



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
MISCELLANEOUS APP. NO.432 OF 2017
IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA
IN THE MATTER OF TAXATION OF COSTS BETWEEN CLIEND AND ADVOCATE

BETWEEN

LIKO AND ANAM ADVOCATES.....APPLICANT

VERSUS

EASY PROPERTIES LIMITED.....1ST RESPONDENT

STEPHEN ONYAMBU OMWENGA.....2ND RESPONDENT

PAMELA BWARI BURUCHARA ONYAMBU.....3RD RESPONDENT

RULING

(1) Before this Court is the Chamber summons dated 13th March 2019 by which LIKO AND ANAM ADVOCATES seeks the following Orders:-

1. THAT this Honourable Court be pleased to set aside the ruling of the Taxing Officer (Hon C. Wanyama) that the applicable schedule to tax/assess the applicant's Advocate/Client Bill of costs dated 25th October 2017 was schedule II of the Advocates Remuneration Order 2014 and not schedule 6 thereof.

2. THAT this Honourable Court be pleased to having regard to the proper schedule of the Advocates Remuneration order 2014 and full value of the subject matter in the amended/supplementary claim, adjust the figures, re-assess the fees due in respect to Items numbers 1, 3 items dated 3/4/2015, 5(a), 10 and 18 of the aforesaid Bill of costs at such reasonable amounts as the Honourable Court may determine or the same be referred back to another Taxing master with appropriate directions.

3. THAT this Honourable court be pleased to set aside the ruling of the Taxing Officer (Hon C. Wanyama) ignoring to tax items numbers 15,5(b), 5(c), 6,7,8, 13,15 item dated 29/11/2016, 17 and 20 of the Applicant's Advocate/Client bill of costs dated 25th October 2017 and proceed to assess the same at such reasonable amounts as the Honourable court may determine having regard to the applicable schedule of the Advocates Remuneration Order 2014 or the same be referred back to another Taxing Master with appropriate directions.

(2) The application which was premised upon Paragraph 11(2) of the Advocates (Remuneration)Order 2014, CAP 16q the laws of Kenya and all other enabling provisions of the was supported by the Affidavit of even date sworn by TIM AGUFANA LIKO, an Advocate of the High Court of Kenya.

(3) EASY PROPERTIES LIMITED (the 1st Respondent), STEPHEN ONYAMBU OMWENGA (the 2nd Respondent and PAMELA BWARI BURUCHARA ONYAMBU (the 3rd Respondent) all opposed the summons. In doing so they relied on the Replying affidavit dated 21st March 2019 sworn by the 3rd Respondent a Director of the 1st Respondent which Replying Affidavit was sworn on behalf of all the three Respondents. The Summons was canvassed by way of written submissions. The applicant filed its written submissions on 11th June 2019 whilst the Respondents filed their submissions on 19th June 2019.

BACKGROUND

(4) The Applicant's firm acted for the Respondents in an Arbitration matter. The applicants thereafter filed an Advocate/Client Bill of Costs dated **25th October 2017**. The Taxing master **Hon. Claire Wanyama** delivered a ruling on **12th March 2019** in which she taxed the Bill at **Kshs.2,753,915**. The applicant subsequently filed a Reference by way of this Chamber Summons seeking that the High Court set aside the decision of the Taxing Officer as well as any consequential orders thereto and that the Bill of costs be remitted back to a different Taxing Officer for taxation.

ANALYSIS AND DETERMINATION

(5) I have carefully considered the submissions of both parties in this matter. As a general rule the High Court will not interfere with the decision of a taxing officer unless it is shown that said decision involved an error in principle and/or law. In **PREMCHAND RAICHAND LIMITED & ANOTHER –VS- QUARRY SERVICE OF EAST AFRICA LTD & ANOTHER [1972]E.A 162** it was held thus:-

“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 fees awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.”

(6) The Applicant contends that the Taxing master applied the wrong schedule by taxing the **Bill under Schedule II** of the Advocates (Remuneration) Order, whilst the Bill ought to have been taxed under **Schedule 6**. The applicant cites **Rule 10(2)** of the **Arbitration Rules 1997** which provide that the applicable schedule to taxation of costs arising from Arbitration matters is the schedule applicable to High Court matters which they submit is **schedule 6** and not **schedule II** which provides for costs of proceedings before tribunals other than those under schedules 8 and 9 of the Order.

(7) In **KIPKORIR TITOO & KIARA ADVOCATES –VS- DEPOSIT PROTECTION FUND BOARD Civil Appeal No.220 of 2004**, it was held that in taxation the failure to take into account relevant considerations may include failure to apply the instruction fees or costs as provided in **“the appropriate schedule of the Remuneration Order”** or where the taxing officer has committed an error of principle.

(8) In the ruling dated **12th March 2019**, the Hon Taxing Officer stated as follows:-

“...the Bill is taxed under Schedule II of the Advocates Remuneration Amendment Order 2014.”

(9) A reading of **Rule 10(2)** of the **Arbitration Rules** makes it clear that the Arbitration Cause Fee ought to be charged as per High court Provisions. The High Court fee provisions are provided for under **Schedule 6**. Therefore, I find that the Taxing Master ought to have applied **Schedule 6** in taxing Advocate/Client Bill of Costs.

(10) The Applicant has also submitted that the taxing master erred in her assessment of the value of the subject matter of the suit. In her Ruling the taxing master assessed the suit value to be **Kshs.268,092,357** **“being the amount claimed in the amended claim.”** The Applicant however argues that there was an additional claim for loss of profits of **Kshs.264,231,828** bringing the entire claim to a total of **Kshs.532,324,185**.

(11) On their part the Respondent submit that the value of the subject matter was not ascertainable from the pleadings before the arbitrator and that the taxing officer is not only limited to the pleadings judgment and settlement is determining the value of the subject matter of the suit thus the taxing matter properly exercised her discretion in determining the value of the subject matter of the suit to be **Kshs.268,092,357.00**. In support of this the contention the Respondents rely on the case of **JORETH LIMITED –VS- KIGANO & ASSOCIATES [2002] eKLR**, where it was held:-

“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 xing officer is thus not only limited to the pleadings, judgment and settlement in determining the value of the subject matter of a suit, and is granted such discretion by paragraph 13A of the Advocates (Remuneration) Order which provides as follows.”

(12) The case of **KAMUNYORI & CO. ADVOCATES –VS- DEVELOPMENT BANK OF KENYA LIMITED [2015] eKLR**, set out the principles which a taxing officer is enjoined to follow while taxing a Bill of costs as follows:-

“There are principles which a taxing officer is enjoined to follow while Taxing Bills of Costs. It is axiomatic that an advocate is entitled to claim instructions fee. Where an advocate is instructed by a client to sue or defend a suit, providing the advocate does the work, he is entitled to charge for the work he has done. In determining the instructions fee in an advocate/client Bill of Costs, the relevant provision in the Advocates Remuneration Order is Schedule VI B. It shows that the instructions fee is calculated on the basis of the value of the subject matter in the suit where it can be determined from the pleadings or the judgment or where parties have entered into a settlement.”[own emphasis]

(13) Similarly in **PETER MUTHOKA & ANOTHER –VS- OCHIENG & 3 OTHERS [2019] eKLR**, it was held:-

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

(14) In this case annexed to the Bill of Costs dated **25th October 2017** is the Claimants Supplementary Statement of claim. Part B thereof outlines the claims of investment the claimant had made to the project. The claim was for **Kshs.268,092,367.03** paragraph 4 of Part C includes a claim for **Kshs.264,231,828** for loss of profits. Paragraph j provides a summary of the claim as follows:-

Capital Investment - 268,092,357

Loss of Profits - 264,231,828

Total claim - **532,234,185**

Based therefore on the foregoing, it would appear that the taxing master erred in assessing the value of the subject matter which is quite easily discernible from the pleadings on record.

(15) For the above reasons, I find that there was indeed an error in principle and for that reason I hereby set aside the Ruling of the Taxing Master dated **12th March 2019**. The matter to be referred back for taxation before a different taxing officer. Costs of this summons will be in the cause. It is so ordered.

Dated in Nairobi this 19th day of June 2020.

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Justice Maureen A. Odera