



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC. CIVIL APPLICATION NO. E266 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. This ruling is in respect to the client/applicant's reference dated 19<sup>th</sup> December 2018 and the advocate/respondent's application dated 5<sup>th</sup> November 2019. Directions were, by consent, taken that both applications be dealt with concurrently. The reference is brought under Rule 11 of the Advocates Remuneration Order and 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 application is supported by the affidavit of CLEMENT GITAU who avers that the taxing master erred in misconstruing the subject matter of the taxation thereby beginning and completing the taxation on the wrong premises. He further avers that the taxing master erred in treating an application for joinder as suit and thus arriving at a wrong conclusion by adopting the subject matter as Kshs 34,750,000. He faults the taxing master for failing to apply the provisions of part J of schedule 6 of the Advocates Remuneration Order and thus arriving at a wrong decision. According to the client/applicant, the award made by the Taxing Master is manifestly excessive as to attract a finding that was erroneous.

3. The applicant/advocate's application dated 5<sup>th</sup> November 2019 is brought pursuant to Section 51 of the Advocates Act CAP 16 Laws of Kenya seeks 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. 1,688,932.74/- on account of taxed advocate-client legal costs.**

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

4. The application is supported by the affidavit of EDDY NICHOLAS ORINDA who avers that he represented the client in the matter that gave rise to the advocate- client bill of costs that was taxed at Kshs 1,688,932.74 and a certificate of taxation duly issued.

5. The applications were canvassed by written submissions.

6. The client/applicant submitted that the Taxing Master misconstrued the subject matter of the taxation which was an application for joinder and not a suit. Counsel submitted that schedule 6 of the Advocates Remuneration Order does not provide for the instruction fees payable to an advocate for filing an application for joinder and argued that the same ought to be assessed under part J under the heading other matters.

7. On his part, the advocate/respondent submitted that the Taxing Master correctly deduced the subject matter, first, from the express letter of instructions dated 7<sup>th</sup> February 2019 which had expressly instructed the advocate to apply for joinder and to attach for the judgement and decree of Kshs. 34,750,000/-. It was further submitted that the Taxing Master correctly exercised her discretion by referring to the said letter of instructions and the pleadings in question before arriving at the conclusion on the issue of the subject.

#### **Issues**

8. The main issue that arises for determination is whether the taxing officer erred in principle in the taxation of the bill of costs dated 24<sup>th</sup> October 2019

#### **Analysis**

9. I have carefully considered the pleadings filed herein, the submissions of Counsel and the authorities that they relied on. I will determine the client's application dated 19<sup>th</sup> December 2019 first as its outcome will determine whether or not this court should proceed and consider the advocate's application for judgment and decree on the taxed advocate-client legal costs.

10. In the *Joreth Ltd. v 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.”***

11. In the present case, the Taxing Master held that the applicable law was Schedule 6 of the Advocates Remuneration Order which provides for party and party costs of proceedings in the High Court.

12. Courts have taken the position that they will not interfere with the taxing officer's decision on taxation unless it is shown that the decision was based on error of principle, or that the amount awarded was manifestly excessive so as to justify interference. These legal parameters were laid down by Ringera J. (as he then was) in *First American Bank of Kenya v Shah and Others [2002] 1 E.A. 64 at 69* wherein he held that;

***“First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle”.***

13. In the present case, the Taxing Officer stated as follows while taxing the item on instruction fees:

***“Having considered the rival submissions, I fall back on the instruction of the Respondent to the Applicant which are clearly spelt out in the letter dated 7<sup>th</sup> February 2019, paragraph 2 thereof reads:***

***“...File an application to enjoin the bank (Victoria Commercial Bank Limited) in the currently ongoing suit, No. HCCC No. 425 of 2018 – Malplast Industries Ltd v NIC Bank Limited, as Interested Party for purposes of recovering the proceedings of the suit to offset their outstanding facilities held with us” ...***

***Pursuant to the said instructions, the applicant filed the application under Certificate of urgency on 15<sup>th</sup> March 2019 praying for orders that the respondent be enjoined as an interested party with the sole aim of recovering the decretal sum of Kshs 34,750,188.80.”***

14. The client/applicant faulted the taxing master for adopting the sum of 34,750,188.80 as the value of the subject matter in order to ascertain the amount due in respect to the instruction fees. The client/applicant contends that the advocate was instructed to prepare and file an application to enjoin the respondent and that did not amount to a suit. In *Paul Semogerere & Olum v Attorney General* Civil Application

No 5 of 2001 the court stated;

***“In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable which sometimes are against one another in order to arrive at a reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates, remuneration should be as such levels as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make an allowance for the fall if any in the value of money. It is because of consideration for this intricate balancing exercise that taxing officer’s opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify that interference.”***

15. In the circumstances of the case, the advocate’s instruction was to file an application for orders that the respondent be enjoined as an interested party with the aim of recovering the decretal sum of Kshs 34,750,180.80. My finding is that the value of the subject matter is Kshs 34,750,188.80 as held by the Taxing Master.

16. The client applicant further contended that the taxing master erred in principle by failing to take into account the deposit of Kshs 1,228,275/= which was admitted by the advocate. I however note that the taxing master addressed this issue in her ruling when she stated that the sum had been deducted from the applicant’s bill of costs in MISC application cause E265 of 2019. I therefore find that there is no reason to deduct the same as it would amount to double deduction of the same amount.

17. In conclusion, I find that the Taxing Officer properly exercised her discretion in taxing the bill of costs as she did and that there was no error in principle in the said taxation. In sum, I find no merit in this reference which I hereby dismiss with costs to the advocate.

18. Having found that the reference is not merited, it follows that the application by the advocate succeeds as section 51(2) of the Advocates Act stipulates 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.”***

19. 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.”***

20. In the present case, the certificate of taxation dated 28<sup>th</sup> October 2019 has not been set aside or impugned by this court. I therefore enter judgment in favour of the advocate/applicant against the respondent/client for the taxed sum of Kenya shillings One Million Six hundred and Eighty-Eight Thousand Nine hundred and Thirty-Two Cents Seventy-Four (Kshs. 1,688,932.74/- together with costs plus interest from the day 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.”***

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. Makori for client

Mr. Orinda advocate for advocate.

Court Assistant: Sylvia