

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

REFERENCE NO.34 OF 2022

(Arising from the Ruling in Bill of Costs No. 137 of 2022 as per Chugulu, Deputy Registrar delivered on 15th day of December, 2022)

MICHAEL B. MASINDE APPLICANT

VERSUS

FRANCIS ENDENI MSANGI RESPONDENT

Date of last Order: 03/08/2023

Date of Ruling: 14/09/2023

RULING

I. ARUFANI, J

This is an application for reference made under rule 7 (1) and (2) of the Advocate Remuneration Order of 2015, GN. No. 264 of 2015, (henceforth, referred as the Order). The applicant is beseeching the court to call and examine the ruling and decision in Bill of Costs No. 137 of 2022 so as to satisfy itself about the legality, propriety and correctness of the decision given by Hon. Chugulu, Taxing Officer on 15th December, 2022. The reference is made by way of chamber summons and supported by the affidavit sworn by the applicant and opposed by the counter affidavit sworn by Ms. Juliana J. Mumburi, Advocate for the respondent.

The brief background of this reference as can be traced from the affidavit, counter affidavit and the submissions filed in the court by the

counsel for the parties is to the effect that; the applicant filed Land Case No. 210 of 2021 in this court against the respondent and three others who are not parties in this reference. The stated suit was attacked by several preliminary objections raised by the respondent and one of his co-defendants namely D. S. Izina @ Dhahiri Said Izina. The court sustained the stated preliminary objections and struck out the suit with costs.

After the foregoing stated decision being delivered the counsel for the respondent filed the bill of costs mentioned hereinabove in this court seeking to be awarded the sum of TZS 16,950,000/= being instruction fee, costs of attending the court and disbursement. The taxing officer taxed the bill of costs at the tune of TZS 3,540,000/=. Upon the applicant being aggrieved by the costs granted to the respondent by the taxing officer, he filed the present reference in this court basing on the grounds deposed at paragraph 6 of the affidavit supporting the application which read as follows: -

- 1. The taxing officer erred in law and fact for awarding the instruction fee and attendance costs without basing to the prescribed scale as stipulated in the Advocate Remuneration Order, 2015.*
- 2. That the taxing master erred in law and fact for awarding instruction fee and costs above the prescribed scale without the respondent proving them by production of receipt or engagement or remuneration agreement or voucher or existing of special factors.*

3. The taxing officer failed to exercise her discretion judiciously for not taking into account the instant Bill of cost No. 137 of 2022 and bill of cost No. 138 of 2022 originating from Land case No.210 of 2021 has similar claimed costs and was represented by the same advocate and may have conflicting decision by being adjudicated by two different taxing officers.

While the applicant was represented in the matter by Mr. Cleophas Manyangu, learned advocate the respondent was represented in the matter by Ms. Juliana J. Mumburi, learned advocate. The hearing of the application was conducted by way of written submission. The counsel for the applicant argued the afore listed first and second grounds jointly. He stated rule 46 of the Order states all bills of costs are to be taxed on prescribed scale and not according to the whims of the parties or taxing officer.

He stated they have no quarrel with the costs for attendance, bill of costs and disbursement save that the disbursement is TZS 40,000/= and not TZS 60,000/=. He stated the first gist of their complaint is that the taxing officer erred in law in awarding instruction fee of TZS 3,000,000/= contrary to the law. He argued it is apparent that instruction fees for advocates and their client are governed by the Order and the taxing officer is required in exercising his or her discretion in taxing the bill of costs to abide to the law.

He argued the taxing officer awarded to the respondent the instruction fee of TZS 3,000,000/= contrary to the law purporting that the amount is reasonable and fair. He stated there are two bills of costs emanating from Land Case No. 210 of 2022 which are Bill of Costs No. 137 of 2022 which was before Hon. Chugulu, Taxing Officer and Bill of Costs No. 138 of 2022 which is before Hon. Kisongo, Taxing Officer. He stated taxation of the instruction fees for the proceedings before the High Court, subordinate courts or tribunal are governed by eleventh schedule of the Order.

He referred the court to item 1 (k) of the eleventh schedule of the Order which provides for instruction fees to sue or defend in any case not provided for shall be reasonable but not exceeding TZS 1,000,000/=. He submitted the act of the taxing officer to charge TZS 3,000,000/= as instruction fee to defend the case is not only against the law but also it was so high because of two reasons. Firstly, he stated the matter resulted into the bill of costs which its decision is being challenged in the present matter ended at preliminary objections and at a very early stage of the proceedings. Secondly, he stated the counsel for the respondent did not exhibit any extensive research that was done on complexity of the matter as the suit was struck out for the failure to cite the title deed in the plaint and thirdly, the decree holder has failed to state the correct and appropriate scale to be used in charging the bill of costs.

He argued even if the respondent was entitled to be award over and above instruction fees prescribed under the Order but the respondent was required to give proof of the amount of instruction fee which exceeded the prescribed scale. He said the respondent did not adduce any proof by the nature of engagement agreement or EFD receipts as the award was over and above the scale. He submitted there is no remuneration agreement was attached to the bill of costs which would have prescribed special grounds arising out of the nature, importance, complexity, sensitivity or urgency of the contentious business not envisaged at the time of signing the agreement to convince the taxing officer to award costs which is above the one prescribed by the law.

He argued in relation to the last ground of reference that, the taxing officer erred in law and facts for failure to exercise her discretionary power judiciously. He argued the taxing Officer failed to take into account there was another Bill of Costs No. 138 of 2022 which is pending before Hon. Kisongo, Taxing Officer. He argued the mentioned bill of costs originated from the same Land Case No. 210 of 2021 and said it has the similar claim of costs and the applicants in both bills of costs were represented by the same advocate in the mentioned land case. He argued that, although he raised the stated observation before the taxing officer and prayed her to make an order for consolidating the stated two bills of costs, but the

taxing officer did not make any order in relation to the stated prayer and in lieu thereof, she proceeded to tax the bill of costs separately.

He stated the decision made in the bill of costs in the instant reference may have conflict with Bill of Costs No. 138 of 2022 which was scheduled for ruling before Hon. Kisongo on 13th July, 2023. He submitted that, as the costs claimed in the mentioned bill of costs are similar to what has been adjudicated in the bill of costs which its decision is under examination of this court, he is praying the award made in the Bill of Costs No. 137 of 2022 be set aside with an order that the Bill of Costs No. 138 of 2022 pending before Hon. Kisongo be consolidated and adjudicated by one taxing officer.

In conclusion, he prayed the court to set aside the award of TZS. 3,000,000/= as instruction fee and the respondent be awarded the amount prescribed under item 1 (k) of the Eleventh Schedule to the Order. He prayed further that the decision by the taxing officer be vacated with an order that Bill of Costs No. 137 of 2023 and Bill of Costs No. 138 of 2022 be consolidated and determined by single taxing officer instead of two separate taxing officers to avoid conflicting decisions as they are both originating from the same Land Case No. 210 of 2021.

In reply, the counsel for the respondent stated in relation to the first ground of reference that, by taking into account the nature of the suit, the amount of research, printing of the required materials, time spent in

adjudicating the matter due to its complexity, the value of the suit which was TZS. 390,000,000/= and hard work of prosecuting the matter and raising preliminary objections which resulted into the striking out of the suit justified the award given by the taxing officer in the impugned decision of the bill of costs.

She referred the court to the case of **National Chicks Corporation Ltd & Others V. The National Bank of Commerce Ltd**, Com. Case No. 11 of 2014 (unreported) and **Ujagar Singh V. The Mbeya Co-operative Union**, (1968) HCD where it was stated taxing officer is required to consider the work done and time taken in preparing the case in awarding instruction fees. She argued that, item 7 of the Ninth Schedule to the Order provides for 3% to 7% of the value of the suit to be the scale for computing instruction fees in contentious matters.

She argued that, although the taxing officer gave the award which was below what was prayed as the value of the subject matter of the case was TZS 390,000,000/=, but they agreed to what was taxed by the taxing officer after seeing the taxing officer was governed by rule 12 (1) read together with item 1 (a) of the Eleventh Schedule to the Order. She argued that, the taxing officer has discretion to award not only costs, charges and expenses authorized by the Order but also those appears to him or her necessary for the attainment of justice. She referred the court to the case of **George Mbuguni & Another V. A. S. Maskini**, [1980]

TLR 53 which insisted in considering the complexity and time taken for research while considering instruction fees to be awarded.

She submitted that, item 1 (j) and (k) of the Eleventh Schedule to the Order are not proper scale for adjudicating the instruction fee to be awarded to the respondent as the case which gave rise to the impugned award of bill of costs was not an application for a prerogative order. She argued that, rule 62 of the Order allows advocate to represent more than one person in a same suit and manner of awarding costs to the advocate represented more than one party in a single suit. She said in preparing the written statement of defence of her clients she charged them separately and she filed in the court the written statement of defence of her clients separately.

She stated she drafted separate written statement of defence because each client had his own facts to state in the case and their evidence were different and that is the reason for drafting two separate bills of costs. She stated the Bill of costs No. 138 of 2022 has already been decided but she don't have the copy of the decision of the taxing officer and when the matter was decided she was not in court as she had travelled to Kilimanjaro to attend burial event of her relative.

She stated in relation to the second ground that, as held in the case of **Tanzania Rent a Car Limited V. Peter Kimuhu**, Civil Reference No. 9 of 2020, in taxation of bill of costs there is no need of proving instruction

fees by presentation of EFD receipt. As for the third ground of reference she repeated what she has just submitted in the first ground of reference that rule 62 of the Order allows separate bills of costs to be preferred. At the end she prayed the court to dismiss the application with costs and award granted by the taxing officer be upheld.

I have carefully considered the submissions fronted to the court by the counsel for the parties and after going through the affidavit and counter affidavit filed in the instant application the court has found the issue to determine in this matter is whether the application is meritorious. In determine the stated issue I will adopt the style used by the counsel for the applicant of consolidating the first and second grounds of reference and deal with them together and the third ground which will now be the last ground will be dealt separately.

The court has found as the counsel for the applicant has categorically stated in his submission that they have not quarrel with the costs of attendance, bill of costs and disbursement the court will focus on determination of the legality, propriate and correctness of the instruction fee which the counsel for the applicant argued it was awarded without basing on the prescribed scale stipulated under the Order. The court has found it is true as rightly argued by the counsel for the applicant that rule 46 of the Order requires all bills of costs to be taxed on the prescribed

scale unless a Judge of the High Court has found there is a special reason for doing otherwise. For clarity purposes the cited rule read as follows: -

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

That being the position of the law, the court has found the record of the matter reveals the suit gave rise to the bill of costs which its decision is being sought to be examined by this court was a claim of unliquidated sum as it was a claim of an order for declaration of ownership to the land. That being the nature of the case upon which the respondent was granted costs, the court has found as rightly argued by the counsel for the applicant, taxation of instruction fee for the stated case was supposed to be made in accordance with the scale provided under the Eleventh Schedule of the Order.

The court has found item 1 (k) of the foregoing schedule cited to the court by the counsel for the applicant was the rightful item to be looked at in the taxation of the instruction fees which was supposed to be awarded to the counsel for the respondent. The cited provision of the law provides for instruction fees to sue or defend any case which is not provided for in other items of the cited schedule. Since claim of the declaratory order the respondent was seeking from the court is not

provided for in any other items of the afore cited eleventh schedule or in any other schedule of the Order, the instruction fees to be awarded in the respondent's bill of costs was supposed to be taxed under item 1 (k) of the eleventh schedule of the Order.

The court has found that, as stated in the case of **Edmund Mgeni V. Mjanja Nagagwa**, Taxation Civil Reference No. 1 of 2021, HC at Mwanza (unreported), a look at item 1 (k) of the eleventh schedule reveals that, it does not provide for a specific amount to be taxed but rather it is directing reference to be made at the above item. Looking the immediate above item, it is item (j) which provides that such sum as the taxing officer shall consider reasonable but not more than Tshs. 1,000,000/= . Therefore, item (j) of the eleventh schedule of the Order was the provision of the law which ought to guide the taxing officer in taxation of bill of costs filed in the court by the respondent.

The court has found the argument by the counsel for the respondent that the instruction fees in their bill of costs was not supposed be taxed under the stated eleventh schedule of the Order but was supposed to be taxed under nineth schedule of the Order is not correct because the nineth schedule of the Order is a scale of fees for contentious proceedings for liquidated sum. Since the bill of costs which gave rise to this reference emanated from contentious proceedings of unliquidated sum it cannot be said the appropriate scale for taxation of instruction fee in the bill of costs

of the respondent was the ninth schedule stated by the counsel for the respondent.

Having found the instruction fee for the counsel of the respondent was supposed to be taxed under item 1 (k) read together with item (j) of the eleventh schedule of the Order, the court has found the follow up question to determine in this matter is whether the amount awarded to the respondent was justifiable. The court has found the counsel for the respondent argued the respondent was entitled to the amount awarded by the taxing officer because of the nature of the suit, the amount of research, printing, the time spent in adjudication of the matter, complexity in ascertaining all points of law raised in the matter and the value of the subject matter which worth Tshs. 390,000,000/=.

The court has found that, although it is in agreement with the counsel for the respondent that taxing officer is required to take into consideration the above stated factors in assessing the instruction fee to be award in a bill of costs, but the stated factors does not empower the taxing officer to award instruction fees which is beyond the instruction fees prescribed in the schedule governing instruction fee to be awarded in a particular matter if there is no justifiable reason for doing so.

The court has come to the stated finding after seeing Rule 46 of the Order states clearly that all bill of costs shall be taxed on the prescribed scale. If there was a need of awarding more fees provided under Rules

12 and 15 of the Order which allows an advocate to be awarded compensation in the business of exceptional importance or unusual complexity, the respondent was required to show in the bill of costs that he was entitled to the stated compensation and the taxing officer was required to disclose in the ruling of the court for granting instruction fees which is beyond the one prescribed by the law.

The court has found in showing the respondent was not entitled to the instruction fees awarded by the taxing officer the counsel for the applicant argued there is no any engagement agreement or EFD receipt adduced in the court to substantiate the awarded instruction fee. The court has found the position of the law as held in number of cases including the cases of **M/S Buckreef Gold Company Ltd V. M/S Taxplan Associates Ltd & Another**, Misc. Com. Reference No. 3 of 2017, HC Com Div. at DSM (unreported) and **Tanzania Rent a Car Limited**, (supra) is well settled that, there is not provision in the Order requires payment of instruction fees to be proved by production of engagement agreement or EFD receipt as argued by the counsel for the applicant.

The court has found it was stated by the Court of Appeal in the case of **Tanzania Rent a Car Ltd** (supra) that, in taxation of bill of costs there is no need of proof of instruction fees by presentation of receipts, vouchers, and or remuneration agreement because the taxing officer,

among other things is expected to determine the quantum of the said fees by considering what is provided in the statutory scales, complexity of the matter and time taken for researching the matter.

While being guided by the position of the law stated hereinabove the court has found the amount awarded to the respondent as an instruction fee of Tshs. 3,000,000/= is not supported by the above stated factors because as rightly argued by the counsel for the applicant the matter was determined at preliminary stage before going to the hearing of the matter on merit. The court has also failed to see any complexity of the matter alleged by the counsel for the respondent which would have justified grant of the instruction fees which is beyond the fees prescribed in the scale governing the instruction fee ought to be awarded to the respondent.

The court has also arrived to the stated finding after seeing the reason caused the applicant's suit to be struck out as appearing in the ruling of the court annexed in the affidavit supporting the application was failure of the plaintiff to disclose description of the property in dispute as required by the law. To the view of this court, it cannot be said the stated point of law was complex point of law because it is a point which has been traversed in number of cases decided by our courts. The court has also gone through the impugned ruling of the court and find the instruction fee awarded to the respondent was granted after being found it was

reasonable and fair and there is nowhere stated it was granted because of the nature or complexity of the matter.

The position of the law as stated in the cases of **Attorney General V. Amos Shavu**, Taxation Reference No. 2 of 2000 and **Tanzania rent a Car Ltd** (supra) is very clear that, it is a general rule that the award of instruction fees is peculiarly within the discretion of a taxing officer and the court will be reluctant to interfere with the decision, unless it is proved that the taxing officer exercised his or her discretion injudiciously or has acted upon a wrong principle or wrong consideration. While being guided by the above stated principle of the law the court has found in the light of the reasons stated herein above the instruction fee awarded to the respondent in the impugned ruling was wrongly awarded because it was awarded contrary to the prescribed scale of the law and without justifiable reason to support the same.

As for the last ground of reference the counsel for the applicant argued the taxing officer failed to exercise her discretionary power judiciously for not taking into account the Bill of Costs No. 137 of 2022 and Bill of Costs No. 138 of 2022 were originating from the same land case No. 210 of 2021, they had the similar claim of costs, the parties in both bills of costs were represented by the same advocate and may have conflicting decisions. The court has found the counsel for the respondent did not dispute she has filed in the court the stated two bill of costs. Her

argument is that she filed two separate bills of costs in the court because she prepared two separate written statement of defence for the two defendants she was representing in the matter and submitted that Rule 62 of the Order allows an advocate to represent two or more parties in a suit.

The court has found it is true as rightly argued by the counsel for the respondent that Rule 62 of the Order allows costs to be charged for an advocate who has represent two or more party in a matter to be charged separately. However, the cited rule requires when a taxing officer is taxing bills of costs of a case where the same advocate has been employed by two or more parties in a suit to take into consideration the bill of costs between the parties and their advocate. To the view of this court and as rightly argued by the counsel for the applicant where there are two or more bills of costs from the same matter which have been filed in court by the parties represented in a matter by the same advocate, it will be more justifiable for the stated bills of costs to be consolidated and taxed together to avoid double taxation and conflicting decisions in the bills of costs arising from the same decision.

The court has found the counsel for the applicant prayed the court to set aside the impugned ruling in the instant reference and order the Bill of Costs No. 138 of 2022 pending in the court be consolidated with the Bill of Costs No. 137 of 2022 and be adjudicated by one taxing officer.

The court has found the stated prayer cannot be granted because as stated to the court by the counsel for the respondent the stated Bill of Costs No. 138 of 2022 which was pending before Hon. Kisongo, taxing officer has already been adjudicated.

In the light of what I have stated hereinabove the court has found that, as it has been found the instruction fee granted to the respondent in the Bill of Costs No. 137 of 2022 was arrived without abiding to the scale prescribed by the law and as there is no reason to justify its grant, the court has found the step which can be taken in the matter is to set aside the instruction fee granted to the respondent and substitute the same with the amount of instruction fees prescribed by the law.

Consequently, the reference filed in the court by the applicant is hereby allowed, the amount of instruction fee of Tshs. 3,000,000/= awarded to the respondent in the ruling delivered in the Bill of Costs No. 137 of 2022 is accordingly set aside and it is substituted thereof with the instruction fee of Tshs. 1,000,000/=. Other costs awarded by the taxing officer in the ruling of the court which have not been challenged by the applicant will remain as taxed by the taxing officer. It is so ordered.

Dated at Dar es Salaam this 14th day of September, 2023



Jeece
I. Arufani
JUDGE
14/09/2023

Court:

Ruling delivered today 14th day of September, 2023 in the presence of Ms. Juliana Mumburi, learned advocate for the respondent who is also holding brief for Mr. Cleophas Manyangu, learned advocate for the applicant. Right of appeal to the Court of Appeal is fully explained.



I. Arufani
I. Arufani
JUDGE
14/09/2023