



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL SUIT NO. 3 OF 2012

AHMED DAHIR SALAT.....PLAINTIFF/RESPONDENT

VERSUS

FIRST COMMUNITY BANK....DEFENDANT/APPLICANT

RULING

Background

1. The Plaintiff/Respondent herein was successful in his suit against the Defendant/Applicant herein and was awarded costs, subsequently he filed a bill of cost for taxation dated 8th March, 2019 where the Taxing Master upon considering the same and vide a ruling delivered on 8th July, 2019 taxed the Respondent bill at Kenya Shillings Six Million, Five Hundred and Ninety-Two Thousand, Three Hundred and twenty nine and fifty cent (Kshs 6,592,329.50/=).
2. The Applicant being dissatisfied with the said ruling by Hon J.J. Masiga subsequently filed the instant application by way of Chamber Summons dated 9th August, 2019 and filed on 13th August, 2019, seeking orders that the decision of the Taxing Officer in its entirety and reasoning thereof of Hon. J.J. Masiga, Deputy Registrar, dated and delivered on 8th July, 2019 allowing the Respondent party to party Bill of costs at Kshs 6, 592,329.50/= be set aside and the matter referred back to the taxing master for fresh taxation.
3. The grounds upon which the application is based on the face of the application are that the taxing master misdirected himself in law in arriving at a decision that is not tenable in law, that he exercised his discretion on grounds that are both unclear, unreasonable and legally untenable and that he applied a wrong amount for instruction fees yet the subject matter of the dispute is Kshs 3,956,825/= and therefore the taxation to the sum of Kshs 6, 592,329.50/= is baseless.
4. The Respondent filed a Preliminary Objection and Replying affidavit in response to the said application both dated 28th August 2019 and filed on 29th August, 2019. The objection was raised on the ground that the application is not compliant with the Advocates (Remuneration) Order or any known legislation and that it amounts to an abuse of the court process.
5. In his replying affidavit the Respondent contends that the respondent has not enunciated or elaborated the purported principles that the taxing master erred in to warrant the setting aside of the taxation, arguing that the applicant is only aggrieved that the taxing master exercised his discretion in his favour and not in their favour.

Submissions

6. Both parties filed their respective submissions and highlighted the same on 13th November, 2019 when the matter came up for hearing. The applicants submitted that the bill as taxed is overly exaggerated and does not resonate with the care and labour provided, the subject matter of the suit and established principles of taxation as laid down in the case of *Premchand Raichand Ltd vs Quarry Services of East Africa Ltd (1972)EA 162*.
7. They submitted that the subject matter of the suit is Kshs 2,600,000/= and therefore the learned Magistrate failed to evaluate all the documents and evidence placed before him for purposes of ascertaining the value of the subject matter of the suit and erred in taxing the bill at Kshs 6, 592,329.50/= . They rely in the case of *First American Bank of Kenya vs Shah & Others (2000) 1 EA* and *Joreth Limited vs Kigano & Associates (2002) EA 92*.
8. In addition, they submitted that they were not served with the Respondent bill and therefore justifying their non-attendance to the same.

9. Further, they submitted that the taxing master erred in granting instructions fee yet the respondent was acting in person, and therefore the same fails the threshold for fidelity as it amounts to awarding professionals costs to laymen.

10. In regard to the alleged noncompliance, they submitted that their objection is in line with Rule 11(2) of the Advocates Remuneration Order and urged the court to dismiss the Respondent Preliminary Objection and allow their application.

11. The Respondent in their submissions stated that he served the applicant personally with his bill and the hearing notice and therefore the allegation that they were not served is false.

12. On whether the taxing master applied the correct principles in determining the value of the subject matter, he submits that since the same was not indicated in the plaint he believes that the taxing master correctly exercised his discretion.

13. In regard to the issue of instructions fee, he submitted that at the inception of the suit he had hired the firm of Mosi & Company Advocates to act for him, and therefore charging instruction fee is justified, which is based on the value of the subject matter.

14. In addition, he submitted that this court has the jurisdiction to tax the bill without remitting it back to the taxing master. In this he relies in the case of *American Bank of Kenya vs Gulab P. Shah & Others (2002)*.

15. In sum he submitted that the applicants have not laid the basis for interference with the taxing master decision arguing that the taxation was lawful and the applicant should not cry foul yet he failed to attend to the same when called upon to do so.

Determination

16. I have considered the applicant application, the respondent's response and the parties' respective submissions, and in my view two issues arise for determination. The first is on whether the Respondent Preliminary Objection is merited and secondly whether the Taxing Master applied the correct principles in determining the Respondents bill.

17. The Respondent in support of their Preliminary Objection submitted that the applicant did not comply with the procedure laid down under Rule 11 of the Advocates Remuneration Order. They are challenging the procedure adopted by the applicant in challenging the taxing master ruling.

18. The advocates Remuneration Order under paragraph 11 provides the procedure for objecting to taxation. **Paragraph 11 (1) and (2)** provides as follows:-

11 (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 the parties concerned, setting out the grounds of his objection.

19. Therefore based on the above, it is apparent that the objection procedure is in three stages. The first is the objecting party giving notice to the taxing officer to the items in the taxed bill of costs he objects to. Secondly, the taxing master is obliged to forthwith give reasons for taxing of the items objected to. Thirdly, the objector within fourteen days of receipt of the taxing officer's reasons must file a reference before a judge.

20. I have considered the instant application in view of the above and it is my finding that the application herein is in compliance with Paragraph 11 of the Advocates Remuneration Order cited hereinabove, the Applicant brought the application by way of summons in Chambers as stipulated by the Advocates Remuneration Order at Rule 11 (2) and further the taxing master provided the reasons for his decision and I therefore find that the Respondent Objection lacks merit.

21. Coming to the second issue for determination in this reference, which is substantive, that is whether the Taxing Master applied the correct principles in determining the value of the subject matter and in taxing the instruction fee.

22. The principles that guide the court when dealing with a reference are well settled. A judge sitting on a reference will not interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs. See *The Joreth Case* and *Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board, (supra)*.

23. What I need to determine in the reference before me is whether the taxing officer made an error of principle to warrant interference with his exercise of discretion.

24. In this case the Taxing Master reason for taxing the bill to the sum challenged herein is simply because the bill as presented by the Respondent was unchallenged as the Applicant herein did not file a response or enter appearance for purposes of taxation, and as a result he allowed the bill as it is.

25. The appellant in answer to their non-attendance submitted that they were never served with the hearing notice nor taxed bill and thus they failed to file their response and challenge to the bill. In addition, they have argued that subject matter of the suit is Kshs 2,600,000/= and therefore the learned Magistrate failed to evaluate all the documents and evidence placed before him for purposes of ascertaining the value of

the subject matter of the suit and erred in taxing the bill at Kshs 6, 592,329.50/=. Further, they submitted that instructions fees ought not to be awarded as the Respondent was acting in person.

26. I have looked at the pleadings herein and it is apparent to me that the subject matter of the suit is ascertainable from the parties pleadings, as the dispute relates to a loan advanced to the Respondent by the applicant, and that the Taxing Master did not delve into determining the same as he only allowed the Bill as presented by the Respondent on the basis that the same was unopposed. In my view he ought to have considered the same as per the established principles for taxation of bill of costs, even though the applicants had failed to appear or file a response.

27. I am of the view that the Taxing Officer to this extent erred as he ought to have determined the value of the subject matter from the pleadings. The factors to be considered in ascertaining the value of the subject matter of a suit were set out by the Court of Appeal in *The Joreth Case* as follows:-

“We would at this stage point out that the value of the subject matter of a suit for the purposes 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 fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances”.

Conclusion

28. Having found that the taxing officer erred in principle, this court has the discretion to either remit the bill to the taxing officer with appropriate direction on how it should be taxed or to proceed and tax the same. In the case of Kipkorir Titoo & Kiara Advocates vs. Deposit Protection Fund Board (supra) the Court of Appeal stated as follows:-

“And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see; *Sonza v Ferrao* [1960] EA 602). The Judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji Naran Patel* (No. 2) [1978] KLR 243).”

29. Considering that the Taxing Master herein never considered the bill as presented by the Respondent in accordance with the established taxation principles, this is in view of the fact that the reason given for the amount taxed was that the same was unopposed and therefore implies that he allowed the same as presented and therefore it would be prudent for this Court to allow the taxing master to tax the same in accordance with the law and if any of the parties is dissatisfied with the quantum can approach this court for review.

30. The upshot of the foregoing is that, **this court sets aside the decision of the Taxing Officer dated 8th July 2019 and directs that the Bill of Costs dated 8th March, 2019 be put before the Taxing Officer for the re-taxation in accordance with the established legal principles. In this case the subject matter of the suit can be clearly be determined from the pleadings.**

DATED, DELIVERED AND SIGNED AT GARISSA THIS 27TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE