

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

CONSOLIDATED COMMERCIAL

REFERENCES NO. 27 AND 28 OF 2022

(Originating from Taxation Cause No. 150 of 2022)

NCBA BANK (TANZANIA) LTDAPPLICANT

VERSUS

DR. MARY ANDREW MGONJA.....RESPONDENT

RULING

A.A. MBAGWA J.

This ruling stems from the Consolidated Commercial Reference No. 27 and 28 of 2023 filed by parties herein seeking to challenge the decision of the taxing officer in respect of Taxation Cause No 150 of 2022 dated 17th November, 2013. The respondent, Dr. Mary Andrew Mgonja successfully sued the applicant in Commercial Case No. 150 of 2021 in which the applicant was ordered, among other things to pay costs. Subsequently, the respondent filed bill of costs i.e., Taxation Cause No. 150 of 2022 for reimbursement of TZS 11, 634,062/= being instruction fee, attendance in court and disbursement. The said application was heard

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and the taxing officer awarded a total sum of TZS 7,222,031/=which comprised TZS 2,917,219 being instruction fee, TZS 850,000/= being attendance costs, TZS 2,454,812/= being disbursement and TZS 1,000,000/= being costs for prosecution of taxation cause.

Astonishingly, both parties were not satisfied with the decision of the taxing officer. As such, the applicant sought to challenge the decision through Commercial Reference No. 27 of 2022 whereas the respondent challenged the decision by filing Commercial Reference No. 28 of 2022. By mutual consent, both parties agreed and prayed the Court to consolidate these two references for reason that they are against the same decision.

In Commercial Reference No. 27 of 2022, the application was supported by sworn affidavit of Regina Kiumba, the applicant's counsel whereas the respondent resisted the application through a counter affidavit sworn by Prof Leonard Paulo Shahidi. The applicant faulted the decision of the taxing officer on five grounds namely;

- i) That, the taxing officer had no jurisdiction to entertain the respondent as the applicant had already filed a notice of appeal to challenge the decision of the High Court.

- ii) That, the applicants were not given a right to be heard on the matter.
- iii) That, the decision of the taxing officer was not backed up by any materials to justify the award of the taxed sum.
- iv) That, the taxing officer decided the bill of costs in total disregard of the laid down legal principles guiding taxation matters.
- v) That, items 2, 3, 4,5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 and fee for hearing of taxation cause to the tune of TZS 7, 222, 031/= were arbitrarily awarded.

Conversely, in Commercial Reference No. 28 of 2022, the respondent, Dr. Mary Andrew Mgonja challenged the decision on the ground that the amount of TZS 2, 917,219/= which was awarded as instruction fee was excessively low. She supported the application with an affidavit sworn by Prof Leonard Paul Shaidi.

On the hearing day, the applicant was represented by Ms. Regina Kiumba, learned advocate whereas the respondent had the services of Mr. Mlyambebele Mweli, learned advocate.

Submitting in respect of the 1st ground, Ms Kiumba faulted the taxing officer for entertaining the taxation proceedings without jurisdiction. She expounded that the taxing officer heard Taxation Cause No. 150 of 2021

whilst there was a notice of appeal against the judgment and decree in Commercial Case No. 150 of 2021 (annexure TMA1). According to Ms Kiumba, the taxing officer lacked jurisdiction to hear the matter. She drew the attention of the court that any point relating to jurisdiction of the Court can be raised at any stage. To cement her submission, she referred the Court to the case of **R.S.A. Limited vs Hanspaul Automechs Limited Govindarajan Senthil Kumal**, Civil Appeal No. 179 of 2016, CAT at Dar es Salaam.

It was Ms. Kiumba's further submission that once a notice of appeal is filed, the court (taxing officer) ceases to have powers to entertain taxation proceedings. As such, in view of the applicant's counsel, the decision of the taxing officer is a nullity. To bolster her argument, the learned counsel cited the case of **Noman Mahboub (T/A Noman Al Mahboub General Trading Corporation Vs Milcafe Limited)**, Commercial Case No. 41 of 2003, HC (Commercial Division) Dar es Salaam and **Dominic Ishengoma vs Managing Director Geita Gold Mining**, Civil Reference No. 11 of 2020 at page 16. The learned counsel opined that the taxing officer ought to stay the taxation proceedings after the notice of appeal had been lodged.

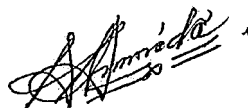


On the 2nd ground, the applicant's counsel briefly submitted that the applicant was not given the right to be heard in the sense that she was not heard as to why the claims should not be granted.

Pertaining to the 3rd ground, the applicant assailed the ruling on the reason that there were no sufficient materials to warrant the awarded costs. The learned counsel contended that the respondent did not adduce evidence such as receipts to support her claims.

Regarding the 4th ground, the learned counsel argued that the taxing officer decided the matter in total disregard of the laid down principles. She referred to the cases of **Premchand Raichand LTD and Another vs Quarry Service of East Africa LTD** and Another EALR [1972] and **Attorney General vs Amos Shavu**, Taxation Reference No. 2 of 2000, CAT at Dar es Salaam. The counsel was of the strong view that the taxing officer did not exercise her discretion wisely in taxing the instruction fee.

On the 5th ground in respect of items 7, 11,12 and 13 (court attendances) which the taxing officer charged at TZS 100,000/= each, the learned counsel strongly submitted that the rate used was so high. She submitted that the taxing officer ought to tax them at the rate of TZS 50,000/=. In relation to items, 2, 3, 4, 5,6,8, 10, 15 and 16, the counsel submitted that the amount of TZS 50,000/= for each attendance was so high. In her

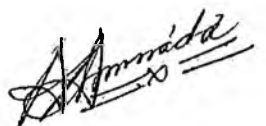
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views, the taxing officer ought to tax the court attendances at TZS 20,000/= per each item. On this, she cited the case of **Hotel Travertine Ltd VS National Bank of Commerce**, Taxation Civil Reference No. 9 of 2006, CAT at Dar es Salaam, to support her position.

In the end, the applicant's counsel invited the Court to interfere with the discretion of the taxing officer as the same was exercised injudiciously.

In reply, after adopting the counter affidavit and affidavit of Prof Leonard Paul Shaidi filed in respect of Commercial References No. 27 and 28 respectively, the respondent's counsel told the Court that the applicant's grounds are misconceived and devoid of merits.

Responding to the 1st ground on the jurisdiction of the court, the respondent's counsel submitted that the ground is misconceived as there is no law that provides for automatic stay of bill of costs just because there is a notice of appeal. He strongly submitted that the filing of a notice of appeal did not oust the court's power to hear and determine the bill of costs. Mr. Mweli supported his argument by the decision of this Court in **Rose Mkeku vs Pervez Shabbirdin**, Misc. Land Application No. 89 of 2021, HC at Mwanza. At page 7 and 8. The learned counsel further argued that if the applicant wanted the court to stay the bill of costs, she ought to move the court but unfortunately, she did not do so.



Regarding the 2nd ground on the right to be heard, the respondent's counsel dismissed the complaints for being baseless. He said that the complaint is not born from the court record and no evidence was brought by the applicant to support the contention.

Regarding the 3rd ground, the respondent's counsel had it that the folio which was filed in Taxation Cause No. 150 of 2022 was self-explanatory. He submitted that the decision of the taxing officer was based on the particulars contained in the folio.

Pertaining to the 4th ground, it was the counsel's submission that the taxing officer taxed the bill of costs according to the principles. He reasoned that Commercial Case No. 150 of 2021 from which Taxation Cause emanated was complex and that is the reason why it went through a full trial.

Coming to the 5th ground, the respondent argued that the taxing officer was justified to award the taxed amount. He picked item 7 in the folio as an example and explained that, the parties spent more than 15 minutes. Further, he submitted that the amount of TZS 50,000/= which was taxed for other items was reasonable.

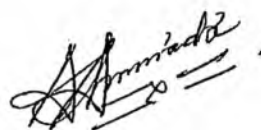
In fine, on account of his submission, the respondent's counsel urged the Court to dismiss Commercial Reference No. 27 of 2022 with costs.

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With regard to Commercial Reference No. 28 of 2022, the respondent faulted the taxing officer on one aspect namely, the instruction fee. The respondent's counsel submitted that the respondent claimed instruction fee to a tune of TZS 7,779,250/= based on the claims in the plaint to wit; TZS 63,765,625 and TZS 33,475,000/=. The learned counsel clarified that the claimed amount falls under item 6 of the 9th Schedule to the Advocates Remuneration Order which provides for 5% up to 8% of the liquidated claim. He lamented that the taxing officer erroneously taxed the instruction fee under item 7 of the 9th Schedule. He concluded that the taxing officer ought to award instruction fee of TZS 7,779,250/= as claimed in the folio. He thus prayed the court find his argument meritorious and consequently award the respondent TZS 7,779,250/= for instruction fee.

In her brief rejoinder, Ms Regina Kiumba, insisted that the amount taxed was so high considering that the case was not complex nor did it take too long. She still prayed the Court to allow the application to wit, Commercial Reference No. 27 of 2022.

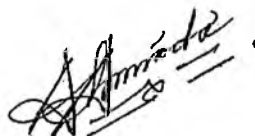
I have keenly gone through the parties' depositions and their rival submissions. I have noted that while the applicant is challenging the decision of the taxing officer and prays for reduction of the amount taxed

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as instruction fee and court attendance, the respondent seeks for reversal of the decision of the taxing officer and increase of the amount of instruction fee taxed.

Having that in mind the first question for determination is whether the taxing officer had jurisdiction to hear and determine the bill of costs. The applicant had it that since there was a notice of appeal, the taxing officer had to stay the proceedings. On the contrary, the respondent's counsel was opined that a mere filing of notice of appeal does not bar the taxing officer from hearing and determining the taxation proceedings. It is settled in law that when a notice of appeal is duly filed in the Court of Appeal, the High Court jurisdiction ceases over the matter as per case of **Tanzania Electric Supply Company Ltd vs Dowans Holdings and Another**, Civil Application No. 142 of 2012 (unreported) in which the Court of Appeal had this to say;

"It is settled law in our jurisprudence which is not disputed by the counsel for the applicant, that the lodging of a Notice of Appeal in this court against an appealable decree or order of the High Court commences proceedings in the court. We are equally convinced that it has been established that once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter.

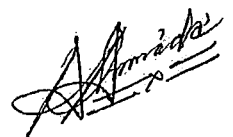
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However, the principle in the above cited case does not extend to matters like application for execution and bill of costs. In the case of **Mitsushita Electric Co. Ltd vs Charles George t/a G.G. Traders**, Civil Appeal No. 71 of 2001, the Court of Appeal had this to say;

"...Once a notice of appeal is filed, this court is seized of the matter in exclusion of the High Court except for applications specifically provided for such as leave to appeal, provision of the certificate on a point of law or execution where there is no order of stay of execution from this court..."

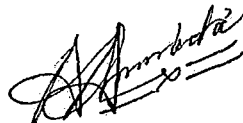
The above position was restated by the Court in the case of **Awinie Mtui and Three Others vs Stanley Ephata Kimambo (Attorney for Ephata Mathayo Kimbambo)**, Civil Application No. 19 of 2014, CAT at Arusha.

Further, this position was taken by this court when dealing with the case of **Muhoni Kitege vs The Principal Secretary Ministry of Energy and another**, Misc. Land Application Case No. 123 of 2021, HC at Mwanza at page 7 which underscored the point that taxation proceedings are not among the matters in which the jurisdiction of the High Court is ousted by filing a notice of appeal.

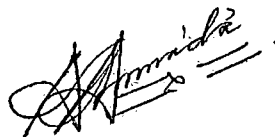
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On my part, I totally agree with the submission by the respondent's counsel that the filing of notice of appeal does not bar the taxing officer from determining the bill of costs. The reason for adopting this position is that if, a notice of appeal does oust the court's jurisdiction from hearing application for execution save where there is a stay order, it follows that the same cannot bar hearing of bill of costs which is a consequential application like execution, in the absence of the stay order. Thus, I am of the view that the taxing officer had full powers to hear and determine the bill of costs as she did. In the result, I find the 1st ground wanting in merits and consequently, I dismiss it.

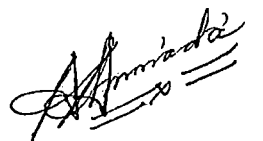
Regarding the 2nd ground that the applicant was denied right to be heard, I should say that the record speaks against the applicant's contention. At page 1 of the ruling which is attached to the application, it is clear that on the hearing date, the applicant was represented by Ndehurio Ndesamburo, learned advocate. It follows therefore that the applicant's complaint is unfounded. In the 3rd and 5th grounds, the applicant was faulting the taxing officer on the ground that she awarded the costs without sufficient materials whereas in the 4th ground the applicant contended that the taxing officer decided the bill of costs in total disregard of the guiding principles. After canvassing the arguments by the parties,



I find it pertinent to determine the grounds along with the respondent's complaint in Commercial Reference No. 28 of 2022. The applicant assailed the ruling on the reason that there were no sufficient materials to warrant the awarded costs. The learned counsel expounded that the respondent did not adduce evidence such as receipt to support her claims. On the contrary, the respondent replied that the folio was self-explanatory. I have gone through the folio which is attached to the application particularly items 2 up to 16 which are about court attendances. The taxing officer charged each court attendance at TZS 50,000 save for attendances in respect of hearing and mediation which she taxed at TZS 100,000/= each. Item 3 of the Eight Schedule to the Advocates Remuneration Order enjoins the taxing officer to tax TZS 50,000/= for every court attendance of 15 minutes or part thereof. Thus, the taxing officer can charge above 50,000/= if she is opined that the attendance exceeded 15 minutes. In the instant matter, the taxing officer charged each attendance at TZS 50,000/= except four attendances pertaining to hearing and mediation which she taxed at TZS 100,000/= each. The applicant did not dispute about the number of days attended in court. In my view, the taxing officer was within the dictates of Item 3 of the Eighth Schedule as such, her decision cannot be faulted.

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The taxing officer also taxed the instruction fee at TZS 2, 917, 219, disbursement at TZS 2, 454,812/= and costs for prosecution of bill of costs. The applicant contended that the taxing officer decided the bill of costs in total disregard of the laid down legal principles guiding taxation matters. To reinforce her complaint, the applicant's counsel cited the case of **Premchard Raichand LTD and Another vs Quarry Service of East Africa LTD and Another** EALR [1972] and **Attorney General vs Amos Shavu**, Taxation Reference No. 2 of 2000, CAT at Dar es Salaam. However, the learned applicant's counsel was not specific as to which exact principle was breached or ignored. On the other hand, the respondent complained via Commercial Reference No. 28 of 2022, that the taxing officer ought to tax the instruction fee under Item 6 of the 9th schedule and not Item 7. The respondent's counsel submitted that the claimed amount falls under item 6 of the 9th Schedule to the Advocates Remuneration Order which provides for 5% up to 8%. He lamented that the taxing officer erroneously taxed the instruction fee under item 7 of the 9th Schedule. He concluded that the taxing officer ought to award instruction fee of TZS 7,779,250/= as claimed in the folio. He thus prayed the court find his argument meritorious and consequently award the respondent TZS 7,779,250/= for instruction fee.

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I have gone through the case laws cited by the applicant's counsel, the Advocates Remuneration Order and the impugned ruling. At page 2 up to 3 of the ruling, the taxing officer had the following to say;

"Among the reliefs sought were payment of Tshs. 97, 240, 625/= as agreed interest from the plaintiffs' two accounts. On that basis item 1 taxed under item 8 of the Nineth Schedule make a sum of Tshs. 2,917,219/="

It is common cause that the respondent was claiming a sum of TZS 97, 240, 625/=. This amount falls under item 6 of the Nineth Schedule which caters for claims between TZS 70, 000,000/= and TZS 150,000,000/=. The above provision requires the taxing officer to charge the instruction of between 5% and 8% of the liquidated claim. Nonetheless, as indicated in the excerpt of the ruling, the taxing officer wrongly applied item 8 instead of item 6 and no reason was provided for the departure. Had she applied item 6, she would have awarded the respondent instruction fee of TZS 4,862,031.25 being 5% of the liquidated claim.

It is a settled law that award of instruction fee is the exclusive discretion of the taxing officer and the Court will reluctantly interfere with the decision unless the taxing officer exercised his discretion injudiciously, has acted upon a wrong principle or applied wrong consideration. See



Tanzania **Rent a Car Limited Vs. Peter Kimuhu**, Civil Reference No.9 of 2020, CAT at Dar es Salaam. In the case at hand, the taxing officer applied a wrong scale and therefore her decision is liable to interference. In the circumstances, I find merits in the respondent's complaint hence I set aside the award of instruction fee in the sum of TZS 2,917,219/= and substitute it for TZS 4,862,031.25.

In the upshot, the prayers under Commercial Reference No. 27 of 2022 are hereby dismissed whereas Commercial Reference No. 28 of 2022 is allowed to the extent that instruction fee of TZS 2,917,219/= awarded by the taxing officer is hereby set aside and substituted for TZS 4,862,031.25

I make no order as to costs in order to bring the dispute to an end.

It is so ordered.

The right to appeal is explained.




A.A. Mbagwa

JUDGE

23/08/2023