

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

AT DAR ES SALAAM

COMMERCIAL REFERENCE NO. 12 OF 2023

(Arising from the Ruling of the Taxing Officer dated 19/07/2023 in Taxation Cause
No. 55 of 2023)

Between

EQUITY BANK TANZANIA LIMITED 1ST APPLICANT

EQUITY BANK KENYA LIMITED 2ND APPLICANT

AND

NAS HAULIERS LIMITED 1ST RESPONDENT

EVEREST FREIGHT LIMITED 2ND RESPONDENT

TANGA PETROLEUM COMPANY LIMITED 3RD RESPONDENT

RULING

Date of Last Order: 29/01/2024

Date of Ruling: 08/03/2024

GONZI, J.

The Respondents were the Plaintiffs in Commercial Case No. 105 of 2021 against the Applicants which was determined by this Court on 19th April 2023 (Hon. Nangela, J.) The suit also comprised of a counter claim by the applicants against the Respondents. The court issued its judgment in

respect of both the main suit and the counterclaim in favour of the Respondents, with costs.

The Respondents duly instituted Taxation Cause No.55/2023 against the Applicants claiming a total of Tshs. 1,173,289,250/= as the total costs of the case. The Applicants resisted the presented Bill of Costs. The Taxing Officer heard both sides in the taxation proceedings and in her Ruling dated 19/07/2023, she granted the Bill of Costs application as follows, and I reproduce verbatim her order:

- i. **Instruction Fees Tshs. 80,000,000/=**
- ii. **Attendance Costs Tshs. 1,500,000/=**
- iii. **Disbursements Tshs. 10,970,000/=**
- iv. **Costs for this Bill of Costs 1,000,000/=**

The whole Bill of Costs is therefore taxed at Tshs. 93,470,000/= (say one ninety-three million four hundred seventy thousand only. It is so taxed."

It is from the above Ruling of the Taxing Officer that the Applicants have preferred the present reference under the provisions of Order 7(i) of the

Advocates Remuneration Order, GN. No. 263 of 2015. In their Chamber Summons, the Applicants prayed that:

- (i) That this Honourable Court be pleased to make a finding that the ruling of the Taxing Officer dated 19th July 2023 is improper for it being unreasonable and made in contravention of the principles of taxation of Bill of Costs;**
- (ii) The Honourable Court be pleased to set aside the decision of the Taxing Officer issued on 19th July 2023 in Taxation Cause No. 55 of 2023 and proceed to tax the Bill of Costs to the tune of TZS 26,000,000/=;**
- (iii) Costs be provided for;**
- (iv) Any other orders or relief(s) this Honourable Court deems fit to grant.**

The application was supported by an affidavit of Jasbir Mankoo, learned advocate for the Applicants. It was resisted through the counter affidavit of Frank Mwalongo, learned Advocate for the Respondents. On 4th October, 2023, the Court (Hon. Nangela, J.) ordered the hearing of this application to proceed by way of written submissions and issued a

schedule for both parties to file their respective submissions. The schedule has been duly complied with by the parties. In the hearing of the application, the Applicants enjoyed the services of Jasbir Mankoo, Learned Advocate, while the Respondents enjoyed the services of Juventus Katikiro, learned Advocate. Following the promotion and transfer of Hon. Nangela, J., from this station, the case was assigned to me as the successor Judge to determine the application at hand. I have gone through the record of the case. I have also read the submissions by counsel for both sides. I am thankful to them for their well-reasoned arguments which are of great assistance to the court.

In her submissions in support the Application, Ms. Jasbir Mankoo, learned advocate for the Applicants, adopted the affidavit for the applicant and submitted that the applicants are seeking the intervention of this court to review the assessment of the Taxing Officer on instruction fees and to re-tax the bill of costs based on the principles of taxation of costs. She argued that the Ruling of the Taxing Officer is based on an error of principle and that the instruction fees awarded are so manifestly excessive that it necessitates interference. The learned counsel argued that it is a celebrated rule in taxation proceedings that the allowance of instruction

fees is a matter which is in the Taxing officer's discretion, and for that matter, courts are reluctant to interfere with that discretion unless it can be shown that the Taxing Officer's decision was based on an error of principle or the fees awarded were manifestly excessive as to justify an inference. To buttress her point she referred this court to the decisions in **Haji Athumani Issa v. Rweitama Mutatu (1992) TLR 372; the Attorney General versus Amos Shavu No.2 (2000); and Premchand Raichand Ltd and another versus Quarry Services of East Africa Ltd and Others)No.3) (1972) 1 EA 162.**

Having established the general rule and the exceptions thereto under which the Court can interfere with the discretion of the Taxing Officer, the learned counsel for the applicant then proceeded to challenge the Ruling of the Taxing Officer by arguing that the Taxing Officer in her Ruling in the last page, had identified item 1(k) of the Eleventh Schedule of the Advocates Remuneration Order, 2015 as the one applicable in the taxation of instruction fees for suits the type of which have not been provided for under the Advocates Remuneration Order such as suits for unliquidated sums. She argued that whereas the Item 1(k) of the Eleventh Schedule to the Advocates Remuneration Order stipulates Tshs.

1,000,000/= as the maximum fees awardable, in the present case the Taxing Officer erred by awarding costs of Tshs. 80,000,000/= (Shillings eighty million only) as instruction fees under the Item 1(k) of the Eleventh Schedule to the Advocates Remuneration Order, 2015. The applicant's counsel challenged the way the Taxing Officer exercised her discretion by taking into account such factors like the fact that there were 15 claims in the plaint, 7 claims in the counter claim, 36 batches of Exhibits and 7 witness testimonies. The learned counsel argued that even with those considerations, it would not be justifiable to multiply the maximum awardable amount of Tshs. 1,000,000/= by a factor of 80 and thereby awarding Tshs. 80,000,000/= instead of the Tshs. 1,000,000/= as the instruction fees. The Applicant's advocate reasoned that the suit was one for declaratory orders only and not liquidated sums wherein the Respondent brought only one witness to prove the case and defend the counterclaim and that most of the documents were not objected to during their tendering at the time of hearing. The applicant's counsel, therefore, argued that the Taxing Officer did not exercise her discretion properly. The Applicant's counsel relied on the decision of **R versus the Minister for**

Agriculture Exparte W’Njuguna and others (2006)¹ EA 359 where the High Court of Kenya held that:

“it is necessary for the Taxing Master to specify clearly and candidly how she exercised her discretion and that discretion as an aspect of judicial decision making is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived.”

The learned advocate for the applicant submitted further that the counter claim, although it is a separate suit in law, its disposal occurred simultaneously with the main suit whereby the same issues were framed for both the main suit and the counter claim. she argued further that the witnesses testified simultaneously for both the main suit and the counter claim. She referred the Court to the case of **Chell Engineering Limited versus Unit Tool & Engineering Co Ltd** (1950) 1 All ER 378 where Lord Denning held that:

"That in most of these cases it is desirable that a judge should consider whether a special order should be made as to costs because the issues are often very much interlocked and the usual order of judgment for plaintiff in the claim with costs and

for Defendant on counter claim with costs does not always give a just result.”

Based on the above authorities, the applicant’s counsel argued that the Taxing Officer ought to have made a finding that a counter claim and the main suit are interlocked in terms of their issues and as such in considering the instruction fees, she should not have taken into account the counter claim at all.

The applicant’s advocate submitted that the Item 1(k) of the Eleventh Schedule to the Advocates Remuneration Order has fixed a cap amount of costs awardable for that item as Tshs. 1,000,000/=, therefore taxing the instruction fees at Tshs.80 million was extravagant and exorbitant. He relied on the case of **Kassim versus Habre International Limited** (2000) EA 98 where the Supreme Court of Uganda held that the Taxing Master in computation of instruction fees should be guided by the principles that: (i) **the instruction fee should cover the advocate’s work including taking instructions and other work necessary for presenting the case for trial or appeal.** (ii) **It would be proper to give slightly a higher award to the counsel for the appellant although there is no rule of law for the court to do so.** (iii) **The**

taxing Master has to tax each bill on its merit. (iv)The taxing master will have to take into account the value of the subject matter. (v) The taxing Master has a discretion which he/she has to exercise judicially and not whimsically or capriciously. Whilst a successful litigant is entitled to a fair reimbursement of the costs incurred, the Taxing master must take into consideration the public interest.

The applicant's counsel therefore argued that, in the present case, the Taxing Master ought to have also taken into consideration public policy that costs should not be allowed to a level that would confine access to the court to the wealthy while at the same time the general level of remuneration of advocates had to be such as it attracts new recruits to the profession. It was submitted further by Ms. Mankoo that time spent in litigation, by itself, cannot make a case complex as there could be other extraneous factors for the delay of the case. Complexity of the case, according to the learned counsel for the Applicant, should be determined with regard to number of witnesses, documents tendered, uniqueness and novelty of the dispute, among others.

In the end, Ms. Jasbir Mankoo, the learned advocate for the applicant prayed that the Ruling of the Taxing Officer in respect of the instruction fees be quashed and be substituted with Tshs. 26 million as the reasonable amount.

In reply submissions, Mr. Juventus Katikiro, learned Advocate for the Respondents submitted that the application has no merit and that it should be dismissed with costs. Mr. Katikiro submitted that the major complaint by the applicant is that the instruction fees were too excessive against the principle of taxation. He argued that in the Commercial Case No. 105/2021 which gave rise to the order of costs, the Respondents had sued the Applicants claiming for declaratory orders that the Applicants were not entitled to recover the facility or any part of the facility worth USD 16,275,000 from the Respondents. That the case was litigated for almost 18 months from institution on 6th October 2021 to its completion on 19th April 2023. He argued that there were six issues including the issues as to whether the second applicant herein availed the banking facility for standby letter of credit (SBLC/LC) of USD 16,275,000 to secure the loan facility from Lamar Commodity Trading DMCC and as to whether the Applicants herein owe the Respondents a sum of USD 19,769,680 as

claimed by the Applicants in their counter claim in commercial Case No.105/ 2021.

Mr. Katikiro further submitted that it is on record at page 21 of the Judgment that in proving their cases, the Applicants brought 6 witnesses and 22 Exhibits while the Respondents brought 1 witness and 14 Exhibits. The Respondents' counsel therefore argued that the matter was complex to litigate and consumed much time and energy of the parties and their lawyers. He submitted that under Rule 32 of the Commercial Court Rules, ordinarily commercial cases are expected to be litigated within 10 months from the inception to the end. But the Commercial Case No.105 of 2021 took 18 months due to its complexity. He cited the case of **Junior Construction Co. Ltd and 2 others versus Mantrac Tz Limited**, Commercial Reference No.09 of 2022 wherein this court held that instruction fees have to be commensurate with effort, time and the work done and that in determining the instruction fees, the Court should have regard to nature of the case, its complexity, the amount of research involved in the course of hearing and disposing of the case at hand.

The Respondent's counsel argued that Commercial Case No. 105/2021 was complex, time consuming, and involved a lot of preparations in terms

of energy and research. He argued that even the Taxing Officer in her Ruling as can be seen at paragraph 2 of the last page thereof, took into account the relevant factors. These factors are the nature of the case which was complex, the time consumed being 17 months, as well as large number of witnesses whereby the Applicants brought 6 witnesses and tendered 22 exhibits while the Respondents brought 1 witness and tendered 14 exhibits. He cited the case of **Anthony Ngoo and another versus Kitinda Kimaro**, Civil Appeal No.25 of 2014 decided by the Court of Appeal of Tanzania at Dar es Salaam to buttress his point that **an award of large sum as instruction fee will only be justified by nature of the case, its complexity, time taken up to the hearing or arguments.**

The Respondent's Counsel therefore concluded by praying that the application be dismissed with costs as the Taxing Officer acted within the principles of taxation and committed no errors.

By way of rejoinder, Ms. Jasbir Mankoo argued that Item 1(k) of the Eleventh Schedule to the Advocates Remuneration Order has limited the maximum amount of awardable costs as Tshs. 1 million only. That the item states: **"Such sum as the Taxing Officer considers reasonable but**

not more than 1,000,000/=". Therefore, the Applicant's counsel submitted that the Respondent's counsel in his reply submissions has not addressed this legal argument at all, rather than merely and generally arguing that the case was complex.

Ms. Jasbir Mankoo argued further that since it was the finding of the Taxing Officer that the Commercial Case No.105/2021 was one for declaratory orders and not for liquidated claims, as such, the taxing officer should have exercised her discretion but without exceeding the set scales. She argued that once the Taxing Officer had identified the applicable item in the Advocates Remuneration Order, 2015, she should have applied it in reaching her decision, rather than identifying the claim as unliquidated sum and identifying the proper taxing item in the Advocates Remuneration Order as Item 1(k) of the Eleventh Schedule and yet thereafter going ahead to treat it as if it were a claim for liquidated sum.

The Applicant's Counsel argued that the cases cited as authorities by the respondent's counsel are not applicable to the case at hand because the cited cases were decided based on liquidated claims while in the case at hand, the taxing officer has held that the claims were for declaratory orders and thus not liquidated sum.

After going through the rival arguments by the parties and going through the applicable law, I now proceed to determine the application at hand. It must be remembered that what is in dispute in this application for reference before me is only one item in the awarded costs namely the instruction fees. Again, to set the perspective clear, it is not disputed that the Commercial Case No. 105 of 2021 from which the order of costs emanates, was not founded on liquidated sum, but declaratory orders. The Respondents' counsel has attempted to argue in his reply submissions that the claim in the suit was one for liquidated sum. However, it must be noted that this question of whether or not the claim in the Commercial Case No.105 of 2021 was for liquidated sum, was raised in and decided by the Taxing Officer in her Ruling leading to this reference. In their Bill of Costs under Item 1, the Respondents had claimed Instruction Fees to prosecute the case at Tshs. 1,160,570,250 /=. Records show that on the 22nd June 2023, during the hearing of the Bill of costs, as it can be seen at page 2 of the Taxing Officer's Ruling, the Respondent's counsel Juventus Katikiro and Halima Semanda argued in support of the amount claimed under their item 1 of the Bill of costs as instruction fees by saying that the amount of Tshs.1,160,570,250/- claimed was based on item 8 of the Ninth Schedule

to the Advocates Remuneration Order, GN. No.263 of 2015, that is 3% of the outstanding loan the USD 16,275,000 equivalent to Tshs. 37,448,775,000/=. In the Ruling of Taxing Officer dated the 19th July 2023 at page 6, the learned Taxing Officer held at the 1st paragraph:

"Reading the body of the plaint in commercial case No.105 of 2021, the reliefs upon which the Applicant prayed for judgment and decree against the Respondents, the prayers encircled into about twelve court declarations, general damages awarded at the tune of Tshs. 300,000,000/=. As rightly submitted by the Respondent counsel, the said USD 16,275,000 equivalent at Tshs. 37,448,775,000/- was neither pleaded nor granted by the court warranted computation of instruction fee under item 8th of the Ninth Schedule to the Order".

It must be noted that neither the Respondent nor the applicant has challenged that holding of the learned Taxing Officer on the precise nature of the claim in Commercial Case No. 105 of 2021. The above finding therefore is unchallenged and hence conclusive between the parties and the settled position is that the claims in Commercial Case No. 105 of 2021 were not liquidated and further that Item 8 of the Ninth Schedule to the

Advocates Remuneration Order is not applicable. It should be borne in mind that the Advocates Remuneration Order, 2015 under the ninth schedule stipulates scale of fees for contentious proceedings for liquidated sum in original and appellate jurisdiction. Item 8 thereof provides that where the value of the subject matter of the case is Over Tshs. 400,000,000/= then the instruction fees thereof shall be 3%; provided that where the defendant does not dispute the claim and does not file a defence, the scale of fees should be two-thirds of the fees. As said above, the issue as to which Schedule and item the instruction fees were supposed to be charged in the Taxation Cause No.55 of 2023 which have led to this reference, was raised before the Taxing Officer and she decided it by holding that Item 8 of the Ninth Schedule doesn't apply. No one has challenged that finding. I am not entitled to make any determination on that aspect although the parties in their submissions have gone a little bit outside the scope of the present reference and addressed that aspect. It is not among the complaints raised by the Applicants in the present application.

Conversely, while the Taxing Officer categorically excluded the applicability of Item 8 of the Ninth Schedule to the Advocates

Remuneration Order 2015, she made a finding and held that the Instruction Fees in Commercial Case No.105 of 2022 were chargeable under Item 1(k) of the Eleventh Schedule to the Advocates Remuneration Order. The holding of the Taxing Officer to this effect is vividly seen in the second paragraph of page 6 of the Ruling where it reads, and I quote verbatim:

“Proceedings in Commercial Case No. 105 of 2021 reveals the suit took about seventeen months from November, 2021 when it was filed to April 2023 when determined. The suit was indeed complex involved fifteen claims in the main suit and seven for the respondent counter claim. the Respondent raised objection in respect of the Plaintiff witnesses’ statement, the objection heard and determined by the court. The suit further involved 36 batches of exhibits and seven witnesses testified in respect of six issues agreed by parties. On that basis under item 1(k) of the Eleventh Schedule, instruction fee taxed at Tshs. 80,000,000/- only.” (underlining supplied).

Therefore, the instruction fees of Tshs. 80,000,000/= were taxed in accordance with the Eleventh Schedule under Item 1(k). The said Item 1(k) of the Eleventh Schedule makes reference to Item J which provides for costs of proceedings in the High Court, subordinate courts and

Tribunals. The fee for instructions in a suit to present or oppose an application for a prerogative order is prescribed to be such sum as the Taxing Officer shall consider reasonable but not more than 1,000,000/=. Then Item (k) follows immediately and pegs the awardable costs as instruction fees to sue or defend in any case not provided for in the Schedules to be at the same rate and amount as stipulated in the preceding Item (J), which is Tshs.1 million only.

The central issue which arises in this Ruling is whether or not the Taxing Officer acted properly when she taxed the instruction fees at Tshs. 80,000,000/= in respect of Commercial Case No.105/2021, a suit whose claim fell was declared to fall under Item 1(k) of the Eleventh Schedule to the Advocates Remuneration Order 2015, while the same item clearly prescribes the maximum amount of costs awardable as Tshs. 1,000,000/= ? The counsel are divided on this aspect. While Ms. Jasbir Mankoo learned advocate for the Applicants has argued that the Taxing Officer's discretion is confined within the Tshs. 1 million prescribed as the upper limit, Mr. Katikiro learned advocate for the Respondents holds the view that the Taxing Officer under Item 1(k) of the Eleventh Schedule to the Advocates Remuneration Order has broader discretion beyond the

prescribed upper limit of Tshs.1 million. Mr. Katikiro backed up his position by making an argument that actually Commercial Case no. 105/2021 involved liquidated claims. At the very outset, I should state that the argument by Mr. Katikiro, learned advocate, that Commercial Case No.105 of 2021 concerned liquidated sum claims, is irrelevant at the moment and the Respondent is estopped to raise it now because the same issue was raised before the Taxing Officer who decided it in her Ruling and no party has challenged that holding. As it stands, both parties do not dispute or challenge the finding by the Taxing Officer that Commercial Case No.105/2021 was in respect of unliquidated sum and thus the taxation of instruction fees thereof does not fall under the Item 8 of the Ninth Schedule, rather it falls Under Item 1(k) of the Eleventh Schedule to the Advocates Remuneration Order 2015. Therefore, it would be illogical at the moment to argue that the Taxing Master had no limit to tax the instruction fees under Item 1(k) of the Eleventh Schedule because the main case from which the order of costs emanates, was in respect of liquidated sums. To argue that way, now would tantamount to the Respondents secretly and un-procedurally introducing their own grounds of reference challenging the order of the Taxing Officer, while stealthily

sailing onboard the Applicants' ship of reference, which unfortunately does not carry the Respondent's consignments of grievances against the Ruling of the Taxing Officer.

I will, therefore, proceed to determine whether or not the discretion of the Taxing Officer to tax instruction fees under Item 1(k) of the Eleventh Schedule to the Advocates Remuneration Order 2015 is curtailed, restricted and limited to the upper limit of Tshs.1million only? This issue has been answered in numerous cases in Tanzania. In the case of **Trace Associates Limited and 2 Others Versus Rosemary Tryphone**, Taxation Reference No. 09 of 2023, High Court of Tanzania (Commercial Division) at Dar-Es-Salaam, the Taxing Master had awarded Tshs.5 million instead of the Tshs.1 million as instruction fees for a matter that fell under item 1(k) of the Eleventh schedule to the Advocates Remuneration Order, GN.263 of 2015 on the reason that the case was complex as it had taken 6 months to end. On reference to the High Court Judge (as per Hon. Nangela, J.,) held:

"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' behavior 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.....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." (underlining supplied)

The Honourable Judge in that case was of the view that the discretionary powers of the Taxing Officer under Item 1(k) of the Eleventh Schedule to the Advocates Remuneration Order was not limited to the prescribed maximum amount Tshs.1million only, but the Taxing master could go beyond the prescribed maximum amount provided that any departure made by the Taxing Officer from the prescribed upper limit must be justified by cogent and relevant reasons. In that case, the Honourable Judge reduced the amount of instruction fees from the Tshs. 5 million

awarded to the scheduled and prescribed amount of Tshs. 1 million only holding that the Taxing Officer had acted on a wrong principle.

The basis of not interpreting the provision of Item 1(k) of the Eleventh Schedule to the Advocates Remuneration Order, 2015 strictly stems from the spirit of the law regulating taxation of costs as reflected in the language used in the other general provisions of the Advocates Remuneration Order 2015. In particular, Order 12 (1) of the Advocates Remuneration Order G.N 263 of 2015 provides 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." (emphasis supplied).

The above provision means that the Taxing Officer is given broad discretion when it comes to taxation of costs and the Advocates Remuneration Order, G.N 263 of 2015 helps as a guideline for the Taxing Officer by providing the ideal benchmarks in relation to which the Taxing Officer should exercise his discretion judicially in the taxation of costs proceedings. The Taxing Officer may tax the costs at a rate or amount which deviates from the prescribed figures in the Advocates Remuneration Order, G.N 263 of 2015 provided that he acts judicially and reasonably in

making that departure, and that the ultimate amounts thereby taxed as costs are not excessively high or low in comparison to the statutorily fixed rates. The prescribed scales were intended to act as the benchmarks indicating the ideal amounts which in the absence of justifiable reasons for departure therefrom, the ideal costs should have been taxed at.

In the case of **Charles Marko Naibala vs. Lilian Marko Naibala**, Civil Reference No.02 of 2023 (unreported), 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."

I therefore join hands with the foregoing judicial statements acknowledging and respecting the broad discretionary powers of the Taxing Officer in taxation of costs. I find that the discretion of the Taxing Officer to tax instruction fees under Item 1(k) of the Eleventh Schedule to the Advocates Remuneration Order is not curtailed, restricted or limited to the upper limit of Tshs.1million only as the wording of the item in that Order appears to suggest. But I also find that in the exercise of that

discretion, the Taxing Officer is duty bound to act judiciously and adhere to the relevant principles relating to taxation of costs.

I asked myself whether in the case at hand, much as the Taxing Officer had un-curtailed, un-restricted and unlimited discretionary powers to tax instruction fees under Item 1(k) of the Eleventh Schedule to the Advocates Remuneration Order 2015, did she act judicially and not excessively in the exercise of her discretion of awarding Tshs.80 million as instruction fees beyond the prescribed upper limit of Tshs.1million only? It is settled that the discretion must be exercised judicially. The Taxing Officer in determining if, and to what extent, he should depart from the fees scales prescribed in the Advocates Remuneration Order 2015, has to consider some 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. By doing so he will have acted judicially.

If the relevant factors are not considered or the relevant principles of taxation are not followed by the Taxing Master while exercising his

discretionary powers, then on reference, the Court will inevitably interfere with his Order. The extent to which, and grounds for, the court's interference with the decision of the Taxing Officer in taxation proceedings, were restated briefly in the case of **Asea Brown Boveri Ltd v Bawazir Glass Works Ltd and another** [2005] 1 EA 17, where 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."

I paused to ask whether in the Taxation Cause No. 55/2023 which led to the present reference application, the Taxing Officer acted judicially and whether the Bill as taxed was manifestly excessive as to justify my interference? As to exercising the discretion judiciously, in my view, the Taxing Officer sufficiently acted judicially in giving relevant and reasonable considerations justifying her departure from the benchmark of Tshs.1million prescribed under Item 1(k) of the Eleventh Schedule to the Advocates Remuneration Order 2015. This can be seen in the second paragraph of page 6 of the Ruling where it reads and I quote verbatim:

"Proceedings in Commercial Case No. 105 of 2021 reveals the suit took about seventeen months from November, 2021 when it was filed to April 2023 when determined. The suit was indeed complex involved fifteen claims in the main suit and seven for the respondent counter claim. the Respondent raised objection in respect of the Plaintiff witnesses' statement, the objection heard and determined by the court. The suit further involved 36 batches of exhibits and seven witnesses testified in respect of six issues agreed by parties. On that basis under item 1(k) of the Eleventh Schedule, instruction fee taxed at Tshs. 80,000,000/- only.

It must be noted that those reasons were given after having heard arguments from both sides in the Taxation proceedings before her. The above reasons supplied by the Taxing Officer are among the ones which courts consider relevant in taxation proceedings. Hence, I find that the Taxing Officer acted judicially.

Finally, I asked myself whether the Bill of costs as taxed was excessive? Ms. Jasbir Mankoo, learned counsel for the Applicants has argued that the instruction fees of Tshs. 80 million awarded is excessive and exorbitant as it represents a factor of 80 times the prescribed scale of Tshs. 1,000,000/= under Item 1(k) of the Eleventh Schedule. Mr. Katikiro, as I have stated herein before had no straight response to this argument but resorted to

justifying the amount by describing the claim in the Commercial Case No.105 of 2021 as one for liquidated sum to which Item 8 of the Ninth Schedule would apply and thereby uplift the maximum amount to 3% of the value of the subject matter. Like I have said, the unchallenged Ruling in the taxation Cause No.55/2023 which is subject of this reference before me held that the claims in Commercial Case No.105 of 2021 were not in respect of liquidated sum. Hence the argument by Mr. Katikiro, learned advocate, has no legs to stand. I am inclined to accept the argument by Ms. Jasbir Mankoo, learned Advocate for the Applicants that the amount of Tshs.80 million imposed by the Taxing Officer as instruction fees in a place where the benchmark prescribed fee is the maximum of Tshs.1million, is excessive. I am not saying that the instruction fees of Tshs.80 million is excessive in relation to the amounts involved in the Commercial Case No.105 of 2021. This is because as the unchallenged aspects of Ruling of the Taxing Master shows, the Commercial Case No.105 of 2021 was in respect of unliquidated sums, as it was one for seeking declaratory orders only. All that I am saying is that the instruction fees of Tshs.80 million awarded by the Taxing Officer was excessive and too much a departure when compared to the maximum prescribed ceiling

of Tshs.1 million which the Item 1(k) of the Eleventh Schedule to the Advocates Remuneration Order has fixed. The Taxing Officer ought to have started her evaluation and assessment of the costs to be awarded as the instruction fees from the benchmark of Tshs.1 million prescribed in the Advocates Remuneration Order and then make some upward or downward deviations from the prescribed scale while considering the relevant factors applicable to the case before her. In my considered view, even with all the considerations given in the ruling of the Taxing Master that proceedings in Commercial Case No. 105 of 2021 took about seventeen months from November, 2021 when it was filed to April 2023 when it was determined; that the suit was a complex one involving fifteen claims in the main suit and seven claims in the counter claim; that the Respondent raised objections in respect of the Plaintiff's witnesses statements; that the suit involved 36 batches of exhibits and seven witnesses testified in respect of six issues agreed by parties; still these factors could not reasonably justify the disproportionately higher amounts of costs awarded as instruction fees under item 1(k) of the Eleventh Schedule, all the way from the prescribed fee scale of Tshs.1,000,000/= to the tune of Tshs. 80,000,000/-

! There is no explanation why and how the said factors jettisoned the amount 80 times more.

Importantly, it appears to me that the other relevant factors and principles of taxation were not given much consideration. In particular, considerations of public policy to ensure affordability of litigation and consistency in quantum of costs were not given much attention. One may be tempted to think that the Applicants are Banks hence wealthy entities which can afford to part with huge sums of money in terms of costs. But from a broader picture the colossal expenses incurred by the banks will ultimately reflect into an increase in lending interest rates and reduced pay to the employees. The money held by banks belongs to the individual depositors, some extremely poor, and investor in equity who might end up getting losses and yield lower profits in terms of dividends. The overall effect is to make environments for doing business unfriendly hence a blow to the national economy. At any rate, the rich and the poor should all be treated equally before the law.

I do not say that litigants should not bear the costs consequential to litigation. All that I am saying is that the costs should be reasonable to reimburse the ones who incur expenses as a result of being unfairly

brought to litigation. But at the same time costs should not be too exorbitant as to curtail access to justice by people of all walks of life. The enactment of the Advocates Remuneration Order was meant to bring predictability in the exercise of discretion by the Taxing Officers who are expected to make some warranted departures there from, but while traversing within the penumbra of, the prescribed fees scales. If the Taxing Officers were left to determine awardable costs while completely oblivious to the Advocates Remuneration Order 2015, it would make that piece of legislation redundant. The wording of Order 12 (1) of the Advocates Remuneration Order G.N 263 of 2015 reads 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."

In that provision, it is clear that the dictates of the provisions of the Advocates Remuneration Order come first before the Taxing Officer, in alternative, exercises his discretion to partly depart there from, a departure which should be geared towards attainment of justice which could not be so attained by sticking to the dictates of prescribed fees scales.

Again, the desire to have the fees scales prescribed in the Advocates Remuneration Order 2015 taken into consideration by the Taxing Officers, is reflected in the legal roots from which the Advocates Remuneration Order 2015, stems. That is the Advocates Act, Cap 341 of the Laws of Tanzania. The Advocates Remuneration Order, 2015 is made under Section 49(3) of the Advocates Act, Cap 341 of the Laws of Tanzania. In authorizing the making of the Advocates Remuneration Order, the Advocates Act prescribed the following under section 52 thereof:

52. As long as any order made under section 49 is in operation the taxation of bills of costs of advocates shall, subject to the subsequent provisions of this Part with respect to agreements as to remuneration, be regulated by that order.

The above provision underscores the truth that the objective of enactment of the Advocates Remuneration Order, was to streamline the law in the aspect of taxation of costs. It is therefore a requirement of the law that as long as the Remuneration Order made under section 49 of the Advocatee **ACT** is in operation, the taxation of bills of costs of advocates shall be regulated by that order. The Order made under section 49 is now in existence and that is the Advocates Remuneration Order, 2015.

Therefore, much as the Advocates Remuneration Order itself gives discretion to the taxing officers, the discretion should be exercised in line with the fees scales prescribed by the Order. The fee scales prescribed by the Order should be kept in mind while exercising the discretion in the taxation proceedings.

Section 50 of the Advocates Act underscores the desire by the legal profession to have the prescribed fees scales and rates considered in the taxation of costs. It provides:

Any order made under section 49 may, as regards the mode of remuneration, prescribe that it shall be according to a scale of rates of commission or percentage, varying or not in different classes of business, or by a gross sum, or by a fixed sum for each document prepared or perused, without regard to length, or in any other mode, or partly in one mode and partly in another, and may regulate the amount of remuneration with reference to all or any of the following, among other, considerations, that is to say—

- (a) The position of the party for whom the advocate is concerned in the business, that is, whether as vendor or purchaser, lessor or lessee, mortgagor or mortgagee, charger or chargee, and the like;**
- (b) The place where, and the circumstances in which, the business or any part thereof is transacted;**
- (c) The skill, labour and responsibility involved therein on the part of the advocate;**
- (d) The number and importance of the documents prepared or perused, without regard to length.**

By prescribing the matters which should be included in the Advocates Remuneration Order, the Advocates Act, Cap 341 intended to make sure that such matters would be legally safeguarded and adhered to. The prescribed fee scales in the Order should therefore not be lightly brushed aside during the taxation exercise but should be taken as the reference points while traversing the way along the taxation exercise.

In fine, the Applicants have filed the present application for reference Order 7(i) of the Advocates Remuneration Order, 2015 after being aggrieved by the Ruling of the Taxing Officer in Taxation Cause No.55/2023. Order 7(i) of the Advocates Remuneration Order, 2015 stipulates that: "Any party aggrieved by a decision of the Taxing officer,

may file reference to a Judge of the High Court.” I have already found that the departure from the prescribed fee scale of Tshs.1 million under Item 1(k) of the Eleventh Schedule to Tshs.80 million is astronomically excessive despite the existence of relevant factors in that case which warranted some deviations from the prescribed fees. In their chamber summons, the Applicants prayed that I be pleased to *"make a finding that the ruling of the Taxing Officer dated 19th July 2023 is improper for it being unreasonable and made in contravention of the principles of taxation of Bill of Costs"* and further that I *"be pleased to set aside the decision of the Taxing Officer issued on 19th July 2023 in Taxation Cause No. 55 of 2023 and proceed to tax the Bill of Costs to the tune of TZS 26,000,000/=*". The reference is challenging only the costs awarded under the item of instruction fees. Throughout the submissions, the Applicant's Counsel did not explain or rather substantiate the legal, logical or factual basis for the Applicants' insistence that the appropriate amount of instruction fees should have been Tshs. 26,000,000/=, but that consistent insistence signifies that the Applicants, who took part in the proceedings of Commercial Case No. 105/2021, regard it that in the circumstances of the Commercial Case No.105/2021, the ideal instruction fees for the Advocates

representing the Respondents ought to have been Tshs. 26,000,000/=.

On my part, while I have noted that unsubstantiated proposition, I am of the view that the Learned counsel for the Applicants cannot wishfully set the fees payable to the Respondent's Counsel. Therefore I have taken into account the relevant considerations stipulated by the Taxing Officer in the second paragraph of page 6 of the Ruling in Taxation Cause No. 55/2023 that proceedings in Commercial Case No. 105 of 2021 took about seventeen months from November, 2021 when it was filed to April 2023 when it was determined; that the suit was a complex one that involved fifteen claims in the main suit and seven claims in the counter claim; that the Respondent raised objections in respect of the Plaintiff's witnesses statements; that the suit involved 36 batches of exhibits, seven witnesses and six issues; the presence of a counterclaim which increased the scope of research and drafting more pleadings and which doubled as a separate suit; the interest of public policy of ensuring affordability of litigation; the need for remuneration of advocates to be an incentive to attract new recruits to the profession for its continued existence and flourishing as well as the readiness of the Applicants to pay instruction fees of Tshs.26 million in this case. I would have taxed the Instruction fees in this case at

Tshs. 30 million instead of 80 million. In my view that would have met the justice of the case.

Accordingly, I hereby set aside the portion of the decision of the Taxing Officer with respect to instruction fees, issued on 19th July 2023 in Taxation Cause No. 55 of 2023 and proceed to tax the item of Instruction fees in the Bill of Costs at the tune of TZS. 30,000,000/= (Thirty Million shillings only. The other items in the Certificate of Taxation issued by the Taxing Officer on 20th July 2023, remain intact. This application is allowed to the extent above shown. I make no order as to costs for this application.



A handwritten signature in black ink, appearing to read "A. H. Gonzi", written over a horizontal line.

A. H. GONZI

JUDGE

08/03/2024

Ruling is delivered in Court this 8th day of March 2024 in the presence of Mr. William Mang'ena, Advocate for the Applicants and Mr. Kelvin Ngeleja, Advocate for the Respondent.

A handwritten signature in black ink, appearing to read "A. H. Gonzi", written over a horizontal line.

A. H. GONZI

JUDGE

08/03/2024