

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

CIVIL REFERENCE NO. 4 OF 2003

(From the decision of Lila, District Registrar – Taxing Officer)

NATIONAL BANK OF COMMERCE APPLICANT

VERSUS

KAPINGA & CO. ADVOCATE RESPONDENT

Date of last order – 27/6/2006

Date of Ruling – 23/8/2006

R U L I N G

Shangwa, J.

This is a reference against the decision of the Taxing Officer dated 7/10/2005 in Miscellaneous Civil Application No. 117 of 2001 wherein he awarded a sum of shs.420,000,000/= to the respondent as instruction to defend the suit. Learned counsel for the applicant are requesting this court to reverse the said decision on grounds that the amount which was awarded is too excessive.

On 18/5/2006, I ordered that the reference should be argued by way of written submissions and it was so argued. Counsel on both sides made lengthy and extensive submissions and arguments on behalf of their clients.

It was submitted by learned counsel for the applicant Messrs Ishengoma, Masha, Mujulizi and Magai that taking into consideration the nature of the claim, the work done and time taken; the sum of shs.420,000,000/= awarded by the Taxing Officer is unreasonable and too excessive. They said that High Court Civil Case No. 42 of 1999 **FAHARI BOTTLERS LTD VS. NBC (1997) LTD** which the respondent was instructed to defend did not proceed to hearing as the plaint was rejected by the court at the earliest stage on grounds that it did not disclose a cause of action.

They further submitted that as the claim in the suit was for unliquidated damages, it was wrong for the Taxing

Officer to award instruction fees at 3%. They stated that item 2 of the Bill of Costs should have been taxed at most at shs.4,000,000/=. They prayed that this reference/application be allowed and the costs awarded be reduced to a reasonable amount in the circumstances of this case.

On the other side, learned counsel for the respondent Professor Mgongo Fimbo submitted that in taxing the Bill of Costs, the Taxing Officer followed the direction of this court Madame Oriyo, J. when he applied Schedule IX to the Advocates Remuneration and Taxation of Costs Rules, GN No 515 of 1991.

He contended that in awarding the amount of shs.420,000,000/=:, the Taxing Officer took into consideration relevant factors and exercised his discretion judiciously and correctly and that this court has no legal basis to interfere with his decision.

He requested the court to take into account the value of the subject matter of the suit i.e. Shillings 14 billion, the volume of the plaint which contained fifty four (54) paragraphs with a list of Seventeen (17) documents and one hundred eighty nine (189) pages of annexures and the written submissions which were made in arguing the preliminary objection and the length of the ruling of this court. He prayed that this reference be dismissed with costs.

The back ground to this reference is as follows: On 24/11/2000, the respondent filed a Bill of Costs in this court in which he claimed *inter-alia* instruction fees to defend the suit of shs.420,000,000/= (four hundred twenty million) being 3% of shs.14 billion which was claimed by FAHARI BOTTLERS LTD against NBC in High Court Civil Case No. 42 of 1999. This case was struck out with costs following the respondent's preliminary objection that the plaint does not

disclose a cause of action. In Taxing the Bill of Costs, the former Taxing Officer Mutungi, District Registrar applied Schedule XI to the Advocates Remuneration and Taxation of Costs Rules, GN No. 515 of 1991 and allowed shs.4,000,000/= instead of shs.420,000,000/=. His decision was overturned by this court Madame Oriyo, J. The matter was remitted to the Taxing Officer Mr. Lila, District Registrar who took over office from Mr. Mutungi. Madame Oriyo, J. instructed the said officer to tax item 2 of the Bill of Costs "*instruction to defend*" under Schedule IX to the Advocates Remuneration and Taxation of Costs Rules GN No. 515 of 1991. The Bill of Costs was accordingly taxed by the Taxing Officer Mr. Lila, District Registrar.

In his typed ruling, Mr. Lila, District Registrar had the following to say and I quote:

*"I am well aware that in her ruling
Madame Judge did put it clear that Rule*

11 of the Advocates Remuneration and Taxation of Costs gives the taxing officer a discretion to tax in item 2 at a lower or higher percentages than those under Schedule IX for reasons to be stated . . . The issue to be determined here is therefore, whether item 2 should be taxed at 3% or more or less of Tshs.14,000,000/= . . . I must hurriedly state that for a party to raise a preliminary objection, file tenable and successful submissions he must have, no doubt, made a thorough research on the matter which calls for spending much energy and effort . . . considering the above, there are all justifications for me to tax the costs claimed in item 2 "instruction to defend" at 3% of the

monetary value of the claim value in the suit (plaint). I accordingly tax costs in item 2 at 3% of Tshs.14,000,000,000/= which gives us Tshs.420,000,000/=."

This court has been called upon to determine as to whether or not the Taxing Officer was justified in awarding shs.420,000,000/= as instruction to defend which is 3% of shs.14 billion which was being claimed by Fahari Bottlers against the applicant NBC in High Court Civil Case No. 42 of 1999.

I have taken time to consider and I agree with learned counsel for the applicant that the amount of shs.420,000,000/= awarded to the respondent by the taxing officer as instruction to defend is unreasonable and too excessive in the circumstances of this case. In my opinion, raising a preliminary objection against the plaint and arguing it as the respondent did in this case did not require much

energy and effort. Also, going through the plaint which contains 54 paragraphs with a list of 17 documents and 189 pages of annextures as the respondent did in this case did not require much energy and effort.

In my view, the huge sum of money which was claimed in the suit namely 14 billion and the volume of the plaint which has 54 paragraphs and 189 pages of annextures does not in any way make this case to be peculiar. What is peculiar in this case is the heavy amount of money which was awarded by the Taxing Officer Mr. Lila, District Registrar to the respondent as instruction fees namely shs.420,000,000/= for just going through the plaint and its annextures and raising a preliminary objection against it in High Court Civil Case No. 42 of 1999 that it did not disclose a cause of action. I believe that the work done to prepare the preliminary objection and argue it was not as heavy as the huge amount of money which was awarded to the

respondent as instruction to defend. Indeed, the suit did not proceed to hearing. So, the energy and effort which was spent by the respondent in preparing and arguing the preliminary objection by way of written submissions and so