

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL REFERENCE NO. 6 OF 2020**

**(Arising from the decision of the Taxing Officer Hon. M.N.Ntandu,  
DR, in Commercial Case No.39 of 2014)**

**DIAMOND TRUST BANK**

**TANZANIA LIMITED .....APPLICANT/DECREE HOLDER**

**VERSUS**

**PUMA ENERGY**

**TANZANIA LIMITED ..... RESPONDENT/JUDGEMENT DEBTOR**

**Date of Last Order:22/04/2021**

**Date of Ruling:17/05/2021**

**RULING**

**MAGOIGA, J.**

The applicant, DIAMOND TRUST BANK TANZANIA LIMITED aggrieved by the decision of the Taxing Officer, Hon. M.N.Ntandu, Deputy Registrar has referred this reference to this court under the provisions of order 7(1) and (2) of the Advocates Remuneration Order, 2015 and the usual prayer any other enabling provisions of the law praying that this honourable court be pleased to grant the following orders, namely:-




- a. Interfere decision of the Taxing Officer which taxed off a total sum of TZS.73,443,304 claimed as instruction fee contrary to the established principles under the law;
- b. Grant the instruction fees which was taxed off by the Taxing Officer contrary to the established and prescribed principle under the law;
- c. Costs of this reference be provided for;
- d. Any other order(s) this Honourable Court may deem fit to grant.

The chamber summons was accompanied by the affidavit of Mr. Zacharia Nyaruhucha Daudi, learned advocate for the applicant stating the grounds and reasons upon which this reference is to be granted.


Upon being served with the application, the respondent filed a counter affidavit deposed by Mr. Abdallah Hussein, learned advocate for the respondent stating the grounds and reasons why this reference should not be granted.

The facts of this reference are imperative to be stated for better understanding the gist of this reference. The respondent hereinabove was plaintiff in Commercial Case No. 39 of 2014 which was against the applicant claiming TZS.2,448,110,160.87 being amount due and owing to



the plaintiff cumulatively in two bank guarantees provided by the defendant. Before a suit was heard and determined inter parties, same was dismissed for want of prosecution with costs to the defendant. The applicant/defendant as usual filed a bill of costs claiming TZS.87,426,698/= which comprised of instruction fees, court appearance and disbursements. Unfortunately, the bill of costs was heard ex-parte and the Taxing Officer upon hearing the applicant in her reasoned ruling, taxed the bill of costs at tune of TZS.1,170,000/= and taxed off the rest of the claims, aggrieved with that ruling, the applicant lodged this reference claiming the prayers as contained in the chamber summons.

When this reference was called on for hearing, the applicant was represented by Mr. Zacharia Nyaruhucha Daudi, learned advocate. On the other hand, the respondent had the legal services of Mr. Abdillahi Hussein and Ms. Norah Marah, learned advocates.

Parties learned advocates had earlier filed skeleton written arguments in support of their respective stances, which I have had time to read carefully. 

Mr. Daudi when allowed to argue the application told the Court that, he prays to adopt his affidavit and written skeleton arguments, which according to him, were enough to grant the application as prayed. In the affidavit which had 5 paragraphs, the first 4 paragraphs were giving the history of the taxation proceedings before Taxing Officer but in paragraph 5 the applicant pointed out that upon getting the ruling, Mr. Daudi discovered that the ruling contained irregularity where a sum of instruction fees has been taxed off contrary to the established and prescribed principles in the law relating to taxation which need this court's interference.

In his written skeleton arguments, Mr. Daudi pointed out that the applicable law/regulation/order is the Advocate Remuneration Order, 2015 and for liquidated claim an advocate's instruction fees are calculated based on percentage of quantum as provided for under Nineth Schedule to the Order. According to Mr. Daudi, the cited Schedule does not require proof of fee paid by production of Electronic Fiscal Device receipt during taxation before a Taxing Officer. To buttress his point, the learned advocate for the applicant cited string of cases by this court on the point starting with BUCKREEF GOLD COMPANY LTD vs. TAXPLAN ASSOCIATES LTD , MISC.



COMMERCIAL REFERENCE NO.3 OF 2017 by His Lordship Mruma, J, SALEHE HABIB MANJI vs. MANJI GURMUKH SINGH AND ANOTHER, LAND REFERENCE NO.7 OF 2019 by Her ladyship Makani, J, SAPI INVESTMENT LTD vs. AZID KAONEKA, CIVIL REFERENCE NO.4 OF 2019 by His Lordship Mkasimongwa, J, ASM (T) LTD vs. LUSEKELO MWAKIBETE AND 2 OTHERS, MISC. CIVIL APPLICATION NO. 479 OF 2019 by her ladyship De-Mello, J, and VIJAY SHANTILAL CHOCHAN vs. ABDUL SHAKOOR HALDAY, CIVIL REFERENCE NO. 14 OF 2019 by his Lordship Mlyambina, J. of which the learned brothers and sisters judges held that no requirement of EFD receipts in taxation proceedings because it is not a requirement of Advocates Remuneration Order, 2015.

Furthermore, the learned advocate for the applicant in addition to above cited case laws submitted to this court a recent decision of the Court of Appeal of Tanzania in the case of TANZANIA RENT A CAR vs. PETER KIMUHU, CIVIL REFERENCE NO.9 OF 2020 CAT (DSM) (Unreported) in which the Court of Appeal interpreting the provisions of paragraph 9 (2) (3) and (4) of the Third Schedule to the Court of Appeal Rules, 2009 as amended in which the court observed and held that the Taxing Officer is given discretion to tax bill of costs properly for the attainment of justice



and that discretion should be exercised within the cost scales prescribed in the Rules and guided by the case of HOTEL TRAVERTINE LTD vs. NATIONAL BANK OF COMMERCE, TAXATION CIVIL REFERENCE No.9 of 2006 held that under the Rules no requirement 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 cost scales statutorily provided for together with the factors enumerated above.

Guided by the above submission and authorities, it was the conclusion of the learned advocate for the applicant that, the taxed off amount of TZS.73,443,340.00 was wrongly taxed off and invited this court to interfere with the decision of the Taxing Officer by granting the amount with costs.

On the other hand, Mr. Hussein, learned advocate for the-respondent in rebuttal prayed to adopt their counter affidavit and skeleton written arguments filed in opposing this reference. In the counter affidavit which had 9 paragraphs, but paragraph 1-7 inclusive admitted paragraphs 1,2 and 4 of the affidavit but denied paragraph 3 and started narrating the reasons for their failure to prosecute the taxation proceedings before the



Taxing Officer. However, in paragraphs 8 and 9 the learned advocates for the respondent equated the allegations contained therein as baseless and misconceived. According to the learned advocate for the respondent, the Taxing Officer was justified in her decision.

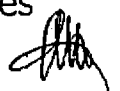
In his skeleton written arguments, the learned advocate for the respondent gave the history of the Commercial Case No.39 of 2014 and its consequences leading to this reference. The learned advocate further pointed out that the purpose of taxation is aimed at restituting a party who has been awarded costs to position he was before engaging in litigation. According to Mr. Hussein, therefore, the principle which applies to section 110(1) of the Tanzania Evidence Act [Cap 6 R.E.2019] do applies in bill of costs and the taxation proceedings have to be determined in accordance to the dictate and requirement under section 36(1) of the Tax Administration Act, 2015. To buttress his point, the learned advocate cited the case of PROFESSOR EMMANUEL A. MJEMA vs. MANAGING EDITOR, DIRA YA MTANZANIA NEWSPAPER AND 2 OTHERS, CIVIL REFERENCE NO. 7 OF 2017 by his Lordship Mgeta, J and ANAND SATYAVAN CHANDE AND ANOTHER vs. EXIM BANK, TAXATION REFERENCE NO.01 OF 2020, by his Lordship Nangela, J.



According to Mr. Hussein the charged scales do not remove the legal requirement to prove claims for whatever money spent by a party to a case in prosecuting or defending it by production of receipts.

Mr. Hussein pointed out further that, he is aware that there is, as of now, two schools of thought in the High Court on the requirement of EFD receipt or not in taxation proceedings. The learned advocate, however, he was quick to point out that, the two schools of thought do have one thing in common/understanding that, they do not rule out the relevancy of the EFD receipts. Mr. Hussein went further to argue that, the only difference is where it would be needed which, and according to him, highly depends on circumstances of each case. The learned advocate for the respondent implored this court to dismiss this reference with costs.

On the recent decision of the Court of Appeal of Tanzania cited by Mr. Daudi, Mr. Hussein argued that the decision in that case is distinguishable as it was dealing with reference guided by Court of Appeal of Tanzania Rules, 2009 while the one we have here is guided by the Advocates Remuneration Order, 2015.





In the alternative, the learned advocate for respondent argued that, in case I agree with the decision of the Court of Appeal, this court be guided by the wisdom of the Court of Appeal of Tanzania where the amount taxed was reduced by half and that by the same spirit, I reduce the amount in this reference because the matter was not complex and that it was just dismissed for want of prosecution and as such the amount claimed was on the high side.

In rejoinder, Mr. Daudi admitted that it is true the matter did not go into full hearing but almost all procedures were accomplished and the remaining part cannot deny the applicant the amount claimed which is within the prescribed scales as provided for under the law. The learned advocate reiterated that in taxation proceedings, the principle is that, receipts are not required to prove bill of costs on instruction fee. On that note he invited this court to allow this reference as prayed.

This marked the end of hearing of these rival arguments on requirement or not of EFD/any receipt in taxation proceedings.

Let me state at the outset that, this reference is yet another legal snag showing that, the dust on requirement of receipt or not is yet to cool in



our jurisdiction at the High Court level. As pointed out by Mr. Hussein, truly there is, as of now, two schools of thoughts as to whether requirement of EFD/any receipt is required or not on instruction fee. I must admit that, I belong to the second school of thought that, advocates are required as matter of policy and law to issue EFD receipts on instruction fees as provided for under section 36(1) of the Tax Administration Act, 2015 unless exempted in accordance with the law. And it is the same receipts that are to be presented during taxation proceedings not only to prove that the money was paid but also to comply with the requirement of the law as provided for under section 36(1) of Tax Administration Act, 2015. See the recent ruling of this court in the case of MOLLEL ELECTRICAL CONTRACTORS LTD vs. MANTRAC TANZANIA LIMITED, MISC. COMMERCIAL REFERENCE NO 05 OF 2020, HCCD (DSM) (UNREPORTED).

In the above ruling, this court was very clear that each case has to be decided on its own peculiar facts, unless the basic facts are similar and to make the point clear it stated and insisted that:



**"the provisions of the Order (The Advocates Remuneration Order), therefore, have to be read together with other laws and not in isolation when it comes to taxation proceedings."**

Now back to the instant reference, I have noted that; **one**, the suit subject of this reference was filed way back in 2014 before coming into force both the Advocates Remuneration Order, 2015 and The Tax Administration Act, 2015 [Cap 438 R.E. 2019] which came into force on 17<sup>th</sup> July 2015 vide Government Notice No. 264 and on 24<sup>th</sup> July 2015 vide Government Notice No. 304 respectively. **Two**, both the Advocates Remuneration Order, 2015 and Tax Administration Act, 2015 have no provisions providing that the acts done before they came into force shall apply retrospectively.

With the above noted points of law, therefore, before I delivered this ruling I invited the learned advocates for parties' to address me on whether in the instant reference which was filed way back in April 2015 before coming into force of the Order, 2015 was to be taxed under the new law and whether requirement of EFD receipt was imperative and applicable.

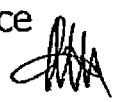


Mr. Daudi was brief to the point that, the instant reference was to be taxed in accordance with the old Advocates Remuneration and Taxation Costs Rules, 1991 and according to him the rate of scale applicable was 3% and there was no requirement of EFD or any other receipts. So he concluded that the Taxing Officer was wrong to tax off the instructions fees which were charged in accordance with the law.

On the other hand, Mr. Hussein, learned advocate for the respondent pointed out that under the provisions of Order 72, is very clear, the applicable law is the new law. On the requirement of receipt, the learned advocate for the respondent conceded that it was not a requirement by then.

With the above background, the requirement of EFD receipts to all business men and women, advocates inclusive, came into force on 1<sup>st</sup> August 2015 vide Government Notice No.304 of 2015 and it is upon that background, the second school of thought for requirement of EFD receipts comes into play.


Therefore, in the instant reference, guided by the above noted points of law and facts, I am, therefore, entitled to find and hold that since



instruction fee in this reference was charged under the repealed Advocates' Remuneration and Taxation of Costs, 1991, it is obvious, by then, there was no requirement of EFD receipts under the Tax Administration Act, 2015. Further, upon going through the ruling of the Taxing Officer, the only reason why the applicant was denied instruction fee was the need of receipt as required under the Tax Administration Act, 2015, hence, want of proof under section 110 of the Tanzania Evidence Act, [Cap 6 R.E.2019]. With due respect the learned Taxing Officer, she erred in law by her failure to note that when the suit was filed and relevant laws applicable by then for charging instruction fee were not the Advocates Remuneration Order, 2015 and Tax Administration Act, 2015. It is though on different reasons to those argued, I find the learned Taxing Officer misapplied the law to deny the applicant's instruction fee that did not require EFD or any other receipts. On this reason alone suffices to reverse her decision that the applicant failed to prove instruction fee while it was not a requirement of the law by then.

Mr. Hussein in the alternative urged this court that, in case I find that receipt was not a requirement, I will be guided by the wisdom of the Court of Appeal of Tanzania in the case of TANZANIA RENT A CAR vs. PETER



KIMUHU (supra) and reduces the amount to a reasonable amount as it was done by the Court of Appeal. I have gone through the proceedings before the Taxing Officer and the arguments made therein and noted that the applicant's arguments were that, they charged the amount of TZS.73,443,304/= pegged on 3% of the minimum amount claimed of TZS.2,448,110,160/= as per item 8<sup>th</sup> of 9<sup>th</sup> Schedule to Advocates Remuneration Order, 2015. This was wrong on the part of the applicant because by then Order 2015 was not operative. However, I do agree that by then 3% was the prescribed minimum scale to any claim above Tshs. 3 million and as such the minimum an advocate was to charge as per 9<sup>th</sup> Schedule to Rules on contentious matter of an ascertained amount. Since, by then the minimum percentage was 3% on the ascertained liquidated sum, I find merits though on different reasons to interfere the amount claimed because either way the rate by then and now is the same. In the event, therefore, I allow, 3% of TZS.2,448,110,160/= which is TZS.73,443,304/= and this amount shall be paid with VAT because the suit was at its highest stage as correctly argued by Mr. Daudi, learned advocate for the applicant. 

The argument by Mr. Hussein that Order 72 provides for application of the new law will not assist his rebuttal because the scale in both laws is the same as correctly argued by Mr. Daudi and rightly so in my own view.

The provisions of Order 72 are limited to two situations; one, after coming into force where it is impracticable to apply which is not the case here. Two, in case of difficult and doubt and the Judge or the Taxing Officer has given directions, which is not the case here.

In the fine and for the reasons stated above, this reference must be, and is hereby allowed to the extent explained above with no order as to costs to put to an end of this litigation.

It is so ordered.

Date at Dar es Salaam this 17<sup>th</sup> day of May, 2021.



  
S. M. MAGOIGA

JUDGE

17/05/2021