



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC CIVIL APPLICATION NO.632 OF 2004**

**MACHARIA NJERU T/A MACHARIA - NJERU ADVOCATES....ADVOCATE/RESPONDENT**

**VERSUS**

**LONDON DISTILLERS (K) LIMITED.....CLIENT/APPLICANT**

**JUDGMENT**

(1) Before this Court is the Chamber Summons dated **17<sup>th</sup> July 2017**, in which the Client/Applicant seeks for Orders:-

**“1. THAT the Honourable court be pleased to set aside the Taxing Officer’s ruling delivered on 4<sup>th</sup> July, 2017 as it relates to the reasoning and determination of item No.3 of the Advocate/Clients Bill of Costs dated 26<sup>th</sup> July 2007.**

**2. THAT this Honourable court be pleased to adjust the figures and re-assess the fees due to the Advocate.**

**3. THAT costs of this application be provided paid by the Advocate.”**

(2) The summons which was premised upon **Rule 1(2)** and **11(4)** of the Advocates (Remuneration) Order and **Section 1A, 1B** and **3A** of the Civil Procedure Act, Cap 21, Laws of Kenya and all enabling provisions of the law, was supported by the Affidavit dated **13<sup>th</sup> July 2017** sworn by **MOHAN GALOT** the Governing Director of **LONDON DISTILLERS (K) LIMITED** (The Client/Applicant herein).

(3) The Advocate/Respondent opposed the application through the Replying Affidavit dated **14<sup>th</sup> May 2018** sworn by **ELIJAH MWANGI NJERU**, a partner in the firm of Macharia Mwangi & Njeru Advocates. The court directed that the matter proceed by way of written submissions. The Client/Applicant filed their written submissions on **14<sup>th</sup> May 2018**, while the Advocate/Respondent filed their written submissions on **22<sup>nd</sup> May 2018**.

**BACKGROUND**

(4) It is not in dispute that the Client/Applicant had instructed the Advocate/Respondent to defend it in Milimani **HCCC No. 184 of 2001 SEEBOUND COMPANY LIMITED –VS- LONDON DISTILLERS (K) LIMITED**. The Client/Applicant additionally instructed the Advocate/Respondent to file on its behalf the Counterclaim. In that Counter-Claim the Client/ Applicant sought to be awarded the sum of **Kshs.102,408,038/50**.

(5) This reference arises from the ruling delivered by the Taxing Master **Hon. Elizabeth Tanui** over the Advocate/Client Bill of Costs dated **26<sup>th</sup> July 2017**. The Taxing officer made an award of **Kshs.3,697,798/=** on the aforesaid Bill of Costs. Item No.3 on that Bill related to a Counter Claim filed on behalf of the Client/ Applicant which involved a claim for **Kshs.102,408,038.50**. The Taxing Officer taxed this particular item at **Kshs.1,576,121/=**. The Client/Applicant being aggrieved by this award against item No.3 filed this reference challenging the award made by the Taxing Master. The Client/Applicant alleges that the Advocate/ Respondent deliberately ignored its instructions to reduce the amount claimed in the Counter-Claim in order to enable it claim higher amount in fees.

(6) The Client/Advocate asserts that the Advocate/ Respondent ignored their express instructions vide a letter dated **23<sup>rd</sup> April 2004** to amend the Defence and Counterclaim to reduce the amount claimed therein from **Kshs.102,408,038/50** to **Kshs.2,000,000/=**. It was submitted that the Taxing Master failed to give due weight to the letter dated **23<sup>rd</sup> April 2004**, and misdirected herself, in awarding a manifestly excessive fee with regard to item No.3 of the Bill of Costs dated **26<sup>th</sup> July 2017**.

(7) On their part the Advocate/Respondent avers that pursuant to instructions received from the Client/Applicant they did file in Court a Counterclaim dated **15<sup>th</sup> March 2001**. That while preparing for the trial a **Mr. Odero** who was an agent of the Client/Applicant called the Advocate/Respondent and without sufficient notice informed the latter of their intention to engage a new lawyer. The Advocate/ Respondent accordingly raised their fee note dated **20<sup>th</sup> April 2004**. Thereafter the Client/Applicant wrote a letter dated **23<sup>rd</sup> April 2004**, purporting to instruct the Advocate/Respondent to reduce the amount claimed in the Counterclaim.

(8) The Advocate/Respondent insists that their instructions were to file a Counter-claim for **Kshs.102,408,038/ 50** and at no time were they instructed to alter or vary this claim. That the Taxing master properly taxed the Bill of Costs dated **26<sup>th</sup> July 2017** and that the award of **Kshs.1,576,121** under item No.3 of the Bill of Costs was both lawful and correct.

### **ANALYSIS AND DETERMINATION**

(9) As stated earlier the only ground on which this reference is based is that the Hon. Taxing master erred and misdirected herself in awarding a sum of **Kshs.1,576,121** on item No.3, being Instruction fees. The question then is what was the correct value of the subject matter of the suit to be utilized in assessing the instruction fees. In **JORETH LIMITED –VS- KIGANO & ASSOCIATES [2002] I E.A. 92** the court held as follows:-

**“We would at this stage point out 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 into 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.”**

Section 2 of the **Civil Procedure Act Cap 21 Laws of Kenya** defines the term “pleadings” to mean and include:-

**“A petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”**

(10) In the present case the pleadings (being the Counter-claim) filed in court on **16<sup>th</sup> March 2001** was clearly for an amount of **Kshs.102,408,038.50**. The Defendant/Applicant claims that by a letter dated **23<sup>rd</sup> April 2004** he instructed the Advocate/ Respondent to alter the amount of the Counter-Claim to read **Kshs.2,000,000/=**. However this alteration was never done. There is no way the taxing master could have assessed the instruction fees based on the wishes or intentions of the Client/Applicant in the face of very clear sum claimed in the Counter-claim.

(11) The Client/Applicant alleges bad faith due to the failure of his advocate to heed their instruction to reduce the amount claimed in the Counter-Claim to **Kshs.2,000,000/=**. It is alleged that this omission was a deliberate action by the Advocate/Respondent aimed at securing a higher amount in instruction fees for himself. These allegations are very grave but are they supported by the facts?

(12) The defence and counter claim were filed on **16<sup>th</sup> March 2001**. On **8<sup>th</sup> March 2004** the Advocate/Respondent was abruptly informed that his services were no longer required by the client and that a new counsel would be appointed to take over the matter. The Advocate/Respondent accordingly raised a fee note for services rendered on **20<sup>th</sup> April 2004**. It is only after this fee note was raised in which the Advocate sought to be paid **Kshs.2,720,206.40** that the Client/Applicant wrote the letter dated **23<sup>rd</sup> April 2004** instructing that the amount in the counter-claim be varied. Who then was acting in bad faith? Why dismiss counsel on **8<sup>th</sup> March 2004** and then expect the same advocate to effect instructions purportedly issued on **23<sup>rd</sup> April 2004** (one full month later). It was not until **23<sup>rd</sup> April 2004** almost three (3) full years after the Counter-Claim had been filed that the Client/Applicant had a change of mind and decided to review downwards the amount in the counter claim. In the intervening period the suit had been prepared and had been set down for hearing.

(13) It is important to examine closely this letter dated **23<sup>rd</sup> April 2004** which the Client/Applicant seeks to rely upon as proof at the amount in the Counterclaim ought to have been **Kshs.2,000,000/=**. In that letter the Client/Advocate writes:-

**“You have based your fee note on the Counter claim which you will probably not be able to prove in court because it is exaggerated, Kshs.102,408,038.50. This is unfair to me.”**

It is clear from the wording of this letter that the Client/Applicant main grievance was that the Advocate/ Respondent would claim instruction fees based of this sum of **Kshs.102,408, 038.50**. This letter did **not** contain express instructions to reduce the figure.

(14) It is important to note that vide an earlier letter dated **9<sup>th</sup> September 2002**, the Client/Applicant wrote to the Advocate/Respondent thus:-

**“We have asked for Kshs.102,408,038.50 in the counterclaim, let them accede to our proposal that they pay Kshs.70,000,000/= in full settlement. This is to be made entirely without prejudice and for the purpose of a negotiated settlement out of court....”**

Here the Client/Applicant unequivocally instructed his advocate to make a demand for **Kshs.102,408,038/50** as a bargaining chip to pressurize the opposite party into acceding to their demand for **Kshs.70, 000,000/=**. The thought process and the motives of the Client/Advocate were clear and his instructions to the advocate were also clear. I find that the Client/Applicant’s attempt to reduce the amount claimed came too late in the day and in any event was never effected. Since the Client/Applicant indicated his intention to engage a

new lawyer they were at liberty to instruct this new lawyer to amend the Counterclaim to reduce the claim to **Kshs.2,000,000/=**. The fact that the Client/Applicant took no such steps to amend the Counter-Claim convinces me that they had no real intention to do so. The letter dated **23<sup>rd</sup> April 2004** was written purely to avoid paying the Advocate his fees based on the counterclaim filed in court based on the Client/Applicant express instructions.

(15) In **REPUBLIC –VS- MINISTER FOR AGRICULTURE & 2 OTHERS [2006] KLR** it was held:-

**“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will therefore not interfere with the award of a taxing officer particularly where he is an experienced officer...”**

Similarly in **KIPKORIR, KIPTOO & KIRARA ADVOCATES –VS- DEPOSIT PROTECTION FUND BOARD.....** it was held:

**“On a reference to a judge from 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 asserting the costs.”**

I find no error in principle by the Taxing officer in assessing the costs in this matter. The Taxing officer relied upon the pleadings on record, more specifically the counterclaim filed in court which was ascertainable for **Kshs.102, 408,038/50**. The amount awarded under item No.3 accorded fully with the Advocates Remuneration Order [2009].

(16) The Client/Applicant submitted that the Taxing master failed to consider and give due weight to the contents of the letter dated **23<sup>rd</sup> April 2004**. This is not the case. I have carefully perused the ruling delivered on **6<sup>th</sup> July 2017** by the Taxing master in which she stated as follows:-

**“I have noted the contents of the letter dated 23<sup>rd</sup> April 2004 by the Respondent to the Applicant.....**

**I have also noted the contents of the letter dated 9<sup>th</sup> September 2002 by the Respondent to the Applicant.....**

**From a reading of the two letters, it is evident that the Respondents were aware of the claim of Kshs.102,408,038/50. The Respondent seems to have doubted the claim against the Plaintiff because of the Applicant’s fee note. That however does not change the fact that the counterclaim is for a claim of Kshs.102, 408,038/50. The amount is ascertainable.....”**

(17) The Taxing Master did consider and dispensed with the allegation by the Client/Applicant that the counterclaim was for **Kshs.2,000, 000/=**. As I have found earlier this letter was merely a ploy by the Client/Applicant to avoid paying the Advocates his fees based on the amount claimed in the Counter-Claim.

(18) On the whole I find no merit in this reference. There exists no basis upon which to interfere with the decision of the Taxing Master, specifically the award made under Item no.3. I therefore dismiss this reference in its entirety and uphold the award made by the Taxing Master in her ruling dated **4<sup>th</sup> July 2017**.

Costs are awarded to the Advocate/Respondent.

Dated, Signed and Delivered in **Nairobi** this **31<sup>st</sup>** day of **JANUARY** 2019.

**Justice Maureen A. Odero**