



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI-MILIMANI**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC. CIVIL APPLICATION NO. E265 OF 2019**

**IN THE MATTER OF THE ADVOCATES ACT CAP 16**

**AND**

**IN THE MATTER OF THE ADVOCATE-CLIENT BILL OF COSTS**

**AND**

**IN THE MATTER OF NBI HC COMM NO. 83 OF 2019, VICTORIA**

**COMMERCIAL BANK LIMITED v MALPLAST INDUSTRIES LIMITED**

**EDDY NICHOLAS O ORINDA P/A ONE AND ASSOCIATES ADVOCATES....APPLICANT/ ADVOCATE**

**VS**

**VICTORIA COMMERCIAL BANK LIMITED.....RESPONDENT/ CLIENT**

**RULING**

1. This ruling is in respect to the applicant/advocate's application dated 5<sup>th</sup> November 2019 and the respondent's/client's reference dated 19<sup>th</sup> November 2019. When the matter came up for directions on 27<sup>th</sup> January 2020, the parties herein agreed to canvass both applications concurrently. I will, in this ruling, determine the client's reference first as its determination will have a bearing on the advocate's application.

2. The client's application is brought under Rule 11 of the Advocates Remuneration Order (ARO), the Advocates Act and Section 3A of the Civil Procedure Act. The client seeks the following orders:

***a. THAT the ruling and the order on taxation delivered herein on 24<sup>th</sup> October 2019 be varied and/ or set aside.***

***b. THAT this Honourable court be pleased to tax the Bill of costs dated 27/06/2019 afresh and/or make directions as to fresh taxation before a different taxing master.***

***c. THAT costs of this reference be provided for.***

3. The application is supported by the affidavit of CLEMENT GITAU who avers that the bill of costs relates to instructions issued to the advocate to demand that the client's customer clears the loan arrears within 7 days. He avers that the Taxing Master erred in principle by misconstruing the subject matter of taxation thereby completing the taxation on the wrong premises. He also faults the Taxing Master for allowing the instruction fees on the amount on the debenture when the main prayer sought the suit that gave rise to the taxation was for specific performance. The client therefore contends that the award made by the Taxing Master was manifestly excessive and erroneous.

4. Parties canvassed the application by way of written submissions. The client submitted that the Taxing Master erred in principle in adopting the value of the debenture in determining the instruction fees when the suit was for not for a liquidated sum but for specific performance and.

5. The advocate, on his part, submitted that the that the Taxing Master did not misconstrue the subject matter since she relied on the pleadings wherein the plaintiff/client sought judgment for specific performance, injunction and general damages in respect to the Debenture dated 17<sup>th</sup> November 2017 whose value was Kshs. 275 million. It was further submitted that Taxing Master exercised her discretion judicially in determining the subject matter based on the relevant provisions of the Advocates Remuneration Order and awarded instructions

fees at Kshs. 5 million before enhancing the same by Kshs. 670,000/-.

6. The main issue for determination is whether the Taxing Master erred in law and principle in the taxation of the bill of costs dated 24<sup>th</sup> October 2019

7. I have carefully considered the pleadings filed herein, the submissions by Counsel together with the authorities that they cited. In an application for the setting aside of the decision of the Taxing Master, the general rule is that courts will not interfere with the findings of the taxing officer unless there is an error in principle. This is the position that was authoritatively stated by the South African court in *Visser v Gubb* [1981 \(3\) SA 753](#) (C) 754H – 755C wherein the court expressed itself 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.”***

8. Similarly, in *Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others* 1984 (3) SA 15 (A) at 18F C G the court held that:

***“ . . . that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him . . . viz that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Masters view of the matter differs so materially from its own that it should be held to vitiate his ruling.***

9. When determining the issue of costs due to an advocate, the Taxing Master is required to take into account the time spent in handling the case, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant. The ultimate question raised by the client in seeking the setting aside of the taxation is whether the Taxing Master struck this equitable balance correctly in the light of all the circumstances of this case.

10. It is a well-established principle that the exercise of the Taxing Master's discretion will not be interfered with ‘unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.’ (See *Preller v S Jordaan and Another* [1957 \(3\) SA 201](#)).

11. In *Joreth Ltd v Kigano & Associates* (2002) 1 EA 92 it was held that;

***“the value of the subject matter for 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 ascertainable the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just taking in account, amongst other matters, the nature and the 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.”* {Emphasis added}.**

12. In the present case, the taxing master stated as follows in respect to the instruction fees the;

***“Can one determine the value of the subject matter from the pleadings? The answer is in the positive. The respondent suit revolves around the debenture agreement dated 17<sup>th</sup> November 2019 Clause 20 of the said Agreement expressly provided that the Respondent would be the sole banker to its customer as long as the Debenture was in existence. It is alleged that in breach of the said (Debenture) Agreement, the customer had banking transactions with other banks, hence the suit with a prayer for specific performance, permanent injunction and general damages. It is not denied that the value of the subject matter of the said Debenture is Kshs. 275,000,000/-, and pursuant to the provisions of paragraph 1(b) of Schedule 6 of the Advocates Remuneration Order 2014...”.***

13. The Client challenges the decision of the Taxing Master on the basis that the suit did not involve a claim for monetary award. I have perused the Plaintiff dated 26<sup>th</sup> February 2019 that is the subject of the instructions fees herein and I note that the orders sought were as follows: -

***a. Order of specific performance directing the defendant to channel their subsequent banking transactions with the plaintiff***

***b. A permanent injunction directing the defendant to refrain from banking with other financial institutions during the existence of the debenture Agreement***

***c. General damages***

***d. Costs with interest at court rates.***

14. In *Kagwimi Kang'ethe & Company Advocates -vs- Penelope Combos & Another* Nairobi HCCC Misc Number 394 of 2008 Mabeya J held as follows:

***"..Let it be known that it is not necessary that the value of the subject matter be in the prayers, it is to be ascertained from the pleadings generally. My view therefore is that, since the value of the subject matter in this matter seems to have been ascertainable, there was no error of principle on the part of the taxing officer"***

15. As I have already stated in this ruling, the prayers sought in the Plaintiff did not include any monetary award or claim for the value of property or debenture for which a value could be ascertained. It is clear that the suit was for declaratory orders, injunction and for general damages. I note that nowhere in the pleadings was the value of the debenture stated so as to justify the learned Taxing Master's findings on the value of the subject matter. My finding is that instruction fees ought to have been calculated as provided for under the provisions of the Advocates Remuneration Order Schedule VI1 (1) which stipulates that: -

***"To present or oppose a case not provided for which sum should be reasonable but not less than Kshs. 6,000/="***

16. I therefore find that the Taxing Master erred in principle in pegging the instruction fees on the value of the debenture when the value of the debenture was not stated in the pleadings and was therefore not ascertainable.

17. In *Thomas James Arthur v Nyeri Electricity Undertaking* [1961] E.A 492 it was held that:

***"where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional case".***

18. Similarly, in *Kipkorir, Tito & Kiara Advocates V Deposit Protection Fund Board* [2005] eKLR the Court of Appeal held as follows: -

***"We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA, (1) that would be an error in principle. And if a Judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer. (See - D'Souza Vs Ferrao (1960) EA 602. (See Devshi Dhanji Naran Patel (No.2) [1978] KLR 243.)"*** (Our emphasis)

19. Having regard to the findings that I have made in this ruling and guided by the dictum in the above authorities, I find that the client's reference herein dated 6<sup>th</sup> November 2019 is merited and I therefore allow it. The Advocate-Client Bill of Costs dated 27<sup>th</sup> June, 2019, is remitted for taxation before a Taxing Master other than Hon. Elizabeth Tanui, Deputy Registrar.

### **The Advocate's Application**

20. Following the impugned taxation by the taxing master, the advocate made an application under Section 51 of the Advocates Act for the following orders: -

***a. THAT judgment and decree be and is hereby entered and issued on behalf of the applicant against the respondent for Kshs 7,618,598.40/= on account of taxed advocate- client costs***

***b. That interest and costs of this application and of execution be to the applicant.***

21. Considering that this court has already found that the Taxing Master erred in principle in taxing the bill of costs, I find that the Advocate's application for judgment in the sum of Kshs 7,618,598.40/= is no longer tenable and hold that the Advocate may, in view of this court's determination on the issue of the instructions fees, await the re-taxation of the bill of costs before as ordered hereinabove before amending his application to bring it in tandem with ruling on instruction fees.

22. I make no orders as to the costs of the applications.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 20<sup>th</sup> day of August 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 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Makori for client.

Mr. Orinda for advocate for advocate

Court Assistant: Sylvia