

**IN HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM**

TAXATION REFERENCE. NO. 09 OF 2023
(Originating from Taxation Cause No.40 of 2023)

TRACE ASSOCIATES LIMITED1ST APPLICANT
PIUS KASHAIZA BENGESI.....2ND APPLICANT
ALBIN EVARIST.....3RD APPLICANT

VERSUS

ROSEMARY TRYPHONERESPONDENT

Last Order: 06/09/2023.

Date of Ruling: 13/10/2023.

RULING

NANGELA, J.:

This application was filed in court by way of a chamber summons supported by an affidavit of Albin Evarist, the 3rd Applicant. It was brought to the attention of the court under Order 7 (1) & (2) of the Advocates Remuneration Order, 2015 seeking for the following orders:

1. That this court be pleased to reduce
the sum allowed in item No.1 from
TZS 5,000,000 /= which were
awarded by the Taxing Officer as
instruction fees to TZS 1000,000/=

on the ground that the Taxing Officer applied a wrong principle.

2. That this court be pleased to tax off the fees for filing the Petition, item No.10, of the ground that the Taxing Officer allowed that item although the said Petition became redundant when it was amended, and it is only the amended Petition which was used to determine the matter.
3. That, in the alternative to (B) Item number 11 for filing the amended Petition be disallowed for being incurred out of negligence on the part of the Plaintiff's advocate.
4. Any other relief(s) as the court may deem fit to grant.

In court, the Applicant enjoyed the services of Mr. Sylvester Eusebi Shayo, learned advocate while Mr. Obedi Mwandambo and Ms. Aziza Mmbaga, learned advocates appeared for the Respondent.

When the parties appeared before me on the 10th of August 2023, this court ordered parties to dispose of the

matter by way of written submissions and a schedule of filing such submissions was given to the parties. The parties duly complied and, hence, this ruling.

Submitting in support of the reference application, Mr. Shayo adopted the prayers on the chamber summons and the affidavit and submitted that, the first issue to consider is whether the Taxing Officer applied the correct principle when she awarded TZS 5,000,000/= as instruction fees instead of awarding TZS 1,000,000/= as prescribed under item 1(k) of the 11th Schedule to the Advocates Remuneration Order, GN. No.264 of 2015.

Mr. Shayo submitted that, according to Order 39 of the GN.264 of 2015, bills of costs are supposed to be drawn and taxed according to the prescribed scales unless otherwise stated and certified by a Court Judge. He contended, however, that in the matter at hand there is no such certification that the bill be taxed otherwise.

He submitted that according to what is revealed on the second paragraph of page 3 of the Taxing Officer's ruling, the Taxing Officer held a view that, the matters from which the Bill of Costs emanated being miscellaneous commercial case the

applicable scale is the one scheduled under item 1(k) of the 11th Schedule which offers TZS 1,000,000/- for instruction fees, for cases not scheduled under the order.

He maintained that, since the Taxing Officer cited that correct principle, she should have followed it to tax item number 1 at TZS 1,000,000/= but she applied a wrong principle stating that the Misc. Commercial Cause No.49 of 2022 had taken about six months and so TZS 5,000,000/= would suffice for instruction and taxed the amount accordingly.

He submitted that, the Respondent was the cause of a one-month delay because, firstly, she filed a defective petition on the 17th of November 2022 and amended it on 22nd of December 2022, hence cannot be remunerated for that. Secondly, the matter took a very short time in court as it was heard by way of written submissions.

He contended that, the Taxing Officer did not state how the amount increased by five-fold from TZS 1000,000/= to 5,000,000/= and neither did she state that the time taken was unreasonably long to attract any additional costs.

He argued that, since fees for court attendance and filing are taken under items 2 to 9 of the Bill of Costs, it was a wrong principle for the Taxing Officer to increase the ordinary scale given as instruction fee merely because of the time taken in court. It was his submission that instruction fees are fixed and pegged at the known factors regardless of the time taken.

To support his submissions, reliance was placed on the case of **Thinamy Entertainment Ltd & 2 Others vs. Dino Katsapas**, Misc. Commercial Application No.86 of 2018 (unreported) which followed the decision in the case of **Ujagar Singh vs. The Mbeya Cooperative Union** (1968) HCD 173 and the Kenyan case of **Joreth Ltd vs. Kigano and Associates** (2002) 1 E.A 92 (CAK).

He observed that, in the **Joreth Ltd vs. Kigano and Associates** (supra) the court supported a view that instruction fees are an independent and static item charged once only and is not affected or determined by the stage the suit has reached. He concluded, therefore, that, the instruction fees cannot be charged depending on the time taken to determine the case.

Mr. Shayo submitted that the second issue in this reference is whether the Taxing Officer should have only allowed item No.10 being fees for filing the amended petition and not both items 10 and 11. In his submission, Mr. Shayo was of the view that, the fees for filing the petition and for attending on the 17th November 2022 (items No.02 and 10) were wasted costs because the said petition was replaced by an amended petition filed on the 22nd December 2022 (items 04 and 11). He concluded that, it was erroneous to include both in the Bill of Costs and charging them as it was done.

The Respondent did file a reply to the submissions made by the learned counsel for the Applicant. In his submission Dr. Alex Nguluma, the learned counsel for the Respondent who filed the written submission was of the view that, the Reference Application should be dismissed with costs for lack of merit.

He submitted that the Taxation of Bill of Costs has unique and interesting background features and findings which heavily influenced the Taxing Officer in arriving at the decision she arrived at which is now a subject of this Reference. He

argued that the decision should be upheld as it is premised on the correct principles of law and sound rules of practice.

While adopting the contents of the counter affidavit filed in this court in opposition to the Reference Application, it was Dr. Nguluma's submission that, the factual issues raised in the counter affidavit in para 4 and 5 thereof have not been contested by the Applicant and so the Reference Application should be dismissed.

As for the issues raised, it was Dr. Nguluma's submission that, the real issue is whether the reasons advanced by the Applicant are sufficient to move the court to interfere with the exercise of judicial discretion of the Taxing Officer. He submitted that, although the Applicant complain that the Taxing Officer applied wrong principle ending up with an award of TZS 5,000,000/= instead of TZS 1,000,000/= prescribe under the given scale, the fact is different.

He argued in essence that the Taxing Officer exercised her judicial discretion in awarding the Respondent the disputed sum, which discretion of conferred to her under Order 12 (1) of the Advocates' Remuneration Order G.N. 264

of 2015. The respective Order 12 (1) of the G.N 264 of 2015 is to the effect that:

"The Taxing Officer may allow such costs, charges, and expenses as authorized in this Order or appear to him to be necessary or proper for the attainment of justice."

To back his submission on that point, reliance was placed on the case of **Charles Marko Naibala vs. Lilian Marko Naibala**, Civil Reference No.02 of 2023 (unreported) where it was held that:

"The awarding of the bill of costs is the discretion of the Taxing Officer and the court will always be reluctant to interfere with the same, unless it is proved that the Taxing Officer exercised his discretion injudiciously or has acted upon a wrong principle or applied a wrong consideration."

He concluded, therefore, that, the Taxing Officer had exercised her discretion and made a correct assessment in awarding TZS 5,000,000.00 as instruction fees in respect of

the prosecution of the Misc. Commercial Cause No. 49 of 2022 considering the time used of about six months. He contended that the Applicant has not stated as to whether the Taxing Officer exercised her discretion injudiciously.

He contended that, as far as the quantum awarded the case of **Charles Marko Naibala** (supra) the court, citing the case of **Haji Athumani Issa vs. Rweitama Mutatu** [1992] TLR 372 was of the view that:

"The law about Taxation is this:
That, Judges will in most cases not interfere with the questions of quantum, because these are regarded as matters with which the Taxing Officer is particularly fitted to deal with. But and that is a bis "BUT" the court could interfere if the Taxing Officer clearly acted unjudicially."

It was a further submission by Dr. Nguluma that, although the Applicant's counsel contend that the matter took a fairly short period of time to dispose of, one should not be blind of the time taken to prepare and prosecute the matter.

He contended that, it is only fair to consider the research, drafting, filing and appearances made in the period of six months.

He relied on the case of **CRDB Bank Plc vs. Starpeco Limited & Another**, Commercial Reference No.14 of 2022 (unreported). In that Reference matter, this court was of the view that:

“For my part, I think, and, always I have been driven by the philosophy that: *“cases are won in chambers and not in Court rooms”*, meaning that, earnest preparations of a case, including the laying down of its winning strategies, discerning its weaknesses and strengths as well as the putting up of the requisite research teams for purposes of putting in place appropriate legal and authoritative ‘authorities’, are all matters that starts *‘from the day one’* when an advocate is engaged and not only when the matter comes

to the Court and he appears before
the Judge/Magistrate.”

In view of all that, it was Dr. Nguluma’s submission that the award of TZS 5,000,000/= as instruction fees was reasonable.

As regards item No. 10 which was taxed as presented, it was Dr. Nguluma’s submission that, the same was taxed based on the Taxing Officer’s discretion conferred to under Order 12(1) of the GN.264 of 2015 based on the submission put forward by the parties during the taxation proceedings. For the reasons so stated, he urged this court to dismiss this Reference Application with costs.

In a brief rejoinder, it was Mr. Shayo’s submission that the Respondent has just made sweeping statements with no factual or legal basis. He contended that, the submission that the taxation reference presents a unique and interesting background features is baseless as no such features were pointed out. Likewise, he considered the arguments that the averments in paras 4 and 5 of the counter affidavit were not contested as a baseless argument.

Mr. Shayo contended that, as a matter of principle there must be consistency in the awards made by the Taxing Officer and that is why exercise of discretion under Order 12(1) of the Advocates Remuneration Orders G.N. 264 of 2015 must not be arbitrary. He therefore reiterated his submission in chief and urged this court to allow this Reference Application with costs.

I have carefully considered the rival contentions advanced by the learned counsel for the parties herein. While Mr. Shayo believes that the Taxing Officer applied a wrong principle when she determined the Bill of Costs which was laid before her, Dr. Nguluma sees it differently arguing that what was used was an exercise of discretion, which, in principle should not be interfered with.

As rightly stated by Dr, Nguluma in his submission, courts are always very circumspect when called upon to interfere with decisions made by Taxing Officers when taxing Bills of costs. In the case of **Asea Brown Boveri Ltd v Bawazir Glass Works Ltd and another [2005] 1 EA 17**, guidance was given regarding how and when a taxation

matter should be entertained. In that case the Court stated 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.

In this matter before me, the issue is that the Taxing Officer taxed the item related to instruction fee excessively and in disregard of the prescribed scales. Mr. Shayo has argued that as per Order 39 of the GN.264 of 2015, Bills of costs ought to be drawn and taxed in accordance with the prescribed scales. That indeed correct. However, as rightly contended by Dr. Nguluma, the law has as well provided for the room to exercise discretion when taxing bills of costs, and Order 12 (1) of the Orders is alive to that fact.

That being the position, the question to ask is whether under the circumstance of this matter, the Taxing Officer was supposed to use the prescribed scale or rely on her discretion and if the latter stands, whether she exercised it judiciously.

Under Orders 41 and 46 of the GN. No. 264 of 2015, the law provides that:

41. "Bills of costs incurred in contentious proceedings under this Part shall be taxable according to the rates prescribed in the Tenth, Eleventh and Twelfth Schedules to this Order.

....

46. All bills of costs shall be taxed on the prescribed scale, unless a Judge of the High Court, for special reasons to be certified, allows costs in addition to the costs provided by the scale or refuses to allow costs or allows costs at a lower rate than that provided by the scale."

In his submission, Mr. Shayo contended that, there has not been special reasons certified by a Judge regarding why the costs designated as instruction fees should be that much instead of what is prescribed under item 1(k) of the 11th schedule to GN.264 of 2015. While I do take a concern in that regard, I am as well alive to the fact that, Taxing Officers do not act robotically by taking a strict approach to the application of the scales as provided for but do as well consider other factors which are well accepted by the courts.

Such factors include the nature of the case itself, the time taken in disposing of the matter, value and nature of the subject matter, parties' behaviour in facilitating expeditious disposal of the case, public policy of ensuring affordability of litigation and consistency in quantum of costs to mention but a few.

See, in support, the cases of **National Bank of Commerce Limited vs. MM Worldwide Trading Co. Ltd**, Misc. Commercial Cause No.217 of 2015, **Attorney General vs. Amos Shavu**, Taxation Ref. No.2 of 2000, (unreported), and **Eco Bank Tanzania Limited vs. Double Company Limited & 3 Others**, Commercial Ref. No. 2 of 2019 (all unreported).

Essentially, it is an agreed principle that, instruction fees must be commensurate with the work for which they are to be charged. A tedious work will, definitely, attract much. This is the gist of what this court's stated in its holding in the above cited case of **CRDB Bank Plc vs. Starpeco Limited & Another** (supra) wherein the Court considered as well as the preparatory time invested in the case as a factor to consider.

See also other cases such as **Attorney General vs. Amos Shavu**, (supra); **Kapinga and Co. Advocates vs. National Bank of Commerce**, Civil Appeal No.8 of 2011, CAT, DSM (unreported), **East Africa Development Bank vs. Blueline Enterprises Ltd**, Civil Ref. No.12 of 2006, CAT, DSM (unreported), **ZTE Corporation vs. Benson Information Informatics Ltd t/a Smart**, Comm.Ref.No.61 of 2018 (unreported) and **C.B. Ndege vs. E.O Aliva and AG [1988] TLR 91**.

All those cases do subscribe to the view that instruction fees must be commensurate with the effort, time, and the work done. However, it is vital to note that each case must be held on its own circumstances, and one must as well demonstrate how tedious the case was. In the matter at hand Dr. Nguluma has contended that, the matter before the court presented unique features but fell short of pointing them out. He also contended that the Taxing Officer considered the time taken and so exercised her discretion.

Even so, one must ask as to whether the matters which were laid before the court were in nature complex in such a way that they would have warranted a departure from the

prescribed scale which, as rightly submitted by Mr. Shayo, the Taxing Officer observed to be item 1(k) of the 11th Schedule which offers TZS 1,000,000.00. The only reason given by the Taxing Officer as to why she awarded TZS 5,000,000/= were that the matter has stayed in court for about six (6) months.

There is as well nothing said regarding whether there was any complexity in disposing the same or how intensively the Respondent herein invested in the research when preparing for the matter. I am indeed in one with the submissions made by Dr. Nguluma that there was research and preparation and the filing of the matter but how complex was it to warrant a departure and prefer to exercise discretion?

As I stated earlier herein above, principally, in matters of taxation of costs, a Taxing Officer enjoys wide discretion as it may be discernible in Order 12 (1) of GN 264 of 2015 which provides as follows, that:

“The taxing officer may allow such costs, charges and expenses as authorised in this Order or appear to him to be necessary or proper for the attainment of justice.”

I am also mindful of the decision of the Court of Appeal in the 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) in which the Court commenting on the award of instruction fees 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."

In my view, and as regards the present Reference Application before me, in the absence of cogent justifications to shield the Taxing Officers preference to exercise her discretion instead of applying the prescribed scale, one would tend to agree with an argument that she applied a wrong principle when she exercised her discretion and further still, exercised her discretion injudiciously.

The fact that the matter took a period of 6 months was not by itself a sufficient reason to depart from applying the prescribed scale for the matter which was not scheduled under the Order. It follows that, the instruction fees should have been taxed in line with the prescribed scale which is item 1(k) of the 11th Schedule, to the G.N. No. 264 of 2015 which attracts the sum of TZS 1,000,000/=.

Save for what I have stated herein above, the rest of items awarded by the Taxing Officer remains intact. In the upshot of all that, therefore, this Court settles for the following orders, that:

1. This reference application is hereby allowed to the extent stated herein.
2. The amount of **TZS 5,000,000** charged as instruction fees is held to be erroneously charged and is hereby set aside and substituted for with **TZS 1,000,000/-** as per the requirements of Item No. 1 (k) of

the 11th Schedule to the 2015,
G.N. No. 264 of 2015.

3. That the Respondent to pay
costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 13TH DAY OF OCTOBER
2023



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DEO JOHN NANGELA
JUDGE