

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL CASE NO. 19 OF 2002**

**TANZANIA CIGARETTE CO. LTD ..... PLAINTIFF**

**VERSUS**

**THE REGISTRAR OF TRADE AND SERVICE MARKS**

**AND**

**MASTERMIND TOBACCO (TANZANIA) LIMITED**

**R U L I N G:**

**J. K. MRUMA - DR - TAXING OFFICER,**

The Appellant/Judgment debtor, the Tanzania Cigarette Company Limited appealed to this court against the decision made by the Registrar of Trade and Service-Marks in favour of Master Mind Tobacco (Tanzania) limited who were the interested party in the "Trade and service Marks Act 1986 TMA No. 29572 super match (Word & Device) in class 34 in the name of Tanzania Cigarette company Ltd", the matter which was referred to the Registrar of Trade & Service Marks for her necessary actions. In their Memorandum of Appeal, the judgment debtors (i.e. appellants) proposed this court to make the following orders:-

- (i) A declaration that the assignment of the trade mark No. 21488 to Master Mind Tobacco Tanzania Limited was void and of no effect.
- (ii) An order that the Registrar takes steps to remove trade mark No. 21488 from the Register of trade marks due to expiration and non renewal on time.

- (iii) A declaration that at the time the appellant (i.e. judgment debtor) filed its application for the registration of its trade mark, which is similar to trade mark No. 21488, the registration of the later had expired and therefore the appellant's was the only application, and its interest in the mark took priority over all other interests and that its rejection was wrongful.
- (iv) A declaration that the appellant's application which is the sole application for the mark, is still valid pending before the Registrar and the latter be directed to consider and decide on the same according to law.
- (v) An order that costs be provided for and any other relief as this honourable court shall deem fit.

The matter was disposed of by way of written submissions in which the parties were allowed to file evidence by way of affidavits. On 19<sup>th</sup> September 2003, Hon. Kalegeya, J. delivered his judgment in which the appeal was struck out for incompetency. The interested party (now the decree holder), were awarded costs. This bill of costs is in respect of that order.

The bill of costs which consists of 29 items has a total claim of T.Shs.41,110,330/- disbursements inclusive. The disbursement claims (items 28 and 29) are conceded. I therefore proceed to tax them as presented.

Item 1 is for instruction fee to oppose the appeal (as interested party) and the amount claimed is T.Shs.40,000,000.00. According to Ms. Kasonda's submission this amount is claimed on the basis of peculiarity and unprecedency of this matter which involved substantial and difficult issues of Trade Mark Laws. Ms. Kasonda submitted further that although the decree holder was not made a party to the appeal, but the decision of the appeal against the Registrar of Trade Marks would have adversely affected their rights. These necessitated them to file an unprecedented application to intervene in the proceedings and seek to oppose the appeal. The said application involved, inter alia, lengthy affidavits and adducting of additional evidence by way of affidavit in support thereof. The learned counsel submitted further more that I should allow such fees which I may consider reasonable. She cited the case C. B. Ndege V E. O. Avila & the Attorney General [1980] TL R 91, where it was observed that what is reasonable depends on the amount of time energy and industry involved in the

prosecution or defence of the case. She also cited Rule 9 of the Third Schedule to the Tanzania Court of Appeal Rules 1979 which provides that:

*" 9 (1) The fee to be allowed for instruction fee to make, support or oppose any application shall be such sum as the taxation officer shall consider reasonable but shall not be less than T.Shs 00. ...*

*(2) The fee to be allowed for instruction 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 reason to bear the costs and all other relevant circumstances."*

Further reference was made to the decision in the case of Thomas James Arthur V. Nyeri Electricity Undertaking (1961) EA 492: where it was held that even where the fee allowed by a taxing officer was higher than seemed appropriate, the court will not interfere with questions of solely quantum as these are matters which taxing officers are regarded as particularly fitted to deal and the court will only intervene where there is exercise of a wrong principle.

Ms. Kasonda concluded that instruction costs must be commensurate with the amount of time energy and industry involved in the defence of the matter.

In response, Mr. Marando for the judgment debtor pointed out some legal matters which he believe must be the guide in dealing with this matter. He submitted that Under Rule 45 of the Advocates' Remuneration and Taxation of costs Rules 1991, all bill of costs should be taxed on the prescribed scale, unless a judge of the High Court certifies some special grounds that may permit taxation on the higher side. The learned counsel submitted further that under rule 55 (2) of the said Rules, it is directed that documents which are charged by folios shall have the folios thereof consecutively numbered in the margin of the same and the number of the folios shall be endorsed therein in figures. This means that the documents themselves must be filed with the bill of costs for the court and the opposite party to verify. Mr. Marando asserts further that under rule 55 (3) the length of such documents must be certified. It is Mr. Maira's conviction that the

discretion of the taxing officer with regard to scale is only allowed under Rule 67 of the Rules which provides for allowances for witnesses called to give evidence.

With regard to the application of the Third Schedule to the Tanzania Court of Appeal Rules 1979, it is submitted that the said rules do not apply to taxations in the High court of Tanzania and that it is the Advocates' Remuneration and Taxation of Costs Rules which apply to these proceedings.

As regards the research that was done, it is Mr. Marando submission that since the appeal was struck out for incompetence, all the research and arguments in the merits cannot be considered for purpose of this taxation as they are costs improperly incurred by an advocate under rule 48 of the Rules. According to Mr. Marando the decree holder's counsel should have raised a preliminary objection and confine herself to that argument only, in which case no enormous research could have been done.

As regards to items 2, 4, 5, 9, 10, 11, 14, 15, 16, 17, 18, 19 and 23 a submission has been made that in the first place the documents referred to are not attached, and the folios are not indicated therefore it is not possible to calculate charges per folio which is contrary to the Rules. As to items 3, 6, 8, 12, 20, 24, 26 and 27, it is submitted that the claim therein should be disallowed because no time spent has been indicated therefore it is not possible to calculate the costs.

In conclusion it has been submitted that the decree holder have not shown what was the amount involved in this case, the amount of work involved in terms of research and hearing of this application to warrant the amount in the bill of costs.

I will start with the question of which law is applicable in this matter. It would appear from Ms. Kasonda's submission that she suggests that both the Advocates' Remuneration and Taxation of Costs Rules 1991, and the Court of Appeal of Tanzania Rules 1979 are applicable in this matter. This view is gathered from the counsel's submission in para 2.8 and 2.10 and the case cited and quoted therein. With due respect to Ms. Kasonda the Third schedule to the Tanzania Court of Appeal Rules 1979 do not apply to taxation in the high Court.

Rule 123 of the Tanzania court of Appeal Rules is clear that:

*"These Rules shall apply to all proceedings in relation to applications and appeals to the court, immediately after the coming into operation of the Appellate Jurisdiction Act, 1979."*

The term "Court" under the Tanzania court of Appeal rules is defined under sub rule (1) of Rule 2 of the said rules to mean:

*"A Court of Appeal of the United Republic of Tanzania established by the constitution, and includes any division of that court and single Judge exercising any power vested in him sitting alone"*

Although this matter was heard by the High Court in its appellate jurisdiction in matters related to trade marks, that alone cannot make the High court to be the Court of Appeal within the ambit of the Tanzania Court of Appeal Rules (GN No. 102), of 1979. I therefore, agree with Mr. Marando's version that the Rules do not apply in this matter.

Further more I agree with Mr. Marando's submission that the Law applicable in this matter is the Advocates Remuneration and Taxation of costs Rules 1991.

Rule 2 of the said Rules is very clear that:

*"These Rules shall apply for the purposes of the remuneration of an advocate of the High Court the taxation of costs in contentious matters in the High Court and courts subordinate to the High court." [Emphasize mine].*

The matter in question was a contentious trade mark matter which was before the High Court therefore, taxation of bill of costs arising therefrom is taxable under the Rules provided for by GN No. 515 of 1991. Schedule VI to the Rules provide for scale fees for transactions connected with trade marks. However, the schedule does not cover taxation proceedings. It would appear from the Rules that the most appropriate schedule to this matter would be schedule X1 which caters for costs of proceedings in the High Court and subordinate courts. The instruction fee to present or oppose an appeal is provided under paragraph (i) thereof and the scale fee in opposed appeal is T.Shs.3,100/=. The proviso (i) to the said paragraph gives the taxing officer discretion to allow other fees and allowances in respect of the work done and also the nature and importance of the matter.

The decree holder's counsel claims for T.Shs.40m/= as an instruction fee. This amount is in any event fantastic, and some of the particulars given to support it are, I think quite misleading. For instance, I am referred to the decision of the taxing Master in the case of C.B. Ndege Vs. E. O. Ayila & the Attorney General [1988] TL. R. 91. and Rule 9 of the third schedule to the Tanzania court of Appeal Rules 1979. While the principle laid down in Ndege's case might be relevant in assessing what is reasonable instruction fee in any taxation, nevertheless, the Court of Appeal Rules which were applied in that case do not apply here.

It is submitted for the decree holder that in assessing what is reasonable fee payable as instructions in this matter, I should look on the amount of time, energy and industry involved in the trial. To this much I agree.

Now as regards time, it would appear that the proceedings were commenced on 8<sup>th</sup> July 2002 and were finalized on 30<sup>th</sup> October 2003 when the judgment was handed down. Fifteen (15) months period is slightly over the average time taken to dispose of a case in this registry therefore it can be said to have had taken long period of time.

As to the question of law, in fact there were difficulties of law in the case at hand. Basically trade marks law is new in our systems. The Trade and Service Marks Act 1986, and the Trade and Service Marks Regulations 2000, are relatively new laws in our jurisdiction. The issue to be determined by the court were not the subject of a great number of judicial decisions at least in our jurisdiction. This means that the law applicable, even if the facts had been established would have taxed the knowledge of senior and experienced counsels. There is indication that enormous research was done at the stage this case had reached. There is proof that apart from lengthy written submissions there were proofs by affidavits (evidence), which were equally long.

Lastly, the lengthy of the judgment given (43 pages), and the remarks made thereof, that.

*"While I regret that the above findings have disabled me from considering, analysing and deciding on the able and massive submissions by the counsel (s) and the various interesting issues raised therein, I hope that at an appropriate time, if the procedural aspect will be successfully pursued, the parties will again be able to knock at the court's door and imprest for its consideration of the merits."*

are index of the complexity of the case. It is for reasons I have endeavored to give that I think this is a proper case for me to exercise my discretion under Rule 11 of the Advocates' Remuneration and Taxation of Costs Rules, and the proviso (i) to paragraph (j) of Schedule X1 to the Rules to allow such fees, costs and charges which appear to me to be necessary and proper. Now having regard to all relevant and necessary considerations, I would allow T.shs.20,000,000/= as instruction fees in this matter. The rest is taxed off.

Item No. 2 is for receiving chamber summons to attend the court on 19/7/2002 and for perusing and studying the affidavit attached thereto and the amount claimed is T.Shs.1000/=. I have gone through the record and find that on the said date the parties attended before a Judge. As to the amount claimed, I find it to be quite fair and reasonable. I therefore tax item 2 as presented.

Item No. 3 is for attending the court before the judge in chambers on 19/7/2002. I have dealt with the issue of attendance and perusal when dealing with item No. 2. The claim made under item 3 is a repetition of what is claimed in item 2 and is confusing. I disallow it.

Item 4 is for drawing a counter affidavit and the amount claimed is T.Shs.200,000 I had an opportunity to go through the said counter affidavit (actually it is an affidavit) of Thabit Rajabu Katunda. It is a five page document containing factual matters. I find no justification for the decree holder's counsel to charge all that money to prepare a document the content of which is all within the knowledge of its deponent. I reduce the amount claimed and tax item 4 at T.Shs.50,000/=

Item No. 5 is for making five copies of the said affidavit (i.e. item 4), the amount claimed is T.shs.750/=. It is not stated what is the price of producing one copy of the said document. Normally, making of copies involves spending actual amount of money and the claim thereof is a claim for refund. The principle is that any claim for refund must be accompanied or supported by receipts evidencing the payment or expenditure thereof. Because item 5 is not supported by any receipt, I disallow it.

Items 6, 8, 12, 20, 22, 24, 26 and 27 are for various attendance made to this court on different occasions. The amount claimed vary between T.Shs.750/= and T.Shs.3,500/=. Taking into account the time spent in court, transport to and from the court and other incidentals, I think the amount claimed under each item is reasonable and fair. Thus, save for items 24, 26, and 27 which are disallowed for reasons to be stated later on, the rest (i.e. item 6, 8, 12, 20, 24 are taxed as presented.

Items 9, 13, 14, 15, 16 and 17 are said to be for "Receiving and studying...." Various documents. The Advocates' Remuneration and Taxation of Costs Rules does not provide scales fee for "receiving and studying the document and to say the least, I think it is unrealistic for a learned counsel to impose charges for "receiving" documents. In my opinion the claims for receiving and studying have no chance under the Rules, I therefore disallow them and tax off the entire amounts claimed under items 9, 14, 15, 16 and 17.

Items 7, 13, 21 and 25 are related to serving of documents to the other parties and the amount claimed on each service is T.Shs.300/=. The mode of the said service is not disclosed eg. Whether it was through publication or court clerks and/or court brokers (process servers). In the circumstance I find it difficult to assess the amount chargeable and the basis of the assessment of the amount claimed is not disclosed. I disallow the amount claimed thereof.

I disallowed items 24 and 26 and 27 and reserve the reasons. I now add to that list items 23 and 25 and my reasons are as under: It is provided under rule 46 of the Rules that:-



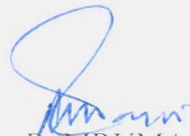
*"When more than one sixth of the total amount of a bill of costs exclusive of court fees is disallowed the party presenting the bill for taxation shall not be entitled to the costs of such taxation"*

In this bill of costs more than one sixth of the total amount claimed has been disallowed, therefore the decree holder is not entitled to the costs of this taxation.

Items 10, and 18 are for drawing on affidavit and written submissions respectively. I have already dealt with the issue of drawing affidavits when dealing with item 4 and I allowed T.Shs.50,000/= for the work done. For similar reasons (as in item 4), I reduce item 10 to T.shs.50,000.00 and tax off the excess. As regards drawing of written submissions, I appreciate that a quite reasonably long final written submission containing both matters of law and matters of fact together with annexures of suggested authorities was prepared. The decree holder's counsel is entitled to be fairly remunerated for the job. However, I think T.Shs.500,000.00 is on the high side of the scale. I reduce it and assess the amount chargeable at T.Shs.300,000.00 and tax it accordingly.

In summary therefore, this bill of costs is taxed at T.shs.20,691,620.00

Order accordingly.



A. R. MRUMA  
**DEPUTY REGISTRAR  
TAXING OFFICER**  
24/6/2004

**Court:** Ruling delivered in presence of Ms. Gogadi for the Decree Holder who holds Mr. Marando's brief for the Judgment Debtor.



A. R. MRUMA  
**DEPUTY REGISTRAR  
TAXING OFFICER**  
25/6/2004