



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.1 OF 2018

BULSHO TRADING CO. LTD.....APPELLANT

VERSUS

1. ROSEMARY LIKHOLO MUTAKHA

2. BONVENTURE WIYEMA IMBAYI.....RESPONDENTS

R U L I N G

[1] The reference vide the chamber summons dated 15th September 2021 is made by **Wanyama & Co. Advocates**, who acted for the respondents in this appeal. They seek the basic order that the ruling of the deputy registrar on the taxation of the respondents party and party bill of costs delivered on 11th August 2021 be set aside and the said bill of costs be remitted to the deputy registrar for taxation on item 1 on the instruction fees for opposing the appeal and on item 2 on the instruction fees for cross-appeal on the basis of the grounds set out in the chamber summons and the supporting affidavit deponed on 15th September 2021 by **Moses Wanyama Onyango**.

The appellants opposed the reference through **Omondi & Co. Advocates**.

[2] Hearing of the reference was by written submissions which were duly filed by both parties respectively and from which arise the issue for determination i.e. whether the reference is proper and competent before the court and if so, whether the objector has demonstrated satisfactory grounds for this court's interference with the decision of the taxing officer.

In that regard, paragraph **11 (eleven)** of the **Advocates Remuneration Order** provides as follows:-

- (1) Should any party object to the decision of the taxing officer he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons which shall be served on all parties concerned setting out the grounds of his objection.
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under sub-paragraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

[3] Basically, the jurisdiction of the deputy registrar is limited to taxing the bill of costs and giving reasons for the taxation. Accordingly, the respondents party and party bill of costs dated 15th April 2021 was taxed on 11th August 2021, and on the 15th September 2021, the present reference was filed. Apparently, the date of taxation was also the date of the taxing officer's ruling on taxation delivered in the absence of both the appellant and respondents. The respondents were obviously aggrieved with the ruling and that is why they filed this reference. However, they did so unprocedurally as they did not comply with the requirement of issuing a notice to the taxing officer in writing of the items of taxation to which they objected in terms of sub-paragraph (1) of the main paragraph 11 (**eleven**) of the Advocates Remuneration order.

[4] It would therefore follow that this reference is neither competent nor proper before the court. Compliance with sub-paragraph (1) of paragraph 11 invariably brings into operation sub-paragraph (2) which grants the court the power to interfere with a decision of the taxing officer on taxation. On this basis, the reference is clearly incompetent and improper before this court. It is fatally defective and fit for dismissal on that ground alone.

If however, the reference was competent, the respondents were required to establish that either the decision of the taxing officer was based on an error of principle or the fee awarded was manifestly excessive or low as to justify an inference that it was based on an error of principle (see, **First American bank of Kenya Vs Shah & others (2002) 1EA 64**).

[5] In considering whether or not to reverse the order of the taxing officer, the following principles as set out in the Ugandan case of **Bank of Uganda Vs. Banco Arabs Espanol (1999)EA 45 (SCU)**, apply:-

- (a) The court will not normally interfere with the taxing master's ruling simply because it thinks it would have awarded a different figure had it been the one taxing the bill.
- (b) The court can interfere if it is proved that the amount taxed was manifestly excessive or law and,
- (c) The court can interfere if there is proof that the taxing officer followed a wrong principle in reaching his decision.

[6] Bills should always be drawn in accordance with the applicable Rules of the Advocates Remuneration Order. Parties are therefore expected to "play" according to the Rules. If this is done, then the need to file references would not arise or would be greatly reduced. The taxing officer, in taxing the bills, must also play in accordance with the Rules and applicable principles. Herein the contest is on items 1 and 2 of the impugned bill of costs. These items were on instruction fees. These were taxed at ksh.25,200/= on each items pursuant to Schedule 6 of paragraph 1 (a) of the Remuneration order in relation to appeals. The taxing officer appreciated that the judgement on record and the decree extracted therefrom were the basis for determining the value of the subject matter in question but in this matter such value could not be deduced from the judgment and the decree. For this reason, items 1 and 2 were taxed at ksh.25,200/=, the amount set for Appeal.

[7] In **Joreth Ltd Vs. Kigano & Associates [2002] 1 EA 62**, The Court of Appeal held that the value of the subject matter for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (**if such be the case**), but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just, taking into account, amongst other matters, the nature and the importance of the proceedings, any directions by the trial judge and all other relevant circumstances.

And, in **Trade Bank Ltd (in liquidation) Vs. LZ Engineering Construction Ltd and Another Civil Application No.117 of 2000 (NBI CA)**, it was stated that the taxing officer has to be guided by the value of the subject matter in dispute in assessing instruction fees as provided in **Schedule 6 of the Remuneration Order** and a taxing officer is obliged to determine the value of the subject matter from the pleadings, judgement or settlement between the parties.

[8] The principles in the case of Joreth Ltd (**supra**) were clarified or elaborated in the case of **Peter Muthoka & Another Vs. Ochieng & three others (2010) eKLR**, where the Court of Appeal set down the proper basis of taxing the instruction fees in the following terms:-

“It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependant on the stage at which the fees are being taxed. Where it happens before judgement, it is the pleadings that form the basis for determining subject value. Once judgement has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgement does determine conclusively the value of the subject matter as a claim no matter how pleaded, gets its true value as adjudgae by the court.”

[9] It was further stated that:-

“It is only where the value of the subject matter is neither discernable from the pleadings nor determinable from the pleadings, the judgement or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instruction fees in accordance with what he considers just bearing in mind the various elements contained in the provisions we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he was engaged with the proper basis as expressly and mandatorily provided, either the pleadings, the judgement or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provisions being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.”

[10] Herein, the taxing officer opted for the judgement as the starting point and concluded that the value of the subject matter could not be determined from it. Having done so, the taxing officer proceeded to assess and tax the individual fees on the basis of **Schedule 6 paragraph (1)(a)** of the Remuneration Order which provides that to present or oppose an appeal in any case not provided for above such sum as may be reasonable but not less than kshs.25,200/=. The respondents' have failed to demonstrate satisfactory grounds for this court to interfere with the decision of the taxing officer as they did not prove that the taxing officer exercised her discretion wrongly by taking into amount irrelevant factors or by omitting to consider relevant factors. There is also no proof that the amounts taxed with respect to items 1 and 2 (**i.e instruction fees**) were manifestly excessive or manifestly low. Further, there is no proof that the taxing officer followed a wrong principle in reaching her decision. On the contrary, the taxing officer rightly applied the principles set out in the aforementioned cases of **Joreth Ltd (supra)** and **Peter Muthoka & Another (supra)**.

[11] In the upshot, this reference apart from being fatally defective is also lacking in merit and is hereby dismissed with costs to the appelliant.

J.R. KARANJAH

J U D G E

[Delivered & signed this 30TH day of NOVEMBER 2021]