



Conrad Maloba Associates v Music Copyright Society of Kenya (MSCK) (Miscellaneous Cause E1018 of 2020) [2021] KEHC 310 (KLR) (Commercial and Tax) (29 November 2021) (Ruling)

Neutral citation: [2021] KEHC 310 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CAUSE E1018 OF 2020**

MW MUIGAI, J

NOVEMBER 29, 2021

BETWEEN

CONRAD MALOBA ASSOCIATES APPLICANT

AND

MUSIC COPYRIGHT SOCIETY OF KENYA (MSCK) RESPONDENT

RULING

Chamber Summons

1. The Applicant filed Chamber Summons Application dated 6th April 2021 for orders that;
 1. The decision of the Learned Deputy Registrar dated 25th February 2021 with respect to instruction fees, fees for getting up and preparing for trial and fees increased by 50% itemized on the Applicant's Bill of Costs dated 19th August 2020 be set aside and taxed afresh by this Court. Which Application was supported by the sworn Affidavit of Cain Mingodated 6th April 2021 and based on the grounds that;
 - a. By a Ruling dated 25th February 2021 Hon. Claire Wanyama DR taxed the Applicant's Bill of Costs in the amount of Kshs.205, 375
 - b. The Deputy Registrar failed to take into account the scale of fees prescribed under Schedule VI Rule 1 (i) of the Advocates (Remuneration) Order 2014 in a Claim where the Applicant sought for orders restraining the Defendants from swearing into office and effecting registration by the 3rd Defendant as the 1st Defendant's Eastern Region Director & Governing Council Member.



In awarding the lesser amount, the Deputy Registrar failed to give any justification as prescribed under the said schedule.

- c. The Deputy Registrar failed to take into consideration the value of the subject matter when calculating instruction fees.
- d. The Deputy Registrar failed to take into consideration fees for getting up and preparing for trial pursuant to Schedule VI Rule 2 of the Advocates (Remuneration) Order.
- e. This Court is bestowed with the powers to grant such orders *ex debito justitiae* and to avert an injustice being occasioned.

Applicant's Submissions

2. The Applicant submitted that in assessment of the instruction fees in the taxation, the Deputy Registrar failed to consider relevant factors such as the nature or importance and complexity of the suit, interest of parties, labor expended and the responsibility undertaken by the Applicant, general conduct of the proceedings, public interest in the suit and thereby arrived at an erroneous decision on the taxation.

3. In the case of [Belgo Holdings Limited v Robert Kotch Otachi & another \[2019\] eKLR](#) the Court stated;

In the instant case, although the taxing officer indicated that she had considered; the entire court record and the judgment of the Honorable Judge, the nature, interest, conduct and length of the proceedings and the importance of the cause to the parties, she did not describe with precision and in details how she related these factors to the facts of the case, for example, she did not explain what she established to be the length of the case and what she understood to be the importance of the "cause to the parties" and /or the complexity of the matter if any."

4. Further, that Schedule VI paragraph 2 of the Advocates Remuneration Order provides that the fees for getting up are in any case where a denial of liability is filed or in which issues for trial are joined by pleadings, a fee for getting up and preparing the case for trial shall be allowed. The Applicant submitted that getting up fees includes the mode of disposal of the suit which was by way of a Preliminary Objection and supported by written submissions. The Applicant relied on the case of [Stephen Mwangi & 2 others versus Tusker Mattresses Limited \(2018\) eKLR](#) where the court opined as follows;

The second issue was on item 2 which is getting up fees. There was a sum sought for getting up and the Taxing Officer did not allow it. The Respondent argues that the sum was not awardable as no hearing took place. The Claimants assert that the getting up fee is due and for this rely on the case of Nguruman Ltd v Kenya Civil Aviation Authority & 3 Others (supra), a decision of my brother Lenaola J. (as he then was). In that case, the court upheld the reasoning of the taxing officer in regard to Schedule VI paragraph 2 of the Advocates Remuneration Order which states that the fees for getting up are in any case where a denial of liability is filed or in which issues for trial are joined by pleadings, a fee for getting up and preparing the case for trial shall be allowed. In my view, this getting up includes the mode of disposal of the suit which was by way of written submissions. I would therefore review the decision of the taxing master and allow a third of the instruction fee as getting up fees. The sum of Kshs. 49,578.70 would be awardable as getting up fees are a third of then instruction fees. In all other respects the Ruling of the Taxing Officer was not erroneous in principle and is upheld. In the final result, this reference only succeeds to the extent that getting up fees are payable to the Claimants being the sum of Kshs. 49,578.70 as well as costs of this



reference which I set at Kshs. 10,000/- only so as to save time and expense taxing the matter afresh before the taxing officer.”

5. It was the Applicant’s submission that Preliminary objection is a denial of liability and appropriate responses were filed in response to the P.O and subsequently submission. On the strength of the Nguruman case cited above getting up fees are awardable even where there is no hearing and stated that the fee for getting up and preparing for trial is founded as where there is a defence a fee for getting up is founded. The Applicant diligently acted on behalf of the Respondent and thus should be remunerated as billed.

Respondent’s Submissions

6. The Respondent submitted that the taxing master correctly found that the proceedings that was the subject matter of the bill was an election matter and no pecuniary value was involved and therefore correctly held that the fees chargeable was to be taxed as other matters since the matter eventually proceeded for arbitration elsewhere. The taxing master correctly applied the law and facts and exercised her discretion fairly in awarding Kshs 100,000/- for the work done.
7. It was the Respondent’s further submission that on the award on getting up fees again the taxing master correctly adopted the provisions of paragraph 2 (iii) of the Schedule 6. It was very evident that the case which was ended at a preliminary stage by an objection was thereafter by consent referred to arbitration elsewhere and at no time was there any indication that the matter was about to proceed for trial which again the taxing master correctly identified, was a case that would have involved the viva voce testimonies of witnesses none of this was done and therefore she justly disallowed this claim.
8. The Respondent contended that the court has no reason and should not interfere with the award of the taxing master and the objection ought to be dismissed with costs.

Determination

9. After considering the Application, Response and the submissions filed by the parties herein the issue for determination is whether the decision by the Taxing Officer should be set aside?
10. It is now trite law that the High Court will only interfere with the decision of a Taxing Master in cases where there has been shown to be an error in principle. In *Republic –Vs- Ministry of Agriculture & 20 Others Ex-Parte Muchiri W’ Njuguna [2006] eKLR*, Hon. Justice J. B. Ojwang (Retired) stated as follows: -

The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other...The court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle.”

11. It was the Applicant’s contention that the Deputy Registrar failed to take into consideration the value of the subject matter and getting up and preparing for trial pursuant to Schedule VI Rule 2 of the Advocates (Remuneration) Order when calculating instruction fees.



12. The principles governing taxation of costs by a Taxing Officer laid out in the above cited case were also reiterated in the leading case of *Premchand Raichand Ltd Another vs Quarry services of East Africa Ltd and Another*. The principles laid out are: -
- i. The instruction fee should cover the advocates work including taking instructions and preparing the case for trial or appeal.
 - ii. The taxing master was expected to tax each bill on its merits;
 - iii. The value of the subject matter had to be taken into account;
 - iv. The taxing master's discretion was to be exercised judicially and not whimsically or capriciously;
 - v. Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public interest such that costs were not allowed to rise to a level that would confine access to the courts to the wealthy.
 - vi. No appeal or reference can be allowed unless the appellant can show or demonstrate that above mentioned principles have been breached because judges on appeal as a principle do not like to interfere with an assessment of costs by the taxing officer unless the officer has misdirected himself or herself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.”
13. From the foregoing the Taxing Officer is required to take into account the time necessarily taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant.
14. In the instant case, the Plaintiff sought restraining orders against the Defendant and the matter was settled by consent issued on 18th October 2016 and parties were directed to proceed for arbitration. The Applicant contended that the Deputy Registrar failed to take into consideration fees for getting up and preparing for trial pursuant to Schedule VI Rule 2 of the Advocates (Remuneration) Order.
15. Under Schedule VI Rule 2 of the Advocates (Remuneration) Order, the said issue can be categorized under the head other matters as was rightly put by the Taxing Officer. Under this head the Applicant was entitled to the amount of Kshs.75, 000 considering the matter was defended. In addition, the matter was settled by consent and parties directed to proceed for arbitration.
16. I therefore find that the decision of the Taxing Officer in awarding the getting up fees of Kshs.75, 000 was not based on any error of principle to justify interference by this Court.

Disposition

17. The orders sought in the Applicant's Chamber Summons Application dated 6th April 2021 are therefore not merited for the foregoing reasons, and the said application is hereby dismissed.

DELIVERED SIGNED & DATED IN OPEN COURT ON 29TH NOVEMBER 2021(VIRTUAL CONFERENCE)

M.W.MUIGAI

JUDGE

