



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 92 OF 2012

AFRICAN MERCHANT ASSURANCE CO. LTD.....PLAINTIFF/RESPONDENT

VERSUS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT/APPLICANT

Coram: Hon. Justice R. Nyakundi

Mukiri Global advocates for the plaintiff/respondent

Oloo & Chatur advocates for the defendant/applicant

RULING

By a chamber summons dated 9.12.2019, the applicant challenges the decision of the taxing master on the bill of costs delivered on 6.11.2019 on the following grounds:

- 1. That the Learned taxing master erred in taxing instructions fees at Kshs.1,140,165.17/=.**
- 2. That the Learned taxing master erred in taxing off Kshs.14,660,987.00/= without any proper basis and without considering the amount of work involved in litigating the suit.**
- 3. That the Learned taxing master applied wrong principles in taxing the bill of costs and thereby arriving at an inordinately low figure of Kshs.1,912,647.99/=.**

As a consequence, the Honourable Court sets aside the Ruling dated 6.11.2019 on the defendant's Bill of Costs dated 26.9.2018 and award such amount as it deems just and fit.

Background

The stricken suit by the Court of Appeal was filed by the respondent against the appellant under the doctrine of subrogation on 18.6.2012 seeking liquidated sum of Kshs.82,253,214/= for loss and damage. The claim was heard and determined by the High Court vide Judgment delivered by **Chitembwe J** on 16.3.2016 in which an award of Kshs.71,527,412 plus costs and interest was made in favor of the respondent/plaintiff.

Being aggrieved with the entire Judgment, an appeal was lodged by the defendant/applicant that Judgment became a subject matter of the Court of Appeal filed by the defendant/applicant against the plaintiff/respondent. The Court of Appeal took the following view:

“The Appeal has merit and is hereby allowed with costs. We set aside the Judgment of the High Court dated 16.3.2016 and substitute the same with an order striking out the suit with costs.”

This position so well establishes the jurisdiction of the taxing master as it relates to the defendant's bill of costs in so far as the retainer and trial before the High Court is concerned. Being of that persuasion its quite clear that the spectre of any taxation falls within the provisions of the Advocates Remuneration Order.

The contention by the applicant's case based on the affidavit and other correlated materials that the taxing master erred in Law and fact in finding that the; bill of costs due and payable under instructions fees Kshs.1,140,165.17/= . The applicant further asserts that the matter by its

nature was complex and in that scenario should have compelled the taxing master to take such factors into account to fairly tax instructions fees at a higher quantum.

Determination

As noted by the Court of Appeal in **Kipkorir Titoo & Kiavi Advocates v Deposit Protection Fraud Board {2005} 1KLR 528** the test in Law to intervene on taxation of taxing master ought to be within the following principles:

“On a reference to 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, an example for an error or principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles.”

In this case, the value of the claim is ascertainable from the pleadings and subsequent Judgment of the High Court being Kshs.71,527,412/= from the initial claim of Kshs.82,253,214/=. Given the Judgment and the Decree thereof the context of the circumstances in my view in assessing the instruction fees awarded by the Court takes precedence to the initial sum in the pleadings. Several jurisprudential decisions have given rise to efforts to formulate principles to deal with the scope and approach which is helpful to the taxing master on assessment of instructions fees. The cases on point include **Leonard Kalunga Mbuvi t/a Kalunga Mbuvi & Advocates v Accredo & others Malindi Civil Application Number 59 of 2011, Joreth v Kigano & Associates EA 92**. The Law recognizes that in exercising discretion on taxing instruction fees the taxing master should take into account:

- (a). The amount involved in the matter or value of the subject matter.**
- (b). The nature, importance and complexity of the matter.**
- (c). The interests of the parties.**
- (d). General conduct of the proceedings and**
- (e). The person to bear the costs. (See Premichand Rainchand v Quarry Services of East Africa {1972} EA 162)**

The second approach applied in taxing bill of costs is enunciated in **Makumbi & Another v Sule Electric (U) Ltd {1990 – 1994} (EA 306) USC** where the Court held that:

“depending on the circumstances mere production of a long list of authorities does not necessarily mean that there was a protracted research by counsel and that an advocate should not be reimbursed for what he has not spent.”

As regards the contention by the applicant he considers the matter to be complex by virtue of expert evidence involved and the time taken to peruse the voluminous documentary evidence which formed the basis of the litigation.

Regrettably, the applicant forgets that the costs in question are statutorily provided for and are to be taxed in accordance with the Advocates Remuneration Order and the scale set as applicable. Likewise, in the instant taxation, it is clear from the record that Schedule VI or ARO of 2006 was invoked to decide the issue on instructions fees due and payable.

I have inquired into the proceedings before the taxing master and its validity to the regulating procedure. The question that falls for determination in the instant reference is whether the discretion exercised was due to an error of principle or under Schedule VI of ARO or just a complaint on the quantum awarded.

Dealing with the argument concerning the interpretation of Schedule VI of ARO of 2006, it must be pointed out that the correct formulae was considered and applied by the taxing master. This is a simply a matter of fees chargeable and the discounted percentages set at 1.5% and 1.25% respectively. Whereas, the liquidated amount of Kshs.82,253,214/= looks attractive it's incapable of a higher tariff of costs. There are clear guidelines to be followed, as illustrative of the Ruling by the taxing master.

The full import of Schedule VI should be guided by the objects of the nature, importance and complexity, and interest of the parties. This interpretative approach must receive inspiration from the right of access to justice, a recognized right which has assumed constitutional importance under Article 48 of the Constitution.

It must be noted that at this stage the burden of proof is on the applicant to demonstrate an error of principle or failure to take into account relevant matter on the part of the taxing master. There is nothing unusual or exceptional about the claim under the doctrine of subrogation and the questions which cropped up between the plaintiff/respondent and defendant/appellant in HCCC No. 92 of 2012 to call for enhancement of instructions fees. The phrase instruction fees and value of the subject matter without a doubt is ascertainable as required from the pleadings, even more significantly the Judgment rendered by **Chitembwe J.**

In my view, the taxing master in assessing instructions fees while interpreting Schedule VI of ARO of 2006 kept the taxation within the four corners of the said provision of the Remuneration Order. As such reference of the matter to the High Court for issuance of a variation or intervention of setting aside the certificate of costs by substituting with another more acceptable award lacks merit.

To this extent, I dismiss this reference with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF DECEMBER, 2020

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R. NYAKUNDI

JUDGE

NB: This Ruling has been dispatched electronically to the respective emails of the advocates in the matter.