



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CIVIL CASE NUMBER 443 OF 2017

GITHIRU & COMPANY ADVO.....CATESRESPONDENT

VERSUS

NATIONAL BANK OF KENYA.....APPLICANT

RULING

What is before me is the Chamber Summons dated 6th August 2019, reference under **Advocates Remuneration Orders paragraph 11 (2)**. It seeks orders that this court re-examine, re-assess or give directions in regard to the items objected to in the Notice of Motion dated 22nd March 2018.

The gist of the matter is that the applicant instructed the respondent to represent it in **Nakuru High Court Civil Case Number 501 of 1995** where it had sued one **Kenneth Kiptala Kamuren**. The claim was for Kshs. 1,081,634/80. The applicant had obtained an *ex-parte* judgment and decree issued for Kshs. 3,253,690 as at the time the respondent was instructed to take over the matter and pursue execution of the judgment by way of attachment and on committal of the Judgment Debtor to civil jail.

This never happened.

The *ex-parte* judgment was set aside, and the suit eventually dismissed for want of prosecution.

The respondent filed a Bill of Costs in which he sought ***instruction fees*** on the basis of the decretal sum of Kshs. 3,253,690, and the work done as *'tracing the court file from archives, making copies of pleadings, filing notice of change, perusing investigation report, giving detailed opinion and advise'*, Kshs. 200,000/=, increased by ½, 100,000/= + 16% Value Added Tax (VAT) – 48,000/=.

This was objected to by the applicant on the ground that the respondent had sought fees of Kshs. 100,000 +VAT, and disbursements of Ksh 5000 which sum was paid and he could not be heard to ask for more.

This was countered by the argument that the respondent had only asked for a deposit, and which was paid, but it was never agreed that the Kshs. 100,000/= was the full fees.

There are two issues: ***whether the reference is merited? What orders to issue.***

On the first issue which the dispute is about the award on the head of instructions fees.

Was Ksh 100,000 the agreed fees?

I have perused the correspondence between the parties and the respondent in the letter accepting instruction states:

“As to the costs of proceeding, we opine that a sum of Kshs. 100,000/= plus VAT at 16% and disbursements of Kshs. 5,000/= are required to enable us proceed. We enclose a detailed Deposit Request Note showing the intended steps”.

In its response the applicant stated,

“..... we shall attend to your Deposit Request Note and revert.”

Hence it appears to me that both parties were aware that they were discussing a deposit in fees.

So, what was chargeable?

From the material before me, the respondent came on board when the matter had already been filed and judgment obtained. Hence, they were not **'suing or filing a suit'**, that had already been done by their **predecessors**. Could they claim instruction fees as though they were the ones filing the suit?

To answer this, I found guidance in **Braeburn Ltd v Tony Gachoka & Another [2009] eKLR**. The issue to be considered was the amount of work done, the complexity of the work done by counsel.

In increasing the instruction fees awarded by the taxing master from Ksh 2500 to Ksh 125 000 the court noted:

The respondent's application was not an ordinary application but a very complex matter challenging the mode of execution and the provisions of Civil Procedure Act which provides for committal of a debtor to civil jail. The suit was transferred to a specialized division of the High Court where the Chief Justice constituted a bench of two judges to hear the application. The application had fourteen prayers. The Attorney General took an interest in the matter and entered appearance as amicus curiae.

Be that as it may the guiding principle is that the award of costs is an exercise in discretion. The same court stated:

"The taxing master's decision is an exercise in discretion and for this court to interfere, the taxing master must be shown to have gone wholly wrong"

It is evident from the reasons given for the wards made that the taxing master herein did not analyse the circumstances of the case and to determine whether the respondent was entitled to the full fees charged. This in view of the fact that the respondent had specific instructions on which they had given a legal opinion.

The deposit sought by the respondent was so as to;

- i) File an application striking out the defence.
- ii) Set the suit down for hearing.

The respondent did neither and the suit was dismissed for want of prosecution.

It is my view that the taxing master ought to have taken into consideration the work done, considering that the respondent had not instituted the suit, and never got to do what the applicant had instructed them to do.

The second relates to attendances, it was argued that there was no evidence of the alleged attendances, upon which some awards were made. I did not have the benefit of the court file and the taxing master ought to have confirmed the alleged attendances and made a note in the ruling.

There would be no justification for the amounts charged for mentions, and attending court for ruling as they are not in tandem with the ARO 2009.

Hence I find that the reference is merited.

What orders to issue?

The principles to bring to bear when dealing with the references of this nature were well articulated in S R D 'Souza & Others vs. C Ferrao & Others (1960) EA 602 which was a Court of appeal decision. It adopted the principles stated by Buckley IJ in the estate of Ogilvie: Ogilvie vs. Massey (1910) P 243.

"On questions of quantum the decision of the taxing master is generally speaking final. It must be a very exceptional case in which the Court will even listen to an application or review his decision. In question of quantum the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed; the Court will not interfere unless the taxing master is shown to have gone wholly wrong. If a question of principle is involved it is different; on a mere question of quantum in the absence of particular circumstances the decision of the taxing master is conclusive. I think that the learned judge ought not to have interfered."

In the circumstances it would not be prudent for me to interfere as I am not seized of all the facts. So, this matter is referred back to the taxing master to;

- i) Assess the instruction fees in light of the circumstances of this case.

ii) To assess the costs awarded for attendances as per the ARO 2009 and the evidence available in the court file.

iii) On photocopying etc. evidence of court receipts, as may be in the court file.

Orders accordingly.

This matter was due for Ruling on 25th of June 2020 but was not ready. Mr. Kamonjo Kiburi appeared and was given today's date. Neither he nor Mr. Githiru appeared.

Dated and signed and delivered via email at Nakuru this 30th Day of June 2020.

Mumbua T. Matheka

Judge

In the presence of:

Edna Court Assistant

Kamonjo Kiburi and Co Advocates for Applicant N/A

Githiru and Co Advocates N/A