



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC. CIVIL APPLICATION NO. E267 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 INSTRUCTIONS TO RECALL THE FULL AMOUNT OF KSHS. 763,150,760.30/ PLUS INTEREST OF KSHS. 1,630,842.75 AS AT 4<sup>TH</sup> FEBRUARY 2019, CROSS COMPANY GUARANTEE AND DIRECTORS' PERSONAL GUARANTEES FROM MALDE HOLDINGS LIMITED**

**EDDY NICHOLAS O ORINDA P/A**

**ONE AND ASSOCIATES ADVOCATES.....APPLICANT/ ADVOCATE**

**VS**

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

**RULING**

1. Through the reference dated 19<sup>th</sup> December 2019 the client/applicant 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<sup>th</sup> June 2019 afresh and/or make directions as to fresh taxation before a different taxing master***

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

2. The client's application is premised to be brought under Rule 11 of the Advocates Remuneration Order and is supported by the affidavit of CLEMENT GITAU who avers that the Taxing Master erred in misconstruing the subject matter thereby beginning and completing the taxation on the wrong premises. He further avers that the taxing master erred in allowing instruction fees as against the client without taking into account the subject matter contained in the demand letter. The applicant faulted the taxing master for making a finding that the demand was served on a customer when there was no evidence to that effect.

3. The advocate also filed an application under section 51 Advocates Act seeking 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. 13,405,127.04/-on account of taxed advocate-client legal costs.***

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

4. Directions were, by consent, taken that the two applications be canvassed concurrently by way of written submissions.

5. The advocate submitted that the client instructed him to recall the sum of Kshs 764,781,603.05 from the client and institute a suit to recover the same. The advocate stated that he duly acted on those instructions before his retainer was terminated. He submitted that the instructions for the recall of the loan were for the entire debt of Kshs 764,781,603.05/- which, according to him, forms that basis of the instruction fees.

6. Counsel for the client, on the other hand, submitted that the Taxing Master erred in principle when she considered the sum of Kshs 764,781,603 as the subject matter of the taxation. He argued that the Taxing Master ought to have taken the sum total of the arrears which amounts were in the demand instead of adopting the amount for the facility advanced to the client's customer. He also faulted the Taxing Master for failing to reduce the instruction fees by half as provided for in Paragraph 7(a) of the Advocates Remuneration Order on debt collection.

7. Having considered the two applications and the parties' respective submissions, I find that the main issues for determination are:

**a. Whether the taxing officer erred in law and principle in the taxation of the bill of costs dated 27<sup>th</sup> June 2019.**

**b. Whether judgment should be entered and issued on behalf of the applicant/advocate against the respondent/client.**

8. In *Arthur v Nyeri Electricity Undertaking* [1961] E.A 497 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".**

9. Similarly, in *First American Bank of Kenya v Shah & others* [2002]1 E.A 64 pg. 69 In that case Ringera J (as he then was) made the following remarks:

**"I find that on authorities this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an interference that it was based on an error of principle.**

10. The question before the court is whether there was an error in principle in the taxation of the bill of costs dated 27<sup>th</sup> June 2019 to warrant interference by this court. The client's case was that the Taxing Master erred in adopting the sum of Kshs 763,150,760.30 as the subject matter for ascertaining the instruction fees. In the impugned ruling on taxation, the Taxing Master held as follows:

**"I have looked at the copy of the letter exhibited by the applicant. The same is indicated to have been served on one Mr. Mukesh on behalf of Malde holdings. It is not disputed that Mr. Mukesh is the Director of Malde Holdings. I also note that the respondent was served with the same letter on 11/2/2019. There is no doubt that M/s. Malde holding was served with the demand letter. I find that the applicant did execute the Respondents instructions and is therefore entitled to fees. The said letter indicates that it was a follow up letter to an earlier letter dated 25/1/2019. The amount demanded was Kshs 763,150,760.30 plus interest of Kshs. 1,630,842.75 a total of 764,781,603.05.....Item No. 1 is therefore taxed at Kshs 11,541,724/=**"

11. It is trite that the subject matter for purposes of taxation ought to be determined from the pleadings, judgment or settlement. In *Joreth Ltd vs Kigano & Associates* (2002)1 EA 92 the Court of Appeal 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."**

12. In the case, I note that the letter issuing instructions dated 4<sup>th</sup> February 2019 reads as follows:

**"..... please proceed and prepare a seven days' notice for Malplast Industries Limited demanding for the arrears of the loan interest of Kshs 1,665,301.20, overdrawn amount (above limit) of Kshs 8,352,625.26 and a ledger balance of USD 51.79 as indicated above**

**Please also proceed to prepare a demand notice for Malde holdings Limited recalling the full amount of Kshs 763,150,760.30 plus interest of Kshs 1,630.842.75 as at 04.02.2019; cross company guarantees and personal guarantees within (7) days,."**

13. According to the client, the taxing master ought to have taken the sum of the arrears whose amounts were in demand. Having examined the letter, the amount demanded was Kshs. 763,150,760.30 in addition to the interest which brings the total to Kshs 764,781,603.05. I therefore find that there was no error on the part of the taxing master in determining the value subject matter.

14. On the issue whether the taxing master ought to have reduced the instruction fees by half, paragraph 7 of schedule 5 provides that:

**"In respect of non-contentious debt collection matters an advocate may enter into a general agreement with a client to charge therefore upon the following inclusive scale in lieu of charging per item for work done, but— (a) where not more than one letter of demand has been written the scale shall be reduced by one-half, subject to a minimum fee of Kshs. 1,000; or (b) where the**

**letter of demand is followed by the institution of proceedings at the instance of the same advocate the scale does not apply and fee shall be as prescribed in paragraph 5 of this Schedule or under Schedule 6 or Schedule 7 as the case may be”**

15. I note the provision for reducing the instruction fees by half is applicable in respect to part (a) not (b). The taxing master, in the instant case, applied part (b) which is not limited to that aspect. From the above foregoing, I find that the applicant failed to demonstrate the error in principle, on the part of the Taxing Master, in taxing the bill of costs in question. I therefore find that the reference is not merited and I hereby dismiss it with costs to the advocate.

16. The other issue of whether judgment should be entered and issued for advocate against the client, I find that having dismissed the reference the advocate’s application succeeds. Section 51(2) of the Advocates Act grants this court the mandate to enter judgment for the costs recovered. The section provides as follows;

**“The certificate of the taxing officer by whom any bill has been taxed shall unless it is set aside or altered by the court, be final as to the amount of the costs recovered thereby; and the court may make such order in relation thereto as it thinks fit, including where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”**

17. In **Lubulellah & Associates Advocates v N K Brothers Limited** [2014] eKLR the court observed that;

**“The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the Applicant against the Respondent herein for the taxed sum indicated in the Certificate of Taxation that was issued on 25<sup>th</sup> November 2012.”**

18. Considering that certificate of taxation dated 13<sup>th</sup> November 2019 has not been set aside or impugned by this court, I enter judgment in favour of the advocate/applicant against the respondent/client for the sum of Kenya shillings Thirteen Million Four Hundred and Five Thousand One Hundred and Twenty-Seven shillings and Zero Four (13,405,127.04/=). I also award the advocate/applicant costs plus interest from the date of the judgment pursuant to Rule 7 of the Advocates (Remuneration) Order which provides that:

**“An advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiry to one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount has been paid or tendered in full.”**

19. It is so ordered.

**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. Orinda present in person.

Mr. Makori for the client.

Court Assistant: Sylvia