ground regarding photocopies and e-filing charges. Mr Denga, for the Respondent, submitted that first and foremost that both falls within instruction fees. That is why even the counsel for Applicant cited no authority be it case law or Advocates Remuneration Order to amplify the claim. The counsel wondered that he knows of no law which stipulates that the e-Filing charges be specifically reimbursed as costs to the decree holder. He hence invited the Court to find this ground to be without merit.

The Applicant's counsel reacted to the Respondent's opposition of the third ground on the issue of photocopies and e-filing charges. He opined that there is a provision in the 11th Schedule item 2(d) of the Advocates Remuneration Order dealing with copies. Regarding the e-filing, she submitted that this is a development of the law, and which the Respondent did not object that the pleadings were scanned and filed before the court through e-filing system. The Applicant counsel stressed that those were miscellaneous expenses incurred. To her the taxing officer erred in taxing them off.

My view on the third ground on photocopies and e-filing charges is that the said ground appears to be alien in that the Advocates Remuneration

Order does not provide for the same. It may be asked though, are photocopying, scanning and e-Filing expenses not covered by the Advocates Remuneration Order? Can they be taxed? This should not detain us much. It is imperative that, only items stated in the Advocates Remuneration Order can be taxed.

Moreover, and in my view the law is clear on copies. That is because under item 2(a) of the 11th Schedule to the Advocates Remuneration Order provides for copies. Therefore, it was inappropriate to tax off the photocopying expenses under item 42 of the Bill of costs. The photocopying expenses ought to be taxed. However, the Applicant's counsel erroneously cited item 2(d) of the 11th Schedule to the Advocates Remuneration Orders dealing with copies in special cases. The item 2(a) of the said Schedule covers copies in general sense including plaint, Written Statement of Defence, and others. What is strange thought is that the Applicant did not enumerate what things were photocopied. That certainly did not please the taxing officer. I agree with the taxing officer that the photocopying charges were without basis or rather unsubstantiated. For that reason, they cannot be taxed.

Furthermore, I am not convinced on scanning charges (item 43) too. They are nowhere stated in the Advocates Remuneration Order. They were deservingly taxed off. Similarly, the e-filing fees were rightly taxed off. Frankly, the e-filing fees are still court fees that have already been charged under disbursement (items 35 and 36). Therefore, they cannot be reclaimed again. Thus, I will not deal with them. I am saying so because e-filing fees are filing fees, and they were accordingly taxed.

The fourth ground was that the taxing officer erred in law when she taxed off the disbursement costs for the witnesses under items 45-55 of the bill costs all those were taxed off. The Applicant's counsel submitted that according to the Advocates Remuneration Order, order 61 it provides for discretion of the taxing officer in allowing the witness expenses. She went on submitting that as reflected in the proceedings, the Applicant is the company whose office is in Mbeya and the witnesses came from Mbeya. And in all time when the matter was scheduled for hearing the Applicant's Managing Director appeared before the Court and he was the sole witness in this case. He pleaded with the Court that based on the circumstances the taxing officer ought to have granted the expenses incurred by the witness as presented in the Bill of costs. He ended submission on this ground by praying that the court to grant the amount claimed for witness expenses.

The Respondent's counsel objected to the fourth ground where the taxing officer is being attacked for taxing off witnesses' expenses. The counsel brought to the attention of the Court the fact that the Applicant did not appear during hearing of Taxation Cause No. 112 of 2022. And hence the claim for the witnesses' expenses were therefore not justified. Along that the Respondent's counsel pointed out that the Applicant contravened the law and the taxing officer rightly taxed off the witness expenses in view of Orders 61(3) and 58(1) of the Advocates Remuneration Order. The law under Order 58(1) requires that receipts or vouchers for all disbursement charged in a bill of costs other than witness allowance and expenses supported by statement signed by an advocate shall be produced at the taxation if required by the taxing officer. Mr Denga submitted further that much as the law does not requires that witness allowances and expenses

to be produced during taxation. But it requires the said witnesses' expenses or allowance be supported by statement signed by an advocate. That is not all, according to Respondent's counsel, the provisions of Order 61(1) states that when taxing costs of witnesses' expenses the same shall be supported by a statement signed by an advocate and filed with the bill of costs stating:

- (a) The place of abode and the condition, quality, occupation or
- (b) rank in life of the witness or intended witness charged for
- (c) a distance they have had travelled, mode of travel, and if by rail the class in which such witness travelled for the purpose of attending the trial.
- (d) Whether to the knowledge or belief of the deponent they attended as witnesses in any other cause or came upon any other business
- (e) That statement shall state that they were material and necessary witness for the party on the trial of the cause, and the notice of their evidence must be produced on taxation.

From the foregoing the Respondent's counsel concluded that since the above provisions are couched in mandatory terms and no statement signed by the advocate were filed with the Taxation Cause No. 112 of 2022, the taxing officer rightly taxed off the said witness expenses. He thus asked the court to find the above ground of reference lacking merit and dismiss it.

I noted that the Applicant's counsel did not bother to re-join on this point. Rather he reiterated her submission in chief. The Court's stand in a quest for witness's expenses is brief. It is trite that when the law has

categorically set certain requirements or procedure the same must be followed. In the application at hand the Applicant laments the taxing officer decision to tax off the witnesses' expenses. But the law has set procedures or format as to how the witness expenses may be claimed. That is the import drawn from Order 61(1) and (3) of Advocates Remuneration Order. Failure to comply with such format is a fatality that cannot be remedied now. In my considered view the Applicant's non-appearance at the hearing of taxation was equally his own folly. The fourth ground therefore is rejected for lacking substance.

The last ground is that the taxing officer erred in law when she taxed off instruction fee, and charges for attending taxation proceedings. Ms. Kulwa, the Applicant's counsel submitted that looking at the bill of costs at the last part, indicated as anticipated costs for filling the bill of costs which the taxing officer taxed off the whole part because it is contrary to the law, Order 55 (3) of the Advocates Remuneration Order which is contrary to the presented bill of costs. That the cited Order states that the said part shall remain blank for completion by the taxing officer. She submitted that the Applicant complied with the same except the item for instruction fee to pursue the Bill of costs. The learned counsel went on praying that it should be awarded since the Applicant filed the bill of costs and there are costs incurred for filing the bill of costs, and costs incurred for attending the Court to file the said bill of costs. She added that they effected service to the Respondent.

On his side Mr Denga, the Respondent's counsel replied to the last ground that the taxing officer is being attacked for disallowing the costs for attending and prosecuting Taxation Cause No. 112 of 2022. He submitted that the taxing officer is justified in law because the Applicant herein

contravened the provision of Order 55(3) of the Advocates Remuneration Orders of 2015. The said provision states that fees for attending taxation cause shall not be included in the body of the bill. But the item shall appear at the end and the amount left blank for completion by the taxing officer. He opined that this provision is couched in mandatory terms which requires compliance. He submitted that since the Applicant contravened the law, the taxing officer was correct in declining granting it. The inclusion of the amount by the Applicant was uncalled for as it pre-empted the taxing officer.

The Applicant's rejoinder on the last ground was that the provision of the Order states that fees for attending taxation shall not be included, it shall appear at the end and the amount be left blank. It was her submission that looking at Taxation Cause No. 112 of 2022 the said amount for attending taxation cause were left blank in compliance with the law. But the instruction fee was included. She opined that the taxing officer erred in taxing them off. He prayed that this application be granted with costs.

Apparently, the last ground for reference is straightforward. It calls upon the Court to rule whether it was proper for the taxing officer to tax off the whole of item 60 costs for attending bill of costs. I am settled in my view that she justifiably did so, considering the provision of order 55(3) of the Advocates Remuneration Order which reads as follows:

"Fee for attending taxation shall not be included in the body of the bill, but the item shall appear at the end, and the amount left blank for completion by the taxing officer."

Regarding the bill of costs on item 60, there are two points to be noted: first, it purports to include instruction fee TZS 3,000,000/=. And second,


it has left blank the costs for attending bill of costs hearing. What one deduces here is that the Applicant is attempting to be clever by mentioning the instruction fee and leaving blank another item in the same category named costs of bill of costs hearing. I appreciate the clarity in Order 53(3) of Advocates Remuneration Order. It talks about fee for attending taxation proceedings. It does not matter whether the Applicant calls it instruction fee or costs for attending bill of costs hearing. I am thus in accord with the taxing officer on this. The Applicant's inclusion of instruction fees for the bill of costs was a clear violation of Order 53(3) of the Advocates Remuneration Order. That said the last ground is dismissed for lacking merit.

In the end, the taxation is varied to extent stated hereinabove. Each party shall bear its costs.

It is so ordered.

DATED at DAR ES SALAAM this 17th Day of February 2023.




U. J. AGATHO
JUDGE
17/02/2023

Date: 17/02/2023

Coram: Hon. U.J. Agatho J.

For Applicant: Bernedetha Fabian (Advocate)

For Respondent: Erick Denga (Advocate.)

C/Clerk: Ms. Edith Kanju

Court: Ruling delivered today, this 17th February 2023 in the presence of Bernedetha Fabian, learned counsel for the Applicant, and Erick Denga, the learned counsel for the Respondent.



U. J. AGATHO

JUDGE

17/02/2023