

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL REFERENCE NO. 26 OF 2022

(Arising from Taxation Cause No. 115 of 2022)

TANZANIA PORTS AUTHORITY..... 1ST APPLICANT

ATTORNEY GENERAL 2ND APPLICANT

VERSUS

JV TANGERM CONSTRUCTION CO. LIMITED &

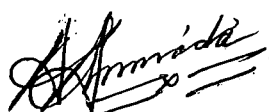
TECHNOCOMBINE CONSTRUCTION LIMITED

(A JOINT VENTURE).....RESPONDENT

RULING

A.A. MBAGWA J.

This is a reference against the decision of the taxing officer (M. B. Mpaze) in Taxation Cause No. 115 of 2022. The respondent successfully sued the appellants in Commercial Case No. 117 of 2015. She was thus granted costs of the case, among other reliefs. As such, the respondent filed Taxation Cause No. 115 of 2022 to claim the costs she incurred in prosecuting Commercial Case No. 117 of 2015. In her ruling delivered on 28th October, 2022, the taxing master taxed the whole bill of costs at TZS



2, 047, 067, 100.00 out of which TZS 2,000,000,000/= was instruction fee.

Aggrieved, the applicants have preferred this reference by way of chamber summons made under Order 7(1) and (2) of the Advocates Remuneration Order 2015 praying for the following reliefs;

1. That this Honourable Court be pleased to interfere and reverse the decision of the Taxing Master on ground of improper exercise of discretion by awarding the instruction fees and other costs to the Respondent contrary to the law.
2. Any other order (s) that, this Honourable Court deems fit to grant for the interest of justice.

The applicants' chamber summons was supported by an affidavit sworn by Stanley Kalokola who deponed to have taken part in the prosecution of Commercial Case No. 117 of 2015 and subsequently Taxation Cause No. 115 of 2022.

Mr. Kalokola faults the learned taxing officer for wrongly awarding TZS 2,000,000,000/= as instruction fees based on 3% chargeable under the Advocates Remuneration Order, 2015. He laments that the taxing officer did not judiciously exercise her discretion for the said sum was not proved by the respondent (decree holder). Mr. Kalokola further complained that

A handwritten signature in black ink, appearing to be 'A. Amadi', written over a horizontal line.

the taxing officer relied on the amount claimed in the plaint in Commercial Case No. 117 of 2015 to award the instruction fee instead of basing on the proved decretal sum. He concluded that the taxing officer, in exercising her discretion, disregarded the established principles of law.

In contrast, the application was resisted by the respondent through a counter affidavit sworn by Seni Songwe Malimi who also stated that he, together with Advocate Michael Ngalo handled both Commercial Case No. 117 of 2015 and Taxation Cause No. 115 of 2022. Mr. Malimi states that the instruction fee was taxed based on 3% provided under the Advocates Remuneration Order, 2015 and other attending considerations as such, the taxing officer was right. He also stated that the decree from which Taxation Cause No. 115 of 2022 emanated is in excess of TZS 20 billion. He stressed that the decision of the taxing officer is justified owing to the fact that the pleadings in Commercial Case No. 117 of 2015 were voluminous, the matter involved complex facts and legal issues, the respondent had services of two senior counsel and its trial took long time. When the matter was scheduled for hearing, the applicants were represented by a team of learned attorneys comprising of Samwel Lukelo (PSA), Edwin Webiro (SA) and Stephen Noe (SA). On the other part, the respondent was represented by Seni Songwe Malimi, learned advocate.



At the outset Mr. Webiro adopted the contents of affidavit sworn by Stanley Kalokola. He then proceeded that as general rule, the decision can only be challenged where it is established that the taxing master misdirected himself or instruction fee taxed was so high or low in such a way that it calls for intervention of this Court or where the taxing officer took into account matters that he ought not to have considered. In support of his assertion, Mr. Webiro referred this Court to the case of **Pardhan vs Osman** 1969 VOL EALR. 528.

The learned State Attorney submitted that the taxing master misdirected herself on the following grounds; **one**, that in taxing the bill of costs, she applied the wrong schedule to wit, the 9th Schedule instead of 11th schedule as indicated at page 9 and 11 of the ruling. He clarified that the 9th Schedule deals with liquidated sum which, according to the learned State Attorney, was not applicable in this matter. He argued that liquidated sum refers to the amount which the parties agree in the contract that in case of dispute the agreed sum would be charged. He also referred to Black's Law Dictionary 8th Edition at page 264 and 418, and submitted that it defines liquidated sum and liquidated damages without detailed elaborations. Further, the learned State Attorney continued that this Court also had once an opportunity to define liquidated

A handwritten signature in black ink, appearing to read "A. Aminda", with a horizontal line underneath.

sum in the case of **Southern Highland Earthworks Company LTD vs UAP Insurance Tanzania Limited Ltd**, Taxation Reference No. 1 of 2021, HC at Songea at page 8. He thus concluded that the application of the 9th schedule was not proper because there was no liquidated sum on which the parties had agreed. He opined that what was pleaded in the plaint was special damages which is different from liquidated sum. He stressed that the taxing officer should have applied item "k" of the 11th Schedule and in case what is provided was found insufficient, then section 54 of the Advocate Act could be invoked.

In the alternative, Mr. Webiro submitted that even if the 9th schedule were properly applied, the taxing officer ought to have taxed the bill of costs consistent with an award made by the Court. He explained that what was claimed in the plaint was about TZS 115 billion but the plaintiff did not manage to prove the entire amount as the decree indicates that the plaintiff managed to prove about TZS 20 billion. It was thus his humble submission that the percentage or the sum to be used in calculating the instruction fee was the amount awarded in the decree and not the amount claimed in the plaint. While referring to the case of **Premchand Raichand Limited and Another vs QUARRY Services of East Africa Limited and Another** 1972 Vol. I EALR. No. 162, the learned State

A handwritten signature in black ink, appearing to be 'A. M. M. M.', with a horizontal line underneath it.

Attorney insisted that in deciding on the instruction fee, the court is enjoined to consider the following principles;

- a) That costs should not be allowed to raise to such a level as to confine access to court to the wealth.
- b) That successful litigant ought to be fairly reimbursed for the costs he had incurred.
- c) That so far as practicable, there should be consistence with the awards made

The State Attorney concluded that the taxing master ought to have charged the instruction fee by looking at the awarded amount and since there was no agreement adduced by the advocate, he was opined that the decision of the taxing officer is liable to be set aside with costs. He added that in case the court finds that the amount was supposed to be one million, the respondent should be denied the entire sum as the same would be below 1/6 of the claimed amount as per order 48.

In reply, Mr. Seni Songwe Malimi, like his counterpart commenced by adopting the respondent's counter affidavit. At the outset, Mr. Malimi told the Court that the reference has no purpose in the sense that it does not tell the applicant's position in the taxation of this matter. He said that the applicant ought to show the figure he is contesting or he ought to show



the reliefs in terms of figures. To support his argument, Mr. Malimi referred this Court to the case of **the Jubilee Insurance Company of Tanzania vs Vodacom Tanzania Public LTD Company**, Consolidated Taxation Reference No. 02 and No. 03 of 2020, HC Commercial Division at Dar es Salaam. He said that at page 14 of the above case, Hon. Nangela, J held that the relief which, at the end, was to be awarded in the reference ought to be included in the chamber summons.

With regard to invocation of the 9th schedule instead of 11th schedule and that the 9th schedule is meant for liquidated damages which is not applicable in the instant case, the respondent's counsel submitted that the argument by the applicant is misconceived. It was the counsel's submission that the word liquidated sum as appearing under the 9th schedule refers to liquidated amount pleaded in the suit. He argued that the liquidated damages refer to specific amount claimed in a suit. He beseeched the Court to be inspired by the provisions of Order VII rule 2 of the Civil Procedure Code which requires a party who claims in a monetary suit to specifically plead the amount as such, according to the respondent's counsel, that is the reason why the 9th schedule provides for scales based on claims. He added that the practice of this Court has been to invoke the 9th schedule on monetary decree. He cited the case of



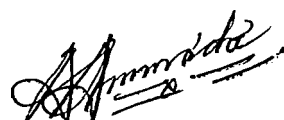
National Bank of Commerce Limited vs MM Worldwide Trading Co. LTD and 2 others, Miscellaneous Commercial Cause No. 217 of 2017, HC Commercial Division at Dar es Salaam particularly at page 7 and 8.

Furthermore, while expounding on the meaning of liquidated sum, the learned counsel referred to page 264 of the Black's Law Dictionary and said that it defines liquidated claims as;

'A claim for an amount previously agreed on by the parties or that can be precisely determined by operation of law or by the terms of the parties' agreement'

On the strength of the above definition, the counsel submitted that an amount which is arrived at from the parties' agreement is a liquidated sum.

Moreso, the respondent's counsel elaborated that most of the claims under Commercial Case No. 117 of 2015 except for general damages were emanating from or calculated based on agreements. He concluded that the suit from which the taxation under discussion arose was for liquidated sum hence the instant reference is without merits and therefore liable to be dismissed.

A handwritten signature in black ink, appearing to be 'A. M. M. M.', with a horizontal line underneath it.

The respondent's counsel emphasized that the present case from which this taxation arises is not among the matters listed under the 11th schedule and for that reason the 11th schedule is not applicable.

Responding on the case of **Southern Highland Company Limited** (supra) cited by the applicants' counsel, Mr. Malimi submitted that it provides narrow definition of liquidated sum. Also, the respondent's counsel cited the case of **Rose Mkeku (the Administratrix of the Estates of the late Simon Mkeku) vs Parvez Shabbirdin**, Misc. Land Application No. 89 of 2021, HC at Mwanza and submitted that the Court taxed the instruction fee at 3%.

Regarding the alternative argument that even if the 9th schedule were the proper schedule to be applied, the taxing master ought to consider the awarded amount and not claimed or pleaded amount, the respondent's counsel candidly told the Court that taxation should be charged based on the claimed amount. He referred to the case of **VIP Engineering and Marketing LTD vs Citibank Tanzania Limited**, Civil Application No. 24 of 2019, CAT at Dar es Salaam.

With respect to order 15 of the Advocates Remuneration Order and section 54 of the Advocates Act, the respondent's counsel replied that he had no problem with section 54 but in the circumstances of the case, it



was inapplicable because the respondent's lawyer charged the fee according to the amount claimed. On order 15 of the Advocates Remuneration Order, he submitted that the same is in favour of the respondent in this matter as it provides for special fee and that is within the discretion of the taxing master. He elaborated that at page 12 of the impugned ruling, the taxing master described the nature of the matter to be complex, tedious and which involved a lot of legal issues and huge amount of money. As such, the respondent's counsel submitted that even if this Court finds that it was not proper to use the 9th schedule, a special fee was allowable given the nature of the case. In the end, the respondent's counsel stated that the amount of TZS 2 billion which is less than 3% of the claimed amount awarded by the taxing master was appropriate.

Mr. Seni Malimi continued that TZS 20 billion awarded does not include the interests. According to him, TZS 2 billion taxed as instruction fee from 20 billion was proper.

With regard to the case of **PREMCHAND** (supra), the counsel submitted that owing to the circumstances of the case, the taxation of TZS 2 billion does not offend any of the principles in PREMCHARD case. He added that advocates always charge based on the claimed amount as charging based

A handwritten signature in black ink, appearing to be 'A. Amuda', with a horizontal line underneath it.

on the outcomes of the case is prohibited under Advocate Act read together with rule 81 of Advocates Professional Conducts and Etiquette Regulation, 2018, GN No. 118 of 2018

In the event, the respondent's counsel urged the court to dismiss the reference with costs.

In rejoinder, Mr. Webiro submitted that the respondent's argument that the reference has no purpose for want of clear reliefs is meritless because the reliefs are indicated in the chamber summons and have purpose because their main argument was that the 9th schedule was not correctly applied. He continued that the case of **Jubilee Insurance** (supra) cited by the respondent's counsel is distinguishable from the facts of this case because there was no misapplication of the schedule rather the applicant was complaining on the excessive amount awarded.

With respect to Order VII rule 2 of CPC referred to by the respondent's counsel, Webiro submitted that he had no problem with that as much as it requires the plaintiff to state the claimed amount in the plaint. According to him, the said order does not deal with the issue of liquidated sum.

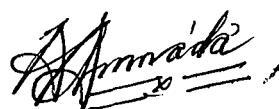
Also, the learned State Attorney distinguished the case of **National Bank of Commerce Limited vs MM Worldwide Trading Co. LTD** (supra) on the ground that the issue of liquidated sum was not discussed therein.



Elaborating on the 11th Schedule which the respondent's counsel submitted that it was not intended for monetary claims, Mr. Webiro argued that he read the entire schedule but he did not come across with the provision which clearly excludes the 11th schedule from monetary claims. He added that the respondent counsel did not supply any authority to that effect. In fine, he reiterated his submission in chief that the 11th schedule applies to non-liquidated sum or claims in particular, item (k).

More so, Mr. Webiro submitted that both parties were at one that for a claim to be liquidated it must be the one agreed in the contract/ agreement as per the definition provided in the Black's Law Dictionary. In addition, he said that he went through the judgment attached to the application particularly at page 2 and noted that there were two contracts for design and construction and the price for both contracts was TZS 12, 419, 883,947.71. He was thus opined that if the liquidated sum is what was agreed then this would be the liquidated claim. As such, any amount in excess of the mentioned amount above is not liquidated. Mr. Webiro was insistent that by pleading the amount in the plaint, it does not make it a liquidated sum rather it must be the one agreed in the contract.

I have carefully canvassed the parties' depositions and the rival submissions. The bone of the applicants' contest is on the scale used to

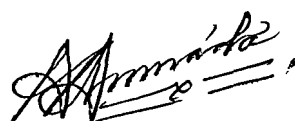
A handwritten signature in black ink, appearing to read 'A. Amvada', with a horizontal line underneath and a small flourish at the end.

charge the instruction fee in Taxation Cause No. 115 of 2022. As such, the relevant issue for determination is whether the taxing officer correctly applied the 9th schedule in taxing the instruction fee.

The applicants strongly argued that the taxing officer misdirected herself in applying the 9th schedule because that is dedicated for liquidated sum which was not applicable in Commercial Case No. 117 of 2015. Mr. Webiro was of the view that liquidated sum arises only where the parties have included a liquidated damages clause in the agreement to the effect that in case of breach, the defaulting party would pay the other party a fixed sum. The learned State Attorney submitted that the contracts from which the suit, namely, Commercial Case No. 117 of 2015 arose did not contain such a clause hence it was not proper for the taxing officer to charge the instruction fee under the 9th schedule.

In contrast, the respondent's counsel vehemently opposed the applicant's proposition of what it means by liquidated sum. He opined that the taxing officer correctly applied the 9th schedule to the Advocates Remuneration Order which cater for liquidated sum. He argued that where a party claims for a specific amount, that claim qualifies as liquidated sum.

After canvassing the rival submissions and upon my research on the subject, I have observed that there are two things which, if care is not

A handwritten signature in black ink, appearing to read "A. Aminda", with a date "20" written below it. The signature is written over a horizontal line.

taken, may be confused or interchangeably used wrongly. These are liquidated damages and liquidated sum. Liquidated damages refer to the type of compensation which is agreed by the parties to a contract in case of breach of contract. Thus, in liquidated damages there should be a specific clause in the agreement providing for damages to be paid in case the contract terms are breached. See the case of **Oil and Natural Gas Corporation Limited vs Oil Country Tabular Limited**, Arbitration Petition No. 449 of 2007, High Court of Judicature at Bombay. Furthermore, in the case of **Mcguiness vs Norwich and Peterborough Building Society** [2011] EWCA CIV 1286 at paragraph 37, the Court had the following to say,

'The most obvious use of the term "liquidated" has been in relation to liquidated damages. "Liquidated" has been defined judicially as meaning the sum which the parties have by their contract assessed as the damages to be paid for its breach.'

In the case of **the City Council of Dar es Salaam v. Taj Mohamed**, (1968) H.C.D, the Court, while deliberating on liquidated damages, held;

'Section 74 of the Contract Act provides that where a contract specifies liquidated damages the aggrieved party "is entitled, whether or not actual damage or loss is proved to have been caused there by, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named ...'


A handwritten signature in black ink, appearing to be 'A. Ammalak', with a horizontal line underneath it.

In addition, a definition on the liquidated damages was provided in the case of **Naumann, Gepp (East Africa) Ltd v Ranchhodhai Baberbhai Patel and others** [1957] 1 EA 771 (SCK) where the Court held;

'They knew that in the ordinary course of such a contract the defendants would be subject to a clause specifying a date for the completion of the building and provision for liquidated damages payable by the defendants to the owner in the event of failure to complete the building by the date specified in the contract.'

From the foregoing authorities, it goes without saying that the liquidated damages is the amount of compensation which parties to the agreement have agreed on to be paid by a party who breaches the contract. As such there should be a specific clause as submitted by Mr. Webiro.

On the contrary, liquidated sum or claim is different from liquidated damages. Liquidated sum is a claim for money or good which the claimant was deprived of by reason of wrongful act of another. In other words, liquidated sum refers to a claim of right which a party was entitled to but he was deprived of it due to someone's wrongful act. In the case of **Tanzania Sand and Stone Quarries v. Omoni Ebi** (1972) H.C.D., the High Court while adjudicating on liquidated sum held;

A handwritten signature in black ink, appearing to be 'Amrinda', with a flourish underneath.

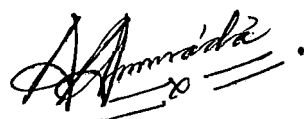
'The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing the suit. Where however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment'

Also, the similar position was taken by the Court in **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd (No 2)** [1970] 1 EA 469 (CAN).

Thus, in light of the above authorities, it is my opinion that all cases arising from breach of contracts fall under liquidated sum in that from the very beginning a party knows what he was entitled to had it not been the breach by another. To put it in a very crude way, in any claim for which the court is enjoined to grant commercial interest from the date of filing the suit to the date of judgment qualifies to be referred to as liquidated sum because a party is presumed to have been entitled to the said claim prior to the judgment.

The Ninth Schedule is titled;

"Scale of fees for contentious proceedings for liquidated sum in original and appellate jurisdiction."

A handwritten signature in black ink, appearing to read 'A. Amrinda', with a horizontal line underneath it.

Further, item 1 of the Ninth Schedule uses the phrase;

"For any claim not exceeding 2,500,000/="

My objective reading of the above phrase tells me that the instruction fee is charged based on the claim and not the award in the decree as submitted by applicants' counsel.

In view thereof, since the respondent in Commercial Case No. 117 of 2015 was claiming for sum which she was entitled to by virtue of the contracts, the claims were liquidated sum that is the reason why the court granted interest at the commercial rate from the date of filing the suit to the date of judgment.

I have gone through the judgment and decree in Commercial Case No. 117 of 2015 which were attached to the application. It is clear that the respondent herein was claiming about TZS 88 billion which is well above TZS 400,000,000/=. According to item 8 of the Ninth Schedule to the Advocates Remuneration Order, the scale of instruction fee for contentious proceedings involving liquidated sum of over TZS 400,000,000/= is 3%. As such, the taxing officer was right to tax instruction fee at TZS 2 billion being 3% of the liquidated sum to wit, TZS 88 billion.


A handwritten signature in black ink, appearing to be 'A. Amadi', with a date '11/11' written below it.

All the above considered, it is my unfeigned findings that the taxing officer correctly applied the Nineth Schedule and the amount taxed as instruction fee was proper. In the event, this reference fails for want of merits. I consequently dismiss it. I make no order as to costs in order to bring the dispute to an end.

It is so ordered.

Right of appeal is fully explained.




A. A. MBAGWA
JUDGE
10/07/2023