

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**CIVIL REFERENCE NO. 9 OF 2020**

**TANZANIA RENT A CAR LIMITED.....APPLICANT**

**VERSUS**

**PETER KIMUHU.....RESPONDENT**

**(Application for Reference from the decision of the Taxing Officer of the  
Court of Appeal of Tanzania, at Dar es Salaam)**

**(Msumi, DR-CA.)**

**dated the 10<sup>th</sup> day of September, 2020**

**in**

**Civil Appeal No. 84 of 2012**

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**RULING**

15<sup>th</sup> March & 6<sup>th</sup> April, 2021

**KEREFU, J.A.:**

In this application, the main controversy between the parties is the quantum of an instruction fee awarded to the respondent by the taxing officer (Msumi, DR-CA.) in Civil Appeal No. 84 of 2012. The application is made under Rule 125 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). The grounds upon which the application is anchored are as follows: -

- (a) That, the Registrar in his capacity as taxing officer erred in law by failing to ascertain or require the respondent to prove as whether the instruction fees were charged and paid before taxing TZS 10,000,000.00 being instruction fees;*

- (b) That, the Registrar in his capacity as taxing officer erred in law by making unfounded assumptions that advocate for respondent charged instruction fees and the same were paid by respondent at the tune of TZS 10,000,000.00 without any proof of the receipts, voucher or any other documents of the payment made; and*
- (c) That, the Registrar in his capacity as taxing officer erred in law by taxing instruction fees at the tune of TZS 10,000,000.00 which in all the circumstances as taxed manifestly excessive, unreasonable and the same was taxed without any proof.*

The material facts giving rise to the present reference are not difficult to comprehend. The respondent successful instituted a suit against the applicant in the High Court through Civil Case No. 126 of 2003. Aggrieved, the applicant appealed to this Court vide Civil Appeal No. 84 of 2012 which, upon a notice of preliminary objection raised by the respondent, it was struck out with costs for being incompetent. Subsequently, the respondent filed a bill of costs in the Court's Registry which was placed before the taxing officer of the Court (Msumi, DR.) claiming a total of TZS 29,844,969. Out of this amount TZS 29,469,969.00 which was item No. 1 in the bill, was in respect of instruction fees, whereby TZS 4,495,419.00 was VAT at 18%. The VAT amount was however withdrawn and is not

part of this reference. As for the remaining amount of the instruction fee of TZS 24,974,550.00, the respondent claimed that it was the actual instruction fee to oppose Civil Appeal No. 84 of 2012 on the basis of 3% of the decretal sum awarded by the High Court.

The applicant opposed the bill of costs on the ground that the respondent failed to prove that he paid the said amount as instruction fees and that the said amount was excessive and unreasonable.

In his ruling, the learned taxing officer awarded the respondent only TZS 10,000,000.00 as instruction fees, TZS 115,000.00 costs for other items and TZS 19,729,696.00 was taxed off. Dissatisfied, the applicant filed this reference as indicated above.

At the hearing of the application, Mr. Bryson Shayo, learned counsel appeared for the applicant whereas Mr. Odhiambo Kobas, also learned counsel entered appearance for the respondent. It is noteworthy that, Mr. Shayo had earlier on lodged his written submissions under Rule 106 (1) of the Rules which he sought to adopt to form part of his oral submissions. On the other part, Mr. Kobas did not file any written submissions thus he addressed me under Rule 106 (10) (b) and (11) of the Rules.

Upon taking the floor to expound on the application, Mr. Shayo adopted his written submission and the authorities he had since lodged. He then clarified the first ground by stating that the main issue of contention between the parties is on whether the instruction fees awarded to the responded was supposed to be proved or not. It was his argument that, the taxing officer, before awarding instruction fee to the winning litigant, was required to be satisfied that the instruction fee was indeed paid. He argued that the purpose of awarding costs to a winning litigant is to reinstitute him to his original position by disbursing the costs he incurred in prosecuting the case but not to enrich him.

Mr. Shayo submitted further that principles of proof of claims in litigation under sections 110 and 112 of the Tanzania Evidence Act, [Cap. 6 R.E. 2019] are also applicable in a claim for bill of costs. According to him, in awarding the said costs, the taxing officer is required to ascertain (i) if the claimed costs were incurred and (ii) if the same is within the prescribed scales. He added that, the taxing officer is also required to ensure that advocates do not claim contingency costs in terms of Regulation 81 of the Advocate (Professional Conduct and Etiquette) Regulations, 2018. He argued that, to comply with the cardinal principle that, *he who alleges must prove*, a claimant of an instruction fee should produce: -

- (i) receipts or vouchers in terms of Rule 58 of the Advocates Remuneration Order, 2015 (the Order);
- (ii) remuneration agreement to show that the claimed costs was agreed between the advocate and the client; and
- (iii) deposit security used to pay for such costs under Rule 16 (1) of the Order.

Mr. Shayo added that, since the advocate's business is regulated by laws, rules and regulations, to prove that instruction fee was paid to him, the advocate is required to (i) maintain a business license in terms of section 38 (1) and (c) of the Advocates Act, [Cap. 341 R.E. 2019] (the Act), (ii) be registered under section 29 (1) (a) of the Act and (iii) issue electronic device of all receipts and vouchers for all fees paid to him. To support his proposition, he cited the High Court decisions in **Thinamy Entertainment Limited and 2 Others v. Dino Katsapas**, Misc. Commercial Case No. 86 of 2018 and **First World Investment Court Brokers v. Buck Reef Gold Company Limited**, Misc. Commercial Reference No. 1 of 2019 (both unreported) and urged me to be persuaded by those decisions.

On the second ground, Mr. Shayo faulted the decision of the taxing officer that it was based on assumptions as he based his decision mainly on the Rules and scale of costs which sets only parameters within which

the advocate is allowed to charge the fees and the same could not be used as a proof.

On the third ground, Mr. Shayo cited paragraph 9 (2) of the Third Schedule to the Rules and argued that, although the taxing officer has discretion to award such costs, the said discretion should be exercised judiciously. He added that in determining the amount of the instruction fee to be paid, the taxing officer is required to consider factors such as, amount involved in the appeal, its nature, complexity, interest of the parties and general conduct of the proceedings. It was his further argument that in the case at hand the taxing officer acted injudiciously and did not consider the above factors. He submitted that, if the taxing officer would have considered the said factors, could not have awarded the instruction fees as high as TZS 10,000,000.00. Based on his submission, Mr. Shayo prayed that the instruction fees awarded to the respondent be taxed off in its entirety.

In response, Mr. Kobas cited Rule 125 (1) and (2) of the Rules and paragraph 9 (2) of the taxation of costs under the Third Schedule to the Rules and argued that the taxing officer exercised his discretion judiciously and he did not violate any principle of law to warrant this Court to interfere with his decision. To support his proposition, he cited the decisions of the Court in **Hotel Travertine Ltd v. National Bank of**

**Commerce**, Taxation Civil Reference No. 9 of 2006 and **Registered Trustees of the Cashewnut Industry Development Fund v. Cashewnut Board of Tanzania**, Civil Reference No. 4 of 2007 (both unreported).

On the first and second grounds, Mr. Kobas challenged the submission made by his learned brother as he argued that there is nowhere in the rules and the schedule requiring the applicant to prove a claim of instruction fees by production of receipts, vouchers or remuneration agreement. He said that those documents are required to prove other claims such as disbursement of costs but not instruction fees. To buttress his position, the learned counsel cited the decision of the High Court in **Salehe Habib Salehe v. Manjit Gurmukh Singh and Mohinder Gurmukh Singh**, Reference No. 7 of 2019 (unreported) and he as well urged me to be persuaded by that decision. He then argued that, in this application the taxing officer properly exercised his discretion within the Rules and the cost scales provided for under the Third Schedule to the Rules. He added that in determining the quantum of the instruction fees, the taxing officer considered the nature of the case, the amount of work involved, complexity of the case, together with the amount claimed in the suit. He thus prayed that the application be dismissed with costs for lack of merit.

In rejoinder submission, Mr. Shayo reiterated what he submitted in chief and insisted that the application be granted with costs.

From the submissions of the counsel for the parties, it is clear that the born of contention is on the mode of proving the instruction fees and the quantum awarded to the respondent. Therefore, the pressing issues for my consideration are **first**, whether the instruction fees awarded to the respondent was supposed to be proved by production of receipts, vouchers and/or remuneration agreement or not, and **second**, whether the amount of TZS 10,000,000.00 awarded as instruction fee was excessive and unreasonable.

As argued by both counsel for the parties, it is a general rule that the award of instruction fees is peculiarly within the discretion of a taxing officer and the Court will always be reluctant to interfere with his decision, unless it is proved that the taxing officer exercised his discretion injudiciously or has acted upon a wrong principle or applied wrong consideration. This has been articulated in several decisions of the Court and some of them have been cited above by Mr. Kobas, but I wish to add few more cases of **The Attorney General v. Amos Shavu**, Taxation Reference No. 2 of 2000, **The East African Development Bank v. Blue Line Enterprises**, Civil Reference No. 12 of 2006 (both unreported), **Premchand Raichand Ltd and Another v. Quarry Services of East**



**Africa Ltd and Others** (No.3) [1972] 1 E.A. 162 by the erstwhile Court of Appeal for Eastern Africa and Court of Appeal for East Africa, respectively. Specifically, in **Premchand Raichand Ltd and Another** (supra) the erstwhile Court of Appeal for Eastern Africa laid down four guiding principles which have to be considered when determining the quantum of an instruction fee. These are; -

*"First, that costs shall not be allowed to rise to such a level as to confine access to the courts to only the wealthy; second, that the successful litigant ought to be fairly reimbursed for the costs he reasonably incurred; thirdly, the general level of the remuneration of advocates must be such as to attract worthy recruits to an honourable profession; and fourthly, that there must, so far as practicable, 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, for the kind of case contemplated, is likely to be his potential liability for costs."*

These principles were restated by the Court in **The Attorney General v. Amos Shavu** (supra) and **Registered Trustees of the Cashewnut Industry Development Fund** (supra).

Starting with the first issue, it is clear that while both counsel for the parties are not in disagreement on the foregoing principle, they locked horns on the mode of proving a claim for instruction fees. While Mr. Shayo insisted that the respondent was supposed to produce receipts, vouchers and/or remuneration agreement to prove that the said fees was indeed incurred, Mr. Kobas strongly disputed that claim by submitting that those documents were not required to prove instruction fees, but disbursement of other costs.

I wish to state that, the guiding provision on this matter is paragraph 9 (2) (3) and (4) of the Third Schedule to the Rules. The said provision provides that: -

- (1) *N/A*
- (2) *The fee to be allowed for instructions to appeal or to oppose an appeal shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances;*
- (3) *The sum allowed under paragraph 2 shall include all work necessarily and properly done in connection with the appeal and not otherwise changeable including attendances, correspondence, perusals and consulting authorities; and*

(4) *Other costs shall, subject to the provisions of paragraphs 10, 11 and 12, shall be awarded in accordance with the scale set out in this schedule or, in respect of any matter for which no provision is made in those scales, in accordance with the scale applicable in the High Court.*

As it can be gleaned from the above provision, the taxing officer has been given wide latitude and discretion to determine taxing costs as it appears to him to be proper for attainment of justice. However, the said discretion should be exercised within the cost scales prescribed in the Rules. In addition, and as it was argued by Mr. Shayo, the taxing officer is also supposed to consider other factors such as the greater the amount of work involved, the complexity of the case, the time taken up at the hearing including attendances, correspondences, perusals and the consulted authorities or arguments. In **Hotel Travertine Ltd** (supra), Ramadhani, J.A (as he then was) when considered a similar issue as whether the receipts were required to prove a claim for instruction fees, he observed at page 3 of the Ruling that: -

*"This claim too was taxed off because there was no receipt attached. **That amount I think is reasonable and there can hardly be a receipt unless one went to the court by a taxi. But if one uses one's car that can be difficult to***

***account with a receipt. So, I will allow that claim.***  
*[Emphasis added].*

On the basis of the above provision and authority I am in agreement with Mr. Kobas 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 others, is expected to determine the quantum of the said fees in accordance with the cost scales statutorily provided for together with the factors enumerated above. With respect, I find the submission of Mr. Shayo on this point to have no legal basis.

As regards the second issue, I wish to start by stating that, it is trite law that instruction fees is supposed to compensate adequately an advocate for the work done in preparation and conduct of a case and not to enrich him. In **Smith v. Buller** (1875) 19 E9.473, cited in **Rahim Hasham v. Alibhai Kaderbhai** (1938) 1 T.L.R. (R) 676, the Court observed that, "*Costs should not be excessive or oppressive but only such as are necessary for the conduct of the litigation.*"

In the matter at hand, as already indicated above, the taxing officer awarded TZS 10,000,000.00 as instruction fee simply because the respondent was represented by an advocate who was not one of the legal aid or on *pro bono* basis. I glean this from the ruling of the taxing officer

when justifying the quantum to be paid at pages 16 and 17 of the ruling that: -

*"The fact that the applicant had been presented by an advocate at the appellate stage and that advocate is not one of a legal aid or on a pro bono basis, is convincing enough that there were some instructions which suggests fees arrangement... Regarding all the above, it is my considered opinion that the amount of TZS 24,974,550.00 charged as instruction fee to defend the appeal is slightly on the higher side. I thus hereby tax it down to TZS 10,000,000.00. The remaining sum is taxed off."*

It is on record that before the Court, the appeal was not intricate as it was not argued on merit but struck out with costs on account of the preliminary objection raised by the respondent. Considering this fact, and in terms of paragraph 9 (2) (3) and (4) of the Third Schedule to the Rules, I am in agreement with Mr. Shayo that if the taxing officer had considered the principle of consistency this factor on the involvement of the advocates and the work done by the advocate at the appellate level, would have taxed the instruction fees on the lower side. It is therefore my considered opinion that the taxing officer was in violation of taxation principle of consistence which resulted into a wrong consideration. I find support in the case of **East African Development Bank** (supra) where

the Court after making a finding that the matter involved was not a complex one, it reduced the instruction fees charged for being excessive.

I also find support in **Attorney General v. Amos Shavu** (supra), which had almost a similar situation with this matter at hand. In that case, the Attorney General instituted an appeal to this Court and at the same time he applied for stay of execution of the decree. However, the said application was struck out with costs on technical grounds. Subsequently, the counsel for the respondent filed a bill of costs at the tune of TZS 26,526,220.00 out of which TZS 26,500,000.00 was instruction fees. The Attorney General was aggrieved and hence lodged a reference application before Lugakingira J.A. Having considered that the matter was not complex and that the application was only struck out for being incompetent, the awarded instruction fees was reduced to TZS 30,000.00. At pages 10 – 11 of the ruling, Justice Lugakingira observed that: - *"It is unprecedented for instruction fees merely to oppose a notice of motion to go into Millions."*

Similarly, in this case, since the appeal was not complex as it was only struck out on technical grounds, in observance of the principle of consistency, I am of the settled view that the instruction fees of TZS 10,000,000.00 awarded to the respondent was excessive. Having considered the complexity of the appeal and the time taken by the

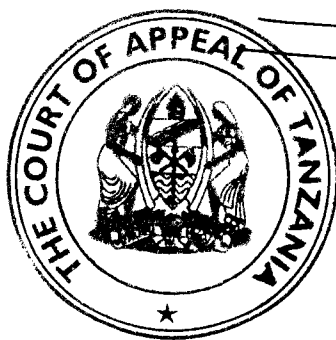
advocate in arguing the preliminary objection and the arguments thereto, I am satisfied that the reasonable sum to be awarded as instruction fees should be a total sum of 5,000,000,00. This, in my view, is a reasonable amount and will fully meet the justice of the case. I thus substitute the TZS 10,000,000.00 awarded by the taxing officer with TZS 5,000,000.00 as instruction fees.

In the event, this reference is allowed to the extent stated above. In the circumstances, each party should bear its own costs.

**DATED** at **DAR ES SALAAM** this 31<sup>st</sup> day of March, 2021.

R. J. KEREFU  
**JUSTICE OF APPEAL**

The Ruling delivered this 6<sup>th</sup> day of April, 2021. In the presence of Mr. Bryson Shayo, learned counsel for Applicant and Mr. Odhiambo Kobas, learned counsel for Respondent, is hereby certified as a true copy of original.



  
E. G. MRANGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**