

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**REFERENCE NO. 31 OF 2022**

(Arising from the decision of the Taxing Officer [Hon. W. Hamza-DR] dated  
29/11/2022 in Bill of Costs No. 146 of 2020 originated in Land Case No.  
370 of 2017

**SAAD SADIKI.....APPLICANT**

**VERSUS**

**EFC TANZANIA MICROFINANCE BANK LIMITED.....1<sup>ST</sup> RESPONDENT**

**MAJEMBE AUCTION MART LIMITED..... 2<sup>ND</sup> RESPONDENT**

**MAULID NGAIWA JUMA..... 3<sup>RD</sup> RESPONDENT**

**RULING**

Date of the last Order: 24.04.2023

Date of Ruling: 25.04.2023

**A.MGEYEKWA, J.**

The applicant wants to fault the decision of Hon. W. Hamza-DR, Taxing  
Master with respect to Taxation Cause No. 146 of 2020 delivered on 29<sup>th</sup>  
November 2022, hence this Application. The same has been broached

under Order 7, Rules 1 and 2 of the Advocates Remuneration Order, G.N No. 264 of 2015 supported by the affidavit sworn by Erick Simon, learned advocate and resisted *vide* counter affidavit affirmed by Ismail Amin Mmari, learned counsel for the 3<sup>rd</sup> respondent. The 3<sup>rd</sup> respondent confronted the application with preliminary objections on two points of law to *wit*. -

1. *That the affidavit in support of the application does not contain grounds that supports the prayers contained therein.*
2. *That the application is in itself legally untenable.*

By the Order of this Court dated 4<sup>th</sup> April 2023, the parties were directed to argue the preliminary objection on the points of law by way of written submissions, and the same was acted upon in conformity with the Court's schedule. As per the good practice of the Court, it demands that having been seized with the preliminary objection, it is prudent and procedural to deal with it primarily before jumping into the merit or demerit of the application at hand.

In sustenance of this application, Mr. Mmari urged to commence with the 2<sup>nd</sup> limb of the objection, he maintained that the present application contravenes Order 48 of the Advocates Remuneration Order, 2015. He submitted that, in

the course of perusal of the award issued in the Bill of Costs No. 146 of 2017, it came to their attention that the Taxing Master allowed Tshs. 17,700,000/= (Seventeen Million Seven Hundred Thousand Shillings Only) out of Tshs. 24,720,000/= (Twenty-Four Million Seven Hundred Twenty Thousand Shillings Only) the difference being a total of Tshs. 7,720,000/= (Seven Million Seven Hundred Twenty Thousand Shillings Only) which accounts for more than 1/6 of the total amount of the Bill of Costs filed before this Court whereas 1/6 of the said amount stands at the tune of Tshs. 4,120,000/= (Four Million One Hundred Twenty Thousand Shillings Only) and that the amount exceeding it should be disallowed. To bolster his proposition, he cited the cases of **John Momose Cheyo v Stanbic Tanzania Ltd**, Commercial Reference No. 72 of 2018, (HCT-COM.DIV.-DSM), (unreported) and **The Regional Commissioner of Shinyanga v Bernard Msonga Sizasiza**, Civil Reference No. 1 of 2019, HCT at Shinyanga, (unreported).

He added that going by the affidavit from the first paragraph to the last paragraph, no word from the applicant that faults the finding of the Taxing Master, thus, the application is therefore in contravention of Order XLIII Rule 2 of the Civil Procedure Code [Cap 33 R.E 2019].

Resisting the application, Mr. Simon contended that, the applicant's grievances against the decision of the Taxing Officer was made through a

back door (by way of preliminary objection) contrary to Order 7 Rules 1 and 2 of the Advocates Remuneration Order, G.N No. 263 of 2015. He argued that the law under Order 48 of the Advocates Remuneration Order, 2015 provides for the discretionary powers to the Taxing Officer to disregard any instruction fee claimed in the computation of the alleged 1/6 amount. To buttress his contention, he referred this Court to the decisions of **Mohamed Builders Limited v Like Steel and Allied Products Limited**, Commercial Reference No. 6 of 2022, and **National Microfinance Bank (NMB) PLC vs. Levison Yohana Kiula**, Reference No. 3 of 2021. He invited this Court to apply the discretion under the aforesaid provision by excluding disbursements to the total of Tshs. 910,000/= (Nine Hundred Ten Thousand Shillings Only) and disregarding instruction fees claimed in the sum of Tshs. 21,000,000/= (Twenty-One Million Shillings Only) as pleaded in item 1 of the bill of costs when computing 1/6 amount.

He asserted that the counsel for the 3<sup>rd</sup> respondent has failed to cite any law which requires an affidavit in support of an application for reference to contain grounds whereas Order XIX Rule 3 of the Civil Procedure Code Cap. 33 [R.E 2019] requires that an affidavit be confined to facts that the deponent can prove.

In retort, briefly, he stated that the 3<sup>rd</sup> respondent was not aware of the decision issued by the Taxing Master until when the instant Reference was

filed before this Court and served upon him. He further maintained that the award of the Taxing Master was illegal for being in contravention of Order 48 of the Advocates Remuneration Order, 2015, hence, should be quashed and set aside.

Having dispassionately considered the rivaling arguments for and against the preliminary objection raised by the 3<sup>rd</sup> respondent's counsel, the question that presents itself for the Court's determination is *whether the preliminary objections are meritorious*. In the matter at hand, the applicant's counsel is complaining that the first objection is brought through the back door.

Before I get to the substance of the preliminary objections it is apposite that I should address the issue raised by the applicant's counsel in his reply to the written submission of the 3<sup>rd</sup> respondent.

I have found it is important to address the point of law raised by the respondent since this court has a duty to take judicial notice of matters relevant to the case even when the matter is not brought in a separate Application. See the case of **Adelina Koku Anifa & another v Byarugaba Alex**, Civil Appeal No. 46 of 2019.

The facts of the instant application correspond well with the authority above whereas, the 3<sup>rd</sup> respondent has raised points of preliminary

objection before the hearing of the reference on merit which it is a proper procedure instead of filing a fresh reference. In case the point of law could not have been raised by the learned counsel for the 3<sup>rd</sup> respondent then this court could have raised or the same could have been raised in a later stage.

Having heard the contention of both counsels, I am of the considered view that the born of contention between the counsels is *whether the 1/6 was properly gauged*.

For better resolving the rivaling arguments, I find it apposite to reproduce the provisions of Order 48 of the Advocates Remuneration Order, G.N No. 263 of 2015 as hereunder: -

*“When more than one-sixth of the total amount of a bill of costs exclusive of court fees is disallowed, the party presenting the bill for taxation shall not be entitled to the costs of such taxation:*

*Provided that, at the discretion of the taxing officer any instruction fee claimed, may be disregarded in the computation of the amount taxed of that fee in the computation of the one-sixth”.*

In light of the above provision, the bill of costs (taxation cause) which was filed on 17<sup>th</sup> November 2020 *inter alia* item 1 on instruction fees stood at the

tune of Tshs. 21,000,000/= (Twenty-One Million Shillings Only). Items 55-62, disbursements were for the sum of Tshs. 910,000/= (Nine Hundred Ten Thousand Shillings Only) save for attendance fees which they do not center on the 2<sup>nd</sup> limb of the preliminary objection. The Taxing Master taxed in the instruction fees and drafting to the tune of Tshs. 15,000,000/= (Fifteen Million Shillings Only). Attendance costs were taxed to the tune of Tshs. 950,000/= (Nine Hundred Fifty Thousand Shillings Only), drafting fees to the tune of Tshs. 840,000/= (Eight Hundred Forty Thousand Shillings Only). The Taxing Master taxed in disbursements to the tune of Tshs. 910,000/= (Nine Hundred Ten Thousand Shillings Only), thus, making a total of 17,700,000/= (Seventeen Million Seven Hundred Thousand Shillings Only).

Guided by the same provision of law, and submission made by Mr. Erick, I fully subscribe that disbursements are a matter of principle not subjected to taxation. Reading Order 48 of the Advocates Remuneration Act, disbursements are excluded. Therefore, I proceed to exclude the amount of the disbursement which was quantified to the sum of Tshs. 910,000/= (Nine Hundred Ten Thousand Shillings Only). The remaining balance ought to have been taxed and was supposed to be Tshs. 16,790,000/= (Sixteen Million Seven Hundred Nine Thousand Shillings Only) minus the grand total amount prayed for which was Tshs. 24,720,000/= (Twenty-Four Million Seven Hundred Twenty Thousand Shillings Only) makes the differential sum

of Tshs. 7,930,000/= (Seven Million Nine Hundred Thirty Thousand Shillings Only), which is more than 1/6 of the total amount of the bill of costs being equivalent to Tshs. 2,798,333.33/= (Two Million Seven Hundred Ninety-Eight Thousand Three Hundred Thirty-Three Shillings and Thirty-Three Cents Only) which should have been disallowed by the Taxing Master and ruled out that the applicant was not entitled to the costs of such taxation as per the dictate of the said provision of law and not otherwise.

I fully associate with the counsel for the 3<sup>rd</sup> respondent and the decisions by my learned brother and sister in the case of **John Momose Cheyo** and **The Regional Commissioner of Shinyanga** (*supra*) respectively apropos to the matter at hand.

The 2<sup>nd</sup> limb of the preliminary objection, having disposed of the entire application, I'm not inclined to determine the 1<sup>st</sup> limb of the objection as opting to do so is tantamount to academic exercise which I'm not prepared to do so at this juncture.

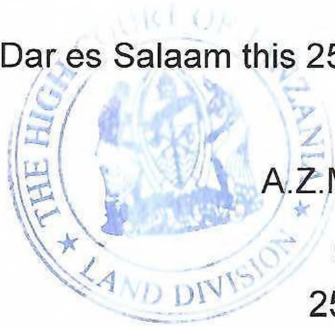
In the final analysis, the 2<sup>nd</sup> limb of the preliminary objection is upheld for being meritorious and proceed to quash and set aside the decision by the Taxing Master and order that, having disallowed more than 1/6 of the claimed amount in the Bill of Costs No. 146 of 2020, the applicant was not entitled to the costs of such taxation.



Consequently, the application is wanting of merits and it is therefore dismissed without costs.

Order accordingly.

DATED at Dar es Salaam this 25<sup>th</sup> April 2023.

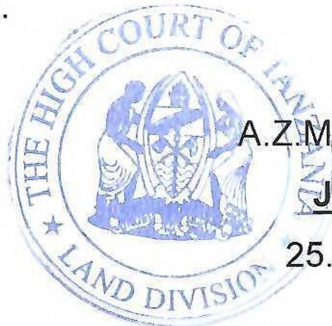


  
A.Z.MGEYEKWA

JUDGE

25.04.2023

Ruling delivered on 25<sup>th</sup> April 2023 in the presence of Mr. Erick Simon, counsel for the applicant, and Mr. Stephen Mayombo, counsel for the 1<sup>st</sup> respondent also holding brief for Mr. Ismail, counsel for the 3<sup>rd</sup> respondents.



  
A.Z.MGEYEKWA

JUDGE

25.04.2023