Alpha Knits Limited v Kenindia Assurance Company Limited (Civil Case 351 of 2005) [2023] KEHC 2527 (KLR) (Commercial and Tax) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2527 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 351 OF 2005

EC MWITA, J

MARCH 24, 2023

BETWEEN

ALPHA KNITS LIMITED ..... PLAINTIFF

AND

KENINDIA ASSURANCE COMPANY LIMITED ..... DEFENDANT

RULING

1. This is a reference through Chamber Summons dated August 24, 2022, against the ruling by the Taxing officer, (Hon Wanyama), delivered on July 21, 2022. The reference is brought under rule 11(2) of the Advocates (Remuneration) Order. It seeks to set aside the Taxing officer's decision dated July 21, 2022 on the defendant's Bill of Costs dated February 5, 2020 with respect to items 1 on instruction fee and 194 on getting up fee.

2. The reference seeks to have this court assess items 1 and 194 at Kshs 750,000 and Kshs 375,000 respectively. In the alternative, the court should remit the bill of costs for fresh taxation on the two items before another taxing officer.

3. The reference is premised on the grounds on its face and written submissions dated November 2, 2022.

4. The defendant relies on the decision in *Republic v The Competition Authority ex parte Ukwala Supermarket Limited (Misc Civil Appl No 360 of 2014) [2017] eKLR* on the principles on which the court will interfere with a taxing officer's exercise of discretion.

5. The defendant asserts that the taxing officer erred in assessing instruction fee as the basic fee provided only under the 1997 *Advocate Remuneration Order*. Citing *Mitchell Cotts Kenya Ltd v Amboseli Estate Ltd (HCCC 5426 of 1992)*, the defendant submits that the taxing officer should have considered the

increments on the basic instruction fee under the 2006 and 2014 Advocates Remuneration Order over the duration of the case.

6. The defendant blames the taxing officer for failing to increase the basic instruction fee to reflect the complexity of the matter and the work done. In the suit, the plaintiff had sought an account of all premiums paid to the defendant together with original copies of all insurance policies, debit notes and receipts. In the alternative, the plaintiff sought a refund of premiums paid.

7. The defendant maintains that instruction fee claimed (of Kshs 750,000) is a proper reflection of the work done and the responsibility involved in dealing with the complex accounting issues spanning from December 19, 1992 to May 17, 1998. According to the defendant, its advocates prepared three bundles (A, B and C) analyzed, collated and cross-referenced them to its witness' statement in defending the claim. The defendant argues that the evidence eventually led to the withdrawal of suit.

8. The defendant argues that the taxing officer erred by failing to give an explanation regarding the question of increase of the basic instruction fee raised in its written submissions. The defendant again relies on Republic v The Competition Authority ex parte Ukwala Supermarket Limited (supra) to assert that after setting the basic instruction fee, a taxing officer then considers whether to increase or reduce it, bearing in mind the complexity of the matter, interest of the parties and general conduct of the proceedings.

9. The defendant also argues that the taxing officer erred by completely taxing off the getting up fee on the basis that the suit had neither been found ready for hearing nor went for trial. The defendant cites paragraph 2 of the Sixth Schedule to the 2014 Advocates Remuneration Order which is the same as paragraph 2 of Schedule VI to the 2006 Advocates Remuneration Order and paragraph 2 of Schedule VI to the 1997 Advocates Remuneration Order for the assertion that getting up fee is to be allowed as long as the case was confirmed for hearing and where a case is not heard the taxing officer must be satisfied that the case had been prepared for trial.

10. According to the defendant, the second and third conditions under paragraph 2 of the Sixth Schedule were met in that the case had been confirmed for hearing and the defendant attended court on four occasions for hearing. The case had been set down for hearing but was adjourned at the request of the plaintiff on September 4, 2019, September 19, 2019 and on November 11, 2019. On December 16, 2019, the defendant was ready to proceed with the hearing but the plaintiff withdrew the suit and was ordered to pay costs. The defendant was also ready to proceed on all the four occasions and, therefore, getting up fee should have been allowed at Kshs 375,000, a third of the instruction fee.

Response

11. The plaintiff has opposed the application through grounds of opposition dated October 13, 2022 and written submissions dated November 30, 2022. The plaintiff contends that the defendant has not demonstrated that the taxing officer erred in principle in the impugned ruling. In this respect, the plaintiff relies on *First American Bank of Kenya v Shah and 2 others [2002] eKLR*.

12. The plaintiff argues that the taxing officer correctly applied the 1997 Remuneration Order that was in force when the defence was filed. To support this assertion, the plaintiff relies on *Joreth Ltd v Kigano & Associates (NRB CA Civil Appeal No 66 of 1999) [2002] eKLR*, that instructions fees is a static item and is not affected by the stage where the suit has reached.

13. The plaintiff submits that the taxing officer determined instruction fee on the basis the subject matter of Kshs 12,206,096. The plaintiff contends that taking accounts is not a complex exercise and points

out that it did not contest the amount of costs incurred in printing, perusing, making copies of various documents filed in court even though the suit was withdrawn before it was heard.

14. Citing the proviso to the Fourth Schedule to 4 the 1997 Advocates Remuneration Order and Mitchell Cotts Kenya Ltd v Amboseli Estate Ltd (supra), the plaintiff argues that the fact that the life of the case spanned three versions of the Advocate Remuneration Orders was not a relevant factor to be considered. The plaintiff urges that the reference be dismissed with costs.

Determination

15. This reference challenges the decision of the taxing officer made on July 21, 2022 on items 1, instruction fee and 194, getting up fee in the party and party bill of costs. The taxing officer allowed item 1 at Kshs 223.094 but declined to allow the item on getting up fee. As it is, the reference challenges the decision on the two items.

16. The principle underlying award of costs was explained in *Manindra Chandra Nandi v Aswini Kumar Acharaya ILR [1921] 48 Cal 427* thus:

> 'We must remember that whatever the origin of costs might be, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected to, or as Lord Coke puts it, for whatever appears to the court to be the legal expenses incurred by the party in prosecuting the suit or his defence. The theory on which costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him and to the defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently, the party to blame pays costs to the party without fault.'

(See also *Vinod Seth v Devinder Bajaj & another (CA No 481 of 2010)*)

17. As parties engage in court, they often instruct advocates to represent them and pay fees for the advocates professional services rendered in form of instruction fee. At the conclusion of the case, the successful party seeks recompense for the legal costs incurred in either prosecuting or defending the suit. The costs should not, however, be a punishment to the unsuccessful party but fair recompense to the successful party for the expenses he had been forced to incur by paying his counsel for the professional work done. In that respect, Advocates Remuneration Orders provide how instruction fee is to be determined, usually based on the subject matter of the dispute or other factors to be taken into consideration by the taxing officer.

18. Taxing bill of costs is an exercise of discretion by the taxing officer, and the law is settled that this court will not interfere with exercise of that discretion unless the taxing officer has erred in principle. (*Premchand Raichand Ltd & another v Quarry Services East Africa Ltd & another [1972] EA 162*); *Rogan-Kemper v Lord Grosvenor (No 3) [1977] KLR 303; [1977] eKLR*; *Bank of Uganda v Banco Arabe Espaniol, Civil Application No 29 of 2019*)).

Instruction fee

19. The defendant has blamed the taxing officer that she applied wrong principles when determining instruction fee. According to the defendant, the taxing officer failed to take into account and apply the three Advocates Remuneration Orders spanning the life of the suit and graduate instruction fee accordingly.

20. The plaintiff supports the taxing officer's decision, arguing that instruction fee is charged once and, therefore, the taxing officer correctly applied the Advocates Remuneration Order that was inforce when the suit was filed. The issue, therefore, is which Advocates Remuneration Order was applicable.

21. I have perused the impugned decision by the taxing officer and the record. The suit was filed on June 28, 2005. The defendant filed a statement of defence dated August 6, 2005 on August 8, 2005 together with request for particulars of the same date.

22. The taxing officered relied on the decision in *N O Sumba & Co Advocates v Piero Cannobio [2017] eKLR*, for the position that the applicable Advocates Remuneration Order for purposes of ascertaining instruction fee, is the one in force when the suit was filed. The taxing officer then taxed item 1 (instruction fee) under the 1997 Advocates Remuneration Order which was in force when the suit was filed.

23. The decision in N O Sumba (supra) restated the correct position in law that the Advocate Remuneration Order applicable when determining instruction fee is the one that was in force when the activity charged was taken or the services rendered.

24. As already pointed out, the suit was filed on June 28, 2005 while the defence was filed on August 8, 2005. Both the suit and defence were filed in 2005. The Advocate Remuneration Order inforce was the 1997 Order. The taxing officer applied that Remuneration Order as it was in force not only when the suit was filed but also when the defence was filed. There were no amendments to the plaint or defence that would have brought the issue of instruction fee under the latter Remuneration Orders. I find no error on the part of the taxing officer on this.

25. The second aspect of the issue is on the quantum of instruction fee allowed. In *Arthur v Nyeri Electricity Undertaking [1961] EA 492*, the court stated that the court will interfere where there has been an error in principle; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal with and the court will only interfere in exceptional cases.

26. The defendant argues that the taxing officer should have allowed instruction fee at Kshs 750,000, taking into account the changes in the subsequent Remuneration Orders. According to the defendant, the life of the case spanned three Remuneration Orders, 1997, 2006 and 2014 hence the urge for the increase of basic instruction fee to 245, 091. 45 in 2006 and 344, 121.90 in 2014. The amount allowed would then be increased to take into account the complexity of the matter and the work that went into defending the suit.

27. When a bill of costs is filed, costs are charged based on the Advocates Remuneration Order in force at the time of the activity was charged. In this respect, the taxing officer applied the 1997 Remuneration Order, taxed item 1 and allowed instruction fee at Kshs 223, 092. In determining instruction fee, the taxing officer took into account Kshs 12,206,096 as the value of the subject matter, which is not challenged by either side.

28. I do not agree with the defendant that the taxing officer erred in principle for failing to increase instruction fee progressively to taking into account the 2006 and 2014 Advocate Remuneration Orders. As the Court of Appeal stated in Joreth Ltd v Kigano & Associates Advocates (supra), 'Instruction Fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached.' In this matter, the value of the subject matter for purposes of instruction fee was determined from the amount in the pleadings and not the judgment or settlement.

29. The pleadings were filed in 2005 and for that reason, there was no legal basis or justifiable reason to apply the 2006 and 2014 Advocate Remuneration Orders and graduate instruction fee when instructions to defend the suit were given in 2005 and the defence was filed accordingly.

30. Similarly, whether or not to increase the amount allowed on instruction fee for reason of complexity of the case was a matter of exercise of discretion by the taxing officer and this court will not readily interfere with that discretion. In Rogan-Kemper v Lord Grosvenor (No 3) [1977] KLR 303; [1977] eKLR, Law, JA stated that a judge will not substitute what he considers to be the proper figure for that allowed by the taxing officer unless, in the judge's view, the sum allowed by the taxing officer is outside reasonable limits so as to be manifestly excessive or inadequate. I am unable to agree with the plaintiff the taxing officer fell into error in this regard.

Getting up fee

31. Getting up fee is allowed when a suit has been prepared and certified ready for trial. Whether the taxing officer should allow getting up fee is, therefore, a question of fact which is dependent on whether the suit was heard or was certified ready for trial. Getting up fees then flows directly from the instruction fee allowed.

32. Paragraph 2 (i) of the Advocates Remuneration Order provides that;

> In any case in which denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up trial and preparing the case for trial shall be allowed in addition to the instruction fee and shall not be less than one third of the instruction fee allowed in taxation.

33. Paragraph 2(11) of the Order further states that no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned. Paragraph 2(iii) further states that in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.

34. The taxing officer taxed off the item on getting up fee, stating that the suit did not go for trial nor was it found to be ready for hearing. I have gone through the record and, in particular, proceedings for June 2, 2016. The matter was mentioned before Ochieng J, (as he then was), who directed the plaintiff to comply within a given period and, in default, it would be taken that the plaintiff had no witness to call and the suit would be dismissed.

35. On June 25, 2018, the suit was mentioned before Odero J who sent the file to be mentioned before the Deputy Registrar on July 13, 2018 for case management. On August 3, 2018, the case was mentioned before the Deputy Registrar when parties confirmed compliance and the case was certified ready for hearing. The file was then to be mentioned before the Judge on July 15, 2019 for taking a hearing date. On that day, July 15, 2019, the court fixed the suit for hearing on September 19, 2019.

36. The record confirms that the suit was indeed prepared and certified ready for trial and was even assigned a hearing date. The Deputy Registrar fell into error and failed to consider a relevant factor when she held that the suit had not been certified ready for trial and, as a consequence, failed to allow the item (194) on getting up fee.

Conclusion

37. Having considered the reference, the response, submissions, and considering the impugned decision by the taxing officer, the conclusion I come to is that the taxing officer, did not err in principle in so far as instruction fee was concerned. The taxing officer applied the correct Advocates Remuneration Order since the activity or service charged was rendered in 2005 when the Remuneration Order in force was that of 1997.

38. Similarly, the taxing officer applied the correct approach and principle in determining instruction fee. Instruction fee being an independent and static item, is charged once under the Remuneration Order in force at the time the activity was charged and is not affected or determined by the stage the suit has reached.

39. Regarding getting up fee, I am satisfied that the taxing officer failed to take into account a relevant factor, to wit, that the suit had been certified ready for hearing even though it was not eventually heard. Once a suit has been prepared for hearing, getting up fee is allowable. The taxing officer fell into error calling for interference with that decision on the aspect of getting up fee.

40. Consequently, the defendant's complaint on instruction fee has no merit and is dismissed. However, the complaint on getting up fee has merit and is allowed. The order taxing off item 194, getting up fee, is set aside. The defendant's bill of costs dated February 5, 2020 is hereby remitted to the taxing officer (Hon Wanyama) who taxed the bill with directions to consider item 194 on getting up fee only, taking into account Paragraph 2(iii) of the Advocates Remuneration Order. Costs of the reference to the defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH 2023

E C MWITA

JUDGE