



REPUBLIC OF KENYA



Royal Ngao Holdings Limited v NK Brothers Limited (Miscellaneous Application E683 of 2020) [2023] KEHC 19428 (KLR) (Commercial and Tax) (30 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS APPLICATION E683 OF 2020

FG MUGAMBI, J

JUNE 30, 2023

BETWEEN

ROYAL NGAO HOLDINGS LIMITED APPLICANT

AND

NK BROTHERS LIMITED RESPONDENT

RULING

Brief Facts

1. The applicant moved the court by way of a Chamber Summons application dated 25th October 2021. It was brought under Sections 1A, 1B, 3A of the *Civil Procedure Act* cap 21, Rule 11(1) & (2) of the *Advocates Remuneration Order* (ARO) and all enabling provisions of the law.
2. The application seeks the following orders;
 - i. Spent
 - ii. Spent
 - iii. That the Honourable taxing officer's ruling dated 17th September 2021 and delivered on 20th September 2021 taxing the respondent's bill of costs dated 19th October 2020 and 4th May 2021 at ksh 991,453/- and ksh 490,581/- respectively be set aside in its entirety.
 - iv. That the respondent be at liberty to submit the bills of costs dated 19th October 2020 and 4th May 2021 to be taxed by a different taxing officer in the division.
 - v. That the proclamation by Fantasy Auctioneers dated 21st October 2021 and the warrants of attachment and sale dated 19th October 2021 issued to Fantasy Auctioneers be set aside.



- vi. That costs be awarded to the applicant.
3. The application is supported by the affidavit sworn by Jane Kagio, the General Manager of the applicant as well as the grounds set out on the body of the application and submissions dated 18th November 2021.
4. A summary of the applicant's case is that the taxing officer delivered a ruling on 20th September 2021 with respect to two bill of costs dated 19th October 2020 and 4th May 2021. The former was pursuant to a ruling dismissing the applicant's Originating Summons dated 24th April 2020. The latter followed a ruling dismissing the applicant's Notice of Motion dated 12th November 2020.
5. The applicant states that the taxing master misdirected herself on the principles of law applicable and failed to exercise her discretion judiciously in the taxation of the two bills of costs. The applicant specifically takes issue with the taxation of the instruction fees and getting up fees in both bills of costs.
6. The appellant notes that the taxing master had acknowledged that the claim before court was not ascertainable from the pleadings and thus the instruction fees for such a claim was 75,000/=. She however proceeded to allow ksh 700,000/= and 350,000/= for the bills based on general and unsupported reasons. The applicant further faulted the taxing master for not specifically stating what she considered complex to have justified the revision of the amount adding that this too, was not substantiated by the respondent. On this basis Counsel submitted that the instruction fee was manifestly excessive and inconsistent with the provisions of the ARO.
7. On the getting up fees, it was the applicant's case that the taxing master misapprehended the law in awarding getting up fees. Counsel submitted that the proceedings had been initiated by way of Originating Summons and Notice of Motion and the same were disposed of by affidavit evidence without a trial and therefore getting up fees did not apply.
8. The application was opposed by the respondent through a replying affidavit dated 4th November 2021 sworn by Rajesh Rothod and buttressed by the submissions dated 1st December 2021. The respondent's contention is that the taxing master taxed the two bills of costs in accordance with the principles of taxation and the ARO. It was stated that the taxing master had the discretion to award instruction fees according to the circumstances of each case after taking account the relevant factors. The respondent further averred that the taxing master gave sufficient reasons and explained the reasons for her decision.
9. Counsel submitted that ksh 75,000/= provided for in the ARO was only the minimum fee and the taxing master had the discretion to increase the fee commensurate to the professional services rendered. Counsel stated that the applicant had failed to demonstrate how the taxing master erred in principle to justify interference by this court.
10. With regard to getting up fees, Counsel submitted that getting up fees was applicable where a claim or issue was contested and in this case the applications were viciously contested. Counsel further submitted that getting up fees was also applicable in matters dispensed by affidavit evidence and written submissions.

Analysis

11. I have carefully considered the pleadings, evidence and rival submissions filed before this Court. In doing so, I am well aware of the limitations of this Court in an appeal of this nature. The generally laid down principle is that this court cannot interfere with the decision of the taxing master unless there is an error of principle, or unless it finds that the fee awarded was manifestly excessive or high to warrant



such interference. (For this see: *First American Bank of Kenya v Shah & others* [2002]1 EA and *Joreth Ltd v Kigano & Associates* Civil Appeal no 66 of 1999 [2002] 1 EA 92, [2002] eKLR amongst others)

Instruction Fees

12. The fact that the instruction fees for both bills of costs are not based on a monetary claim is not controverted. So is the fact that the subject matter was not ascertainable from the pleadings for purposes of taxation. Neither of the parties faults the taxing officer for relying on paragraph 1(b) of Schedule 6 of the ARO. The taxing officer's rationale for this was that;

“The issue before the court was ... not a claim for any amount of money but stay and declaratory orders. The provisions of paragraph 1(b) of Schedule 6 of the Order is inapplicable. ...The basic fee is therefore ksh 75,000/=...
13. Having so found, with respect to the bill of costs dated 4th May 2021, the taxing officer went on to state that;

“Given the work done by the respondent, the nature and importance of the cause, the interest of the parties, the value involved and the general conduct of proceedings, I find a sum of ksh 700,000/- to be a fair figure in instruction fee. I therefore tax Item number 1 ksh 700,000/ = a sum of ksh 302,168.10 is taxed off”.
14. On the latter bill of costs the taxing officer found that

“Based on the reasoning highlighted in paragraph 6 above the instruction fees in respect to the review application brought under certificate of urgency where Honourable Judge upheld the jurisdiction of the arbitrator, is allowed at ksh 350,000/=. A sum of ksh 150,000/= is taxed off.
15. The bone of contention is whether the increase of the instruction fees from ksh 75,000/= to ksh 700,000/= and ksh 75,000 to ksh 350,000 respectively was manifestly excessive. From the record, I note that the respondent stated that the figures on the instruction fees for each bill of costs were based on the complexity of the matter, the urgency thereof, the skill and research employed, the value of the subject matter and the sum chargeable under the ARO.
16. Let me reiterate that the role of this court is not to vary the decision of the taxing officer simply because this court would have awarded a higher or lower figure. The court is only required to satisfy itself that the taxing officer was well guided in her consideration of the law and principles of taxation in reaching her decision.
17. Having so stated, I would also concur with the observation of the court in *Violet Ombaka Otieno & 12 others v Moi University* [2021] eKLR that since matters of quantum of taxation are discretionary, the only way to demonstrate that discretion has been exercised judiciously is by giving plausible reasons for reaching the decision. It is not enough to state the principles guiding the exercise of discretion. It must be demonstrated in the decision that those principles were indeed applied.
18. I have perused the ruling of the taxing master and while I am satisfied that the taxing officer identified the parameters for consideration in taxation, the same should have been elaborated beyond the rubric. The parties as well as the taxing officer acknowledge that the bills relate to an application for review and setting aside of the arbitral award and another for stay of arbitral proceedings. Both applications appear to have been canvassed by way of affidavit evidence, whereupon they were both dismissed.



19. It would have been important in a case such as this, and for the avoidance of any doubt, to issue a particularized and cogent justification for the exercise of the taxing officer's discretion to vary the figure of ksh 75,000/= which is the minimum instruction fee, to ksh 700,000/=:, and ksh 350,000/= respectively. This would include the rationale of the complex elements which guided the exercise of the taxing officer's discretion, justification for the industry and skill required of counsel including the novelty, the amount of work done by counsel based on the volume of documentation prepared, assessed or perused. These details should support the taxing officer's finding of what should be considered to be a fair value upon the work and responsibility involved.
20. Having so stated however, I do not find sufficient detailed evidence before this court that would warrant a justification for a review of the award under this heading. The failure to particularize the issues under consideration is certainly not a ground that would warrant such a move. The taxing officer listed the factors that she considered relevant. As earlier stated, the fact that this court would have awarded a higher or lower figure is not a ground for varying the decision of the taxing officer either. I concur with the finding of Mativo J (as he then was) that the court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the taxing master, but only when it is satisfied that the taxing master's view of the matter differs so materially from its own that it should be held to vitiate the ruling.

Getting up Fees

21. By law getting up fees is charged at one third of the instruction fees. The applicant's grievance as that the taxing master should not have awarded getting up fees since the two applications proceeded by affidavit evidence.

22. The ARO under schedule V1 provides as follows with respect to getting up fees;

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

Provided that –

This fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;

no fee under this paragraph is chargeable until the case has been confirmed for hearing, (emphasis) but an additional sum of not more than 15 per cent of the instructions 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;

in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.

23. In my opinion, a strict interpretation of Schedule VI of the ARO means that for getting up fees to apply, two conditions must be satisfied and that is:-
 - i. Either a case has been confirmed for hearing or
 - ii. If not confirmed, that the case has been prepared for trial.
24. I have no difficulty in finding that schedule VI therefore anticipates that once a matter has gone through all the motions, including interlocutory applications, it may finally be confirmed or it is finally ready



for hearing of witness testimony. It is at this point that getting up fees would be applicable. Had the law makers intended to have getting up fees charged on all applications, nothing would have been harder than to state so expressly.

25. I am of the view that having getting up fees charged on each application argued by Counsel would create an absurdity and would render legal fees outrageously high in contradiction with article 50 of the 2010 Constitution. I would therefore concur with the finding of the Court in *Kenya Agricultural & Livestock Research Organisation (Formerly Kenya Agricultural Research Institute v Njama Limited* [2017] eKLR that

“Because there was no trial; no preparation of witnesses who would have given viva voce evidence; and no witness statements prepared by the advocate, getting up fees was not awardable”.

26. Similarly, in *MITIS Electrical Company Limited Vs National Industrial Credit Bank Limited* misc. Application no 429 of 2004, Kasango J. accepted the respondent’s contention that a getting up fee contemplates a situation in which there is a full trial, at which evidence is adduced. The Learned Judge stated as follows with respect to getting up fees:

“...clearly contemplates where counsel is involved in preparation of witnesses and witness statements etc. This was not the case here. The application was supported by affidavit and no *viva voce* evidence was adduced”.

27. In this case, the fact that the two applications were canvassed by way of affidavit evidence is not controverted. Since no witnesses testified and since there was no evidence or submission led to show that the matters had been listed for hearing or confirmed for hearing, it is my finding that the getting up fees should not have been awarded.

Determination and Orders

28. In conclusion, therefore, these are the final orders of the Court:
- i. The Chamber Summons dated 25th October 2021 succeeds to the extent that the decision of the Deputy Registrar dated 17th September 2021 in respect of the getting up fees is hereby set aside.
 - ii. Consequently, and in light of this decision, the proclamation by Fantasy Auctioneers dated 21st October 2021 and the warrants of attachment and sale dated 19th October 2021 issued to Fantasy Auctioneers are therefore set aside in light of the orders.
 - iii. The matter is now referred to the Deputy Registrar to certify the final costs in line with this decision.
 - iv. The Respondent shall bear the costs of this reference.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JUNE 2023.

F. MUGAMBI

JUDGE

Court Assistant: Ms Lucy Wandiri

