

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

REFERENCE NO 06 OF 2021

(Arising from Bill of Costs No. 40 of 2018 Delivered on 13 January December, 2020)

AGREY GODFREY KIBANGA *(as an administrator of the estate of the late Sembe Godfrey Kibanga) and Another* **1ST APPLICANT**

BRYSON G. DANDA **2ND APPLICANT**

VERSUS

NEEMA ISACK KANYAWANA..... **1ST RESPONDENT**

STAR TRADERS LTD **2ND RESPONDENT**

Date of last Order: 23/09/2022

Date of Ruling: 06/10/2022

RULING

OMARI, J.:

This Application is made under Order 7(1) of the Advocates Remuneration Order GN No. 264 of 2015 (the Orders). The main contention between the parties is the amount awarded in the form of instruction fees, attendance fees and fees for handling the Bill of the Costs by the Taxing Officer in Bill of Costs No. 40 of 2018 arising from Land Case No. 338 of 2016.

It all began when the Applicants sued the Respondents in Land Case No. 338 of 2016. The suit was struck out with costs after the Applicants conceded to a preliminary objection. Thereafter, the Respondents filed a Bill of Costs No. 40 of 2018, the same was heard and finally determined on 13 January, 2020 where the Taxing Officer granted the costs to the tune of TZS 8,947,000. Aggrieved, the Applicants applied for extension of time to file the present Reference out of time due to delay in obtaining the Ruling of the Taxing Officer. The extension was granted on 14 April, 2021. Therefore, the Applicants are before this court seeking to challenge the Ruling in Bill of Costs No. 40 of 2018. They are seeking orders; *inter alia*, that the ruling of the Taxing Officer in Bill of Costs No. 40 of 2018 delivered on 13 January, 2020 be set aside and for it to make befitting orders.

At the hearing for this Reference, the Applicants enjoyed the services of Mr. Rajabu Mrindoko learned advocate while the Respondents enjoyed the services of Ms. Jacqueline Kulwa, also learned advocate.

At the opening of his submission the learned advocate for the Applicants adopted the joint Affidavit of his clients and prayed that it be taken to form part of his submission. He went on to say that the Reference was predicated

on three grounds that is; the instruction fee of TZS 7,500,000 awarded to the Respondents is excessive; the attendance fee awarded at TZS 600,000 is unreasonable and unjustifiable and lastly the award of TZS 750,000 is being complained of for being too high in handling a Bill of Costs. Armed with the three grounds; the Applicants seek to question whether the award is justifiable and if not for it to be set aside by this court.

When submitting on the first ground the learned advocate for the Applicants stated that the main controversy is the quantum of the instruction fees awarded by the Taxing Officer. In his view, the amount is excessive and unreasonable. He fervently explained that the general rule is that the award of an instruction fee is within the discretion of the Taxing Officer and the same cannot be interfered with; unless one proves that the Taxing Officer exercised his discretion injudiciously, has acted upon a wrong principle or has applied wrong consideration. He went on to state that, this has been dealt with in various decisions of the Court of Appeal of Tanzania; one of them being the **Tanzania Rent a Car Limited vs. Peter Kimuhu**, Civil Reference No.9 of 2020, Court of Appeal at Dar es Salaam (unreported).

The learned advocate continued to assert that instruction fees are guided by Regulation 41 of the Orders, which requires the Bill of Costs incurred by an advocate in contingent proceedings to be taxed in accordance to the Tenth, Eleventh and Twelfth Schedule of the Orders. Item 1(k) of the Eleventh Schedule is most relevant. It provides for fees for instructions shall be such a sum as the Taxing Officer shall consider reasonable but not more than TZS 1,000,000. He added that the Eleventh Schedule has a *proviso* that states in exercising the discretion given to him, the Taxing Officer should consider other fees or allowances (if any) in respect of the work, such allowances apply, the nature and importance of the matter, the amount involved and the interest of the parties, the general conduct of proceedings and all other relevant circumstances. This means the Taxing Officer has discretion in determining and taxing costs however, the discretion needs to be exercised judiciously within the cost scale of the Orders.

The learned advocate claimed that instruction fees are supposed to be compensation for preparation and work done in respect of a case it is not an enrichment avenue for advocates as it was decided in the case of **Rahim Hasham vs. Alibhai Kaderbhai** (1938) 1 TLR (R) 676 as it was referred

to by the Court of Appeal in **Tanzania Rent a Car Limited vs. Peter Kimuhu** (*supra*).

He went on to argue that in this matter the Taxing Officer awarded TZS 7,500,000 as instruction fees simply because the matter involved a lot of issues; the Plaintiff had many annexures, which made it time-consuming and complex. However, the suit was not heard on merit and was struck out in the preliminary stages on account of a preliminary objection by the Respondents. In his view, had the Taxing Officer considered this, they would have ruled that the involvement and work was very low and would have taxed on the lower side. He went on to say the matter was not complex and

even if it were, it was struck out on technicalities in the preliminary stages. He concluded on this first point by submitting that in their opinion the Taxing Officer had violated the taxation principle of consistency in this resulted into wrong consideration.

In reply the learned advocate for the Respondents Ms. Kulwa, generally stated that the learned advocate for the Applicants was faulting the Taxing Officer for awarding TZS 7,500,000 as instruction fees on the basis that the amount is high. She disputed this on the ground that the Taxing Officer awarded the set amount after going through the record and seeing the

nature of the case, that it was complex and involved research. She went on to say the suit was instituted in 2016 and it was pending in court until 2018 and for the whole duration they had been prosecuting the matter. The results of research they did on the matter enabled them to raise a preliminary point of objection and the same was pending for two to three sessions in court, until the Applicants side decided to eventually concede. Therefore, the Taxing Officer was justifiable in awarding TZS 7,500,000 since the amount for instruction fee is in the discretion of the Taxing Officer. And he, (the Taxing Officer) was correctly guided by Order 41 read together with the Eleventh Schedule item 1(k) as submitted by the learned advocate for the

Applicant. She continued to submit that when one reads the *proviso* they will find that the Taxing Officer was rightly guided. She averred that the law is clear that the Taxing Officer has to be guided by the nature, importance, amount involved, interests of the parties and the general conduct of proceedings. The Taxing Officer considered general conduct of the proceedings and in his Ruling, he referred to the pleadings having many annexures to be read and to be defended. She concluded by saying that it was her humble submission that the amount of TSZ 7,500,000 is reasonable and she prays that it remains as was taxed by the Taxing Officer.

In his rejoinder, Mr. Mrindoko mentioned that he is sticking to his earlier submission but he would like to add that said suit, that lead to the Bill of Costs had nothing complex about it to the extent of involving research and it ended in the preliminary stages. He went on to say that, their concern was not the nature of the case but the general conduct of the proceedings since the case never advanced to hearing.

Having considered the submissions of both learned advocates on this point it is my considered opinion that the learned advocate for the for the Applicants is sending himself off course by leaning on the argument that because the matter was not heard on merit then complexity of the matter should be downgraded. As rightly stated by the learned advocate for the Respondents, it is the research that did and work they put in that enabled them to raise the preliminary objection, eventually defend it and have the suit struck out.

Looking at the ruling of the Taxing Officer, the amount that the Respondents had originally claimed has actually been taxed. The Bill originally contained instruction fees charged at TZS 15,000,000. When taxing the same, the Taxing Officer stated that ordinarily instruction fees for suits involving property; the instruction fee is charged based on the value of the suit

property. In this particular case there was none mentioned and that is why the suit was struck out. The Taxing Officer went on to say; which I do agree with, considering the nature of the suit which would rise a lot of issues, the Plaintiff had many annexures which would necessarily engage time and energy to go through in preparation of a defense and end up with a preliminary objection. He also noted that the reliefs and orders sought as quoted in the Plaintiff give a picture on the complexity of the matter and went on to charge TZS 7,500,000 for instruction fees.

I am well aware that the amount of work done and effort exerted in this particular matter might not be the same as if the matter had gone on to be heard on merit, however, there was work done and such work has to be considered. It is also true as held by the Court of Appeal in **Tanzania Rent a Car Limited vs. Peter Kimuhu**, (*supra*) that instruction fees are supposed to be compensation for the work done by an advocate. However, it is my considered view that the compensation should be commensurate to the work that the advocate has done, that is the effort put in. I therefore agree with the Taxing Officer in terms of looking at the complexity of the matter as well as the documentation that the advocates had to go through in preparation for the case even if it was struck out in the preliminary stages.

According to the learned advocate for the Applicants the second category of cost complained of is court attendance, the Taxing Officer awarded TZS 100,000 for mention and hearing regardless of the time spent by the advocate(s) in court. He submitted that the guiding provision on assessing attendance is Rule 46 of the Orders read together with item 23 of the Eighth Schedule. From the provision, the determining factor is time spent and not the purpose of attendance since there is no time recorded in the proceedings to show how long the advocate spent in court. He went on to say the Taxing Officer abused his discretion and applied the wrong principle in awarding TZS 100,000. The learned advocate pointed out that in the case of **Rose**

Mkeku vs. Parves Shabbirdin, Misc. Land Appeal Case No. 89 of 2021 High Court at Mwanza (unreported) dealt with the issue of attendance and how the same is taxed.

In her reply on this particular point the learned advocate for the Respondents stated that the Applicants are faulting the Taxing Officer for awarding TZS 600,000 on the basis that the Taxing Officer was not guided by the Eighth Schedule item 23. She disputed this assertion, prayed and submitted that TZS 100,000 per attendance is reasonable and in accordance with the law that her learned brother had cited in his submission. She concluded that they

find the amount of TZS 100,000 reasonable, especially because there is usually no prescribed amount of time spent in court for a hearing or mentions; therefore, the amount be granted as awarded by the Taxing Officer.

In his rejoinder the learned advocate for the Applicants stood by his stance that in the **Rose Mkeku vs. Parves Shabbirdin** case (*supra*) the court held that costs should not be excessive or oppressive but only such a necessary for the conduct of litigation.

Once again, my glimpse at the Ruling by the Taxing Officer reveals that the Respondents had charged attendance at TZS 100,000/= per each mention

for four attendances and TZS 300,000/= per attendance for attendance of hearing twice. The Taxing Officer taxed it to TZS100,000 across the board. In my considered view, the Taxing Officer has not acted injudiciously nor applied a wrong principle.

Finally, the learned advocate for the Applicants when submitting on the last cost complained of, that is TZS 750,000 awarded for handling the Bill of Costs by the Taxing Officer stated that this was very high for a mere Application for a Bill of Costs. He prayed that the court go through the record and set aside the award granted to the Respondents by the Taxing Officer

and allow the Reference to a reasonable amount which will meet justice of the case.

Submitting on the last point being complained of, the learned advocate for the Respondents stated that the amount is reasonable since when one looks at the Eleventh Schedule the Orders item 1(m) provides for instruction fees to pursue Applications. The said provision includes Bills of Costs and provides TZS 1,000,000 for instruction fee in exclusion of attendance and disbursements. She emphasized that the amount of TZS 750,000 is reasonable and she prayed for the amount to be awarded as taxed by the Taxing Officer or taxed upward to TZS 1,000,000 as it is in the Eleventh Schedule item 1(m). She went on to say that authorities that were being relied on by the learned advocate for the Applicants are distinguishable and should not apply to the Reference at hand. She concluded that it was her humble submission that this Application be dismissed.

Once again, I take a look at the Ruling of the Taxing Officer. For the anticipated costs of the Bill of Costs, he stated that the law was very clear that all the Decree Holder had to do leave a blank space, that is, fill nothing, the Taxing Officer shall then to put the reasonable amount under the circumstances of the case. In this particular Application, the Taxing Officer

thought in the circumstances TZS 750,000 is reasonable to cover costs of preparation and presentation of this Bill of Costs. I see nothing wrong or injudicious in the decision of the Taxing Officer having taxed the amount complained of.

In its totality the Taxing Officer ended by taxing the entire bill that was submitted by the Respondents at TZS 8,947,000 the sum of TZS 8,500,000 was taxed off. Which is in our view reasonable in the circumstances of the case and general conduct of the proceedings and all other relevant circumstances.

In the case of **Attilio vs. Mbowe** (1969) HC No. 289 Georges, CJ (as he then was) was of the view that, it would be preferable for the Taxing Master to set out the reasons for his decision; making it obvious that although the Taxing Officer has the discretion to give orders as to costs, he is as well required to give reasons for the same. In this particular Application the Taxing Officer taxed those costs and gave reasons at each stage.

To conclude, If I may borrow the wisdom of the court in **Rose Mkeku vs. Parves Shabbirdin** (*supra*) where it held that courts should usually be reluctant to interfere with the decision(s) of the Taxing Officer; unless it is proved that the Taxing Officer exercised his discretion injudiciously or that

he acted or applied wrong consideration. While the Applicants in the Reference before me are averring Taxing Officer acted upon the wrong principle and actually applied wrong consideration while using his discretion injudiciously; they failed to demonstrate how that was so. Their whole Application is hinged on the matter being struck out at preliminary stages and therefore, it cannot be complex. This, in my view, cannot be the only factor to look at, as already elucidated above. Consequently, I fail to see reason as to why I should interfere with a well-reasoned and thought out decision of the Taxing Officer. I therefore find that the Taxing Officer used his discretion judiciously and reasonably.

In the event, this Reference is not allowed and in the circumstances each party to bear its own cost.

It is ordered accordingly.

Dated at Dar es Salaam on this 6th Day of October, 2022.



A.A. OMARI

JUDGE

06/10/2022

Court: Ruling delivered in the presence of the learned advocate for the Respondents, Ms. Jackline Kulwa.



A handwritten signature in blue ink, appearing to read "A.A. Omari".

A.A. OMARI

JUDGE

06/10/2022