



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIV. APPLICATION NO. 289 OF 2016

MAJUNE KRAIDO

T/A KRAIDO & CO. ADVOCATES..... APPLICANT

-VERSUS-

FAULU MICROFINANCE BANK LTD..... RESPONDENT

RULING ON REFERENCE

1. On 12th September 2019, the learned Taxing Officer taxed the Bill of Costs dated 21st June 2019 in the sum of Kshs 134,905/=.
2. The Applicant, **MAJUNE KRAIDO T/A KRAIDO & CO. ADVOCATES**, was dissatisfied with the Ruling, and has lodged a Reference before me.
3. It was the contention of the Applicant that the Taxing Officer had failed to consider the fundamental guidelines and practice directions which are applicable during the taxation of Party and Party Bills of Costs.
4. The Applicant (who shall henceforth be cited as "*Kraido*") had originally been instructed by **FAULU MICROFINANCE BANK LIMITED** (hereinafter "*FAULU*"), in the case of **MARCELLAS OCHIENG MUSUMBA Vs FAULU KENYA LIMITED, KISUMU HCCA NO. 118 OF 2012.**
5. There appears to have arisen a fall-out between Faulu and Kraido, which led to taxation of the Advocate/Client Bill of Costs dated 7th December 2016.
6. On 15th October 2018 the Taxing Officer rendered her Ruling, in which she taxed the costs in the sum of Kshs 62,640/=.
7. Kraido was dissatisfied with the sum awarded, and therefore lodged a Reference to challenge it.
8. On 29th May 2019 this Court dismissed the Reference, thus upholding the decision to award costs of Kshs 62,640/=, to Kraido. The Costs of the Reference were awarded to Faulu.
9. Thereafter, Faulu lodged its Bill of Costs dated 21st June 2019. That Bill of Costs was taxed and allowed in the sum of Kshs 134,905/=.
10. In a literal sense, Faulu successfully defended the decision to award Kraido costs in the sum of Kshs 62,40/=; and for its efforts Faulu was awarded costs in the sum of Kshs 134,905/=. In effect, Faulu was awarded costs whose value was more than double the value of the subject matter of the Certificate of Taxation which they had successfully defended. I find that that alone is an affront to my sense of justice. I so find because Kraido was entitled to be paid fees for the services the Law Firm had rendered. Yet, if this court were to uphold the decision which the Taxing Officer delivered on 12th September 2019, it would imply that Kraido not only loses what it had worked for, but also pays the client double the sum which the advocate ought to have received!
11. In a nutshell, the costs awarded were so inordinately high that the learned Taxing Officer must be deemed to have applied a wrong principle when exercising her discretion during the process of taxation.
12. In arriving at this conclusion, I am alive to the fact when called upon to determine a Reference from Taxation, the court should not interfere with the decision rendered by the Taxing Officer just because the sum awarded appeared either too high or too low. It is only when the court was satisfied that the award in question was either so high or so low as to amount to an injustice to one party or the other, that the court could interfere with the decision of the Taxing Officer.

13. One of the guiding principles when determining appropriate costs is the overall balance that must be maintained between the interests of the parties in the case.
14. In this case, it appears to me that the Taxing Officer failed to maintain the requisite balance between the interests of the parties.
15. In respect to Instruction Fees, the Taxing Officer applied Paragraph 1 (viii) of Schedule 6, noting that the prescribed fee for lodging a Reference was Kshs 5,000/=.
16. She then enhanced the said Instruction Fees to Kshs 20,000/=, which was described as being “reasonable.” The reason given for enhancing the said Instruction Fee was that the Taxing Officer had taken;

“..... into consideration the nature and importance of the matter as stated”

17. Broadly speaking, that is one of the relevant factors that are taken into account by the Taxing Officer during taxation. However, I find no reasons which might have informed the decision to enhance the prescribed fee by a factor of 4.
18. The Taxing Officer ought to have specifically identified and cited actual aspects of the case which guided her decision to enhance the fees four-fold. In the absence of such specificity, I find that the huge enhancement lacked a sound basis.
19. Another issue of concern is that the learned Taxing Officer did not appear to make a determination on the question whether or not Faulu was entitled to Instruction Fees.
20. Faulu was the client of Kraido. Therefore, when Kraido made submissions to the effect that Faulu was not entitled to Instruction Fees, it was essential that that issue be determined.
21. Ordinarily, a client gives instructions to an advocate, who then represents him/her in a case.
22. If the Advocate/Client relationship faltered, resulting in cessation of the same, (such as in this case), the Advocate may claim Instruction Fees when he files his Advocate/Client Bill of Costs.
23. The question that then arises is whether or not the client would be entitled to claim Instruction Fees when responding to the Bill of Costs or thereafter, when filing a Reference arising from the Taxation of the Bill of Costs.
24. The Taxing Officer must first determine whether or not Faulu was entitled to Instruction Fees, before the Taxing Officer can proceed to the next step if assessing the quantum thereof.
25. If the Taxing Officer were to conclude that Faulu was not entitled to Instruction Fees, no such fee would be assessed.
26. Another issue that arises in this Reference is as regards the need to verify from the record of the proceedings, whether or not each of the items in respect to which fees had been claimed had been awarded costs. There might be instances wherein the party whose Bill was being taxed had had costs of particular applications or some attendances awarded against him. Care must be taken to ensure that the said party is not granted costs in such instances.
27. Of course, by dint of the provisions of Section 27 (1) of the Civil Procedure Act, costs would ordinarily follow the event. However, the said statutory provision also acknowledges that, subject to such conditions and limitations as may be prescribed, and also subject to any provisions of the law relating to costs, the court or judge has full power to determine by whom costs are to be paid.
28. It therefore follows that when the court awarded costs against the party whose Bill of Costs was being taxed, the said party cannot claim such costs in his Bill.
29. In this case, Kraido had filed a Notice of Preliminary Objection, which was later withdrawn. In the Bill of Costs, the withdrawal of the Preliminary Objection is listed as Item No. 41.
30. As the withdrawal was done at the instance of the person who had lodged the Preliminary Objection, and because there was no express order by the court to award costs thereof, I find that the Taxing Officer was obliged to determine whether or not the party with the Bill was entitled to such costs.
31. After withdrawing the Notice of Preliminary Objection, Faulu served Kraido. The Taxing Officer must confront the question about why and how Faulu became entitled to costs for serving Kraido with information about that fact. It would be interesting to hear about the justification for expecting Kraido to bear the costs incurred when Faulu withdrew the Objection that has been lodged by Faulu.
32. Ordinarily, when a party files a pleading or any other document, and thereafter chooses to withdraw it, that is a sign that the party considered it as unnecessary.
33. For all the reasons given herein, I find merit in the Reference. I therefore set aside the Ruling delivered by the Taxing Officer on 12th September 2019.

34. I order that the Bill of Costs dated 21st June 2019 shall be taxed de novo, and that the said taxation will be conducted by a Taxing Officer other than Hon. A. Odawo.

35. The costs of the Reference are awarded to the Applicant.

DATED, SIGNED and DELIVERED at KISUMU

This 27th day of July 2020

FRED A. OCHIENG

JUDGE