IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
TAXATION REFERENCE NO. 14 OF 2022

(Arising from Taxation Cause No. 36 of 2022)

CRDB BANK PLC …………………………………. APPLICANT

VERSUS

STARPECO LIMITED………………………..…1ST RESPONDENT

GRATIAN B NSEKANABO………………..2ND RESPONDENT

RULING

Date of last order: 08/02/2023
Date of Ruling: 17/03/2023

NANGELA, J.

This ruling is in respect of a chamber application filed by the Applicant herein on the 26th day of August 2022 seeking to challenge the decision of the Taxing master Hon. M. B Mpaze (DRCC) issued on 2nd August 2022. The Chamber summons was supported by affidavit of one Pascal Mihayo, head of the Applicant's Legal Department. The chamber summons and the affidavit were filed under Order 7 (1) and (2) of the Advocates Remuneration Order, GN No. 264 of 2015.

The Applicant is praying for the following orders:

1. The Honourable Court be pleased to reverse and set aside the decision of Taxing Master issued

on 2 August, 2022 in Taxation Cause No. 36 of 2022 and proceed to tax the Bill of Costs in accordance with the law.

2. An order as to costs of this reference

The Respondents contested the application by filing a joint counter affidavit sworn by Gratian B Nshakanabo. On 8th December 2022, the parties appeared before this Court. The Applicant was represented by Ms. Mariam Bachuba, learned Advocate, while Ms. Mary Pancras, who as well, is a learned Advocate, represented the Respondents. Both agreed to have the application disposed of by way of written submissions and, their prayer was granted. A schedule of filing was issued and the parties have filed their respective submissions as directed by the Court.

In his submission in support of the application, Mr. Gasper Nyika, the Applicant's Advocate, started by adopting the contents of the Applicant's supporting affidavit and submitted that, as the law on Taxation of Bill of Costs stands, a Taxing Officer is vested with discretionary powers to allow costs, charges and expenses either as authorized by Order 12 (1) of the Advocates Remuneration Order, 2015 or as it appears to him/her to be necessary or proper for the attainment of justice.

He contended, therefore, that, such discretionary powers vested on the Taxing Officer are wide to the extent that she can allow costs, charges and expenses, not only based on the scales provided under the law but also as it may appear necessary in the interest of justice.

Mr. Nyika submitted that, it is trite that the Taxing Officer's decision may only be interfered with when the Court is satisfied that the decision was arrived upon an application of wrong principle or wrong consideration. To cement his position, he cited the case of **George Mbuguzi & Another vs. A. S Maskini** [1980] TLR 53 and the case of **Rose Mkeku (the administratix of the estate of the late Simon Mkeku) vs. Parves Shabbirdin**, Misc. Land Application Case No.89 of 2021 (unreported).

Mr. Nyika, further submitted that, the decision of the Taxing Officer may also be interfered if the amount awarded is too high or law to amount to injustice of one party or that Taxing Officer exercised her/his discretion unjudicial. He cited to the said effect the case of **Premchand Raichand Ltd & another vs. Quarry Services of East Africa Ltd & another** [1972] EA 162 and the case of **Attorney General vs Amos Shavu,** Taxation Reference No.2 of 2000. He noted that, in the latter case, it was stated that, the Taxing Officer's decision, may only be interfered if she exercised such discretion in an unjudicial manner.

From the above set premise, it was Mr. Nyika's submission that, the Taxing Officer's discretion may only be interfered with if it is established that the said discretion was exercised incorrectly or injudiciously, (i.e., based on wrong principle/consideration or causing injustice on one party). He submitted, within that context, therefore, that, the issue which this Court is invited to look at is whether the Taxing Officer exercised her discretion injudiciously or in correctly in arriving at her decision.

In responding to the above, Mr. Nyika submitted that, the Taxing Officer exercised her discretion injudiciously or incorrectly in arriving at her decision. Out of the four grounds which the Affiant of the supporting affidavit had raised under paragraph 7 of that affidavit, Mr. Nyika picked only one ground which he extensively and exhaustively considered in his submission. In particular, the ground he picked is to the effect that, the award of TZS 15,210,000/= is excessive because the matter did not proceed to full trial but ended at its initial stages of the proceedings.

Building on that premise, Mr. Nyika contended, and looking at the component of instruction fees, that, as rightly found by the Taxing Officer, the applicable rates for determining the costs incurred by the Respondents are provided for under the 11th Schedule of the Advocates Remuneration Order.

Mr. Nyika submitted that, according to item 1(d) thereof, as well referred to by the Taxing Officer, the instruction fees for suits in any case where the proceedings are defended or to defend such proceedings, is based on the discretion of the Taxing Officer but should not go below TZS 1,000,000.00.He contended that, in the course of determining the costs used in the **Commercial Case No.84 of 2020**, the Taxing Officer did indeed take into account the complexity of the matter and the time taken to conclude the proceedings (as required- see **Premchand's case** (supra).

Mr. Nyika submitted, however, that, the issue of complexity of the case was considered in the case of **George Mbuguzi** (supra) as one of the determinants of the fairness and reasonableness of the amount of instruction fees to be awarded. He submitted,

further, that, the more amplified and authoritative position was given by the Court of Appeal in the case of **C.B Ndege vs. E.O Ayila & AG** [1988] TLR 91, where it was held that, the instruction fees must be commensurate with the amount of time, energy and industry involved in the matter.

On that account, he contended that the Taxing Officer failed to asses properly the instruction fees when taxing **Commercial Case No. 84 of 2020**, because, the amount awarded was excessive and not commensurate with the nature of proceedings and work done, the amount of time the proceedings took in Court, the energy and industry involved in the matter. He submitted that, not doing so is totally contrary to the principles which states what factors to be considered.

He submitted that, in the first place, the proceedings in Commercial Case No. 84 of 2020, ended at an early stage in the 1st pre- trial-conference (1st PTC) and; secondly, the Respondents' Advocate entered not more than 5 appearances in Court where he had only filed joint written statement of defense to the amended plaint and, finally, that, the case lasted not more than 6 months without even reaching at the trial stage. He contended, therefore, that, the issue of complexity did not arise as nothing went to the determination of the suit.

According to Mr. Nyika, since the Applicant was the Plaintiff, hence, was the one having the burden of proving its case, and given that, the Respondents were among the Defendants, hence, their required energy was that of just opposing the claims raised by the Plaintiff by filing written statement of defense, as

they did, and because the case ended up to the 1st P.T.C, it is clear, therefore, that, there was not much energy which used.

In that circumstance, Mr. Nyika contended that, to award them TZS. 15,000,000/= only for preparation of a Written Statement of Defense, such an amount awarded was excessive. To support his contention, he relied on the case of **Mayers and another vs. Hamilton and others**, [1975] E.A 13, where it was established that, instruction fee grows as the matter grows and vice versa. He submitted that, there are at all no justifications of awarding the Respondents TZS 15,000,000 as instruction fees and, that, at the least they should deserve TZS 5,000,000/= only, of which will be reasonable. He thereby urged this Court to quash and set aside the amount warded of instruction fee.

Mr. Bernard Mbakileki, learned Advocate appearing for the Respondents vehemently opposed Mr. Nyika's submissions and the prayers sought by the Applicants. Commencing his submission with leave to adopt the counter affidavit filed in this Court as forming part of his submission, he went on to admit that principles which Mr. Nyika had reiterated in his preamble to his submissions and the discretionary powers enjoyed by the Taxing Officer under Order 12 (1) of the Advocate Remuneration Order.

He submitted, however, that, what was awarded as instruction fee was not excessive. He contended that, the Taxing Officer rightly and judicially exercised her power when awarding the said TZS. 15,000,000/= to the Respondents as instruction fees taking into account the complexity of the case, amount of research work involved and the documents filed. According to Mr.

Mbakileki, the amount taxed at TZS. 15,000,000/= as instruction fee was minimally arrived at in exercise of Taxing Officer's discretion taking into account the sums involved in the claim were colossal, i.e., TZS. 44,508,529.00 as it were in the bill of costs.

He distinguished the cases cited by the Applicant's Counsel and submitted that; the Applicant's counsel has even gone overboard by transgressing the established principle of natural justice which prohibits one from being a judge on his own case. He contended that, the act of the Applicant's counsel to usurp the role of this Court by directing that the award be TZS. 5,000,000/=was not a right approach. He contended therefore, that, the Applicant's counsel failed to substantiate which principle was flouted by the Taxing Officer.

He contended that, compared to the Plaintiff's claim (Judgement Debtor) which stood at TZS 5,573,188.103.67 in total, the risks involved called for maximum vigilance and care on the part of the Defendants' (Decree Holders) on the part of the learned Advocates who prepared the Written Statement of Defence in order to defend the client's interests and rights, hence deserving to be paid the TZS 15,000,000 as a fair and reasonable amount.

To support his contention, he relied on the already cited case of **Premchand Raichand** (supra), where it was held, inter alia, that:

> "The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not; therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great

> experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other."

Mr. Mbalekile submitted that; the amount awarded as TZS 15,000,000 as instruction fees cannot be excessive as argued only because the matter did not proceed to a full trial by virtue of its withdrawal by the Plaintiff, because that was not the anticipated course of things on the part of the Defendants/Respondents, let alone their advocates who had to prepare for the defence. He submitted that, the amount was therefore awarded taking into account the nature of the case and work input it called for and, thus, the assessment thereof by the Taxing Officer was justified in the exercise of her discretion.

To back up his submissions, he relied on the decision of this Court in the case of **Juma Mganga Lukobora & Another vs. Tanzania Medicine & Medicine Devices Authority (TMDA),** Misc. Civil Application No.642 of 2020 (unreported); and **Manharlal Thakker vs. Bahati Mont and Kibugo Enterprises,** Misc. Appeal No.188 of 2013 (HC-Uganda) (unreported); and **Jubilee Insurance Company of Tanzania Ltd vs. Vodacom Tanzania PLC,** Consolidated Tax Reference No.02 & 03 of 2020, (HC) (Commercial Division) at DSM, (unreported) and **Salehe Habib Salehe vs. Manjit Gurmukh Singh & Another**, Reference No.07 of 2019, (HC) Land Division),DSM, (unreported). He concluded by urging this Court to dismiss this application with costs.

A rejoinder submission was filed by Mr. Nyika and served upon the Respondents. His rejoinder was that, the Applicants reiterate their submission in chief to the extent that the Taxing Officer exercised her jurisdiction injudiciously and the award of TZS 15,000,0000 was excessive because the work done did not support the award of such an amount. He submitted that, the Respondents' counsel misconstrued the Applicant's counsel's submission and, thus, the invocation of matters of violation of principles of natural justice was unwarranted.

As regards that the amount was commensurate to the work done given that the Defendants (Respondents) could not have foreseen that the Plaintiff was to end the proceedings at an early stage, Mr. Nyika submitted that, that kind of submission is without concrete base and misconceived. He contended that; the Taxing Officer failed to take into account the circumstances of the case itself hence occasioning an injustice to the Applicant.

He also contended that, she did not consider the principle that instruction fees will grow as the matter grows (**Mayers and Another vs. Hamilton and Ors.** (supra)). In view of all that, he urged this Court to quash and set aside the award of instruction fees and proceed to award an amount reasonable and fair in the circumstances of the case, which, in his opinion should be TZS 5,000,000.

I have considered all the rival submissions made by the learned counsels for the parties herein. First, I do subscribe to the principles recited herein and all the cases cited by the parties do support those principles. In fact, in the case of **Anand Satyavan**

Chande and Another vs. Exim Bank, Taxation Reference No. l of 2020, (unreported) and that of **Silvaho John vs. Magdalen Shaun**, Civil Ref. No. 7 of 2019 (unreported), it was reiterated with emphasis, that, exercise of the Taxing Officer's discretion, cannot be easily interfered with by the Court, unless there, are exceptional, grounds.

It is worth noting, however, that, powers exercised on the basis of discretion, are powers that must be exercised judiciously and not on caprice, whim, likes or dislikes. Such a principle was set from time immemorial where over centuries ago, courts long emphasized that discretion should be exercised in accordance with sound and reasonable judicial principles.

In **Rookey's Case** [77 ER 209; (1597) 5 Co.Rep.99], for instance, the King's Bench division of the Court in England was of the sound view that: -

> "Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradicts or overturns the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court.

> That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."

Furthermore, **Osborn vs. Bank of the United States**, 22 U. S. 738 [1824], Chief Justice John Marshall (as he then was), writing on judicial power, stated as follows, on the subject:-

> "Judicial power, as contra-distinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

In our own jurisdiction, the cases of **Yusufu Same & Another vs. Hadija Yusufu,** Civil Appeal No. 1 of 2002 (Unreported) and **Lyamuya Construction Company Ltd vs. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010,

(Unreported) have generally commented on how discretion need to be judiciously exercised.

It is as well a trite principle that, costs will follow the event and, a Decree Holder needs to be paid for the costs incurred, unless where they were dispensed with and for the good reasons. The costs paid include the time involved in preparing the case out of and when dealing with the matter in Court, from the start to its end. I note, however, that, in his submission, Mr. Nyika made a point that, instruction fees grow as the matter grows (see**: Mayers & Another** (supra). Indeed so. But that does not mean that, preparation of a case starts when one is in the Court room.

For my part, I think, and, always I have been driven by the philosophy that: "*cases are won in chambers and not in Court rooms*"; meaning that, earnest preparations of a case, including the laying down of its winning strategies, discerning its weaknesses and strengths as well as the putting up of the requisite research teams for purposes of putting in place appropriate legal and authoritative 'authorities', are all matters that starts '*from the day one*' when an advocate is engaged and not only when the matter comes to the Court and he appears before the Judge/Magistrate.

And, as a matter of principle, the force and the tenacity applied when an initial move is being taken is always greater than the force applied to sustain the momentum produced thereby. This is due to the fact that, rest finds one already on motion. From a litigation point of view, it means, if proper preparations were made in the initial filing of the case, sustaining them in the subsequent steps becomes less burdensome.

So, an initial investment is always big at the laying of the foundation. In that regard, no one is expected to prepare less, even if the case seems to be a simple one, and, that is for a reason: *those who fail to prepare for what is ahead of them, will be found in rude shock when it arrives and, even worse shock enough when it arrives in such a manner as they less expected i*t.

That is yet, another "*moral-cum-spiritual"* principle entailing the need to be prepared. Even the Lord Jesus Christ admonished all of us by his word of exhortation in the Gospel of Mathew 24:44 saying: "*Therefore, be ye ready…"* That entails, there is not short-cut when it comes to matters that require preparations. In that context, therefore, I do share the views of Mr. Mbakileki that, the mere fact that the Plaintiff (Applicant) brought her case to an end pre-maturely did not mean that the Defendants had put-up less preparations.

In fact, that was, as rightly stated, a fact which could not have been conjured by the Defendants and, thus, make them to be less prepared. In essence, everyone understands that, once an advocate is engaged to handle a client's case, he must, right away, embark on a serious preparation and mobilization unless he is one of those "*busy-bodies*" who hijacks a wagon of a noble profession not befitting the call. "*The study of the law*", said, Thomas Jefferson sometime in 1790, "*qualifies a man to be useful to himself, to his neighbors, and to the public*." A qualified lawyer will, thus, always put-up befitting preparation in his case right from documentation to even the time he appears to address the Court.

However, that assessment on the part of Mr. Mbakileki regarding preparations done before an advocate even appears in Court, is but a look at one side of the coin. The questions which would follow, and which give us an urge to look at the other flipside of the same coinage are: *since the principle stands to be that award of instruction fees will grow as the matter grows and contrariwise be lessened as the journey get shortened, was it right to award the amount of TZS 15,000,000? Was that principle also taken into account by the Taxing Officer?* I think that is where the kernel is hidden and Mr. Nyika has decided that someone should find it out.

Looking at the facts as they are spelled out in the pleadings and submissions filed in this Court, there is no dispute that, Commercial Case No. 84 of 2020 did not slide through to its normal ending but was brought to an end right at its first pre-trial conference stage. In that regard, I would tend to agree by Mr. Nyika that the industry or skill and energy so far involved was that of laying the foundation. Even so, I will also be quick to add, and as I said, that, that energy and skill is the most important one as it is the foundational laying energy requiring time and strategy.

Certainly, one should not be short- sighted in that regard, and, that is as well a point where exercise of discretion, the discretion which, as the Chief Justice John Marshall said in **Osborn vs. Bank of the United States (supra)** '*is a discretion to be exercised in discerning the course'* and, a complemented by the decision in **Rookey's Case** (supra) discerning of such a curse to be taken without "*in no case … contradicts or overturns the grounds or principles thereof.*"

What I may state briefly from the above is that, exercise of discretion is anchored on observing and being guided by the right and applicable principles, one of it being the principle that, instruction fees will lessen as the matter less complex or shorted in its lifespan and each case will depend on its own circumstance. In the circumstance of this matter, I do not find that, the principle stated by the defunct Court of Appeal of East Africa in the **Mayers and Another** (supra). But having stated so, one would also ask: what then should have been the appropriate amount? Is it the one opined by Mr. Nyika?

First, I must state, as Mr. Nyika pointed it out, that, his was a mere opinion made in his own perception of things and was in no way a breach of the principle of natural justice (*nemo judex in causa sua*). As such, no one should take offense in what he submitted from his perspective. But as rightly stated, deciding what should be the appropriate amount is solely a matter left to the discretion of the Court (Taxing Officer) but on the basis of the applicable principles. That being said, it my considered view that, since the *Commercial Case No.83 of 2020* did also involve preparations which, as I said are always immense at the beginning of every case whether big or small in the eyes of the beholder, awarding an amount to the tune of TZS 10,000,000/- would be just, fair and reasonable.

That amount is in my view further justified taking into account the principles also enunciated in the case of **Premchand Raichand Ltd** (supra) and which were referred with approval by the Court of Appeal in the case of **Tanzania Rent a Car Ltd vs.**

Peter Kimuhu, Civil Ref.No.9 of 2020; (CAT) (unreported), that, when determining the quantum of an instruction fee the following principles need to be considered:

> "*First*, that costs be not allowed to rise to such a level as to confine access to the courts to the wealthy; *second*, that a successful litigant ought to be fairly reimbursed for the costs she had to incur; *thirdly*, that, **the general level of remuneration of advocates must be such as to attract recruits to the profession**; and *fourthly*, that so far as practicable there should be consistency in the awards made, both to **do justice between one person and another and so that a person contemplating litigation can be advised by his advocates very approximately what, for the kind of case contemplated, is likely to be his potential liability for costs**." (Emphasis added).

With such principles in mind, and in particular looking at the 3rd and the 4th principle, I find that the amount of TZS 10,000,000 will also reflect with appreciation the value and skills which the learned advocate for the Defendant/Respondents employed in preparing their Defense case even if the hearing did not take off. It is the first step that set a thousand miles journey into motion. In the upshot of all that, this Court settles for the following orders, that:

1. this reference application is hereby allowed.
2. That, taking into account the obtaining circumstances in the *Commercial Case No.84 of 2020*, the amount of **TZS 15,000,000** charged as instruction fees was excessive and is hereby quashed, set aside and in its place a total of **TZS 10,000,000/=** is hereby substituted for it.
3. That, taking into account that the gauging of the award for instruction was not the making of any of the parties but rather of the Taxing Officer, I will not award costs in the Reference Application and each party shall bear its own costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 17th DAY OF MARCH 2023

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DEO JOHN NANGELA

JUDGE