



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISCELLANEOUS APPLICATION NO. 141 OF 2018

BEING AN ADVOCATE/CLIENT BILL OF COSTS

BETWEEN

SPIRE BANK LIMITED.....CLIENT/APPLICANT

-VS-

MAMICHA & CO ADVOCATES

NDERITU & PARTNERS ADVOCATES.....ADVOCATES/RESPONDENTS

R U L I N G

1. This is a ruling on two applications, one by the applicant dated 11/03/2020 and the other one by the respondents filed on 12/03/2020. Both applications were brought, *inter alia*, under **section 51(2) of the Advocates Act, Cap 16 of the Laws of Kenya and Paragraph 11 (1) (2) and (4) of the Advocates (Remuneration) Order, 2009**.
2. The applications primarily challenge the ruling of **Hon. C. K. Obara** dated 29/08/2019 (“**the subject ruling**”). The said ruling had taxed the respondents’ bill of costs dated 22/11/2018 at Kshs.12,155,497/- less Kshs.2,000,000/- paid on account.
3. Both applications sought that the subject ruling be varied and/or set aside and the bill of costs be referred to another taxing master for taxation. On 17/06/2020, the court directed that the applications be consolidated and be heard together. Accordingly, the court will consider the said applications together as the facts and principles applicable are the same.
4. The applicant’s application was supported by the affidavit of **Emmaculate N. Ngoya**, advocate sworn on 11/03/2020. She averred that while the bill sought a sum of Kshs.31,650,890/-, the subject ruling taxed the same at Kshs. 10,155,497/-. That the said amount was extremely high and not commensurate with the services rendered and charged for the suit.
5. On the other hand, the respondents’ application was supported by the affidavit of **Wilfred Ngunjiri Nderitu**, advocate sworn on 12/03/2020. He averred that the sum of Kshs. 10,155,497/- was inordinately low considering the work done. The taxing master committed numerous errors by relying on wrong principles which led to an erroneous determination. In the premises, the respondents sought that their bill be taxed by another taxing master.
6. On its application, the applicant submitted that, there was nothing to show that the issues the respondents handled were complex. That there was no difficult issue or time consuming to warrant fees of Kshs. 31,650,890/-. In the premises, the amount awarded was excessively high and not inordinately low as contended by the respondents.
7. As regards the respondents’ application, the applicant submitted that the same was filed more than six months after the subject ruling. There had been unreasonable delay in approaching the Court. Various authorities including; **Republic v Commissioner of Domestic Taxes Ex-parte Ukwala Supermarket Limited & 2 others [2018] eKLR, B. Mbai & Associates Advocates v Clerk, Kiambu County Assembly & another [2017] eKLR** and **Geoffrey Makana Asanyo v Nakuru Water and Sanitation Services Company Limited & 3 others [2015] Eklr**, were cited in support of those submissions.
8. On their part, the respondents submitted that; they had received instructions in July, 2018 and had commenced action against fourteen (14) persons vide **Meru High Court Civil Suit No. 4 of 2018**. That the sum of Kshs. 10,155,497/- allowed was inordinately low as to be an erroneous estimate of fair and reasonable remuneration for work done.

9. That the circumstances of the case and the value of the subject matter amounting to Kshs. 433, 824, 997/81 as well as the high degree of skill, labor, specialized knowledge and responsibility involved, were not considered by the taxing officer.
10. That the taxing officer erred in principle in failing to; award a special fee for exceptional importance or complexity of the matter, find that full instruction fees was earned once the plaint was filed, recognize the fact that scale fees in **Schedule 6 of the Advocates Remuneration Order** is a mere guide and other relevant factors justify enhancement of costs. They further faulted her for not considering the client's necessity of hiring of two (2) counsel, treating the bill as party to party bill of costs, treating a folio as one (1) page as opposed to "100 Words", on treatment of disbursements, holding that counsel's attendance in person at court registry was necessary for attendance costs to be awarded, and failing to award VAT.
11. The cases of **J. M. Njenga & Co. Advocates v Kenya Tea Development Agency Limited [2011] eKLR**, **Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd [2014] eKLR** and **Kyalo Mbobu t/a Kyalo Associates Advocates v Jacob Juma [2015] Eklr**, amongst others were relied on in support of those submissions.
12. Before delving into the main issue of taxation, the applicant had complained that the respondents' application was lodged out of time. The subject ruling was delivered on 29/08/2019. The application was lodged on 12/3/2020 which was after six months.
13. The delay was excessive. However, considering that the applicant itself applied for leave to challenge the subject ruling which was allowed in February, 2020. This had led to the applicants current application. I consider that the applicant would suffer no prejudice for the extension of the time sought by the respondents.
14. In any event, the application was filed within the same period that was allowed for the applicant to lodge their challenge against the subject ruling. The application does not seek to delay the matter. Accordingly, the leave sought is hereby granted and the objection thereto rejected.
15. The main prayers in both applications are for the setting aside of the taxing officer's ruling of 29/8/2019. In **Republic -vs- Minister for Agriculture & 2 Others Ex-Parte Samuel Muchiri W'njuguna & 6 Others (2006) Eklr**, the Court held: -
- "The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, ... merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other... The 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 manifestly excessive as to justify an inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment ... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved ... The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs ...".(Emphasis added)*
16. The foregoing are then the principles that will guide this Court in considering the two applications.
17. A taxing officer is the one clothed with special jurisdiction by **the Advocates Remuneration Order** to tax costs. The court ought not to interfere with an award made by the taxing officer unless it is shown that the decision is made on an error of principle, or that the award is manifestly excessive high or low.
18. The applicant contended that the costs awarded was too high and not commensurate with the services rendered. It was contended, in particular that, the award of Kshs. 9,000,000/- as instruction fees in a simple suit for recovery of monies was unfair and biased.
19. To the respondents, the said amount was inordinately low. That the taxing officer applied wrong principles and case law. That although she properly established that the applicable scale was **Schedule 6**, she nevertheless failed to apply the same but applied the party and party instead of advocate/client schedule thereby arriving at a wrong decision.
20. The applicant proposed Kshs. 6,707,374/- as instructions fees while the respondents proposed Kshs. 18,739,667/-.
21. In her ruling, the taxing officer considered, among other decisions, the decisions in **Kanyariri & Associates Advocates v Salama Beach Hotel Limited & 4 others [2014] eKLR** and **First American Bank of Kenya v Shah & another [2002] 1 EA 64**. In arriving at instructions fees, she was cognizant of the fact, and so held, that if the same was based on the claim of Kshs.433,824,997/-, the instructions fees would as well have been between Kshs.15 and 20 million.

22. Further, she held that the respondents were entitled to full instructions fees and that they had perused voluminous documents and attended meetings to prepare for the filing of the suit. That notwithstanding, she allowed instructions fees at Kshs.9 million on the grounds that the hearing of the case was yet to begin.

23. This was clearly an error in principle. Once an advocate for the plaintiff has taken instructions and filed suit, he is entitled to full instructions fees. It does not matter that the same is colossal provided it is within the parameters of **Schedule 6**. It does not matter that the matter has not gone to trial.

24. The taxing officer misapplied the holdings in the cases of **Kanyariri & Associates Advocates v Salama Beach Hotel Limited & 4 others** and **First American Bank of Kenya v Shah & another** (supra).

25. In the first case, the reason why the advocate was not entitled to full fees was because he never initiated the case. He was therefore not involved in the initial research and preparations that resulted in the original pleadings. In the present case, the respondents were involved in the initial preparations until the filing of the suit. It does not matter that they did not prosecute the suit. The entitlement to full instruction fees fell due upon the filing and service of the statement of claim.

26. Indeed, it was held in **First American Bank of Kenya v Shah & another** (supra): -

“The advocate who draws plaint is the one entitled to full instructions fees notwithstanding the progress of the matter”.

This position is informed by the fact that, the advocate who draws the plaint does the donkey work. His work is the basis of an entire suit. A shoddily preparation leads to the death of a case on arrival at the trial. The one who prepares for trial is entitled to the getting up fees which is ordinarily half of the instructions fees.

27. In this regard, it was an error in principle for the taxing officer to hold that she was to allow “minimal work done by the applicants” and allow a paltry sum of Kshs.9,000,000/- instead of the full instructions fees, she herself was convinced that for the claim of Kshs. 433,824,997/=, the instructions fees should have been between Kshs. 15-20 million.

28. Another issue is that, the suit was not for the liquidated claim of Kshs.433,824,997/- only. That was only one of the claims. There were, save for (a) below, other substantive claims independent of the said liquidated claim for: -

- a) the lifting of the veil of the debtor companies;
- b) foreclosure and realization of all the securities held;
- c) the inapplicability of the *in duplum* rule;
- d) damages for fraud and breach of trust and contract.

29. It cannot be said that this was a straight forward recovery suit. The debt of Kshs.433,824,997/- was made claimable from all the defendants from the piercing/lifting of the veil of the co-operate defendants. Framing the claim would require specialized knowledge, labour and skill. The taxing officer herself was satisfied that there was perusal of voluminous documents. Further, to have instructed two advocates, the applicant must have attached much interest and importance in the matter.

30. Accordingly, taking into consideration the foregoing, there were no reasons at all not to award the full instructions fees. In the words of the taxing officer herself, the instructions fees on the liquidated claim being between Kshs.15 and 20 million, taking into consideration the other claims and the matters set out above, the award of Kshs.9,000,000/- for instructions fees was due to an error in principle thereby becoming inordinately low.

31. There was also a claim that there was an error in principle in the taxing officer holding that Value Added Tax (VAT) was chargeable only upon presentation of a certificate from Kenya Revenue Authority.

32. In **Mereka & Co. Advocates v New Kenya Co-operative Creameries Limited [2018] Eklr**, it was held: -

“In regards to the question of whether VAT should be awarded when the same was not pleaded, the court’s view is premised on the case of Amuga & Co. Advocates v Arthur Githinji Maina MISCELLANEOUS APPLICATION NO. 265 OF 2012 wherein the Honourable Judge made reference to the AM Kimani & Co. Advocates –vs- Kenindia Assurance Co. Ltd holding that;

“...under the Value Added Tax Act an advocate is entitled to charge VAT on instruction fees and also disbursements” and J.P Machira T/a Machira & Co. Advocates –vs- MDC Holdings Ltd & 2 others where Justice Ringera held that;

“As regards VAT it is a statutory requirement that legal services are chargeable with VAT.”

33. In **Ngatia & Associates Advocates vs. Interactive Gaming & Lotteries Limited [2017] eKLR**, the court observed: -

“My view is that indeed; estoppel does not operate against the law. Equally, I am in agreement with the advocate that VAT is a

statutory charge on legal services rendered to the client. ...

VAT is a tax levy on advocates in respect of the professional fees they charge for legal services they render to their clients. It is a charge payable to the Kenya Revenue Authority and the advocate is only but a statutory agent for KRA. The levy once collected by the advocate for the legal services rendered is then remitted on a monthly basis to KRA.”

34. From the above, it is clear that VAT is chargeable as a statutory charge. The taxing officer erred in holding that the same was not chargeable for failure on the part of the respondents to attach a certificate from Kenya Revenue Authority. There is no requirement that a certificate be produced, once the money is raised as fees, the KRA will automatically require the advocate to pay VAT on the same. Accordingly, the taxing off of VAT of Kshs. 1,440,000/- was an error in principle.

35. It is clear from the foregoing that the ruling of the taxing officer cannot stand. The same is hereby set aside and the bill of costs is hereby remitted for taxation by a different taxing officer. The application dated 11/03/2020 is dismissed while the application filed on 12/3/2020 is allowed as aforesaid.

DATED and DELIVERED at Meru this 29th day of October, 2020.

A. MABEYA, FCI arb

JUDGE