



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MISC. APPLICATION NO. 7 OF 2019**

**IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER**

**BETWEEN**

**PROF.TOM OJIENDA &ASSOCIATES.....ADVOCATE/APPLICANT**

**VERSUS**

**NAIROBI CITY COUNTY.....CLIENT/RESPONDENT**

**RULING**

**Background**

1. Prof. Tom Ojienda Associates, the Applicant herein, is aggrieved by a ruling delivered by the taxing officer on 3<sup>rd</sup> October 2019, on the taxation of its Bill of Costs dated 12<sup>th</sup> March 2019 which was filed herein on 20<sup>th</sup> March 2019. The Applicant has thus filed an application by Chamber Summons dated 9<sup>th</sup> October 2019, seeking orders that the findings and said ruling by Hon. C. Kithinji which awarded the sum of Kshs 240,555/= be varied and set aside, in relation to item 1 of the said Bill of Costs. Further, that the said Bill of Costs be taxed afresh in light of the actual work done.

2. The said application is supported by the grounds on the face thereof, and an affidavit sworn on 8<sup>th</sup> October 2019 by Prof. Tom Ojienda SC, the Applicant's Managing Director. In summary, the Applicant's case is that it filed and Advocate/Clients Bill of Costs dated 12<sup>th</sup> March 2019, seeking Kshs 17,732,969.60, arising out of legal services it rendered to the Respondent in **Judicial Review Case No. 419 of 2014 - Embassava Savings & Credit Co-operative Society vs County Government of Nairobi**. Further, that the said Bill of Costs was drawn to scale, and the instruction fee of Kshs 10,000,000/= was calculated in accordance with the Advocates Remuneration Order, based on the value of the subject matter which was Kshs 100,000,000/=.

3. However, that the taxing officer erred in reducing the instructions fees to Kshs 100,000/=, and not taking into account the subject matter value. In addition, that the judicial review proceedings involved complex litigation that threatened the Respondent's licencing of motor vehicles, and the amount awarded as instruction fees was manifestly low and cannot compensate the Applicant for the legal services rendered.

4. Nairobi City County, the Respondent herein, opposed the application in Grounds of Opposition dated 28<sup>th</sup> October 2019. The Respondent averred that the Deputy Registrar correctly assessed the instruction fees by taking into account all relevant matters of the case, and did not commit any error of principle in arriving at her decision. Further, that the Applicant has not expressly stated the grievances it has with the said decision and its reasons.

**The Determination**

5. The Court directed that the instant application would be canvassed by way of written submissions. The Applicant did not file any submissions despite being given several opportunities to do so. The Respondent's Advocates, Mbaluka & Company Advocates, filed submissions dated 4<sup>th</sup> December 2020.

6. The substantive issue in dispute in the reference filed by the Applicant is whether there was an error made by the Taxing officer in the taxation of item 1 on instruction fees in the Applicant's Advocate/Client Bill of Costs dated 12<sup>th</sup> March 2019.

7. The Respondent's Advocate in this respect cited various judicial decisions, including **Geoffrey Makanya Asanyo vs Nakuru Water and**

**Sanitation Services Company Limited & 8 Others (2015) e KLR, Republic vs Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna & 6 Others,(2006) eKLR, Republic vs Commissioner of Domestic Taxes ex parte Ukwala Supermarket Limited & 2 Others (2018) e KLR and Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna & 6 Others, (2006) e KLR** to submit that the taxing officer correctly applied the law and relevant facts, and found that there was no justification for the sum sought in the instruction fees, and that the same was exaggerated. The Respondent therefore urged the Court not to interfere with the exercise of discretion and decision by the taxing officer.

8. I have considered the pleadings and arguments made by the Applicant and Respondent. The applicable law as regards taxation of the Advocate/Client Bill of Costs is Schedule 6B of the Advocates (Remuneration) Order 2014, which provides as follows:

**As between advocate and client the minimum fee shall be—**

**(a) the fees prescribed in A above, increased by 50%; or**

**(b) the fees ordered by the court, increased by 50%; or**

**(c) the fees agreed by the parties under paragraph 57 of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences.**

9. Reference is made to the rates in Schedule 6A, which in Paragraph 1(j) of provides as follows as regards instruction fees in constitutional petitions and prerogative orders :

**“To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—**

**(i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000**

**(ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000**

**(iii) to present or oppose application for setting aside arbitral award- 50,000.”**

10. In addition, the applicable principles as regards setting aside or varying a taxation of a bill of costs are that a Court cannot interfere with the taxing officer’s decision on taxation, unless it is shown that the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify interference. These legal parameters were laid down in **First American Bank of Kenya vs Shah and Others [2002] 1 E.A. 64 at 69** by Ringera J. (as he then was) who delivered himself thus;

**“First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle”.**

11. These principles reiterate the position of the Court of Appeal in **Joreth Ltd vs Kigano & Associates (2002) 1 EA 92**, wherein the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion, and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.

12. Specifically as regards the taxing of instruction fees, the following guidelines were provided by Ojwang J. (as he then was) in **Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna & 6 Others, (2006) e KLR** :

**“ 1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;**

**2. the taxation of advocates’ instruction fees is to seek no more and no less than reasonable compensation for professional work done;**

**3. the taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;**

**4. so far as apposite, comparability should be applied in the assessment of advocate’s instruction fees;**

**5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;**

**6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;**

7. where responsibility borne by advocates is taken into account, its nature is to be specified;

8. where novelty is taken into account, its nature is to be clarified;

9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.”

13. These guidelines were also applied by Odunga J. in **Nyangito & Co Advocates – Vs - Doinyo Lessos Creameries Ltd, [2014] eKLR**, and the learned Judge in addition also held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it.

14. I have perused the ruling by the Taxing Officer dated 3<sup>rd</sup> October 2019, and note that she applied Schedule 6A1(j) of the Advocates Remuneration Order, and noted that the basic instruction fee was Kshs 100,000/=. While taxing on the item on instruction fees, the taxing master in her ruling gave the following reasons:

**“In the present matter the applicant represented the 5th respondent in the matter, JR 419 of 2014. They filed the notice of appointment on the 7th November 2014. There was no response of any nature to the pleadings on record to show on the part of this respondent. None are annexed to the bill of cost as having been filed. Parties attended court severally. The matter was concluded without go to hearing. Parties indicated the issuance of license the subject of the clam had been dealt and fresh one issued. The submissions annexed to the bundle of documents are draft as none are on record in the parent file. The matter was thus withdrawn with no orders as to costs.**

**There is nothing on record to show that the issues were complex. There were novel issues raised. There was no difficult issue identified. The matter was being dealt as a simple application for judicial review orders. The matter was not time consuming neither were the pleadings and documents voluminous. The parties indicated at a very early stage in the proceedings that the matter was for settlement. It is indicated that the matter was wholly in the docket of the 1st respondent. Their issuance of the subject licenses resolved the dispute. In this regard it appears that the role of the 5th respondent in the matter was peripheral hence no response status. This demonstrates the level of responsibility and importance of the matter to the parties herein.**

**No more than ordinary diligence was required on part of counsel hence the laid back approach.**

**There is no justification for the sum sought in instruction fees. The same is grossly exaggerated. This is a matter which the basic instruction fees will suffice. This item is thus taxed at Kshs.100,000/-Kshs.9,900,000/- is taxed off from this item..”**

15. It is my finding that while the Taxing Officer may have considered some relevant considerations, it is apparent that the said Officer did not make any reference to or apply the provisions of Schedule 6B, which is the applicable schedule and which provides for a 50% increase in the fees stated in Schedule 6A(1)(j). In addition, she awarded the basic minimum instruction fee provided in Schedule 6A(1)(j) of Kshs 100,000/=:, which should have been subject to a 50% increase. There was thus an obvious error of law made by the Taxing Officer.

### **The Orders**

16. In the premises I find that the decision of the taxing master in awarding instruction fees of Kshs 100,000/= was made in error of the law, as the applicable law, being Schedule 6B of the Advocates (Remuneration) Order 2014, was not applied. This error justifies interference by this Court, and I accordingly find merit in the Applicant’s Chamber Summons dated 9th October 2019 order as follows:

**I. The findings and ruling by Hon. C. Kithinji dated 3<sup>rd</sup> October 2019 which awarded the sum of Kshs 240,555/= in relation to the Applicant’s Advocate/Client Bill of Costs dated 12th March 2019 and filed herein on 20th March 2019, be and is hereby set aside.**

**II. The Applicant’s Advocate/Client Bill of Costs dated 12th March 2019 and filed herein on 20th March 2019 shall be remitted to another Taxing Officer in the Judicial Review Division of the High Court at Nairobi for fresh taxation.**

**III. Each party shall meet their respective costs of the Applicant’s Chamber Summons dated 9th October 2019.**

17. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2020**

**P. NYAMWEYA**

**JUDGE**

**FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING**

**In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the Applicant’s and 2nd and 4th**

**Respondents counsels email addresses, by close of business on 22nd May 2020.**

**P. NYAMWEYA**

**JUDGE**