

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 35 OF 2020**

**(ARISING FROM TAXATION CAUSE NO.74 OF 2019)**

**FIRST NATIONAL BANK TANZANIA LIMITED ..... APPLICANT**

**VERSUS**

**MPOGANO FOOD PRODUCTS LTD ..... 1<sup>ST</sup> RESPONDENT**

**MWALE TRADING CO. LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**MPOGANO PETROLEUM CO. LTD ..... 3<sup>RD</sup> RESPONDENT**

**INTERCONTINENTAL FORWARDERS LIMIT..... 4<sup>TH</sup> RESPONDENT**

**ABDULKADIR ANWAR KARIM ..... 5<sup>TH</sup> RESPONDENT**

**KARIM ANWAR KARIM ..... 6<sup>TH</sup> RESPONDENT**

**Date of Last Order: 27/05/2021**

**Date of Ruling: 18/06/2021**

**RULING**

**MAGOIGA, J.**

The applicant, FIRST NATIONAL BANK TANZANIA LIMITED aggrieved by the ruling of the Taxing Officer in Taxation Cause No. 74 of 2019 has approached this court by way of chamber summons made under order 7(1) and (2) of the Advocates Remuneration Order, G.N. 264 of 2015 praying this court to be pleased to give the following orders, namely:



1. That be pleased to call for records, examine the proceedings, ruling and drawn order of the Taxing Officer in the respondent's bill of costs against the applicant in bill of costs No.74 of 2019 for purposes of satisfying itself as to the correctness and legality of the said proceedings, ruling and drawn order arising there from;
2. That after finding the errors in the proceedings, ruling and drawn order in the decree holder's bill of costs No.74 of 2019 fault, set aside and determine a proper taxation;
3. Costs of this application;
4. Any other orders which the court deem fit and just to grant.

The chambers summons was accompanied with affidavit deposed by Mr. Godfrey Tesha, learned advocate for the applicant stating the reasons why this reference is akin to be granted.

Upon being served with chamber summons and accompanied affidavit, the respondents, filed a counter affidavit deposed by Mr. Makarious Tairo, learned advocate for the respondents stating the reasons why this reference should not be granted. Equally, the respondent raised two set of preliminary objections on point of law but same were withdrawn paving way for hearing of this reference on merits.

The facts of this reference are simple that, the applicant instituted Commercial Case No.162 of 2017 against the respondents but which was decided in favour of the respondents with costs. Subsequently, the respondents filed Taxation Cause No.74 of 2019 which was taxed at the tune of Tshs.36,230,000.00. Aggrieved by the ruling of the Taxing Officer, the applicant preferred this reference, mainly contesting on the instruction fees taxed at Tshs.35,000,000.00, hence, this ruling.

When this reference was called on for hearing, Messrs. Innocent Mushi and Adolf Temba learned advocates were advocating for the applicant. On the other hand, Mr. Makarios J. Tairo was advocating for the respondent.

Mr. Mushi at hearing, prayed to adopt chamber summons, the affidavit and skeleton arguments in support of this reference. The affidavit gave the history of the taxation but in paragraph 7 challenged the Taxing Officer decision on a number of reasons, namely; instructions fees of Tshs.35,000,000.00 was not proved by production of EFD receipt, the Taxing Officer relied on tax invoice and EFD receipt which was produced after hearing of taxation, by holding that legal fees were paid before commencement of Commercial Case No.162 of 2017 without proof from the respondents and by ignoring court's decision without reasons.

Expounding on the above reasons in the skeleton written arguments and oral submissions, Mr. Mushi argued that Advocates Remuneration Order, 2015 has to be read together with Income Tax Regulations, G.N.50 of 2012. According to Mr. Mushi, the first one provides for scales of charging instructions fees and the second one imposes mandatory requirement of EFD receipt to prove payment because advocates are supposed to charge VAT and remit to TRA on 20<sup>th</sup> every coming month. This was not done and when an adjournment was granted the respondent went to print EFD dated 15/11/2019 while invoice was dated 15/11/2017 and the judgement subject of this reference was delivered on 1<sup>st</sup> July, 2019. Mr. Mushi went on to argue that, they cited the case of FIRST WORLD INVESTMENT COURT BROKERS vs. BUCKREEF GOLD COMPANY LIMITED, MISC. COMMERCIAL REFERENCE NO 1 OF 2019, ARUSHA (HCCD) (UNREPORTED) but the Taxing Officer refused to follow it without assigning reasons but just stated the amount is reasonable.

Further, Mr. Mushi argued that allowing advocates not to produce receipts will encourage champerty between advocates and clients which is illegal under Regulation 81 of the Advocates (Professional Conduct and Etiquette) Regulations, 2018. The aim of bill of costs is to reimburse the decree holder



the actual costs incurred and not to benefit him at the detriment of the judgement debtor, insisted Mr. Mushi.

In the fine, the learned advocate urged and implored this court to allow this reference by finding and hold that instruction fees were not paid for and were not proved and consequently taxed them off with costs.

On the other hand, Mr. Tairo, learned advocate for the respondents prayed to adopt the counter affidavit resisting the grant of this reference.

In rebuttal, Mr. Tairo argued that, Rule 14 (1) of Income Tax Regulations, G.N. 50 of 2012 do not state when EFD should be issued but just imposes the use of Electronic devises and as such, according to Mr. Tairo is not applicable in the circumstances we have here.

On the arguments that, Advocates are supposed to charge VAT and remit to TRA on 20<sup>th</sup> of every month, it was the reply of Mr. Tairo that non-compliance with other laws cannot be handled here but by TRA.

On different dated between invoices and EFD tendered, Mr. Tairo briefly and to the point submitted that those issues were covered by the Taxing Officer in her ruling at pages 6-7 that the amount was reasonable. On the argument that the decision of this court was ignored, Mr. Tairo charged that, it is not



true because the decision was considered and the Taxing officer quoted it very clearly.

On the arguments that there are two camps in the High Court on requirement of EFD or not, it was the argument of Mr. Tairo that, following the decision of the Court of Appeal on this point in the case of TANZANIA RENT- A -CAR vs. PETER KIHUMU, CIVIL REFERENCE NO.09 OF 2020 the two camps are no longer there and the current position is EFD is not a requirement under CAT Rules. So, according to Mr. Tairo, whether there is requirement of a receipt or not is no longer a requirement based on the above decision.

Further reply by Mr. Tairo was that, whether it will encourage champerty or not was not stated in the affidavit, and much as there are scales fixed by statute and the guiding principle, no way champerty can be an issue here. Also, was further argument of Mr. Tairo in rebuttal that, since no argument that the principle for taxation were abrogated makes the instant reference unmerited in all intents.

On the arguments that the aim is to refund the decree hold the actual amount spent, was the reply of Mr. Tairo that, it was not stated in the



affidavit, and in the alternative, he argued that the applicant is not challenging the amount to be excessive and this was not a pro bono case and the fears that fees were not paid are fears without any basis of such fears.

On that note, Mr. Tairo concluded that the bill of costs was properly determined and prayed that the instant reference be dismissed with costs.

In rejoinder, Mr. Mushi argued that, the issue of champerty being a point of law need not be stated in the affidavit but a point of law and was covered under the statement under other grounds to be stated. More so, Mr. Mushi went on to argue that, taxes are matter of law and mere issuance of invoice was not proof of the payment but EFD is the only proof which is required.

Lastly but not least, Mr. Mushi pointed out that the Court of Appeal of Tanzania case cited by Mr. Tairo is distinguishable for the facts and resultant conclusion is not the same. According to Mr. Mushi, Order 2015 should not be read in isolation of other laws and that is why they are here challenging the amount taxed on instruction fees. This marked the end of hearing of this reference.



The noble task of this court now is to determine the merits or demerits of this reference. Having carefully considered the affidavit, counter affidavit and both oral and written rivaling arguments of the legal trained minds of the parties', I have noted that, the crux of this reference is, whether the amount of TShs.35,000,000.00 taxed as instruction fees without proof by EFD receipt was properly taxed? This claim, according to the taxation proceedings, was supported by two documents; one, tax invoice dated 15<sup>th</sup> November, 2017, and second EFD receipt dated 27<sup>th</sup> November, 2019. According to Mr. Mushi, the EFD receipt produced and considered by the Taxing Officer, was issued after seeking an adjournment and the date it was issued (15/11/2019) shows same was not paid for the services from the inception of the suit but later in order to enrich the respondent who had not paid for the legal services rendered. Another argument by Mr. Mushi was that by allowing this kind of transaction will encourage champerty as barred under regulation 81 of the Advocates (Professional Conduct and Etiquette) Regulations, 2018.

Mr. Tairo, in rebuttal argued that, EFD was produced and hence the claim of instruction fees was proved as required. In the alternative, the learned advocate argued that, on argument that EFD was not issued and money claimed not paid as required under the Income Tax (Regulations) G.N.50 of



2012 argued that the said Regulations do not state when EFD is to be issued. The learned advocate went on to argue that an invoice issued way back in 2017 shows that the said suit was not a pro bono case and the learned advocate for applicant is not challenging the amount but the issue of EFD receipt which according to the Court of Appeal in the case of TANZANIA RENT -A -CAR vs. PETER KIMUHU (supra) requirement of EFD receipt is no more requirement and water down any argument on receipt issuance.

All the above taken into consideration and having dispassionately considered them, I am entitled to find this reference devoid of any useful merits on the argument that EFD receipt was not issued and proved. The learned advocate for the applicant arguments on EFD are pegged on fears as correctly argued by Mr. Tairo and rightly so in my view, for do not negate the facts that the invoice that was issued way back in November, 2017 proves that there were legal services provided for irrespective when the same was settled. In the case of Ms. TAX PLAN ASSOCIATES LIMITED vs. TANCAN MINING COMPANY LIMITED, MISC. COMMERCIAL REFERENCE NO 02 OF 2019, ARUSHA (HCCD) (UNREPORTED) this court allowed the decree holder to pay tax even after finding that no receipt was issued but services were rendered and charged. On same parity I find that issuance of receipt though late cured the



purpose in which the same were to be charged and once an advocate issues a receipt it is at home and dry with the law.

Another reason, I am entitled to reject this reference was that no proof of champerty was proved because by issuing an invoice the advocate was showing that there was a legal transaction going between parties and hence the argument of champerty is not substantiated at all.

With the above reasons, I find the proceedings, ruling and the drawn order of the Taxing Officer in bill of costs no. 74 of 2019 was properly taxed and are correct for want of iota of reasons to disturb her findings.

That said and done, the instant reference is hereby found to be wanting on merits and same is hereby dismissed with no order as to costs in order to bring this litigation to an end.

It is so ordered.

Dated at Dar es Salaam this 18<sup>th</sup> day of June, 2021.



A handwritten signature in blue ink, appearing to read "S.M. Magoiga".

**S.M.MAGOIGA**

**JUDGE**

**18/06/2021**