



**IN THE EAST AFRICAN COURT OF JUSTICE AT  
ARUSHA**



**FIRST INSTANCE DIVISION**

*(Coram: Faustin Ntezilyayo, DPJ; Charles O. Nyawello & Charles Nyachae, JJ)*

**TAXATION REFERENCE NO. 1 OF 2019**

**THE SECRETARY GENERAL OF  
THE EAST AFRICAN COMMUNITY ..... APPLICANT**

**VERSUS**

**MARGARET N. ZZIWA ..... RESPONDENT**

**19<sup>TH</sup> JUNE, 2020**



## RULING OF THE COURT

### INTRODUCTION

1. This Application was brought by the Secretary General of the East African Community ('the Applicant') under Rules 114, 84(1), 84(2) and 85(1) of the East African Court of Justice Rules of Procedure, 2013. It arises from **Taxation Cause No. 1 of 2019**, which itself arose from **Reference No. 17 of 2014** and challenges the taxed bill of costs awarded in favour of the Rt. Hon. Margaret Nantongo Zziwa ('the Respondent').
2. In the said Application, the Applicant seeks to move this Court for orders that:
  - a) **The Taxation Ruling made by the Learned Taxing Officer on the 4<sup>th</sup> day of June 2019 awarding instruction fees against the Applicant which, coupled with Value Added Taxes of 18 per cent of instruction fees and getting up fees being a quarter of the instruction fees culminated in USD 359,376.99 should be set aside for a more reasonable and less awards.**
  - b) **The Taxing Officer took into account irrelevant matters and did not properly abide with the legal principles in reaching his decision and also failed to appreciate the submissions of Counsel for the Applicant and there are also mathematical miscalculations in the summation of the awards that are prejudicial to the Applicant and need to be addressed; and**
  - c) **Costs of this taxation reference be paid by the Respondent.**
3. At the hearing, the Applicant was represented by Dr. Anthony Kafumbe, Counsel to the Community (CTC); while the Respondent was represented by Messrs. Jet Tumwebaze and Justin Semuyaba.

### APPLICANT'S CASE

4. The Application is supported by the affidavit of Michel Ndayikengurukiye, a Principal Legal Officer in the office of the CTC. The CTC also made oral submissions at the hearing of the Application. The essence of the Applicant's



case is, firstly, that in arriving at the instruction fees awarded to the Respondent, the learned Taxing Master did not properly abide with the principles applicable to such taxations, failed to appreciate the submissions of Counsel for the Applicant, took into account irrelevant matters, and thus arrived at an unreasonably high figure for instruction fees that were awarded to the Respondent. Secondly, the CTC argued that in totaling the sums awarded under the various heads, the learned Taxing Master made a mathematical error in the sum of USD 9,460.99, in favour of the Respondent.

5. In support of his submissions as regards the principles applicable to the determination of instruction fees, Dr. Kafumbe referred to several decisions of the Court: **Kenya Ports Authority vs. Modern Holdings Limited, EACJ Taxation Reference No. 4 of 2010**; **Democratic Party & Another vs. The Attorney General of Uganda, EACJ Taxation Reference No. 3 of 2013**, and **Hon. Sam Njuba vs. Sitenda Sebalu, EACJ Taxation Cause No. 1 of 2013**. These authorities were also relied upon by the Respondent in support of her case. In addition to these, the CTC referred the Court to a Ugandan case of persuasive value, **Constitutional Reference No. 27 of 2013, Twinobusinge Saverino vs. Attorney General**.
6. The Applicant submitted that, arising from these authorities, there are a number of principles that are to be taken into account in taxation of costs. Firstly, costs must not be allowed to rise to such a level as to confine access to the court to the wealthy. Secondly, a litigant should be fairly reimbursed for costs that he has incurred. Thirdly, the general level of remuneration for Advocates must be such as to attract recruits to the profession. The fourth principle is that as far as possible, there should be consistency in the awards made. A fifth principle arising from the authorities is that there is no mathematical formula to be used by the Taxing Master, who must decide each case on its merits. The Taxing Master has a discretion that he must apply judiciously.
7. The Applicant's Counsel made reference to Rule 9(2) of the Third Schedule of the Rules and the criteria set out therein, and concluded by submitting that the Taxing Master did not consider the principles regulating taxation, and the criteria



captured under the said Rule 9(2). He invited the court to set aside the instruction fees awarded by the Taxing Master, and to instead award instruction fees at about USD 3,000.

### **RESPONDENT'S CASE**

8. The Respondent filed an affidavit in reply to the Application. Counsel to the Respondent also made submissions in which they strenuously opposed the Application. At the onset, the Respondent raised two points of law on the basis of which they invited the Court to dismiss the application. Firstly, the Respondent argued that the Application is expressed to be brought under Articles 84(1), 84(2) and 85(1) of the East African Court of Justice Rules of Procedure, 2013. This is in addition to Rule 114 of the same Rules. The Respondent argued that the said Rules 84 and 85 are not applicable to applications made in the First Instance Division of this Court, but are applicable only in applications made in the Appellate Division. This, they argued, was fatal to the Application and they thus urged that it be dismissed. Secondly, Counsel for the Respondent argued that the Applicant had failed to annex the Bill of Costs and the Taxing Master's Order to the Application nor were the Proceedings annexed. This, the Respondent argued, made the Application untenable.
  
9. Turning to the substance of the Application, learned Counsel for the Respondent defended the Taxing Master's award as fair and reasonable. Relying on the same authorities cited above, Counsel submitted that the Taxing Master had correctly applied the principles for taxing and the criteria set out in Rule 9(2) of the Third Schedule. He concluded that there was no just cause for this Court to interfere with the Taxing Master's decision. In particular, he argued that the matter in respect of which the costs had been awarded was a lengthy and complex matter therefore the instruction fees were merited and consistent with fees awarded in similar matters that had been considered by the Court. As regards the mathematical error raised by the Applicant, Counsel for the Respondent conceded that if indeed the additional sum was included in error then it should be removed. In concluding their submissions, Counsel for the

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Respondent asked the Court to dismiss the instant Application with costs, and thereby affirm the Taxing Master's taxation.

### **SUBMISSIONS IN REPLY**

10. In reply, on the legal questions raised, the CTC submitted that the application was based on Rule 114 of the Rules, and the inclusion or reference to Rules 84 and 85 was as a matter of practice. That he included a reference to these latter two Rules cannot render the Application ineffective since the operative rule was Rule 114. As regards his failure to attach the Proceedings, the Order and the Bill of Costs, the CTC submitted that these documents were not required under the provisions of Rule 114 or any other Rule relevant to taxation and, in any event, a Taxation Reference was not an Appeal where the Rules would require inclusion of those documents. On the substantive issues, the CTC reiterated that the award on instruction fees was excessive and, the applicable principles not having been applied properly, there was just cause for the Court to interfere with the Taxing Master's decision.

### **COURT'S DETERMINATION**

11. We have carefully listened to counsel on both sides and considered their respective arguments and submissions. In making our determination, we consider it appropriate to firstly deal with the two legal issues raised by the Respondent. The instant Application, brought by way of Notice of Motion, expresses itself to be brought under Rules 114, 84(1), 84(2) and 85(1) of the Rules. Rule 114 provides as follows:

**Any person who is dissatisfied with a decision of the Taxing Officer may within fourteen (14) days apply by way of reference on taxation for any matter to be referred to a bench of three (3) judges whose decision shall be final.**

12. We are constrained to state from the onset that although this Application was filed under the then Rules of Procedure of the Court, these Rules have since been revoked following the formulation of the East African Court of Justice Rules of Procedure, 2019 that took effect in February 2020. Rule 136 of the Court's



Rules as amended provides for their applicability to all proceedings that were pending before the Court to the extent practicable. Rule 114 of the now defunct East African Court of Justice Rules of Procedure, 2013 is reflected in Rule 130(1) of the Court's Rules as amended therefore the Application shall be determined on that basis. We reproduce Rule 130(1) and (2) below for clarity.

- (1) **Any person who is dissatisfied with the decision of the taxing officer shall by notice of motion apply, within fourteen (14) days to have the matter referred to a bench of three (3) or five (5) Judges, whose decision shall be final.**
- (2) **The provisions of these rules relating to Scheduling Conference, lodging of notices of preliminary objections, list of authorities, appearances and hearing of appeals, shall apply *mutatis mutandis* to this rule.**

13. There can be no doubt, and indeed, none was raised by the Respondent, that Rule 114 [now Rule 130(1)] is the correct rule for this Application, the Applicant being aggrieved by the Taxing Master's decision. Rules 84 and 85 on the other hand, clearly fall under Part C of the now defunct Rules, which is titled *Proceedings in Appellate Division*. The instant Application being in the First Instance Division, there can be no doubt that the reference in the Notice of Motion to Rules 84 and 85 is misplaced and untidy.

14. The Respondent invited the Court to dismiss the Application as being procedurally incompetent, the said Rules 84 and 85 having been invoked. It is our view that to accede to the said invitation would defeat the ends of justice. In his submissions, the CTC did not offer an explanation as to why he included the reference to Rules 84 and 85, other than to observe that it has been the practice. The CTC did however submit that the inclusion of these latter two Rules does not render his application fatal.

15. To the extent that the Application substantially expresses itself to be brought under a legal provision akin to Rule 130(1), which is the correct Rule under which to bring a Taxation Reference before this Court, we consider that this is an



appropriate case to exercise our discretion under Rule 4 of the Court's Rules as amended. It provides as follows:

**Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court.**

16. Accordingly, we deem the reference to Rules 84 and 85 to be superfluous but to have no effect on the validity of the Application.

17. We turn to consider whether the failure by the Applicant to attach the Proceedings, the Bill of Costs and the Order is fatal to the instant Application. It was the contention of Counsel for the Respondent that in the absence of the said documents, there was insufficient material for the Court to appreciate the reasoning of the Taxing Master and thus determine whether it was appropriate to interfere with the taxation. Counsel further argued that in the absence of these documents, the Applicant could not show cause why the Court should interfere with the discretion of the Taxing Master. On his part, the CTC submitted that neither under Rule 114 pursuant to which the Taxation Reference had been made nor in any other Rule is there a requirement that the documents referred to by the Respondent should be attached. He argued that the Taxation Reference brought under Rule 114 is not an Appeal where rules require that specific documents such as a record of the proceedings should be attached.

18. It is not in dispute, that the Applicant, in bringing the Taxation Reference, complied with such requirements as there are in Rule 114. The Application is similarly in compliance with Rule 130(1) of the Court's Rules as amended. Further, the Applicant attached such document as he felt was required to support his case, namely, the Ruling of the Taxing Master. The documents referred to by the Respondent, that is, the Proceedings, the Bill of Costs and the Order were part of the record in this Court (albeit before the Taxing Master). In the interests of completeness and for a tidy presentation, it may well have been helpful and efficient for the Applicant to attach these documents. However, we do not consider that the failure to include the documents is fatal or indeed impacts



negatively on the Application. These documents being part of the Court's own record, were we to consider them necessary for the purposes of determining the instant Application, we would be able *suo moto* to call for them. In the instant Application, the ruling of the Taxing Master was included in the Application. It is our view that the said Ruling contains the reasoning adopted by the Taxing Master to, in particular, exercise his discretion as regards the item of instruction fees, which is the subject matter of this Application. We are therefore not persuaded that the absence of the Proceedings, the Bill of Costs and the Order is fatal to the instant Application.

19. We now consider the Application on its merits. Aside from the mathematical issue raised by the Applicant (which was conceded), the substance of the Application relates to the item of instruction fees. It is this item that the CTC submitted was arrived at by the Taxing Master applying erroneous and unreasonable principles thus resulting in an excessive sum. Counsel for the Respondent, on the other hand, submitted that the Taxing Master exercised his discretion well within the established principles of Taxation, arriving at a reasonable and fair sum in the circumstances. In their respective submissions, both Parties relied upon common authorities. The issue therefore is as regards the interpretation and applicability of the said authorities to the instant Taxation Reference.

20. Rule 129 of the Rules provides as follows:

- (1) **The Registrar shall be a taxing officer with power to tax the costs of or arising out of any appeal, application, claim or reference as between parties.**
- (2) .....
- (3) **The costs shall be taxed in accordance with the Rules and scales set out in the Third Schedule for the First Instance Division....**

21. Rule 9 under the Third Schedule of the Rules, provides as follows:





- (1) **The fee to be allowed for instructions to make, support or oppose any application shall be such sum as the taxing officer shall consider reasonable but shall not be less than USD 100.**
- (2) **The fee to be allowed for instructions to institute an application, claim or reference or to oppose an application, claim or reference shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the reference, its nature, importance and complexity, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the person to bear the costs and all other relevant circumstances.**

22. This Court has had occasion in several cases to consider and pronounce itself on the principles to be applied in the determination of costs and, further, on the correct exercise by the Taxing Master of the discretion granted to him by Rule 9 of the said Third Schedule. Most pertinently, the Court has been able to develop clarity in jurisprudence as to the circumstances in which it will interfere with the said discretion of the Taxing Master.

23. In **Kenya Ports Authority vs. Modern Holdings Limited** (supra), Lady Justice Stella Arach-Amoko, DPJ (as she then was), summarized the principles succinctly as follows:

**The principles regarding review of taxation orders by the courts is well settled. According to a wealth of authorities some of which were cited by both counsel, this Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on error of principle, or the fee awarded was so manifestly excessive as to justify the interference that it was based on an error.**

24. This Court, in **Democratic Party & Another vs. The Attorney General of Uganda** (supra), made the following observations:



We are not travelling in a virgin land in the legal field. The general principles governing taxation orders are well settled. It was propounded by Spry VP, in the leading case of *Premchand Raichand Limited & Another vs. Quarry Services of East Africa Limited & Others (No. 3) (1972) EA 162.*

25. The Court then quoted with approval the summary of the applicable principles set out in *Kuloba, Richard, Hints on Civil Procedure, 2<sup>nd</sup> Edition, pp. 118, 119* as follows:

- a. That costs be not allowed to rise to such level as to confine access to courts to the wealthy;
- b. A successful litigant ought to be fairly reimbursed for the costs he has had to incur;
- c. That the general level of remuneration of advocates must be such as to attract recruits to the profession;
- d. That as far as practicable, there should be consistency in the awards made.
- e. That there is no mathematical formula to be used by the taxing master to arrive at a precise figure. Each case has to be decided on its own merit and circumstances.
- f. The taxing officer has discretion in the matter of taxation but he must exercise the discretion judicially, not whimsically.
- g. The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.

26. These principles have been reiterated and applied in several matters before this Court. See *Prof. Anyang Nyong'o & Others vs. The Attorney General of the Republic of Kenya & Others, EACJ Taxation Reference No. 5 of 2008; Hon. Sam Njuba vs. Sitenda Sebalu* (supra), and *Alcon International Limited vs. Standard Chartered Bank (Uganda) & Others, Taxation Reference No. 1 of 2014.*



27. There can be little, if any, debate therefore about the applicable principles when this Court is invited to interfere with the decision of a Taxing Master and, in particular, the exercise of the latter's discretion on instruction fees. What we must consider in the instant Application is, firstly, taking into account the established principles, is this an appropriate case for such interference. If so, what would be the appropriate and reasonable sum to award as instruction fees?

28. Whilst in submissions, the CTC made reference to all the applicable principles to be found in the authorities as set out in paragraph 25 above; it seems to us that he hinged his case primarily on the purported failure of the Taxing Master to adhere to the principles of the complexity of the case under consideration, as well as consistency in the award of costs. The Taxing Master, in his Ruling, took the view that in terms of the complexity of the subject matter, looking at the authorities, this matter could only be compared to the **Anyang Nyong'o** case. In particular, the Taxing Master attributed considerable weight to:

- (1) The Reference involved the removal of the sitting Speaker of a Regional Legislative Assembly.
- (2) For the first time the Court considered matters involving the production of documents from EALA.
- (3) For the first time the Clerk of the Assembly had to be summoned to produce proceedings of the Assembly.
- (4) In this case for the first time, the East African Court of Justice awarded monetary damages to a winning litigant.

29. The Learned Taxing Master concluded that *'all the above were ground breaking precedents and development of a new jurisprudence in the region with far reaching ramifications.'*

30. In making our determination herein, this Court is mindful of the consistent jurisprudence to be found in the authorities that the court will not lightly interfere with the exercise of discretion by a Taxing Officer. This was well set out by the Appellate Division of this Court in **Alcon International Limited vs. Standard Chartered Bank (Uganda) & Others** (supra). The Court held:



**It is settled law that a Court hearing a reference against a ruling involving the exercise of a Taxing Officer's discretion in a taxation cause, will normally not interfere with the ruling merely because it thinks it would have awarded a different figure had it been the one taxing the bill. This is so because taxation is not a mathematical exercise. It is a discretionary process. Interference by the Court in that process would only be justified when there is proof that either the amount taxed was manifestly excessive or so manifestly deficient as to amount to an injustice; or the Taxing Officer followed a wrong principle(s) or that the Taxing Officer applied a wrong consideration(s) in coming to his or her decision.**

31. Looking at the considerations that guided the Taxing Master as set out in paragraph 28 above, it does seem to us that in applying the principles set out in the authorities and the criteria to be found in Rule 9(2) of the Third Schedule, the Taxing Master put undue consideration on the parties' interests and the novelty of the proceedings, as distinct from the complexity of the jurisprudence that may have been developed in the course of the Reference.

32. We are inclined to agree with the submissions of the CTC that, important as the Reference from which the instant Application arises was, it cannot readily be compared to the **Anyang Nyong'o** case in terms of the subject matter, the number of parties involved, the number of applications and motions, the volume of documentary evidence and the time spent; nor indeed, the resultant jurisprudence developed by the Court. On the issue of consistency, we are also of the opinion that from the ruling of the Taxing Master, he did not give sufficient consideration, if at all, to the consistent levels of awards given for instruction fees by this Court, other than in the **Anyang Nyong'o** case. In the premises, it is our view that the Learned Taxing Master failed to consider adequately and to apply the principle of consistency set out in the various authorities as well as the criteria set out in Rule 9(2) of the Third Schedule. On that basis and on the authorities referred to above, this Court is entitled to interfere with the discretion exercised by the Taxing Master.

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33. While, as we have stated above, we do not think that it is appropriate to equate this matter in terms of complexity with the Anyang Nyong'o case, there can be no gainsaying that the instant matter was of some substance and import, and that this was reflected in the nature of the proceedings and the overall time taken. In our view therefore, the submission by the CTC that the appropriate figure for instruction fees would be around USD 3,000 is both unreasonable and contemptuous. On the other hand, taking into account the nature and general complexity and guided by the authorities of this Court, we consider that the basic instruction fee of USD 251,312.58 arrived at by the Taxing Master, is not reasonable either and is excessive in the circumstances. It is the view of this Court that the Anyang Nyong'o case, to which the learned Taxing Master compared the instant matter and relied upon solely to exercise his discretion, is unique in the history of taxation of costs in this Court. We would look at the entire line of authorities and apply the principle of consistency alongside the nature and relative complexity of the matter.

34. In his submissions, the CTC raised the issue of VAT, arguing that the Respondent had not demonstrated that the law firms were VAT registered to justify the award of VAT. We are disinclined to accept this argument. It was not raised before the learned Taxing Master nor is it a substantive issue in the instant Application. We find no basis to interfere with the learned Taxing Master's awarding of VAT on the taxed instruction fees.

35. Consequently, taking all the foregoing into consideration, and guided by the Order by the Appellate Division for a Certificate of Costs for two Counsel, we would allow instruction fees of USD 140,000 for both Counsel. To that we add getting up fees of  $\frac{1}{4}$  of the instruction fees being USD 35,000.

## CONCLUSION

36. In the premises, and for the reasons that we have given above, we allow this Taxation Reference and set aside the decision on the instruction fees in the Taxation Ruling made by the learned Taxing Master on the 4<sup>th</sup> day of June, 2019. In place of the said decision, we award instruction fees of USD 140,000 together with getting up fees of one quarter thereof, being USD 35,000. We do not



interfere with any other aspect of the learned Taxing Master's Ruling, including the award of VAT and disbursements.

37. In terms of costs, Rule 127 of the Court's Rules proposes that costs should follow the event unless the Court, for good reason, decides otherwise. In this case, having only intervened with regard to one (1) aspect of the Taxing Master's decision, we deem it appropriate that each Party bears its own costs.

It is so ordered.



Dated and delivered by Video Conference this 19th Day of June, 2020.



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**\*Hon. Justice Dr. Faustin Ntezilyayo**  
**DEPUTY PRINCIPAL JUDGE**



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**Hon. Dr. Charles O. Nyawello**  
**JUDGE**



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**Hon. Justice Charles Nyachae**  
**JUDGE**

***\*[Hon. Justice Dr. Faustin Ntezilyayo resigned from the Court in February 2020 but signed this Taxation Ruling in terms of Article 25(3) of the Treaty.]***

