

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL REFERENCE NO. 22405 OF 2024

(Arising from the decision of the Taxing Officer Hon. Minde, DR in Taxation Cause No. 14279 of 2024 delivered on 30/08/2024 in the High Court of the United Republic of Tanzania, Commercial Division at Der es Salaam)

BETWEEN

SONIA TANIL SOMAIYA AND EMAL SUBIR SOMAIYA

(AS ADMINISTRATORS OF THE ESTATE OF THE LATE

TANIL SOMAIYA)1ST APPLICANT

SHIVACOM TANZANIA LIMITED2ND APPLICANT

VERSUS

MICHAEL JOACHIM TUMAIN NGALO.....RESPONDENT

RULING

Date of Last Order: 09/10/2024

Date of Ruling: 15/11/2024

GONZI, J.

The circumstances pertaining to the present application are, to say the least, hilarious and a vivid proof that there are no permanent friends or enemies. It reminds me of the words of Professor Clark D. Cunningham, in: "A Tale of Two Clients: Thinking about Law as Language", in Michigan Law Review, Vol.87 Issue 8, 1989 published by Washington University School of Law, at page 2493 that: **"Like all forms of knowledge, law arises out of experience. Clients are the source of that experience."**

The application revolves around the question as to whether the Taxing Officer who has determined a Party-Party Bill of Costs and awarded a certain amount as instruction fees, is bound, afterwards, to award the same amount of instruction fees in an Advocate-Client Bill of Costs emanating from the same case in which the Party-Party Bill of Costs was presented and taxed as such?

The Applicant filed this application under Order 7(1) and (2) of the Advocates Remuneration Order, Government Notice No.363 of 2015, praying for orders that:

- 1. That this Honourable Court be pleased to quash and set aside the decision of the Taxing Officer of this Court in Miscellaneous Commercial Application No. 14279 of 2024, delivered on the 30th day of August 2024.**
- 2. That this Honourable Court be pleased to determine the appropriateness and reasonableness of costs awarded to the Respondent, ensuring that the awarded costs accurately reflect the services actually provided.**
- 3. That, this Honourable Court be pleased to award the costs of this reference to the Applicant.**
- 4. Any other relief this Honourable Court may deem lit and just to grant.**

The Application is supported by the Affidavit of Mr. Shehzada Amir Walli, Advocate of the Applicants. It is resisted by Counter affidavit of Mr. Michael Joachim Tumain Ngalo, the Respondent.

The background of the case is a typical friendship-turned sour story. The Applicants are former Clients of the Respondent who is a practicing Advocate. In 2021 the late Tanil Somaiya, in whose shoes the 1st Applicants now stand, together with the 2nd Applicant duly instructed the Respondent, as an Advocate, to defend Commercial Case No. 71 of 2021 which had been instituted by Vodacom Tanzania Public Limited Company against the late Tanil Somaiya and the 2nd Applicant. The Respondent accepted instructions and defended the suit which was ultimately dismissed with costs on 10th March 2023 upon a successful preliminary objection. Upon dismissal of the suit with costs, the Respondent filed a Party-Party Bill of Costs for and on behalf of the Applicants against Vodacom Tanzania Public Limited Company. The Bill of Costs was registered as Taxation Cause No. 24 of 2023. The Bill of Costs was eventually taxed at TZS 151,500,000/= by Hon. Minde, Taxing Officer. Out of the total taxed amount, TZS 150 million was taxed and awarded as "instruction fees to defend the suit". Both parties were not satisfied with the decision of the Taxing Officer in Taxation Cause No.24 of 2023. Vodacom PLC filed Commercial Reference No.10 of 2023 while the Applicants filed Commercial Reference No.11 of 2023, both challenging the Taxation Certificate in Taxation Cause No.24 of 2023. The Applicants, once again, instructed the Respondent to pursue Commercial Reference No.11 of 2023 seeking for increment of the instruction fees to at least TZS 800 million being half of the TZS 1.6 Billion claimed before the Taxing Officer under the

Bill of Costs. On its part, Vodacom Tanzania Public Limited Company vide Commercial Reference No. 10 of 2023 was seeking reduction of the taxed amount of costs from TZS 151,500,000/= to TZS 5,000,000/=only.

The two References challenging the same Ruling of the Taxing Officer, were consolidated and heard together by Hon. Agatho, J., in this Court. In his decision delivered on 16th February 2024, Agatho, J., declined both applications for reference and, therefore, upheld the decision of the Taxing Officer. He, inter alia, ruled that the amount taxed as instruction fees was fair, reasonable and just on, among other grounds, the fact that the suit did not go to full trial but had ended at the stage of preliminary objection only. From the submissions of the Applicant's Learned Counsel, it appears that the said Vodacom Tanzania Public Limited Company was aggrieved by the decision of Hon. Agatho, J., in the consolidated Commercial Reference No. 10 of 2023 and Commercial Reference No. 11 of 2023. It appealed to the Court of Appeal of Tanzania and, as such, the amount of TZS 151,500,000/= awarded to the Applicants against Vodacom PLC in Taxation Cause No. 24 of 2023 by Hon. Minde, Taxing Officer, remains unpaid. It must be noted that out of the TZS 151,500,000/=: a total of TZS 150 million was taxed and awarded as "instruction fees" to defend the suit on the understanding that the Applicants had paid or ought to have paid the Respondent Advocate TZS 150 million as his instruction fees to defend the suit; and, therefore, the Applicants were thereby being reimbursed the amount they had paid the Respondent as their Advocate then. However, according to the Respondent's version of the story which is disputed by the Applicants, it unfolds that the Applicants had and have not actually paid in full the Respondent's instruction

fees to the tune of the awarded amount of TZS 150 million which was awarded in the taxation cause as the instruction fees. Upon death of the late Tanil Somaiya, the 1st Applicants as his successors in title, in conjunction with the 2nd Applicant terminated the legal services of the Respondent Advocate. The Respondent, in turn, claimed from the Applicants for the unpaid instruction fees to the tune of TZS 150 million as determined and awarded by the Court in the Taxation Cause No.24 of 2023. The Applicants refused to pay the Respondent Advocate the awarded instruction fees of TZS 150 million alleging that the Respondent had already been paid his agreed instruction fees in full. The Respondent turned against his own clients and instituted the second Bill of Costs between an Advocate and his clients, (Advocate-Client Bill of Costs) claiming against them for payment of TZS 150 million as his unpaid instruction fees for the services rendered by him to the Applicants in defending their Commercial Case No. 71 of 2021 instituted by Vodacom Tanzania Public Limited Company against the Late Tanil Somaiya, in whose shoes the 1st Applicants now stand and the 2nd Applicant. This Advocate-Client Bill of Costs was registered as Miscellaneous Commercial Application No. 14279 of 2024. On 30th August 2024, Hon. Minde, Taxing Officer, delivered her decision granting the Respondent's claim against the Applicants for TZS 150 million as the unpaid instruction fees which represented the same amount as had been granted in first Bill of Costs namely Taxation Cause No.24 of 2023 in the Party-Party Bill of Costs. The Applicants were not amused. They hired another lawyer to fight against their former lawyer - now turned their adversary, and thereby challenge the decision of the Taxing Officer given in Miscellaneous Commercial Application

No. 14279 of 2024 by way of reference to a Judge of the High Court. The present application before me is that reference application seeking to challenge the decision of the Taxing Officer in Miscellaneous Commercial Application No. 14279 of 2024 made in favour of the Respondent in the Advocate-Client Bill of Costs.

The hearing of this application proceeded orally before the Court. The Applicants were represented by Mr. Elisante Frank Jumbe, Learned Advocate, while the Respondent was represented by Mr. Mpaya Kamala, Learned Advocate assisted by Elisa Abel Msuya, Learned Advocate. I thank the Learned Counsel for both sides for their useful arguments.

It was the submission of Mr. Jumbe, Learned Advocate, after having adopted the Applicant's affidavit, that the application at hand was filed on the ground that the Taxing Officer erred in construing the principles of taxation of costs. He submitted that the Taxing Officer has discretion to tax the instruction fees but she has to act judiciously according to the principles and considerations required under the law. He cited **Tanzania Rent A Car Limited vs Peter Kimuhu** (Civil Reference 9 of 2020) [2021] TZCA 103 (6 April 2021), where the Court of Appeal of Tanzania reiterated the guiding principles to be considered when determining the quantum of instruction fees. He submitted that there are four principles mentioned at page 9 of that decision. He mentioned them briefly that costs should not be too high as to restrict access to court to the wealthy persons only; that costs should be awarded as a reimbursement for costs reasonably incurred by the successful litigant; that the general level of remuneration must attract those worthy to

the honourable Profession and lastly that there should be consistence in awarding instruction fees.

Mr. Jumbe, Learned Counsel, submitted that in the present case, the Taxing Officer did not follow the prescribed principles considering the fact that the awarded instruction fees were based on the Party-Party Bill of Costs which amounts however, has been challenged by Vodacom Public Limited Company to the Court of Appeal and that the matter is still pending there and is yet to be determined. He amplified that the decision being challenged in the court of Appeal emanates from the Consolidated Commercial References Nos.10 and 11 of 2023 which was delivered by Hon. Agatho, J. Mr. Jumbe faulted the Taxing Officer for relying upon the same decisions which are under challenge before the Court of Appeal, to tax the Advocate-Client Bill of Costs and award the same amount of instruction fees to the Respondent.

Mr. Jumbe, Learned Advocate, further submitted that the Respondent has actually been paid in full the agreed instruction fees by the Applicants for his services to them when he was their advocate in defending the Commercial Case No.71/2021. He relied on annexure AB 2 to the Affidavit as the proof of such payment in full to the Respondent. Annexure AB 2 to the Affidavit in support of this application is, in turn, a counter affidavit of the Applicants herein filed in court when defending the Advocate-Client Bill of Costs before the Taxing Officer that lead to the present application for reference.

Mr. Jumbe submitted that the Taxing Officer did not consider the relevant factors in awarding the instruction fees such as the nature of the work, the extent of research done and the fact that the case was determined at a

preliminary stage on Preliminary Objections on time limitation. It was argued before me by Mr. Jumbe, Learned Advocate for the Applicants, that the Respondent, therefore, did not spend much time in court and did not use much time to do research. Mr. Jumbe submitted that the instruction fees of TZS 150 million were awarded by the Taxing Officer beyond the prescribed scales and that the relevant factors were not taken into account. He prayed that this application be granted with costs.

Mr. Mpaya Kamala, Learned Advocate, adopted his earlier filed skeleton arguments and the counter affidavit of Michael Joachim Tumain Ngalo, the Respondent. He submitted in opposition to the application for reference. He submitted that the benchmarks for Judge's interference with the Taxing Officer's discretion are limited since the Award of costs is the discretion of the Taxing Officer and, therefore, the court will be reluctant to interfere with it unless there was application of wrong principles by the Taxing Officer. He submitted that, as a rule, Judges will not interfere with the sum of costs awarded unless the Taxing Officer clearly did not act judiciously. He relied on the case of **Charles Zephania Mwenesano vs Daniel Samwel Chuma (Civil Application No. 378 of 2020) [2023] TZCA 97 (8 March 2023)** and the case of **Trace Associates Limited & others vs Rosemary Tryphone (Taxation Reference No. 9 of 2023) [2023] TZHCComD 337 (13 October 2023)** as well as the EACJ case of **Inspector General of Government versus Magezi**. Mr. Kamala submitted that the decision cited by Mr. Jumbe in the case of **Tanzania rent a car** (supra), also states the same principles. He argued that a Judge's interference with the Taxing Officer's decision in reference should not be done as a light matter. He

argued that one of the basic principles as stated in the **Tanzania rent a car** case (supra), at page 9, is that one of the considerations for interference with the decision of the Taxing Officer is lack of consistence on the part of the Taxing Officer. He argued that in this case, what was done by the Taxing Officer was actually to keep in line with being consistent with the past decisions of the Taxing Officer and by the Hon. Judge on reference in respect of the same case whereby the Hon. Judge on reference had confirmed the same amounts earlier on awarded by the Taxing Officer.

Mr. Kamala, Learned Advocate, submitted that the same amount of instruction fees awarded by the Taxing Officer in the second Bill of costs namely the Advocate-Client Bill of Costs, had previously been taxed in the first Bill of Costs, namely the Party-Party Bill of Costs whereby the Applicants had successfully claimed TZS 150 million as the reimbursement of their instruction fees against Vodacom PLC. He argued that it is surprising that when the same amount was taxed in favour of the Respondents as against the Applicants, the same Applicants are now denying or refusing to pay their former advocate, namely the Respondent, the taxed amount of costs of TZS 150 million as his instruction fees. He submitted that the Applicants in the party-party Bill of Costs against Vodacom PLC had initially claimed TZS 900 million before the Taxing Officer as the instruction fees but that at the end of the taxation exercise, the amount awarded as reimbursement of instruction fees was TZS 150 million shillings. He argued that the reasons for reduction of the amount by the Taxing Officer from TZS 900 million claimed in the Party-Party Bill of Costs to TZS 150 million ultimately awarded by the Taxing Officer, included the fact that the case had ended at the stage of a

Preliminary Objection. He argued that it was after the Applicants had refused to pay the Respondent's (Advocate Ngalo's) instruction fees that the Respondent Advocate brought the subsequent Advocate-Client Bill of Costs that resulted into this reference. Mr. Kamala, Learned Advocate, argued that the Bill of Costs leading to the present reference application, was essentially a Bill of Costs filed by an advocate demanding to be paid his money by the clients to whom he had rendered legal services who are the Applicants herein.

Mr. Kamala, submitted that the present application for reference against the awarded costs in the Bill of costs is made by the Applicants in abuse of the court. He submitted that the Taxing Officer acted consistently as she taxed the Advocate-Client Bill of Costs at exactly the same amount as earlier on taxed Party-Party Bill of Costs between the Applicants herein and Vodacom Tanzania PLC. He added that the amount taxed by the Taxing Officer in the Party-Party Bill of Costs was later on challenged by way of reference before a Judge of the High Court but the Honourable Judge confirmed the taxed amounts as reasonable and fair. He argued that by preferring the present application, therefore, in effect, the Applicants are suggesting that the Taxing Officer should have disregarded the position previously taken by the Taxing Officer herself and confirmed on reference by the Judge of the High Court in the consolidated references Nos.10 and 11 of 2023. He argued that such an option would have resulted into inconsistencies in the taxation exercise and therefore offend the rules of taxation.

Mr. Kamala, Learned Advocate, submitted that although the Applicants have submitted that the Ruling of Hon. Agatho, J., in the consolidated Commercial References Nos.10 and 11 of 2023 on the Party-Party Bill of Costs are being challenged in the court of appeal, those facts on pendency of the alleged appeal do not feature in the affidavit in support of this application. He argued that it remains to be a mere statement by the Applicant's Counsel from the bar for which the Respondent has not been given an opportunity to depose in response thereof in the counter affidavit. He went ahead and argued further that even assuming that the statement by the learned counsel for the Applicants were in the affidavit, still it would not be a ground for challenging the decision of the Taxing officer. He submitted that, in this application, the Applicants are speaking with both sides of their mouths. He amplified that actually it is not the Applicants who are challenging the decision of Hon. Agatho, J., in the consolidated references Nos.10 and 11 of 2023 before the Court of Appeal, rather it is Vodacom PLC that has preferred the appeal against the Applicants herein. He argued that this means that the Applicants' position has been consistent that the amount of costs awarded in the Party-Party Bill of Costs, including the instruction fees of TZS 150 million, is fair. He argued that the only motive for filing this application is that the Applicants want to deny their former advocate, namely the Respondent herein, his due instruction fees of TZS 150 million.

On the argument that the Respondent has already been paid all the agreed instruction fees by the Applicants, Mr. Kamala, Learned Advocate submitted that the argument is merely a statement from the bar which is not supported by any evidence in the affidavit. He submitted that nowhere before the

Taxing Officer did the Applicants bring any evidence to show that they have paid the Respondent the TZS 150 million as his instruction fees. He challenged the Learned Counsel for the Applicants in the rejoinder submissions to show this court the proof of such payment. He argued that the said Annexure AB 2 to the affidavit in support of this application, which was referred to by the learned counsel for the Applicants, is merely a counter affidavit, and not a proof of payment of the Respondent's instruction fees.

As regards the argument that the Taxing Officer failed to consider the relevant factors in taxation of costs, Mr. Kamala, Learned Advocate, submitted that all the relevant factors were considered in the previous decisions of the Taxing Officer and confirmed by the High Court Judge in the Consolidated References Nos.10 and 11/2023. He submitted that it is actually because of those same factors and reasons that the initially higher amount claimed as instruction fees had ultimately been reduced to TZS 150 million. He submitted that the total amount of costs claimed previously was 3% of the subject matter in the suit but it was found by Taxing Officer to be too high and therefore it was reduced from TZS 900 million to TZS 150 million. He argued that the decision of the Taxing Officer was unsuccessfully challenged by way of reference before a High Court Judge and it was upheld, hence left intact. He argued that what the Applicants are now seeking by filing this reference application before another Judge of the High Court, is trying to draw a collision between two Judges of the same Court as what this court is now being called upon to decide differently will, inevitably, result into a collision with an earlier made decision of this Court by Hon. Judge Agatho who delivered a decision on the Consolidated References Nos.10 and

11/2023 in respect of the party-party Bill of Costs involving the same matters and same parties.

Mr. Mpaya Kamala, Learned Advocate, concluded his submissions by praying for this court to find that the reference application is un-merited and that the same be dismissed with costs. Mr. Jumbe, Learned Advocate, made brief rejoinder submissions on the alleged failure to bring evidence to prove that the Applicants have paid the Respondent the agreed instruction fees in full. He argued that annexure AB 2 in this application, which is a joint counter affidavit of the applicants filed before the Taxing Officer, is, in itself, an evidence given under oath. He submitted that as the Applicants have stated under oath that they have paid the Respondent in full the agreed fees, their counter affidavit suffices, in law, as evidence of proof of the payment of the instruction fees in full. That marked the end of the submissions by the Learned Counsel for both sides. Once again, I thank Learned Counsel for both sides for their well-presented arguments supported by the relevant authorities.

The central issue for determination in this application is whether the present application for reference against the decision by the Taxing Officer is merited or not. The position of the law is settled as it was stated in **Charles Marko Naibala vs Lilian Marko Naibala (Civil Reference 02 of 2022) [2023] TZHC 18261 (2 June 2023)** where it was held that:

"The awarding of the bill of costs is the discretion of the Taxing Officer and the court will always be reluctant to interfere with the same, unless it is

proved that the Taxing Officer exercised his discretion injudiciously or has acted upon a wrong principle or applied a wrong consideration.”

The Applicants have advanced several reasons for challenging the decision of the Taxing Officer. The complaints leveled against the Ruling of the Taxing Officer, as can be picked from the affidavit of Mr. Shehzada Walli, made in support of the Application at paragraphs 6, 7, 8 and 9 thereof are that:

- 5. The proceedings were terminated after a preliminary objection raised by the Respondent was upheld by the court as stated by the respondent in his affidavit supporting his bill of cost. Given that the matter did not advance to a substantive hearing, the professional services rendered by the Respondent were limited to procedural matters.**
- 6. The Respondent’s work did not involve substantive litigation, advocacy or extensive research to entitle him the award of TZS 150,000,000 (Tanzanian Shillings One Hundred Fifty Million), which is extremely excessive and unreasonable and do not accurately reflect the actual work performed or the nature of the services provided.**

- 7. That the Applicants are aggrieved by the decision of this Taxing Master due to the fact that the amount awarded to the Respondent as costs is excessive, unreasonable, and does not commensurate with the services provided, and I believe that the decision was reached in error.**
- 8. That the Applicant has filed this application challenging the said ruling for being unreasonable and excessive for failure to reflect the actual work performed by the Respondent. Furthermore, these costs seem intended to penalize the Applicant, which raises concerns about their fairness and equity.**

Mr. Kamala has argued that what the Applicants are now seeking is trying to draw collision between two Judges of the same Court as what this court is now being called upon to decide differently will, inevitably, result into a collision with an earlier made decision of this very Court through Hon. Judge Agatho who delivered a decision on the consolidated references Nos.10 and 11 of 2023 in respect of the party-party Bill of Costs. In other words, Mr. Kamala has, indirectly, advanced a legal argument that this court is now functus officio and debarred under doctrines of res judicata and estoppel from determining the same questions that have already been determined by Hon. Agatho, J., sitting in this very Court in the Consolidated Commercial Applications Nos.10 and 11 of 2023 involving essentially the same parties herein.

I have looked at what was the matter in issue and what was decided by Hon. Agatho, J., in in the Consolidated Commercial Applications Nos.10 and 11 of 2023 namely **Sonia Tanil Somaiya & Amal Subir Somaiya (As Administrators of the Estate of Late Tanil Somaiya vs Vodacom (T) Public Ltd Company** (Taxation Reference No. 10 & 11 of 2023) [2024] TZHCComD 10 (16 February 2024). In the Ruling dated 16th February 2024 at pages 2, 3 and 4 Hon. Agatho, J., outlines the pertinent issues for determination by him as follows:

“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 decision of this court on the above issues is seen at page 6 of the Ruling of Hon. Agatho, J., in the Consolidated Commercial Applications Nos.10 and 11 of 2023 who held that:

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.

Again, at pages 8 and 9 of the Ruling in the Consolidated Commercial Applications Nos.10 and 11 of 2023 this Court concluded that:

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.

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."**

Reading the above excerpt from the Ruling of Hon. Agatho, J., in **Sonia Tanil Somaiya & Amal Subir Somaiya (As Administrators of the**

Estate of Late Tanil Somaiya vs Vodacom (T) Public Ltd Company

(Taxation Reference No. 10 & 11 of 2023) [2024] TZHCComD 10 (16 February 2024), it is clear that almost all the grounds of reference raised by the Applicants in the present application are essentially similar to the grounds of reference raised by Vodacom PLC and the Applicants herein against each other in the consolidated references Nos. 10 and 11 of 2023 before Hon. Agatho, J., in an attempt to challenge the Ruling of the Taxing Officer in the party-party Bill of Costs between the Applicants herein and the said Vodacom PLC. The essence of the Applicants' complaints as depicted under paragraphs 6, 7, 8 and 9 of the affidavit in support of the application is that that the Commercial Case No.71/2021 was terminated at the stage of a preliminary objection and that the award of TZS 150,000,000/= as instruction fees is extremely excessive and unreasonable which does not accurately reflect the actual work performed or the nature of the services provided. In my view, these complaints were specifically argued by the parties, including the Applicants, and answered by Hon. Agatho, J., in the Consolidated Taxation References Nos. 10 & 11 of 2023 as shown above. In particular, Hon. Agatho, J., held that:

"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."

With the above findings by this Court, it is not open anymore for the same court, even if presided over by a different judicial officer, to reopen and re-adjudicate upon the same matters and draw a new, possibly different, conclusion thereon. This court is functus officio.

I have looked at the decision of the Taxing Officer in Taxation Cause No. 14279 of 2024 delivered on 30/08/2024 which is the subject of the present reference. It is not in dispute that the Ruling of the Taxing Officer in the Advocate-Client Bill of Costs between the Applicants and the Respondent herein, essentially, followed and adopted verbatim her Ruling in the earlier determined Party-Party Bill of Costs between the Applicants herein and Vodacom PLC wherein the instruction fees payable by the Applicants to the Respondent and which is reimbursable by Vodacom PLC to the Applicants, was determined and certified. The Ruling of the Taxing Officer was confirmed by a Judge of this Court in the Consolidated Taxation References Nos. 10 & 11 of 2023. The Taxing Officer in Taxation Cause No. 14279 of 2024 delivered on 30/08/2024 which is the subject of the present reference, at page 8 thereof held that:

Based on the analysis above and since the Respondent have not brought to court any arguable defence vitiate the Applicant prayers of awarding his costs as prayed in his chamber summons, instruction fee charged via the first bill of costs allowed at Tshs. 150,000,000/-, the legal fee for defending Commercial Case No. 71 of 2021 also awarded via

Taxation Cause No. 24 of 2023 and since the Court taxed off the entire amount of Tshs. 8,570,000/- supposed be taxed via Taxation Cause No. 67 of 2022 for defending Commercial Case No. 67 of 22 for contravention of Rule 48 of the Advocate Remuneration Order, GN. No. 264 of 2015, the second bill of costs taxed off accordingly. (Underlining supplied)

It is clear that the phrase: "instruction fee charged via the first bill of costs allowed at Tshs. 150,000,000/-," refers to the amount that was taxed as instruction fees in the Party-Party Bill of Costs between the Applicants herein and Vodacom PLC emanating from Commercial Case No.71/2021. There is, therefore, a strong legal and factual nexus between the first and the second Bills of Costs determined by the Taxing Officer. The first Bill of Costs was the Party-Party Bill of Costs between the Applicants herein and Vodacom PLC. The second Bill of Costs is the Advocate-Client Bill of Costs between the Respondent herein and the Applicants herein. The amount awarded as the instruction fees in the first Bill of Costs was imposed in the second Bill of Costs. In effect, the second Bill of Costs only assigned the entitlement to the Advocate's instruction fees of TZS 150 million in respect of defending the Commercial Case No.71/2021 from the Applicants to the Respondent upon discovery by the Taxing Officer that the Applicants have not paid in full the instruction fees to the Respondent Advocate for his legal services. The Ruling in the second Bill of Costs also had the effect of making the Advocate's instruction fees of TZS 150 million in respect of defending the Commercial

Case No.71/2021 payable by the Applicants to the Respondent while retaining the right by the Applicants to be reimbursed the same amount by Vodacom PLC vide the first Bill of Costs (Party-Party Bill of Costs). Reasonableness of the amount awarded as instruction fees is a question already settled so far as this court is concerned, in the decision of Agatho, J., in the Consolidated Taxation References Nos. 10 & 11 of 2023. This court cannot, therefore, reopen the same issues and determine them afresh. I emphasize, for avoidance of doubt, that in respect of the same grounds of reference brought by the Applicants in this case, which were determined by this very Court as per Hon. Agatho, J., in the Consolidated Taxation References Nos. 10 & 11 of 2023, this court is now functus officio. Further, the doctrine of issue estoppel would not allow that course taken by the Applicants to have the court raise, consider and determine the same issues that have already been determined by it. In the case of **Tanzania Portland Cement PLC versus Lukas Mwakabanga [2024] TZHCLD 158** (Tanzlii), High Court, at page 4, Mlyambina, J., had this to say on functus officio:

"...It is crystal clear that the doctrine of "functus officio" restricts a judge or a magistrate or the arbitrator to perform a function which has been performed already. It means that when a matter is finally determined, it cannot be re-determined."

In **Issa Athumani Tojo Versus The Republic**, Criminal Appeal No.54 of 1996, the Court of Appeal of Tanzania at page 7, quoted with approval the holding in **Regina v Hogan**, [1974] 1 Q. B. 398, at P. 401 that:

"Issue estoppel can be said to exist when there is a judicial establishment of a proposition of law or fact between parties to earlier litigation and when the same question arises in later litigation between the same parties. In the later litigation the established proposition is treated as conclusive between those same parties. It can also be described as a situation when, between the same parties to current litigation, there has been an issue or issues distinctly raised and found in earlier litigation between the same parties."

Therefore, I find that the complaints by the Applicants that the proceedings were terminated at the early stage of preliminary objection and that the award of TZS 150,000,000/= is extremely excessive and unreasonable which does not accurately reflect the actual work performed or the nature of the services provided, are issues that have already been determined by this Court in the Consolidated Taxation References Nos. 10 & 11 of 2023. This court is now functus officio and is barred under doctrine of issue estoppel from re-determining those issues. I understand that the Respondent was not a party as such in the Consolidated Taxation References Nos. 10 & 11 of 2023, but instruction fees are fees payable by a client to the Advocate. In essence the award of TZS 150 million by the Taxing Officer was made for the benefit of the Respondent. He was the beneficiary thereof whose rights

were determined in the Consolidated Taxation References Nos. 10 & 11 of 2023.

Whereas I hold that it is not open for this Court now to reopen the same matters as have been determined by this court in the Ruling of Agatho, J., in the Consolidated Taxation References Nos. 10 & 11 of 2023, I am of the view that the Applicants are not debarred from raising and arguing entirely new and different grounds of reference to challenge the Ruling of the Taxing Officer in the second Bill of Costs that lead to the present reference, which grounds have not been the subject of the Ruling of this court in the Consolidated Taxation References No. 10 & 11 of 2023 before Agatho, J. In the present application, I find that the only question that is open for determination now which was not the subject of the Ruling of this court in the Consolidated Taxation References Nos. 10 & 11 of 2023 by Hon. Agatho, J., is the question of entitlement of the Respondent to be paid by the Applicants the Advocate's instruction fees of TZS 150 million for defending the Commercial Case No.71/2021. While the Applicants cannot question the quantum of instruction fees payable as that was an issue dealt with in the Consolidated Taxation References Nos. 10 & 11 of 2023, still they may question their liability to pay the Respondent the instruction fees or in other words, the entitlement of the Respondent Advocate to be paid the instruction fees by the Applicants.

Before me, Mr. Jumbe, Learned Advocate for Applicants, submitted that the Respondent has been paid in full his instruction fees by the Applicants for his services to them in defending the Commercial Case No.71/2021. He relied

on annexure AB 2 to the Affidavit as the proof of such payment. Reading the said Annexure AB 2 which is a Joint Counter Affidavit of the Applicants in Taxation Cause No. 14279 of 2024 before the Taxing Officer, it states under paragraphs 8 and 13 that:

8. That the contents of paragraphs 16, 17 and 18 of the Affidavit are noted to the extent that the Applicant filed a written statement of defence accompanied by notice of preliminary objection against on behalf of the late Tanil Somaiya, consequently the said suit was dismissed with costs. The rest of averments are disputed, and the Applicant is put into strict proof thereof. The Respondents further states that it was agreed by the Applicant to file taxation to be reimbursed his legal fees with the above awarded costs.

13. That the contents of paragraph 28 and 29 of the Affidavit are neither admitted nor disputed as the same are the facts known to the Applicant himself. Respondent further states that the Applicant was duly paid all his legal fees accordingly. (Underlining supplied)

The Taxing Officer in Taxation Cause No. 14279 of 2024 delivered her decision on 30/08/2024 wherein the Respondent in this case was the Applicant and the Applicants herein were the Respondents. At pages 6 and 8 thereof the Taxing Officer dealt with the issue of the Applicants having

paid the Respondent Advocate in full his instruction fees. The Taxing Officer held that:

"Since it is not disputed that the presented dispute between Applicant and Respondent is in respect of un-paid legal fees, while the Respondent via his letter dated 24th March, 2024, Annexure 9 to the Affidavit, resisted the Applicant claims that he was not paid his fee and his termination was subject to the payment of the said unpaid legal fees, the dispute started immediately after Respondent being informed un-settled fees through the Applicant letter dated 17th April, 2024. ...Coming to the last issue as to whether the Respondent paid for the legal services offered by the Applicant, despite the truth that it is neither denied nor disputed via the joint-counter affidavit and written submissions filed, the Applicant through his letter dated 17th April, 2024, Annexure 9 to the Applicant affidavit, informed the Respondent in respect of the outstanding fee while contested the Applicant letter dated 24th March, 2024."

The Taxing Officer in arriving at the above shown conclusion, that the Applicants have not paid the Respondent his instruction fees, relied on the evidence before the Court and cited Rule 10 (1) of the Advocate

Remuneration Order, GN. No. 264 of 2015 in respect of Advocate-Client Bill of Costs where there is a dispute arising in respect of legal fees. In particular, the Taxing Officer reasoned in *extenso* that:

“three basic aspects need to be proved for conclusion by the taxing officer that the Advocate to be entitled to the fees claimed. The said aspects include; that there must be an Advocate-Client relationship between Applicant and Respondent, that based on the said relationship, the Advocate Rendered the said legal services and that the said services are not paid for...Since it is not disputed that via his letter dated 11th March, 2024 the Respondent wrote dis-engagement letter to the Applicant terminating legal services rendered by the Applicant, the fact stated under para 26 of the Applicant Affidavit and admitted under para 12 of the joint-counter Affidavit by the Respondents, the issue as to whether there was Advocate-Client relationship is resolved in affirmative. Regarding the second issue as to whether the Applicant offered legal services to the Respondent, after scrutinizing the joint-counter affidavit and written submissions filed, I found nowhere the Respondent counsel dispute or denied the same. Further I have gone through records of Commercial Case No. 22 of 2021, Commercial Case No. 71 of 2021, Taxation Cause

No. 67 of 2022 and Taxation Cause No. 24 of 2023 and noticed the Applicant presence in court proceedings. Hence the second issue again finalised in affirmative. Coming to the last issue as to whether the Respondent paid for the legal services offered by the Applicant, despite the truth that it is neither denied nor disputed via the joint-counter affidavit and written submissions filed, the Applicant through his letter dated 17th April, 2024, Annexure 9 to the Applicant affidavit, informed the Respondent in respect of the outstanding fee while contested the Applicant letter dated 24th March, 2024.

The above excerpt from the Ruling of the Taxing Officer, as quoted verbatim, shows that the issue of payment or non-payment of instruction fees in full by the Applicants to the Respondent was canvassed and traversed by the Taxing Officer in her Ruling. The Taxing Officer correctly analysed the relevant law in view of the evidence before her and came to the conclusion that the instruction fees has not been paid in full by the Applicants to the Respondent. Mr. Jumbe, Learned Advocate, in his rejoinder submissions, submitted that the joint counter affidavit is strong evidence enough to prove that the Applicants have paid the Respondent the instruction fees in full. I don't think so. The counter affidavit was being sworn in response to a contradicted assertion made by the Respondent in his affidavit alleging that he had not been paid the instruction fees in full. Since the same point was being disputed vide the counter affidavit, then the statement by Applicants in

their joint counter affidavit before the Taxing Officer, could not make the said disputed issue of payment proved conclusively. To the contrary, denying the truthfulness of that assertion only heightened the fact that there was a disagreement between the parties in respect of the disputed point. As the Applicants were alleging to have effected payment of the instruction fees in full to the Respondent, they had a burden of proof which they did not discharge as they did not bring any evidence of proof of payment. On the other hand the Respondent had proved the existence of Advocate-Client relationship with the Applicants and that he had rendered his professional services under that agreement but had not been paid by the Applicants and that he had written demand letters claiming his instruction fees. In my view, one cannot reasonably prove that he has effected payment of money to another person, who disputes to have been paid as such, by one simply making his own affidavit saying that he has paid him the amount due. If that were to be accepted, all debtors would simply swear their own affidavits the next morning and have themselves thereby exonerated and effectively discharged from their contractual or legal obligations to pay their debts. I do not think that is a reasonable conclusion which Mr. Jumbe is inviting this court to uphold. I find that where a factual allegation raised by one party through an affidavit, is denied by the other party by way of a counter affidavit, it does not thereby become proved, rather it becomes an issue calling for independent proof and determination. The Taxing Officer determined that disputed fact or issue of payment or non-payment of instruction fees in full in favour of the Respondent and against the Applicants. In

doing so she acted judicially by giving reasons upon which her conclusion was premised. In that regard, the Taxing Officer cannot be said to have acted contrary to the established principles of exercise of the judicial discretion as to warrant this court's intervention to her decision.

Mr. Jumbe submitted that the statement contained in the affidavit, (in this case the joint counter affidavit of the Applicants Annexure AB 2 to the application) is, in itself, the evidence. That is partly true. One of the cardinal principles of law relating to affidavits is that an affidavit is a substitute for oral evidence. This rule was established in the case of **Uganda v. Commissioner of Prisons, Ex parte Matovu** (1966) E.A.514 at page 520. It was accepted by the Court of Appeal of Tanzania in the case of **PHANTOM MODERN TRANSPORT (1985) LTD and D.T. DOBIE (TANZANIA) LTD** and in several other cases. In **Uganda vs commissioner of Prisons**, Exparte Matovu case (supra), the rule on the making and use of affidavits for use in Court was stated that:

"... as a general rule of practice and procedure, an affidavit, for use in Court, being a substitute for oral evidence, should only contain statements of facts to which the witness disposes either of his own personal knowledge or from information he believes to be true." (underlining supplied)

However, in my view, Mr. Jumbe, Learned Counsel for the Applicants, has stretched the rule a bit too far by purporting to conclude that any

factual allegation contained in an affidavit or even a counter affidavit, whether denied by the other side or not, would constitute an established fact and hence suffice as evidence. That is not correct. Mr. Jumbe, Learned Counsel, ought to know that a factual allegation contained in an affidavit is deemed to be true and conclusive proof only if it is uncontroverted by the other side by way of a counter affidavit. If the factual allegation contained in an affidavit is denied by the other side through an affidavit in opposition, the disputed fact is not thereby proved but it becomes an issue still requiring a separate proof. This rule was reflected in **Fatuma Ally Mohamed vs Mohamed Salehe** [2020] **TZHCLand** 2320 (TANZLII) at page 2. I quote:

“The position of the law on failure to file a counter affidavit it is settled. The Respondent is deemed to have not contested on the factuality of the affidavit.”

Before the Taxing Officer, the Respondent alleged that he had not been paid in full his instruction fees by the Applicants. The Applicants filed a counter affidavit disputing that allegation and asserting that they have paid him in full. It means that the factual allegation became an issue requiring proof. It did not become conclusive truth itself simply by virtue of its being contained in the affidavit or counter affidavit as the parties had drawn a factual issue between them in respect thereof. Since the Taxing Officer identified that issue, reasoned along it and came to her conclusions, the determination of the Taxing Officer thereon cannot be put interfered with in this reference without the Applicants showing that in determining the issue the Taxing Officer did not act judicially or that

she acted on the wrong principles. Even before me, when Mr. Jumbe was challenged to show the proof of payment of the Respondent's instruction fees in full by the Applicant, he could not do so apart from merely making reference to the joint counter affidavit of the Applicants which was presented before the Taxing Officer and whose factual allegation was hotly disputed under oaths between the parties. To that effect the argument by Mr. Jumbe, Learned Counsel, respectfully, does not hold water.

Lastly, is the issue of the Taxing Officer applying the same rate or amount of instruction fees of TZS 150 million that was awarded in the Party-Party Bill of costs between the Applicants and Vodacom PLC, to the Advocate-Client Bill of Costs between the Applicants and the Respondent. Mr. Jumbe, Learned Counsel, has faulted this practice by the Taxing Officer as being erroneous. This issue need not detain the court much. In a Bill of Costs instruction fees is claimed as the actual amount paid by a party to his Advocate for his legal services rendered in the legal matter, normally court proceedings. A successful party claims reimbursement of the prescribed instruction fees on the assumption and understanding that he paid or he will pay his Advocate for service rendered.

Advocates earn the instruction fees for their services rendered such as representing a party in a case. Again, borrowing from Clark D. Cunningham, in "A Tale of Two Clients: Thinking About Law as Language", appearing in Michigan Law Review, Vol.87 Issue 8, 1989 published by Washington University School of Law, the roles of

advocates include" representing" their clients in courts or tribunals. The central activity of lawyering is generally described as representing clients. The word "represent" comes to English from Latin by way of the French language and originally seemed to mean simply to "re-present," meaning to present again. This role of the lawyer is described as a lawyer being the "mouthpiece" and it seems to capture the sense of "represent," by indicating that a lawyer merely re-presents what the client has told him or her. "Represent" can also be used to describe the transforming work of the artist. The lawyer as an artist creates a "representation" of the client in the same way that a sculptor creates a representation of a human body or a novelist creates a representation of a human life. The third meaning of "represent" gives the strong sense of identity between the client and a lawyer meaning to take the place of or to act the part of another person. The representation of a client is therefore a series of dialogues: both between the client and lawyer and between the lawyer and other legal actors such as opposing lawyers and a judge. Each dialogue replicates the internal mental dynamic between experience and knowledge in which language both constitutes concepts out of experience and reconstitutes experience by use of concepts. Obviously, a lawyer is not just a translator. The lawyer as advocate or counselor has his or her own agenda, which is both narrow and purposive, while the translator has no personal or professional stake other than the task of faithful and meaningful interpretation. The lawyer must creatively bridge at least two gaps. First, the lawyer must identify and cross the gap between what the client says and what can be said in the language of the law. And the lawyer must also deal with the gap in meaning in the other direction,

from what is said by the judge or other lawyers back to the client. The lawyer is in a constant process of educating himself or herself, his or her client, and the other legal actors to the ways in which both lay and legal language diminish and expand what we know about experience. In my view, therefore, it is the laborious discharge of this noble duty of “representing” clients in courts that entitles lawyers to the adequate prescribed instruction fees from the persons they represent. If the clients do not pay the agreed or prescribed fees, the Advocates are entitled to bring an Advocate-Client Bill of Costs in court and claim for payment of their instruction fees under Rule 10 (1) of the Advocate Remuneration Order, GN. No. 263 of 2015. The clients who pay their Advocates the prescribed instruction fees, are, in turn, entitled to be reimbursed their expenses through the award of a Party-Party Bill of Costs. It is the rule that a successful litigant is entitled to a fair reimbursement of the costs incurred. This rule was restated also in the case of **Kassim versus Habre International Limited** (2000) EA 98 decided by the Supreme Court of Uganda. Now, in order for the winning party to be reimbursed his costs, including the costs paid to the Lawyer as instruction fees, he should actually pay or have paid those fees to the Advocate. If the party being reimbursed the costs of a suit, including the prescribed instruction fees, has not actually paid the said instruction fees to the Advocate, there will be no basis or justification for him to be reimbursed by an award of costs since he will not have incurred the expenses. That will be unjust enrichment through the judicial process. Therefore, whereas the winning party is entitled to be reimburses the instruction fees payable to the advocate, he is in turn bound to pay the advocate the whole amount

awarded or awardable in law as instruction fees. Did the Applicants in this case pay the Respondent the instruction fees in full? In the case at hand in paragraph 8 of annexure AB 2 which is the joint counter affidavit of the Applicants that was filed before the Taxing Officer, the Applicants are loud and clear that they had instructed the Respondent to institute a Bill of Costs to be *reimbursed* the awarded costs. I quote: **"the Respondents further states that it was agreed by the Applicant to file taxation to be reimbursed his legal fees with the above awarded costs"**. The "awarded costs" which the Applicants instructed the Respondent to claim reimbursement in respect thereof included the instruction fees of TZS 150 million payable to the Applicants from Vodacom PLC. That was done vide Taxation Cause No.24/2024 and the amounts therein were confirmed by Hon. Agatho, J., in Consolidated Taxation References Nos.10 and 11 of 2023. Now, if the Applicants get to be reimbursed TZS 150 million as instruction fees for the Advocate to defend the Commercial Case No.71/2021, then in law and in equity they have a duty to pay the same amount to their Advocate as they are being reimbursed by the losing party as the legally prescribed incurred costs as Advocate's instruction fees. The Applicants cannot get "reimbursed" for TZS 150 million as instruction fees and actually end up paying their Advocate a lesser amount or not paying him at all. That would result into an unjust enrichment through the judicial process. I therefore find that it was very correct for the Taxing Officer to award the same amount of TZS 150 million as instruction fees in the second Bill of Costs, namely the Advocate-Client Bill of Costs, as she had awarded in the first Bill of Costs, namely Party-Party Bill of Costs. As correctly argued by Mr. Kamala, Learned

Advocate, that decision by the Taxing Officer was keeping abreast with the principle of for consistence in the taxation of instruction fees by the Taxing Officer which is one of the fundamental principles of taxation of costs obtaining in Tanzania.

To give more credence to what the Taxing Officer did, I will refer to the decision of the Court of Appeal of Kenya in Petition Number E011 of 2023 between **Kenya Airports Authority vs Otieno Ragot and Company Advocates**. The Court of Appeal of Kenya held that the Party and party costs and the certificate of costs issued thereto, are binding upon the Taxing Officer when dealing with the Advocate-Client Bill of Costs. The Supreme Court of Kenya, on appeal, generally affirmed the rule but with some modifications thereby retaining the inherent discretionary powers of the Taxing Officer. I find that the principle stated by the Court of Appeal of Kenya is in accord with the prevailing position of the law in Tanzania that emphasizes upon consistency by the Taxing Officer in the taxation of costs proceedings. In **Tanzania Rent A Car Limited vs Peter Kimuhu** (Civil Reference 9 of 2020) [2021] TZCA 103 (6 April 2021), the Court of Appeal of Tanzania restated the guiding principles to be followed by the Taxing Officer when determining the quantum of instruction fees. Consistence in awarding the amount of instruction fees is one of them. I, therefore, find that what the Taxing Officer, Hon. Minde, DR did in Taxation Cause No. 14279 of 2024 by imposing the same amount in the Party-Party Bill of Costs and in the Advocate-Client Bill of Costs, was correct. There is nothing to fault her decision as such. Mr. Jumbe, Learned Counsel, argued that the decision of this Court in the Consolidated Taxation Causes Nos.10 and 11 of 2023 is

subject of a pending appeal before the Court of Appeal and, therefore, the Taxing Officer should not have acted on it in dealing with the Advocate-Client Bill of Costs. This argument is misconceived, unless and until a court's decision is reversed or vacated from, it remains valid, binding and should be acted upon.

Finally, as I wind up I would like to make reference, once again, to what was held in the case of **Charles Marko Naibala vs Lilian Marko Naibala (Civil Reference 02 of 2022) [2023] TZHC 18261 (2 June 2023)**, where it was held that:

"The awarding of the bill of costs is the discretion of the Taxing Officer and the court will always be reluctant to interfere with the same, unless it is proved that the Taxing Officer exercised his discretion injudiciously or has acted upon a wrong principle or applied a wrong consideration."

In the case at hand, I find that the Taxing Officer did not exercise her discretion injudiciously or act upon a wrong principle or apply a wrong consideration in the determination of Taxation Cause No. 14279 of 2024 which is the subject of the present reference. The reference application is thus devoid of merit. In the upshot, the present application is dismissed with costs.



A.H. GONZI

JUDGE

15/11/2024

Ruling is delivered in Court 15th day of November 2024 in the presence of Mr. Elisante Frank Jumbe, Advocate for the Applicants and Ms. Irene Mchau and Mr.Safari Malata, Advocates for the Respondent.



A.H. GONZI
JUDGE
15/11/2024