



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO 130 OF 1999

CYO OWAYO.....PLAINTIFF/APPLICANT

VERSUS

GS OKOTH

T/A OKOTH & CO. ADVOCATES.....DEFENDANT/RESPONDENT

RULING

1. The application for consideration is the plaintiff's reference dated 8th June 2009 made under **Rule 11 of the Advocates Remuneration Order** seeking to review the decision of the Deputy Registrar taxing the plaintiff's bill of costs dated 24th April 2008. The bill of costs was taxed at Kshs. 132,070/-. The reference seeks for orders that:

a) the decision of the taxing officer be set aside with the exception of items 13,11-1,17,18,21,23,31-37,46,48-61,63,70-80,85,88,89,93-95,97,99,104-111,114-116,118,120-123,128-130,135-138,140-143,146,147,151,153 and 155

b) the Honourable court be pleased to tax the bill without referring the same back to the taxing officer.

2. The appellant submitted that it obtained a decree of Kshs 1,605,600/- and the taxing officer found Kshs 45,000/- appropriate as the instruction fees and gave no explanation for the amount. They contend that the Deputy Registrar's decision was contradictory as he assessed getting up fees at 2/3 of the instruction fees on the ground that the case was complex and involved fairly novel areas of the law. The applicant further contends that the taxing officer's finding was marred with arithmetic errors as the total figure amounts to Kshs 215,663/- instead of the Kshs 132,070/- awarded. It was argued that some of the items drawn to scale were reduced without any explanation by the taxing officer. The applicant was also dissatisfied that the taxing officer disallowed letters that were legitimately exchanged between the parties.

3. The respondent submitted that the matter was dismissed in High Court and that it was the Court of Appeal that awarded general damages of Kshs 710,000/-. It was argued that the guiding figure in any assessment is the principal awarded as damages and the Kshs 500,000 proposed by the applicant as instruction fees is illogical. It was submitted that no serious errors by the taxing officer had been enumerated by the appellant. Regarding the arithmetical error, it was submitted that the same could always be corrected.

4. The principles upon which this court may interfere with the Deputy Registrar's discretion were laid down in **Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR** where the Court of Appeal stated follows;

“On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In Arthur v Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this Court said at page 492 paragraph I: “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 cases”.

5. I now turn to the main issue raised by the applicant, the instruction fees which is determined based on the value of the subject matter. *The value of the subject matter of a suit 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 ascertained the taxing officer is entitled to use his discretion to assess such instructions fees as he considers just taking into account, amongst other thing, the nature and importance of the case or matter (see **Joreth Limited V Kigano & Associates [2002] EA 99**).*

6. The applicant has advanced that the taxing officer ought to have considered the Court of Appeal's decree awarding the plaintiff Kshs 1,605,600/- while the respondent argues that the Kshs 45,000 awarded as instruction fees was adequate considering that the suit before the High Court was dismissed. The Deputy registrar did not give any reasons why he taxed the instruction fee in the bill of costs at Kshs

45,000/-.

7. It is clear that the applicant's suit before this court was dismissed and no interest was awarded. The Court of Appeal thereafter in its judgment dated 13th July 2007 awarded the applicant Kshs 710,000/-, which ought to have guided the Deputy Registrar on the value for purposes of taxation of a bill of costs.

8. I disagree with the applicant's submissions that the Deputy Registrar ought to have considered the amount Kshs 1,605,600/- which comprise of the principal sum and interest when taxing the bill of cost.

In **Bank of India v Surgilabs Limited & 3 others [2008] eKLR** the court held as follows;

“It is therefore clear that the fact that a plaintiff pleads that it should be awarded interest at a certain annual rate on the principal amount does not necessarily imply that such interest pleaded shall be awarded by the court. It cannot therefore be said that when the plaintiff pleads that he should be awarded interest on the principal amount then such element of interest is automatically taken into account when an assessment of costs is being made. A condition precedent for the taking into account of the element of interest is that an order must first have been made by the court. In that regard, I agree with the reasoning of Ibrahim, J in Desai Sarvia & Anor –vs- Giro Commercial Bank (supra).

In the premises therefore, since the Court (in dismissing the Plaintiff's suit for want of prosecution) did not make any order regarding the payment of interest, the thrust of defendants' argument regarding the taking into account of the element of interest in assessing the defendants' instruction fees cannot be sustained. The Taxing Officer did not commit an error of principle or wrongly exercise her discretion when she assessed the instruction fees payable to the defendants after excluding the element of interest.”

9. If the reasoning in the **Bank of India v Surgilabs Limited case (supra)** is applied to the set of facts herein, the only conclusion that can be drawn is that the value of the subject matter is Kshs 710,000/- excluding interest. I therefore find that the Deputy Registrar erred in principle in the holding that the instruction fees was Kshs 45,000 considering that the applicant had a judgment in his favor where he was awarded Kshs 710,000 as damages.

10. The applicant further submitted that the Deputy Registrar disallowed the correspondences between the parties. However, after looking at items 1,4,5,6,7,8,19,20,27,28,39,40,52,53,64 and 65, I am constrained to agree with the Deputy Registrar's position, the said letters were between the plaintiff's advocate and his client and not correspondences between the parties.

11. In the end, the decision of the Deputy Registrar in respect of the bills of costs dated 24th April 2008 is hereby set aside. I therefore allow the reference and direct that the bills of costs be taxed afresh by the Deputy Registrar in accordance with this decision.

Dated, signed and delivered at KISII this 24th day of September 2020.

R.E. OUGO

JUDGE

In the presence of:

Appellant

Absent

Mr. Kaba h/b Mr. Mases

For the Respondent

Jackie

Court Assistant