



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
MISCELLANEOUS APPLICATION NO.23 OF 2019

DESAI SARVIA & PALLAN ADVOCATESAPPLICANT

VERSUS

TAUSI ASSURANCE COMPANY LIMITED.....RESPONDENT

RULING

1. The applicant herein, **Desai Sarvia & Pallan Advocates** (hereinafter “**the Advocate**”) acted for the respondent (hereinafter “**the Client**”) in civil proceedings before the lower court. The advocate/client relationship did not however last up to the conclusion of the lower court case thereby prompting the advocate to file his advocate/client Bill of Costs (BOC).

2. The Deputy Registrar delivered the ruling on the BOC on 4th July 2019 thereby precipitating the filing of the application dated 9th August that is the subject of this ruling.

3. In the said application, the applicant seeks orders that:

1. Part of the Honourable Deputy Registrar’s ruling and order on taxation dated and delivered on 4th July 2019 which relates to the instruction fees which were taxed and allowed at Kshs 15,000/=, costs which were taxed and allowed at Kshs 27,425/=, 50% advocate client increase which was taxed and allowed at Kshs 13,716/= the 16% VAT which was taxed and allowed at Kshs 6,583/= as set out in the advocate/applicant’s Notice of Objection to Taxation herein dated 9th July 2019 be reviewed and set aside, and the advocate/applicant’s Bill of Costs dated 17th January 2019 be remitted to the taxing officer for re-taxation of those items with appropriate directions:

2. The costs of this objection application be awarded to the advocate/applicant.

4. The application is supported by the affidavit of **SUNSDEEP SARVIA** and is premised on the grounds that:-

1. The Honourable Deputy Registrar erred in taxing and allowing the instructions fees at Kshs 15,000/=, costs at Kshs 27,425/=, the 50% advocate client increase at kshs 13,716/=, and the 16% VAT at Kshs 6,583/= which amounts are all so manifestly low as to amount to errors of principle in the circumstances of this case;

2. The Honourable Deputy Registrar failed to exercise her discretion judiciously and reasonably in her taxation of the five disputed items;

3. The Honourable Deputy Registrar erred in awarding the applicant Kshs 15,000/= in instruction fees which is kshs 10,200/= less than the minimum instruction fees set out and chargeable under the applicable paragraph 2 of Schedule 7 of the Advocates Remuneration Order 2006;

4. The Honourable Deputy Registrar erred in taking into account irrelevant factors when she assessed the instruction fees;

5. In the circumstances the applicant Bill of Costs dated has been wrongly taxed as per the ruling of the Honourable Deputy Registrar dated 4th July 2019.

5. The Respondent/Client opposed the application through the replying affidavit of its Advocate **Mr. Fredrick Otieno Mege** who avers that the impugned ruling is complete and sets out the reasons for the Taxing Master’s decision and further; that the ruling was delivered in the presence of the applicant and did not require any further explanation.

6. He further states that the application is time barred having been filed on 13th August 2019 outside the prescribed period. He avers that the applicant did not require a typed copy of the Deputy Registrar's ruling in order to file the reference.

7. I have carefully considered the application dated 9th August 2019, the client's response and the parties' respective submissions together with the authorities that they cited. The main issues for determination are firstly whether the instant application is time barred and secondly whether the decision of the Taxing Master dated and delivered on 4th July 2019 should be reviewed and/or set aside, and the Bill of Costs dated 17th January 2019 remitted to the taxing office for re-taxation.

8. The issue of the timelines of the instant application Rule 11(1) and (2) of the Advocates (Remuneration) Order 1962 (hereinafter "ARO") stipulates as follows:

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

9. In the present case, it was not in dispute that upon the delivery of the impugned ruling on 4th July 2019, the applicant filed a Notice of Objection on 10th July 2019 in compliance with Rule 11(1) of Advocates Remuneration Order. The Taxing Master responded to the Notice of Objection on 18th July 2019 stating that the reasons for her ruling were contained in the ruling which could be obtained in the registry. The applicant concedes that it received the Taxing Masters letter on 22nd July 2019 and it thus follows that in line with Rule 11(2) of the Advocates Remuneration Order, the applicant ought to have filed this reference within 14 days on or before 5th August 2019. The instant application was however filed on 9th August 2019 four days after the expiry of the 14 days as have already stated in this ruling.

10. The applicant argues that he was not able to obtain a typed copy of the Taxing Masters ruling containing the reasons for the taxation on time and that he received the same on 31st July 2019. According to the applicant, the instant application is not time barred having been filed on 9th August 2019 barely 10 days after he obtained the typed copy of the ruling.

11. My finding is that Rule 11(2) Advocates Remuneration Order is clear that 14 days begin to run from the date that the applicant receives the reasons for the ruling on taxation.

12. In the present case, I find that the reasons were received by the applicant on 22nd July 2019 when he acknowledges that he received the Taxing Masters response to the Notice of Objection. It was not disputed that the applicant and/or his representative was present in court on 4th July 2019 when ruling on taxation was delivered. I therefore find that It was not necessary for the applicant to await the receipt of the typed ruling before he could file the reference herein.

13. I therefore find that the instant application is time barred having been filed after the expiry of the 14 days provided for under Rule 11 (2) Advocates Remuneration Order.

14. My above finding on the issue of timelines notwithstanding and assuming that this court is wrong on the said finding, I am still minded to consider the merits of the prayer to set aside/review the impugned ruling and to remit the Bill of Costs for taxation.

15. The applicant faulted the Taxing Master for awarding him Kshs 15,000/= as instructions fees without giving reasons which amount he contends is inordinately low thus amounting to a grave error of principle. It was common ground between the parties that no specific sum was sued for or awarded before the lower court and that the applicable provision for taxation of instructions fees is paragraph 2 of Schedule VII of Advocates Remuneration Order which stipulates as follows: -

"In any suit or appeal by the nature of which no specific sum is sued for or awarded in judgment (other than proceedings falling under paragraph 3 below). Such costs as the court in its discretion but not less than Kshs 5,040/= if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance of difficulty or urgency of the matter) not to exceed Kshs 25,200/=."

16. Courts have taken the position that they will not interfere with the Taxing Master's discretion in taxing bills. In *Rachier & Amollo Advocates LLP v National Hospital Insurance Fund Board of Management* [2019] eKLR, that:

"The principle to be applied when assessing instruction fee in a suit are well settled. The Court of Appeal in the case of Joreth Ltd v Kigano & Associates [2002] eKLR outlined the principle as follows:

"We would at this stage point out that the value of the subject matter of a suit for the purpose 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 ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among 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"

17. Similarly, the principles upon which a judge of the superior court interferes with the taxing officer's exercise of discretion were outlined

by Ojwang J (as he then was) in the case of *Republic v Ministry of Agriculture and 2 Others; Ex-parte Muchiri W’Njuguna & others* [2006] as follows: -

“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 a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award is somewhat too high or too low; it will only interfere if it thinks the award is so high or so 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 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. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state, not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. 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... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularized justification of the mode of exercise of any discretion provided for.... The complex elements in the proceedings which guide the exercise of the taxing officer’s discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs....”

18. In *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR, it was held that:

“The general principles governing interference with the exercise of the taxing master’s discretion were authoritatively stated by the South African court in the case of Visser vs Gubb [1981 \(3\) SA 753 \(C\)](#) 754H – 755C as follows:-

“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

19. Taking a cue from the above cited cases and the principles governing review/setting aside of rulings on taxation, I find that the rationale behind the principle is to avoid unnecessary contests on taxation given that the taxing master has a free hand or discretion in determining the award due to an applicant under the Bill of Costs. In the present case, it is clear that the Taxing Master had a free hand, in determining the amount due to the advocate for instruction fees, to make an award between the minimum kshs 5,040/= and maximum of kshs 25,200/=. The Taxing Master awarded Kshs 15,000. I find that the said award of Kshs 15,000 is reasonable in the circumstances of this case and cannot be said to be erroneous or low so as to warrant this court’s interference with the Taxing Master’s discretion.

20. I note that the Taxing Master made the following remarks in her ruling on taxation.

“I have considered the matter at hand and interest of the parties in the suit as well as the injury sustained and award Kshs 15,000 for instructions fees. Item 2, 3 are allowed as drawn item 4 and 7 are allowed as drawn, the matter was scheduled for hearing by the plaintiff’s advocate.”

21. I also note that the Taxing Master took cognizance of the provisions of paragraph 2 Schedule VII of Advocates Remuneration Order in making the award for instructions fees.

22. Having regard to the contents of the impugned ruling and the reasons advanced by the Taxing Master, I find that the Taxing Master cannot be said to have adopted the wrong principles in coming up with the amount due to the advocate herein.

23. In a nutshell, I am not satisfied that the instant application meets the threshold for reviewing or setting aside the ruling on taxation. Consequently, I dismiss application dated 9th August 2019 with no orders as to costs.

24. I direct that this ruling be adopted and filed in other related and similar applications between the same parties being Miscellaneous 20 and 22 of 2019. It is so ordered.

Dated, signed and delivered via Microsoft Teams at Nairobi this 11th day of June 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the

17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Sarvia for the Applicant

Court Assistant: Sylvia