



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL & TAX DIVISION

HIGH COURT APPEAL REFERENCE 394 OF 2017

QUESTWORKS LIMITED.....APPLICANT

VERSUS

TREBORUAMAK REAL ESTATE INVESTMENT

MANAGEMENT COMPANY LIMITED.....1ST RESPONDENT

TREBORUAMAK CAPITAL COMPANY

LIMITED.....2ND RESPONDENT

JUDE ANYIKO.....3RD RESPONDENT

RULING

The Applicant's application /Reference of 2nd September 2019 takes issue with the Taxing Officer's decision of 21st August 2019 on item 1 of the 1st Respondent's Bill of Costs of 24th January 2019. The Applicant's claim is based on the fact that the Taxing officer erred in law in failing to consider and be guided by **Schedule 6 (A) (1) (j) (a) Appeals of the Advocates Remuneration (Amendment) Order 2014**.

The Learned Taxing Officer erred in law and fact while exercising discretion by taxing instruction fees at Ksh 100,000/-which was manifestly high in the circumstances and in comparison with the minimal sum of Ksh 25,200 provided by the Advocates Remuneration Schedule on Appeals. The Applicant deposed that the appeal was straight forward and cannot be said to have been complex at all.

The 1st Respondent filed grounds of opposition on 30th October 2019 and opposed the Reference on grounds;

The Taxing Officer's decision was in accordance with relevant principles of law and there is no error of principle or in exercise of discretion.

The Taxing Officer considered submissions by Counsel and took into account the nature of the matter.

The 2nd 3rd & 4th Respondents Grounds of Opposition filed on 25th September 2019 reiterated submissions by the 1st Respondent and added that **Schedule 6 (A) (1) (j) (a) Appeals of the Advocates Remuneration (Amendment) Order 2014** only indicated the minimum as Ksh 25,200/- and allowed the Taxing officer to exercise discretion.

DETERMINATION

The Court considered the submissions on reference challenging the award of Ksh 100,000/- as instruction fees for an appeal.

The Appellant relied on case of ***Republic vs Ministry of Agriculture & 2 Others Exparte Muchiri W'Njuguna & 6 Others [2006] eKLR*** as quoted in ***KANU National Elections Board vs 2 Others vs Salah Yakub Farah [2018] eKLR***.

The 1st Respondent relied on the case of ***Nyangito & Co advocate vs Doinyo Lessos Creameries Ltd [2014] eKLR*** on circumstances under which this Court may interfere with Taxing Officer's exercise of discretion.

“a) It must be 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;

b) It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration order itself. Some of the relevant factors to be taken into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved; the interested of the parties, the general conduct of the proceedings and nay direction by the trial judge;

c) If the court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount was high.

The Case of Joreth Limited vs Kigano & Associates [2002] eKLR on assessment/determination of value of the subject matter.

The 2nd 3rd & 4th Defendants relied on the case of Republic versus Competition Authority Ex parte Ukwala supermarket Limited & Anor [2017] eKLR on when this Court may interfere with the Taxing Officer's decision.

This Court relies on In Trans National Bank Limited -vs- Elite Communication Limited & Another [2005] eKLR; Justice Waweru stated as follows;

“on the issue of complexity of the matter, I would observe that the length of the counsels’ submissions, or indeed the length of the judge’s decision, are not necessarily indicative of the complex nature of the matter.”

In the case of Joreth Ltd Vs Kigano & Associates Civil Appeal No 66 OF 1999, the Court of Appeal stated of Instruction fees;

“We would like at this stage [to] point out that the value of the subject matter of a suit for purposes of taxation of the Bill of Costs ought to be determined from the pleadings, judgment of 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, nature and importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any discretion by the Trial Judge and all other relevant circumstances.”

In Republic Vs Ministry of Agriculture & 2 Others Exparte Muchiri W’njuguna & 6 Others [2006] eKLR, OJUANG J (as he then was) stated;

“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 Taxing Officer, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award is too high or too 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 error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle.”

Schedule 6 (A) (1) (j) (a) Appeals of the Advocates Remuneration (Amendment) Order 2014 prescribes on Appeals a minimum of Ksh 25,200/-. This means that the Schedule does not prescribe the maximum amount to be awarded it is not capped.

However, the Taxing Officer ought to apply judicial discretion in awarding reasonable instruction fees on appeal.

I have looked at the Court record, the appeal was heard and determined before Hon. LJ Ngetich. The subject matter involved Ksh 7,000,000/ as per the Plaintiff and the dismissed Counterclaim the Appellant alleged it was entitled to Ksh 13,500,000/-. The Parties Counsel prepared pleadings for the appeal and served other parties in the said proceedings. The Counsel prepared submissions and served. The parties were represented in Court by Counsel on 4th December 2017, 18th April 2018, 3rd July 2018, 16th July 2018, 18th July 2018 and on delivery of the Judgment on 7th September 2019. All these processes necessitated the Counsel input. The length of the Judgment by and of itself does determine complexity but the circumstances of the appeal cumulatively. This Court finds that the amount awarded as instruction Fees in the circumstances was reasonable and dismiss the References with costs.

DISPOSITION

1. The reference(s) is/are dismissed with costs

DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND JUNE 2020. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

N/A FOR THE APPLICANT/APPELLANT

MS. GACHARA H/B MR. MUREITHI FOR 1ST RESPONDENT

MS KABURU FOR THE 2ND 3RD & 4TH RESPONDENTS