



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CASE NO.218 OF 2018

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

SINGH GITAU ADVOCATES.....APPLICANT/ADVOCATE

VERSUS

CITY FINANCE BANK LIMITED (NOW TRADING AS

JAMII BORA BANK LIMITED.....RESPONDENT/CLIENT

JUDGMENT

1. The Applicant herein **SINGH GITAU ADVOCATES** filed in this Court the Chamber Summons dated **19th February 2019** seeking the following Orders:-

“1. THAT the decision of the Taxing Master delivered on 20th December 2018 in so far as the same relates to the reasoning and determination pertaining to the taxation of the Bill of Costs dated 17th October 2017 be set aside.

2. THAT the Honourable Court be pleased to refer the matter back for re-taxation of the Bill of Costs and with proper directions thereof.

3. THAT in the alternative to prayer 2, the Honourable Court exercises its inherent jurisdiction and be pleased to re-tax the Bill of Costs by increasing the amount payable to the Advocate under the Advocates (Remuneration) Order 1997 and/or make such other or further orders as regards the Bill of Costs in issue.

4. THAT the costs of this Application be borne by the Client/Respondent.”

2. The application which was brought under **The Advocates Act Rule 2, 11(1) and (2)** and the **Advocates Remuneration Order** was supported by the Affidavit of even date sworn by **JAMES GITAU SINGH**, an Advocate of the High Court of Kenya. The Application which seeks a review of the Ruling on Taxation delivered by the Honourable Deputy Registrar on **20th December 2018** is based on the following grounds:-

“1. THAT the Taxing Master erred in fact and in law in assessing Item 1 of the Advocates Bill of Costs dated 17th October, 2017.

2. THAT taking into account the true nature of the instructions given to the Advocates by the Client, the extent of their involvement in carrying out such instructions, as well as all other relevant circumstances, the instructions fees allowed under Item 1 of the Bill of Costs herein at Kshs.200,000/= is too low.

3. THAT if the amount is allowed to stand, the Applicant/Advocate will suffer gross injustice as the taxation of the

Advocate/Client Bill of Costs is contrary to set out principles and provisions of the Advocates (Remuneration) Order in determining instruction fees.

4. THAT the taxing master supplied reasons for the taxation on 19th February 2019, and this reference is thus filed within the prescribed period of Fourteen (14) days.

5. THAT the Taxing Master's manifestly low award and disregard of the hearing notices to deny the Applicant getting up fees amounted to an error in principle."

3. The Respondent **CITY FINANCE BANK (now T/A JAMII BORA BANK)** opposed the application for review. They relied on the Repling Affidavit dated **12th March 2019**, sworn by **CHRISTINE WAHOME** the Legal Manager with the Respondent Bank. The application was canvassed by way of written submissions. The Applicant filed his written submissions on **11th April 2019** whilst the Respondent filed their submissions on **30th April 2019**.

BACKGROUND

4. On **20th December 2018**, the learned Deputy Registrar delivered a ruling in which she taxed the Bill of Costs dated **17th October 2017** presented by the Applicant in the amount of **Kshs.447,603**

5. The Applicant was aggrieved by the taxation and filed this review on the basis that the amount awarded by the Taxing master under Item 1 being **"Instruction Fees"** was too low. The Applicant avers that the Taxing Master wrongly exercised her discretion in taxing the Bill by failing to consider that the value of the subject – matter of the suit was **Kshs.25,000,000/=** as per the Plaintiff. It was further averred that the Taxing Master did not give a sound basis for her decision to assess the instruction fees at **Kshs.200,000/=**. The Applicant contends that the minimum instruction fee in opposing the Plaintiff's claim to property worth **Kshs.25,000,000/=** ought to have been **Kshs.424,000/=**. The Applicant also faulted the Taxing Master for failing to award him Getting-Up Fees.

6. On their part the Respondents maintain that the Taxing Master did not err at all in taxing the Bill of Costs. It was averred that the Taxing Master properly exercised her discretion in assessing the instruction fees at **Kshs.200,000/=** on Item No.1. With regard to Getting-Up- Fees, the Respondent contends that the Taxing Master correctly observed that the matter had not been set down for hearing and thus no getting up fees was awardable.

ANALYSIS AND DETERMINATION

7. I have carefully considered the submissions filed by both parties in this matter. The Applicant has challenged the decision of the Taxing Master on two main grounds:-

(i) Failure to correctly assess the amount to be awarded as Instruction Fees.

(ii) Failure to award Getting –up Fees.

INSTRUCTION FEES

8. In the Ruling delivered on **20th December 2018**, the learned Taxing Master found that the prayers in the Plaintiff did not include a claim for a specific amount and proceeded to tax the Instruction Fees under Paragraph 1(1). She then awarded an amount of **Kshs.200,000/=** under this heading.

9. The Applicants position is that the Taxing Master erred in holding that the value of the subject matter could not be discerned from the Plaintiff. In her ruling the Taxing master held that:-

"The prayers above [in the Plaintiff] do not claim any amount and the said item will be taxed as provided in paragraph 1(1) as to present or opposed a case not provided for which sum should be reasonable but not less than Kshs.6,000/=. I have considered the interest of the parties and increase the amount to Kshs.200,000/="

10. The Applicant contends that the value was clearly discernible from the Plaintiff as **Kshs.25,000,000/=** being the value of the property in contention.

11. In **JORETH LTD –VS- KIGANO & ASSOCIATES [2002] E.A 92** the Court held as follows:-

"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 in 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.

12. The question then is this, was the value of the subject matter discernible from the Pleadings in this matter. To answer this question one would need to take a look at the Plaintiff dated **17th October 1997**. The prayers in that Plaintiff did not include any claim for a specific or liquidated sum. The prayers in the Plaintiff were as follows:-

“(a) A declaration that the sale and/or purported transfer of the said property that is to say all that piece of land known as L.R NO.1870/IV/175 Pilipili Road Westlands – Nairobi at the alleged public auction of 12th June 1997 was irregular and unlawful and therefore a nullity.

(b) An order that any action by the Defendants subsequent to the said sale leading to purported transfer of the suit property to the 2nd Defendant be stopped and/or declared null and void.

(c) General damages together with the interest thereon at Court rates.

(d) Costs of the suit together with interest at court rate.”

13. It is manifest that the suit did not involve a claim for an actual monetary award nor did the suit involve a claim for the value of the property. Rather it was suit filed for declaratory orders and for general damages. Therefore I find that the instruction fees ought to have been calculated vide the provisions of the **Advocates Remuneration Order Schedule VII(I)**. Accordingly I find that the Taxing Master did not commit any error in principle in determining the instruction fees as she did.

14. In **REPUBLIC –VS- MINISTRY OF AGRICULTURE & 2 OTHERS E-PARTE MUCHIRI W’NJUGUNA & 6 others, Hon Justice J.B Ojwang** (as he then was) held as follows:-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, interfere therefore with the award of a taxing officer, particularly where he is an officer of great experience, 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 office’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 interference that it was based on an error of principle...[own emphasis]

15. Given that the suit did not involve a claim for the value of the property I find that the Instruction Fees were correctly assessed in line with **Schedule VI** of the **Advocates Remuneration Order** which provides:-

“To present or oppose a case not provided for which sum should be reasonable but not less than Kshs.6,000/=”

16. In **KIPKORIR, TITO & KIARA ADVOCATES –VS- DEPOSIT PROTECTION FUND BOARD [2005] eKLR** the Court of Appeal held as follows:-

“On 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.”

Likewise in **ARTHUR –VS- NYERI ELECTRICITY UNDERTAKING [1961] E.A. 497** it was held that:-

“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 circumstances.
[own emphasis]

17. I find that the learned Taxing Master made no error in principle and find no reason to interfere with assessment on Instruction Fees. Indeed in her discretion she assessed the fees at **Kshs.200,000/=** which was way above the minimum of **Kshs.6,000/=** provided in Para 1(1). I find no reason to interfere with this aspect of the Ruling.

GETTING UP FEES

18. On the question of Getting Up Fees the Taxing Master declined to make any award under that heading on the basis that the suit was not set down for hearing and that **“no evidence was given to show that the suit was ready for trial.”**

19. The Applicant submits that an Advocate is entitled to Getting Up Fees from the very moment a denial of liability is filed or in which issues for trial are joined by the pleadings. **Schedule VI** of the **Advocates Remuneration Order paragraph (II)** provides as follows:-

“In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:

Provided that

(i) This fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;

(ii) No fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15 per cent of the instructions fee allowed on taxation may, if the judge so directs, be allowed against the party

seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned.

(iii) In every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph. “[own emphasis]

20. The general principle arising from the above is that a party is only entitled to Getting Up Fees once a matter has been fixed for hearing. The Applicant argues that the Taxing Master failed to give consideration to hearing notices which had been attached as proof of the hearings attended. They thus argue that they were entitled to Getting Up Fees. I find that preparation of a case for hearing does entitle a party to Getting Up fees. There is evidence from Hearing Notices annexed to the Applicant’s bundle of Documents that, the matter was set down for hearing. On this basis Getting up Fees is merited despite the fact that the suit was eventually dismissed for want of prosecution. Accordingly I find that the Applicant was entitled to Getting Up Fees of **Kshs.66,667/=** which is a third of **Kshs.200,000/=** being the Instruction fees awarded. I do therefore allow this review to this extent only.

21. Finally this Reference only partially succeeds. In light of the award of **Kshs.66,667/=** as Getting –up Fees, the Applicant is entitled to **Kshs.514,270/=** as taxed costs which costs I do hereby award. I direct that each party meet its own costs for this Reference.

Dated in Nairobi this 26th day of November, 2019

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Justice Maureen A. Odero