

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

**AT DAR ES SALAAM**

**CONSOLIDATED TAXATION REFERENCE NO. 10 OF 2023 AND NO. 11 OF 2023**

*(Arising from Taxation Cause No. 24 of 2023 and Commercial Case No. 71 OF 2021)*

**SONIA TANIL SOMAIYA & AMAL SUBIR SOMAIYA (As**

**Administrators of the Estate of the late Tanil Somaiya .....APPLICANTS**

**VERSUS**

**VODACOM TANZANIA PUBLIC LIMITED COMPANY....RESPONDENT**

**RULING**

*Date of last order: 08/11/2023*

*Date of ruling: 16/02/2024*

**AGATHO, J.:**

This ruling stems from two consolidated Taxation References emanating from Taxation Cause No. 24 of 2023 originating from Commercial Case No. 71 of 2021. The Applicants preferred the Taxation Reference No. 10 of 2023 after being dissatisfied with the taxing officer decision to tax TZS 150,000,000/= from the claimed TZS 1,656,446, 558.31, Euro 16,101.22 and UK Pounds 4,108.33 and USD 359.10 all under item 1 of Bill of Costs as instruction fees to defend the suit (Commercial Case No. 71 of 2021). The Respondent on her side she filed as cross-

reference, Taxation Reference No. 11 of 2023 that too arising from taxation cause No. 24 of 2023 in which she is claiming that the taxed amount of TZS 150,000,000/= is excessively high, and beseech the court to interfere, reverse and set aside the taxing officer's decision and be pleased to tax the Bill of costs in accordance with the law and principles of taxation.

Traversing through the pleadings in particular the affidavits and the submissions of the parties, it is observed that they are aggrieved by the ruling of the taxing master though on different grounds. The applicants have found the taxed amount to be too low while the respondent considered the amount taxed to be too high.

It is not disputed that taxation is based on principles found in the law and as well elaborated in **Geroge Mbuguzi & Another v A. S. Maskini [1980] TLR 53; Premchand Raichand Ltd v Quarry Service of East Africa Ltd & Another [1972] EA 162; and Attorney General v Amos Shavu, Taxation Reference No. 2 of 2000 CAT.**

But to dispose these references, and as gathered from the pleadings, the court considered the points of determination in terms of Reference No. 10 to be:

- (a) Whether the taxed TZS 150,000,000/= as instruction fees for defending Commercial Case No. 71 of 2021 for liquidated sum of TZS 55,210,885,277/=: Euro 535,707.37, USD 11,970, and UK Pounds 136,941.27 was inordinately too low.
- (b) Whether the court should interfere with taxing officer's decision by increasing the instruction fees in TZS to the prescribed 3% or to at least TZS 828,513,279.15 which is half of the amount claimed in TZS in the Bill of Costs.
- (c) Whether the court should consider taxing instruction fees expressed in foreign currencies at the prescribed rate of 3%.
- (d) Whether costs should be awarded in this reference application.

Besides the above raised issues to answer them properly, I would add, whether the suit was for liquidated sum? Whether the suit ended at preliminary stages and never proceeded to full trial? And whether the taxation principles were properly applied?

Turning Taxation Reference No. 11 by the Respondent, the issues are:

- (1) Whether the taxed TZS 150,000,000/= was too high, and hence the Bill of Costs was not taxed in accordance with the law and taxation principles.
- (2) Whether the court should interfere with, reverse, set aside the decision of taxing officer and proceed to tax the Bill of Costs according to the law and taxation principles.
- (3) Whether the court should grant costs for the reference.

Along with that, one may add other issues whether the suit was for liquidated sum. And whether the schedules to Advocates Remuneration Order were properly applied.

The points not in dispute is that the suit was based on contract. The Super Dealer Agreement (SDA) and there was contract of guarantee.

The background of the case indicates that there were: a Super Dealer Agreement (herein referred as SDA) entered on 15/11/2004 between Vodacom and Shivacom, the guarantee agreement between Vodacom and Tanil Somaiya concluded on 05/12/2004 and the credit facility agreement of 01/08/2006 between Vodacom and Shivacom. The latter agreement as per clause 9.1 of the SDA was subject to review. It was reviewed in 2010 which increased credit facility limit to TZS 18.3 billion. On 29/06/2011 the

Plaintiff informed Shivacom (not a party to the present case) that credit facility is reduced to TZs 17 billion to take effect from 01/07/2011.

The suit however ended at preliminary stage when the POs were raised by the Applicant. Among the POs raised was that the suit was time barred. The court sustained this PO. It is from that ruling that the Taxation Cause No. 24 of 2023 was initiated and eventually determined. The suit never went to full trial. That is an important factor in the taxation proceedings. Had the suit proceeded to full trial, time spent, professional services and efforts rendered by lawyer(s) would be considerable. That is in line with the principles found in **Premchand's case**. Therefore, a case that ended on a preliminary stage such as by PO cannot be equated with the case that reached full trial. That point is used in determining how much should be taxed as instruction fees.

For that matter, even if the case was for liquidated sum, one cannot use the 9<sup>th</sup> schedule of the Advocates Remuneration Order, 2015 blindly. Other factors must be considered including the length of the trial. It should be remembered that Commercial Case No. 71 of 2021 ended in a PO whose hearing was conducted by way of written submissions. I am thus not convinced that the advocates spent a lot of time conducting trial and

doing research. Although it is understood that instruction fees are charged at the engagement stage and the costs are intended to reimburse a party for expenses incurred in the suit or proceedings, in the circumstance of this case it will be unfair or rather punitive to charge the respondent 3% of the suit amount as instruction fees for the matter ended in preliminary stage. The costs and taxation generally are not meant to be punishment to a losing party. See **Maskini; and Premchand** (supra). It is noteworthy that fairness and reasonability are essential in handling taxation proceedings.

From the above analysis, it is clear that TZS 150,000,000/= is not 3% of the suit amount of TZS 55,210, 885, 277/=: Euro 535,707.37, USD 11, 970, and UK Pounds 136,941.27. That amount is low. However, since the suit ended at the preliminary stage one cannot charge 3% of the suit amount. It will thus be fair not to decrease the taxed amount further contrary to what the Respondent (Vodacom) has suggested. In the lieu of the foregoing, I find TZS 150, 000,000/= not to be excessive. It is fair, just, and reasonable. I thus decline to increase it as requested by the applicant.

Moreover, I will not spill the ink on the issue of the definition of liquidated sum. The respondent has fiercely argued that **Wellworth**

**Hotels and Lodges Limited vs East Africa Canvas Company Limited & 4 Others, Taxation Reference No. 5 of 2022** page 4 has provided the definition. But the same has continued to be elaborated and improved further by subsequent decisions of this court including **KCB v Delina General Enterprises Limited, Commercial Reference No. 24 of 2022; and Exim Bank v M & Five B & Tours** (supra). In my view it is of no use to be labour on the definition of liquidated sum because as I have pointed out hereinabove that the suit ended at preliminary stage thus to rely on a scale dealing with liquidated sum, which is 3% of the suit amount will unreasonably sound like punishment to the respondent.

Turning to the question of charging attending fees separately, a clear discussion of that point has been made in **Exim Bank v M & Five B & Tours** (supra). I will not repeat it here. But it suffices to mention that the 9<sup>th</sup> schedule of the Advocates Remuneration Order deals with instruction fees only. It does not deal with attendance fees. Since there is no schedule that categorically deals with attendance fees the same is pegged on the 8<sup>th</sup> schedule governing scale of fees in respect of business the remuneration of which is not otherwise prescribed. The case of **Sianga v Elias (1972) HCD No. 66** cited by respondent (Vodacom) is in my view not a good law

compared to the Advocates Remuneration Order, 2015 in terms of timing as the Order was promulgated in 2015 and the decision in **Sianga's case** is reported in the HCD of 1972. Therefore, the attendance fee is not part of instruction fee.

Regarding the issue of costs as to whether costs should be awarded in this reference application. I am of the view that being separate proceedings or application the costs may be awarded. The Advocate Remuneration Order, 2015 does not forbid such practice. But in the end the awarding of costs remains to be the discretion of the court that must be exercised judiciously.

As to the question, whether the execution of drawn orders from the taxation cause should await the outcome of the appeal at the CAT? This matter cropped out of submissions of the parties. I wish to remind the parties that they are bound by their pleadings. Nevertheless, and as obiter dicta, in my view the execution of drawn orders need not await the outcome of the appeal unless there is an order for staying the execution of the orders. See **Exim Bank v M & Five B & Tours Commercial Reference No. 16 and 19 of 2022**). Along with that there is the decision of **Rose Mkeku (the Administratrix of the estate of the late**

**Simon Mkeku) v Perex Shabbirdin, Misc. Land Application No. 89 of 2021 HCT Sub registry of Mwanza** holding similar position. I am aware that once there is notice of appeal at the CAT this court ceases to have jurisdiction over the matter. However, that is not for all matters. For instance, execution is not among the matters. Further, in as far as the notice of appeal is concerned it is not about the costs/taxation.

On a question of costs for this reference, the court is of the view that each party should bear its costs given the nature of the issues presented and proceedings. Further factor considered was that there was a cross reference.

In the end the court is set for the following orders:

1. The taxing master's decision is upheld.
2. Each party to bear its costs.

It is so ordered.

**DATED at DAR ES SALAAM this 16<sup>th</sup> Day of February 2024.**



  
**U. J. AGATHO**  
**JUDGE**  
**16/02/2024**

**Date:** 16/02/2024

**Coram:** Hon. U. J. Agatho J.

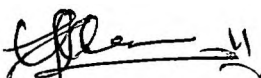
**For Applicant:** Safari Malata, Advocate, h/b Michael Ngalo, Advocate

**For Respondent:** Idrissa Juma, Advocate.

**C/Clerk:** E. Mkwizu

**Court:** Ruling delivered today, this 16<sup>th</sup> February 2024 in the presence of Safari Malata, Advocate h/b Michael Ngalo, learned counsel for the Applicant, and Idrissa Juma, learned counsel for the Respondent.



  
**U. J. AGATHO**  
**JUDGE**  
**16/02/2024**