



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**MISC. CIV. APPLICATION NO. 290 OF 2016**

**MAJUNE KRAIDO  
T/A KRAIDO & CO. ADVOCATES .....APPLICANT  
VERSUS**

**FAULU MICROFINANCE BANK LTD. .... RESPONDENT  
RULING ON REFERENCE**

The matter before me arises from the decision rendered by the learned Taxing Officer on 12<sup>th</sup> September 2019. The said decision was in respect to the Bill of Costs dated 21<sup>st</sup> June 2019.

1. It was the Applicant's case that the Taxing Officer failed to consider the fundamental guidelines and practice directions which govern the process of taxation.
2. The Applicant expressed the view that the Bill of Costs ought not to have been taxed at a higher sum than the Advocate/Client Bill of Costs which had already been paid, in the sum of Kshs 106,290/=.
3. The contested decision awarded costs in the sum of Kshs 134,905/=.
4. In the circumstances, the Applicant submitted that it was not in order for the Taxing Officer to award costs that were higher than the principal sum.
5. The Applicant also submitted that the Taxing Officer had failed to take into account the fact that the Reference, in respect to which the Bill of Costs relates, arose from proceedings commenced by way of a Chamber Summons.
6. As far as the Applicant was concerned, the following words of **Schedule 6** of the **Advocates Remuneration Order** were pertinent;

*'The fees for instructions in suits shall be as follows, unless the taxing officer, in his discretion shall increase or (unless otherwise provided) reduce it .....*

*(a) to sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion .....*"

7. It was the Applicant's position, therefore, that the decision be set aside, and that the Bill of Costs be taxed afresh.
8. In answer to the Reference the Respondent urged this court to find that the said Reference was incompetent and made in bad taste against the decision of the learned Taxing Officer.
9. The Respondent invited the court to find that the Taxing Officer fully appreciated that the provisions of the **Advocates Remuneration Order, 2014** were applicable to the matter before her.
10. The view of the Respondent was that the Taxing Officer had properly taken into account the provisions of **Schedule 6**, when arriving at her decision.
11. The Respondent urged the court to find that the Taxing Officer had given reasons for each of the items which was disputed during the process of taxation.
12. The Respondent submitted that the Reference ought to be dismissed with costs.
13. On the question of Value Added Tax (VAT), the Respondent submitted that the Taxing Officer had correctly held that an Advocate was

entitled to VAT on Instruction Fees.

14. Accordingly, the Respondent submitted that the award of VAT on the Party and Party Bill of Costs was proper.

15. The Respondent was convinced that the Taxing Officer duly applied the relevant principles when she taxed the Bill. Specifically, the Respondent submitted that the Taxing Officer had taxed the Bill on its merits, and also that she had exercised her discretion judicially.

16. In the opinion of the Respondent, the Reference was incompetent because the Applicant had not pointed out any strange principles that had been applied by the Taxing Officer.

17. Finally, the Respondent invited the court to award her the costs of the Reference, because the said Reference lacked merit.

18. As I commence the exercise of evaluating the matter before me, I deem it necessary to delve into its history.

19. On 22<sup>nd</sup> December 2016, Messrs MAJUNE KRAIDO Trading As KRAIDO & Co. ADVOCATES filed a Advocate/Client Bill of Costs.

20. Simultaneously with the said Bill of Costs, the Law Firm sought orders to have the same taxed.

21. It is instructive to note that the Bill of Costs was in respect of legal services which the Law Firm rendered in favour of the Applicant herein, in the case of **BAHATI MURWA Vs FAULU KENYA LIMITED, KISUMU HCCC NO. 20 OF 2014.**

22. The Bill of Costs dated 7<sup>th</sup> December 2016 was, on 15<sup>th</sup> October 2018, taxed and allowed in the sum of Kshs 43,650/=.

23. The Law Firm was dissatisfied with the decision of Taxing Officer, and therefore it lodged a Reference dated 13<sup>th</sup> November 2018.

24. On 29<sup>th</sup> May 2019 I delivered a Ruling on the Reference, holding that the generalized criticism of the taxing officer was insufficient to warrant an order to set aside the Ruling on taxation. Therefore, the Reference was dismissed, with costs to the Respondent.

25. On 21<sup>st</sup> June 2019 the Respondent, (Faulu Microfinance Bank Limited, who shall henceforth be cited as “Faulu”), lodged a Bill of Costs for taxation. The said Bill of Costs is dated 21<sup>st</sup> June 2019.

26. On 12<sup>th</sup> September 2019 the learned Taxing Officer rendered her Ruling, in which Faulu was awarded costs in the sum of Ksh 134,905/=.

27. I note that during the process of taxation, both sides put forward oral submissions. Faulu submitted that the Law Firm (hereinafter “Kraido”) was not entitled to Instruction Fees as the entire proceedings had been commenced by Chamber Summons; instead of either a Complaint, Petition or an Originating Summons.

28. But Kraido responded that the Law Firm had most certainly been instructed to defend a Bill of Costs which had cited the Value of the suit property as Kshs 1,500,000/=. Taking into account the alleged Value of the suit property, it was contended that the Instruction Fee of Kshs 150,000/= had been drawn to scale.

29. In her considered opinion, the learned Taxing Officer held that;

*“... the instruction fee was taken to lodge a reference which was done by way of an application, and not instruction fees of lodging an entire suit that is based on the value of the subject matter.”*

30. I find that the learned Taxing Officer was very right, as the Bill of Costs was not the Party and Party Bill of Costs in the case of **BAHATI MURWA Vs FAULU KENYA LIMITED, KISUMU HCCC NO. 20 OF 2014,** wherein the value of the subject matter would have been a factor for consideration during taxation.

31. The Taxing Officer identified the applicable fee to be Kshs 5,000/=. However, she then proceeded to enhance it to Kshs 20,000/=. In effect, the basic fee was increased four-fold.

32. I hold the considered view that the Taxing Officer did not give any sound reason that would justify such a huge increase to the prescribed fee.

33. Secondly, I find that the Taxing Officer was right to have analyzed the rest of the items on the Bill of Costs, even though the same were not opposed. I so find because it is the role of the Taxing Officer to issue a Certificate of Taxation, after completing the exercise of taxation.
34. It would be a serious blot on the reputation of a Taxing Officer if the Certificate of Taxation were to contain a figure which could not be verified through a scrutiny of the record of the proceedings, including receipts issued by the Court.
35. It was the responsibility of the Taxing Officer to verify, not only that the Bill of Costs was drawn to scale, but also that the Court records reflected each of the attendances cited in the Bill, and also that the court had awarded the costs being claimed.
36. For instance, the sum of Kshs 1,000/= was claimed for “*Drawing a Notice of Preliminary Objection*” on 7<sup>th</sup> April 2017.
37. The Court records show that on 23<sup>rd</sup> May 2017, the said Notice of Preliminary Objection was withdrawn.
38. The question that the Taxing Officer must ask himself or herself is whether or not the person who had withdrawn his own Preliminary was entitled to the costs of the same.
39. Ordinarily, the Judge would have made a decision on the issue concerning the party to be awarded the costs such as for court attendance on any particular date, or the costs for any particular application.
40. Of course, when the Court has made an express determination about the party entitled to particular costs, the Taxing Officer is obliged to give effect to such determination.
41. But if, as in this case, a Preliminary Objection was withdrawn at the instance of the party who had drawn it, there is no order by the court, about the costs of the said Preliminary Objection. It is in a situation such as this, that the Taxing Officer should make a determination.
42. When called upon to make such a determination, the Taxing Officer would derive guidance from **Section 27 (1)** of the **Civil Procedure Act**, which stipulates as follows;
- “Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force for costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers; Provided that the costs of any cause or matter or issue shall follow the event unless the Court or judge shall for good reason otherwise order.”*
43. If costs ordinarily follow the event, the Taxing Officer will need to determine whether or not the Respondent herein was either awarded costs of the withdrawn Preliminary Objection, or in the event that the court did not expressly award costs thereof, would the Respondent be entitled to costs of that which they withdrew?
44. I also note that the parties before the court were **FAULU** and their erstwhile Advocates.
45. If Faulu was entitled to “*Instruction Fees*”, the question that would need to be addressed regards the identity of the person who gave instructions for Faulu.
46. Ordinarily, it is Clients who give instructions to their advocates. The advocate would then represent the client against another party.
47. In this case Faulu was, originally, the client of Kraido. The said Law Firm represented Faulu in the case against **BAHATI MURWA**. It is thus easy to appreciate how Kraido became entitled to claim Instruction Fees, when the Law Firm put together its Advocate/Client Bill of Costs.
48. The Taxing Officer needs to now determine whether or not Faulu would be entitled to claim Instruction Fees against the Law Firm.
49. It is my finding that in the Ruling dated 12<sup>th</sup> September 2019, the learned Taxing Officer did not make a considered decision on that issue.

50. Finally, I note that the Court had already upheld the earlier decision of the Taxing Officer, wherein the Law Firm had been awarded taxed costs amounting to Kshs 43,650/=.

51. In my considered opinion, the learned Taxing Officer was enjoined to place that figure at the centre of her considerations when taxing the Bill of Costs dated 21<sup>st</sup> June 2019.

52. I find that costs in the sum of Kshs 134,905/= was so inordinately high that the learned Taxing Officer must have made an error in the manner she reached that determination.

53. Accordingly, the Reference is successful. I set aside the Ruling dated 12<sup>th</sup> September 2019, and I direct that the Bill of Costs dated 21<sup>st</sup> June 2019 be taxed de novo. I further direct that the taxation be conducted by a Taxing Officer other than Hon. A. Odawo.

54. Costs of the Reference are awarded to the Applicant.

**DATED, SIGNED and DELIVERED at KISUMU This 27<sup>th</sup> day of July 2020**

**FRED A. OCHIENG**

**JUDGE**