



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC. APPLICATION NO. 168 OF 2017

PROF. TOM OJIENDA & ASSOCIATES.....APPLICANT

VERSUS

MUMIAS SUGAR COMPANY LIMITED.....RESPONDENT

RULING

1. These proceedings stem from an Advocate-client Bill of costs dated 3rd November 2017 in which the Taxing officer of this Court taxed the Advocates costs at Kshs.6,110,004/=.

2. The Chamber summons before this Court which are intituled a Reference is dated 3rd October 2018 and is for a multiplicity of prayers as follows:-

1. Spent

2. Spent

3. THAT this Honourable Court be pleased to declare that the Honourable Taxing master had no jurisdiction to tax the Bill of costs.

4. THAT findings and ruling of the S.AS Opander in Misc. Cause No. 168 of 2017, taxing the Respondent's Bill of costs at Khs.6,220,004.10/= be varied and/or set aside.

5. THAT this Honourable Court be pleased to order that the Bill of costs be retaxed after considering the Applicant's submissions on the Bill by any other taxing officer.

6. THAT this Honourable Court be pleased to interrogate the Respondent's Bill of costs in light of actual work done and adopt the Applicant's proposal on taxation of the costs.

7. THAT this Honourable Court be pleased to adjust the contested items as the justice of the case may require, in lieu of remitting the contested items to a taxing officer.

8. THAT this Honourable Court be pleased to order that costs of this application as well as costs in the contested bill of costs be borne by the Respondent.

9. THAT this Honourable Court be pleased to make any such order and or orders as it may deem just and appropriate in the circumstances.

3. A party aggrieved by the decision of the Taxing Officer in respect to a Bill of costs under the Advocates Remuneration Order has a right to challenge the decision by way of an objection under paragraph 11 thereof. The Rule provides:-

“1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the

parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired".

The Rule sets a time limit of 14 days from receipt of reasons from the Taxing Officer for the filing of an objection (a reference by way of a Chamber summons to a Judge). Where a party is late, then sub-paragraph 4 gives the High Court discretion to enlarge time.

4. The evidence is that on 30th April 2018 (first three days after the delivery of the decision), the Applicant requested for a copy of the typed Ruling of the Taxing Officer. That Ruling as it turns out later contained the reasons for the decision and the letter of 30th April, 2018 can therefore be deemed as the Notice envisaged by sub-paragraph (1). A Court stamp shows that the letter was received on 7th May 2018, which would then be within 14 days prescribed by the Rule.

5. The Applicant says that it is only on 20th September 2018 that he was able to obtain a copy of the Ruling. This has not been contested and the Court takes it to be the factual position. If then the current application was filed on 4th October, 2018, then the objection was filed within the 14 days provided by sub-paragraph 2 and would be on time. If however, it is late, then I find that the lateness is not inordinate and has been explained. The Court would extend time and deem the Chamber Summons of 3rd October 2018 as being filed on time.

6. The objection is based on two broad grounds being that the Taxing Officer lacked jurisdiction in taxing the Bill and that the award was without a legal basis and at any rate excessive.

7. The first argument by the Client is that the Taxing Officer lacked jurisdiction to tax the Bill because the Advocate had not provided evidence that he had ceased to act for the Client. The Court was asked to find that the Advocate only ceased to act by filing a proper notice under the provisions of Order 9 Rule 13 (Co-operative Insurance Company Ltd vs. Secucentre limited & another) and cessation cannot be by abandonment.

8. That argument had been taken up before the Taxing Officer. And looking at the decision this is how he dealt with it:-

“Having perused the submissions on this item, the pleadings and affidavits in support thereof and having considered the same, it is quite clear that the subject matter of the case was infringement. On whether the matter is still pending, there is the letter notifying the Respondent that the Applicant ceased acting.”

It does not seem to this Court that the issue was dealt with decisively.

9. Anyhow, nothing will turn on that issue because I share the following view taken by Ochieng. J in Mumias Sugar Company Limited vs. Professor Tom Ojienda & Associates Limited (KSM Misc. Application No. 32 of 2017 (unreported)):-

“18. There is no law that expressly prohibits an advocate from lodging his Advocate/Client Bill of Costs for taxation before either the task is completed or before the advocate ceases to act for the client

9. However, as the Court said in the case of GICHUKI KING'ARA & CO. ADVOCATES V. MUGOYA CONSTRUCTION & ENGINEERING LTD 2010 eKLR, to allow an advocate present his Bill for taxation before the work he was retained to do is completed,

“..... would create a bad precedent whereby an Advocate could tax his bill at will before the business for which he was retained is concluded, and this could result to a multiplicity of taxations in the same retainer, which would be greatly prejudicial to the client”.

Although there would be instances when it is undesirable for an Advocate to lodge his Bill of costs against his Client for taxation before completing the brief or ceasing to act, the law does not bar the Advocate from doing so.

10. This takes me to the heart of the matter. This Court is asked to find that the Taxing Officer committed errors of principle in taxing the Bill. It is trite law that a Judge determining a reference from the taxation by the Taxing Officer will not normally interfere with exercise of discretion by Taxing officer unless the Taxing officer has erred in principle in assessing the costs.

11. The Bill arises out of instructions given to the Advocate to file Nairobi Civil Case No. 463 of 2013 Mumias Sugar Company vs. Option Two Limited & others. This Court has looked at the Plaintiff in those proceedings and observes that it is a cause of action for infringement of the Plaintiff's trademark and of passing off. The prayers sought against the Defendant are for:-

a) An order declaring that the Defendants packaging, distribution, supply and/or sale or offer of sale of sugar under the infringing package constitutes an infringement of the Plaintiff's registered trademarks and passing off of the 1st Defendant's sugar as that of the Plaintiff contrary to the law.

b) A permanent injunction restraining the Defendants either by themselves, directors, assigns, representatives, employees, affiliates, associates, agents or otherwise howsoever from infringing on the Plaintiff's registered trademark numbers 59170, 51250 and 59001 and from passing off any of its goods as the goods of the Plaintiff.

c) A permanent injunction restraining the Defendants either by themselves, directors, assigns, representatives, employees, affiliates, associates, agents or otherwise howsoever from packing, selling, supplying and/or distributing sugar under the packets similar and/or confusingly similar in get up to the sugar processed and packaged by the Plaintiff under its registered trademarks.

d) An order for the delivery up to the Plaintiff of all the packed sugar and off all packaging paper within the Defendants' possession, custody or power, bearing the infringing marks for destruction at the Defendant's cost.

e) An enquiry as to damages or alternatively at the Plaintiffs' option an account of profits made by the Defendants as a result of the aforesaid infringement by the Defendants and an order for payment of any sums found due together with interest thereon at Court rates,

f) General exemplary and punitive damages.

g) Costs of this suit; and

h) Any other order that this Honourable Court deems fit.

12. Although the value of the subject matter could not be ascertained from the pleadings or elsewhere, the Advocate purported to assign a value thereto by stating that the loss of business as a result of the infringement amounted to Kshs.15.795 Billion.

13. This did not impress the Taxing Officer who chose to deal with it as follows:-

"The value of what has been infringed is not ascertainable from the pleadings as there is no monetary figure that was pleaded. These leaves the decision on instructions fees discretionary to the taxing officer. In exercising this discretion I am guided by the decision in Joreth Limited vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] I EA 92 that states that; the valued of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not so ascertainable the Taxing officer is entitled to use his discretion to assess such instruction fee 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.

The nature and importance of the matter herein forms the basis for determination of instructions fees. The matter arose from an infringement. Generally, where there is an infringement, there is always a monetary loss. It is therefore a fact, that the cause was to protect the respondent from financial loss as a result the infringement of the Respondent's sugar. Here lies the importance of the case; protection of the Respondent's business from unfair competitors. In the circumstances, an amount of Kshs.5,000,000/= is fair assessment of instructions fees".

Can it be said that, on his assessment of instruction fees, the Taxing Officer fell into error?

14. It is submitted by the client that the Taxing Master committed an error of principle by failing to set the basic instruction fee before venturing to declare the final amount. For this argument the client cites the decision of Ringera J. in First American Bank of Kenya vs. Shah & others [2002] IEA 64 CCK:-

"The first error of principle complained of is that the basic instruction fees was not set out. That is correct. In my opinion, the Taxing officer must first set out the basic fee before venturing to consider whether to increase or reduce it. The Taxing officer did not do so in this case and the matter is left to inference. That is not a correct approach".

A similar decision by Odunga J. in Nyangito & Co. Advocates vs. Doinyo Lessos Creameries Ltd [2014] eKLR is also called to aid.

15. The Advocate counters this by arguing that the Taxing Officer assessed the fees on the nature, interest and importance of the cause to the parties and the general conduct of the proceedings.

16 Where the value of the subject matter, like here, is not ascertainable for the pleadings, settlement or judgement (if any) then the Taxing Officer has a discretion to determine the instructions. That discretion as always must be judicious. In doing so the Taxing Officer may take into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings and any directions by the trial Judge (see Joreth Limited vs. Kigano & Associates Civil Appeal No. 66 of 1997 [2002] IEA 92. However, where the Remuneration Order provides for a basic fee, the Taxing Officer should bear that in mind as s[he] assesses what s[he] considers just. In this way the Taxing Officer is able to consider the magnitude of the instruction fees reached as against the basic fee set out.

17. The instructions were given on 20th September 2013 and the applicable law on remuneration would be Schedule VI of the Advocates Remuneration (Amendment) Order, 2006. As the value of the subject matter could not be determined from the pleadings, judgment or settlement, the scale of fees would fall under paragraph J which provides a basic fee of Kshs.6,300/= as remuneration to sue or defend in cases not specified in the Schedule. That would be the starting point. The Taxing Officer would be expected to set out the basic fees before deciding whether or not there was a justification to reduce or increase it.

18. In the matter before Court, the Taxing Officer assessed the instruction fees at Kshs.5,000,000/=. This is about 793 times the basic fees. The Taxing Officer gives an explanation that generally where there is infringement there is 'always a monetary loss' and that the cause therefore was to protect the Respondent from financial loss. The Taxing Officer also states that the importance of the case is that it is for protection of the client's business from unfair competitors. All that may be well and good and relevant factors to consider in the exercise of the discretion. But without first setting out the basic fees of Kshs.6,300/=, how can it be said that the Taxing Officer appreciated that the increment s[he] made translated to 793 times the basic fees? This Court takes the view that the Taxing Officer fell into an error of principle.

19. In respect to disbursements, it is not controverted that the Taxing Officer made an award of Kshs.100,000/= without proof of the said disbursements. I understand disbursements to be monies actually paid out and if so there would be need to verify the payment before awarding them. By failing to do so the Taxing Officer again fell into an error of principle.

20. For the reasons given the Court allows the reference, sets aside the decision of 27th April, 2018 in respect to instruction fees and disbursements. The Advocate's Bill of Costs shall be placed before a different Taxing Officer for reconsideration of the two items. Costs of this reference to the client.

Dated, Signed and Delivered in Court at Nairobi this 21st day of February, 2019.

.....

F. TUIYOTT

JUDGE

Present:-

Ochieng for Respondent

Nixon – Court Assistant