

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

REFERENCE NO. 07 OF 2019

(Originating from Bill of Costs No. 1567 of 2018 (Hon. D.C. Kamuzora, Taxing Master))

SALEHE HABIB SALEHE.....APPLICANT

VERSUS

MANJIT GURMUKH SINGH.....1ST RESPONDENT

MOHINDER GURMUKH SINGH.....2ND RESPONDENT

Date of last Order: 17.02.2020
Date of Ruling: 20.04.2020

RULING

V.L. MAKANI, J.

The applicant SALEHE HABI SALEHE is asking this court to examine the ruling of the Taxing Officer in Bill of Costs No. 157 of 2018 (Hon. D.C. Kamuzora) dated 10/09/2019 for the purpose of satisfying itself as to the correctness, legality or propriety of the said ruling. And after finding the errors the court be pleased to quash and set aside the impugned award.

The application is made under Rule 7(1) and (2) of the Advocates Remuneration Order, 2015 (GN No. 264 of 2015) (the **Advocates Remuneration Order**) and is supported by the affidavit of the applicant herein.

The applicant was represented by Mr. Richard Kinawari, Advocate and the respondents were represented by Mr. Eric Simon, Advocate.

At the hearing, Mr. Kinawari adopted the applicant's affidavit. He said the costs awarded by the Taxing Master contravenes section 29(1) of Value Added Tax Act, 2014 which requires that every Advocate be registered as a VAT taxpayer. He said the costs awarded also contravenes section 36(1) of the Tax Administration Act, 2015 which provides that a person who provides goods/services is required to issue a fiscal receipt by using Electronic Fiscal Devices (**EFD**) and he insisted that Advocates are not exempt. He said costs in the present application were awarded without presenting fiscal or manual receipts. He said this contravenes the law and it blesses tax evasion. He cited the case of **Prof. Emmanuel Mjemma vs. MD, Dira Editor & Others, Civil Reference No. 7 of 2017 (HC-DSM Registry)** (unreported) where it was held that for an Advocate to be awarded costs, he has to be VAT registered and he has to issue EFD receipts. He prayed for the costs awarded at TZS 1,860,000/= be set aside as there were no receipts to support the costs awarded.

On his side, Mr. Erick Simon for the respondents objected to the submissions by the applicant's Counsel. He said costs follow event to a successful party and the trial Judge was satisfied that the applicant had incurred costs. He said the Taxing Officer was being guided by the Remuneration Order and hence the decision of awarding TZS 1,860,000/=. He said the Value Added Tax Act and the Tax Administration Act is not applicable in the present application. He said

the said law apply to the affairs of the tax payers and Tanzania Revenue Authority (**TRA**) in that when one fails to pay tax thereon, criminal proceedings can be invoked against the said tax payer. He said in the Remuneration Order there is no requirement for production of receipts save for disbursements under Order 58(1) of the Remuneration Order. He said the production of receipts is not automatic but if required by the Taxing Officer which was not the case; and if necessary, the receipts for disbursement are in the court file. He said if the Advocate has not complied with tax payments the Decree Holder who is subjected to be refunded his costs cannot be punished. Mr. Erick Simon said this court is not bound by the case of **Emmanuel Mjemmas** (supra) which was cited by Counsel. He pointed another conflicting decision that is **M/S Bukreef Gold Limited vs. Tax Plan Associates & Another, Misc. Commercial Reference No. 3 of 2017** where it was stated that EFD receipts are irrelevant in taxation of costs. He said the amount awarded is on the low side as it was cut down from TZS 11,380,000/= which was claimed to TZS 1,860,000/= awarded by the Taxing Officer. He prayed for the decision of the Taxing Officer to be upheld and costs of this application.

In rejoinder Mr. Kinawari said the Value Added Tax Act, 2015 and the Tax Administration Act, 2015 are not discriminatory so advocates are not exempted. He said that the law requires that the advocate who has served and truly that the said services have been given to prove and without the receipts what is stated may be speculations and the court cannot rely on this. He said the Advocates Remuneration Order,

2015 does not bar the adherence of other laws and not is not a cover for the advocate to pay tax.

I have listened to the rival submissions by Counsel for the parties. The main complaint by the applicant is that the Taxing Officer erred for failure to consider that the costs awarded contravenes the Value Added Tax Act and the Tax Administration Act as no EFD receipts were presented in the course of proving the items presented in the bill of costs for taxation.

There are two camps as regards the issue of EFD receipts, the application of the Value Added Tax and the Tax Administration Act in determination of bill of costs. One camp is that which relies on the case of **M/S Bukreef Gold Limited (supra)** where it was stated by my brother Hon. Mruma, J that:

"On the EFD's receipts, I would like to define what EFD (Electronic Fiscal Device) is EFD is a machine designed for use in business for efficient management control in area of sales analysis and stock control systems and which correctly observed by the Taxing Officer EFD receipts are more relevant in tax matters. There is no provision in the Advocates Remuneration Order, 2015 (GN 264 of 2015) which requires proof of payment by production of EFD's receipts. EFD receipts may be relevant when there is a dispute as to whether one pays taxes or government revenues or not. That was not the issue here"

Another camp is that which require production of EFD receipts as proof to substantiate instruction fee. In the case of **Prof. Emmanuel Mjemma** (supra), my brother Hon. I.C. Mugeta, J stated:

"It is a matter of law that all practicing advocates are registered VAT payers (see section 29(1) of the Value Added Tax, 2014). According to section 36(1) of the Tax Administration Act, 2015, a person who supplies goods renders services or receives payment in respect of goods supplied or service rendered shall issue fiscal receipts or fiscal invoice by using electronic fiscal devices...Any act or manifestation of tax avoidance ought to be restricted, it follows, therefore that such Advocates are required by law to issue EFD receipts upon payment for service rendered, claims on such payments shall be proved by submission of EFD receipt as evidence. In this case no such receipt was tendered, therefore, such claims remain unsubstantiated."

In Thinamy Entertainment Limited & 2 Others vs. Dino Katsapas, Misc. Commercial Case No. 86 of 2018 (HC-Commercial Division, Dar es Salaam) (unreported) my sister, Hon. B.K. Phillip sided with the case of **Prof. Emmanuel Mjemma** (supra) and stated:

"I am of a settled view that a proof of any payments to an advocate has to be by submitting Electronic Fiscal Device receipts (EFD receipts) (see sections 36(1) of the Tax Administration Act, 2015)...In the instant application the decree holders did not submit any receipt to prove the claimed instruction and consultation fees, thus this court cannot award costs which are not proved as required by the law."

In this case the Honourable Judge confirmed the costs as was awarded by the Taxing Officer.

And my brother Hon. Magoiga, J in the case of **First World Investment Court Brokers vs. Buckreef Gold Company**

Limited, Misc. Commercial Reference No. 1 of 2019 (HC-Commercial Division, Arusha) (unreported) stated:

"Advocates are doing business and are guided by several laws on taxation and without indulging deep into the issue of EFD as ruled by my learned brother Mruma, J and I.C. Mugeta, J in their respective."

In a recent case of **M/S Taxplan Associates Limited vs. Tancan Mining Company Limited, Misc. Commercial Reference No. 02 of 2019 (HC-Commercial Division, Arusha)** (unreported) my brother Hon. Magoiga, J once again tackling the issue of taxation of bill of costs gave a wider interpretation of section 36(1) of the Tax Administration Act in taxing of bill of costs and stated:

"Guided by the introduction part of the Tax Administration Act, 2015...I find it opposite to give purposive wider interpretation of section 36(1) of the Tax Administration Act, 2015 by taking cognizance that since no dispute that instructions fees were paid and the series rendered. Therefore, to achieve the interest of justice to parties and comply with the spirit of tax collection as envisaged above by the relevant Act, I order that the learned counsel for respondent be paid instruction fees as taxed subject to payment of relevant taxes with penalties, if any for knowing the requirement but opted to do otherwise at the detriment Tanzania Revenue Authority which is casted to collect tax for national development."

He went on saying:

"The arguments of Mr. Sambo could only hold water if at all no receipt was attached. Let me make myself clear that I am not blessing non-issuance of EFD receipts on instruction fees to advocates but I am alive that each case must be decided on its own merits and

circumstances. And the circumstances of this reference have made me choose the cheap devil of making sure that taxes are paid and parties get what they deserve without necessarily employing technicalities to circumvent the purpose of the law itself."

In this latter case the decree holder had presented a manual receipt instead of the EFD receipt. My understanding of the wide interpretation by my learned Hon. Judge is that though EFD receipts are necessary for the support of instruction fees in taxation of bill of costs but it all depends on circumstances of each case.

The decisions I have highlighted above are all High Court decisions and though not binding in this matter, but they are highly persuasive.

Taxation of bill of costs is governed by the Advocates Remuneration Order, 2015. The said Order applies to taxation on the remuneration of an advocate by a client and also for the taxation of costs between a party and another party in contentious and non-contentious matters (Order 2 of Advocates Remuneration Order, 2015). Taxation of bills of costs follows award by the court of costs to the successful party (decree holder) in a civil suit. The rationale behind is to find a reasonable amount to refund the decree holder of the costs incurred after being declared the winner. The taxation of costs before the Taxing Officer subject of this reference was between parties and the controversy as was the case in the cited cases above is instruction fees which was not supported by EFD receipts.

I have gone through the Advocates Remuneration Order, 2015, firstly, there is nowhere that requires proof of instruction fees. I am of the considered view that this may be based on the fact that though the Taxing Officer has the discretion under Order 12(1) of the Advocates Remuneration Order, 2015 to allow such costs, charges and expenses, but the said discretion has to be within the scales authorized in the Order or appear to him to be necessary or proper for the attainment of justice. The duty to abide to the scales is also noted in Order 13 of the Advocates Remuneration Order, 2015 where an advocate is not allowed to charge or accept remuneration over and above those prescribed in the Order unless on special circumstances

In other words, though the Taxing Officer has the discretion of taxing costs as it appears to him to be proper for the attainment of justice, but he is also required to tax costs within the scales prescribed in the Advocates Remuneration Order, 2015. And since the scales are prescribed then proof in terms of receipts (of whatever kind) would not be necessary as the scales are already statutorily provided for. Prudence is evident that proof would only be required where a party claims costs above the statutory scale. The responsibility assigned upon the Taxing Officer would be to look at the scales and tax the bill according to the rates and as justice requires.

Secondly, an advocate may according to Order 16(1) of the Advocates Remuneration Order, 2015 accept security from his client for the amount to become due to the advocate for remuneration and disbursements in business to be transacted or being transacted by

him. This means where a client furnishes security, an advocate may agree to be paid after conclusion of the case or after the taxation of the bill of costs by the winning party. In such instances, an amount of money (the security) is deposited in the clients' account and this amount of money is practically not the advocate's money but it is money being held by the advocate on behalf of the client until the matter is concluded where an invoice is raised according to the instruction fees agreed and direct costs incurred; which amount is thus deducted from the amount deposited in the client's account. In situations of this nature, availability of EFD receipt in respect of instruction fees would only be after the taxation of bill of costs. It becomes premature for EFD receipts to be availed when the advocate is yet to complete his assignment/instructions and formerly paid his fees. So, in such cases no receipts can literally be availed during taxation of bill of costs.

Thirdly, the case subject of this bill of costs was not a tax dispute matter. Tax Administration Act has an elaborate and comprehensive provisions for ensuring that tax payers in this country including advocates fulfill their obligations and the Tanzania Revenue Authority (**TRA**) ensures compliance. Under the Tax Administration Act, the Commissioner General has the mandate to resolve tax issues (section 50(1) of the Tax Administration Act). A person who is not satisfied with the decision of the Commissioner General may appeal to the Tax Appeal Tribunal (section 53(1) Tax Administration Act) and the Commissioner General has powers to extend the date on which tax or part thereof shall be paid (section 59(a) and (b) of the Tax

Administration Act). In view of the cited provisions of the law, the Commissioner General is the one with the powers to inquire upon the reasons as to why an EFD receipt has not been issued. The court will only deal with tax matters where the Commissioner General files a suit to recover tax as a government debt under section 59(a) and (b) of the Tax Administration Act or on appeal from the decision of the Tax Appeals Tribunal. As pointed out in **Buckreef Gold Company Limited** (supra) EFD receipts may be relevant where there is a dispute related to tax matters. It would therefore be unfounded for the court to decline to entertain the decree holders bill of costs simply because no EFD receipt has been issued.

As for section 29(1) of the VAT Act, irrespective that every professional including advocates are subject to VAT registration, but I fail to find the relevance of this provision in connection with issuance of EFD receipts during taxation of bill of costs. The argument regarding this provision is misplaced in the context of the application for reference of bill of costs before this court.

In the totality therefore, it is my considered view that, in taxation of bill of costs there is no need of proof of instruction fees by presentation of EFD receipts (see **Buckreef Gold Company Limited**). However, where the instruction fees is over and above the prescribed scale as provided for in the Advocates Remuneration Order, 2015, then necessary proof may be presented depending on the circumstances of each case, to enable the Taxing Officer exercise his/her discretion (see **M/S Taxplan Associates Limited** (supra)). For direct costs, presentation of receipts or vouchers may be upon

the request of the Taxing Officer (Order 58(1) of the Advocates Remuneration Order, 2015).

In view of the above explanation, the argument by Mr. Kinawari claiming presentation of EFD receipts and non-compliance by the decree holder of the Tax Administration Act and VAT Act in taxation of bill of costs cannot stand. The said pieces of legislation (Tax Administration Act and VAT Act) as we have seen hereinabove are useful in regulating tax matters and would come into play when and only if, for instance, an advocate's tax books are not in order as assessed by the regulator, that is, TRA.

Now, coming to the present case, the respondent charged instruction fees at the rate of TZS 2,000,000/=. The Taxing Officer, correctly in my view, awarded TZS 1,000,000/= which amount is prescribed under Item 1(m) of the Eleventh Schedule to the Advocates Remuneration Order, 2015. The amount awarded is set out in the scale for applications which are opposed as was in the instant matter. Since the argument by Mr. Kinawari has failed, I do not hesitate to confirm the amount of TZS 1,000,000/= awarded as instruction fees and I shall not disturb the amount of TZS 860,000/= as disbursements as the amount taxed is reasonable.

In the result, I do not see any justification to interfere with the decision of the Taxing Officer. It is my finding that the Taxing Officer judiciously awarded the sum of TZS 1,000,000/= and TZS 860,000/=

as instruction fees and disbursements respectively. The application is thus dismissed in its entirety with costs.

It is so ordered.


V.L. MAKANI
JUDGE
20/04/2020