



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**

**CIVIL CASE NO.17 OF 2016**

**NGATIA & ASSOCIATES ADVOCATES.....PLAINTIFF/APPL**

**VERSUS**

**INTERACTIVE GAMING &**

**LOTTERIES LIMITED.....DEFENDANT/RESP**

**ARISING FROM HIGH COURT CASE NO.115 OF 2016**

**INTERACTIVE GAMING & LOTTERIES LIMITED.....PLAINTIFF**

**VERSUS**

**FLINT EAST AFRICA LIMITED.....1<sup>ST</sup> DEFENDANT**

**SAFARICOM LIMITED.....2<sup>ND</sup> DEFENDANT**

**KENYA REVENUE AUTHORITY.....3<sup>RD</sup> DEFENDANT**

**RULING**

This is a ruling on reference brought by way of chamber summons dated 30<sup>th</sup> may 2017.It challenges decision by taxing master in respect of item 1 & 2 in the bill of costs dated 28<sup>th</sup> January 2016.

Grounds on the face of the application are that the amount awarded in item no 1 on instruction fee and item 2 on getting up fee were manifestly excessive in the circumstances of the case as to justify an inference that they were based on an error of principle when she enhanced the scale instruction fee from 2,244,938 to 3,000,000. That she acted in error of principle by awarding getting up fee of kshs 755,062.

Counsel for the applicant cited the case of *Ramesh Naran Patel v Attorney General & Another (2012)* where justice Emukule stated the principles to be applied by the taxing master in increasing instruction fee. Factors to be considered include nature and importance of the cause or matter, interest of the parties and the general conduct of the proceedings. He submitted that each element must be broken down cogently without generalization. He submitted that it was not enough for the taxing master to generalize; and besides the generalization, the reason given does not justify increment of kshs 755,062.

Advocate/Respondent opposed the application on the ground that, the application contravene the mandatory provisions of Rule 11 (1) and (2) of the Advocates Remuneration order and that no sufficient basis has been laid to interfere with the taxing officer's decision; that it was not based on any error of principle to warrant setting aside. That assessment of the taxing master is fair and reasonable. The respondent submitted that the taxing master exercised her discretion judiciously.

On perusal of the ruling by the taxing master I note that the Advocate hearing ceased acting after one witnesses had partially testified. Thereafter the matter was disposed of by interpleader application.

As concern the instruction fee in *Joreth Limited versus Kigano & Associates (2000) eKLR* the court laid out principles that guide taxing officer in exercising her discretion as follows:

“taxing officer is entitled to his discretion to access such instruction fee as he considers just, taking 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, any direction by the trial judge and all relevant circumstance.”

Reasons given by taxing master for the increment of instruction fee from 2,244,939 to 3,000,000 is that it involved huge amount of money and the urgency required to deal with it. He added that the applicant had to peruse several documents and put in time to prosecute the case. I however note from the ruling that only one witness testified partly. The matter was later disposed of by interpleader application. Getting up fee was also awarded which takes care of preparation for hearing. An increment would therefore amount to double award. There is no dispute that the suit did not proceed for full hearing and there is no clear demonstrations of elements necessitating an increment on instruction fee. I do not see justification for increment of kshs 755,062.

In so far as getting fee is concerned, I refer to decision in *Ramesh Naran Patel v Attorney General & Another (2012)* where justice Emukule held as follows:-

“the item in the Advocates Remuneration Order-on getting up fee-contemplates involvement by counsel in the preparation of witnesses, witness statements and determination of the matter by viva voce evidence.”

From record, it is evident that at the time the suit was stayed, hearing had commenced. Besides the preparing witnesses’ statements before the suit was set down for hearing, the Advocate must have prepared them for the hearing which commenced but was not concluded. The Advocate is therefore entitled to getting up fee. The taxing master never erred in principle while award getting up fee.

Getting up fee should however be calculated on the basis of kshs 2,244,939 and not 3,000,000. I refer the matter to taxing master for the correction. Each party to bear own costs on this application.

**Dated and Delivered at Nairobi this 23<sup>rd</sup> day of February 2018**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

.....COURT ASSISTANT

.....COUNSEL FOR CLIENT/ APPL

.....COUNSEL FOR ADV/ RESP