



**REPUBLIC OF KENYA**

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

**MISC CIVIL APPLICATION NO. 609 OF 2016**

**JOE KATHUNGU & CO. ADVOCATES.....OBJECTOR/APPLICANT**

**-VERSUS-**

**WILSON KABURI MACHARIA.....1<sup>ST</sup> RESPONDENT**

**CHRISTINE WANGU MACHARIA.....2<sup>ND</sup> RESPONDENT**

**RULING**

This ruling seeks to determine two applications one dated 30<sup>th</sup> September, 2017 by the Applicant and another one dated 12<sup>th</sup> September, 2017 by the Respondents.

In the Application dated 12<sup>th</sup> September, 2017, the Respondents seek orders that the decision of the Hon. Rashid, Deputy Registrar given on 17<sup>th</sup> August, 2017 from the objectors bill of costs dated 2<sup>nd</sup> December, 2016 be set aside specifically in respect of instruction fees and VAT. The Respondents therefore pray that the Deputy Registrar of the High Court be directed to re-tax the items of instruction fees and VAT in the objector's bill of costs dated 2<sup>nd</sup> December, 2017. The application is supported by the Affidavit of **EVANS THIGA GATURU** sworn on 12<sup>th</sup> September, 2017 where he depones that in assessing the instruction fees due to the Objector/ Advocate, the Deputy Registrar proceeded on the wrong principle of basing the instruction fees on the damages awarded to the Respondents of Kshs. 2,178,800 instead of basing the instruction fees on schedule 6 which was " *Appeals from the Subordinate courts to the High Court*" and that the Objector not being the Appellant should have been awarded Kshs. 25,000/=. Similarly it was also deponed that having assessed the wrong instruction fees, the VAT was also wrongly assessed. The Applicant /Advocate filed grounds of opposition dated 2<sup>nd</sup> October, 2017 on the grounds that the Application is bad in law, that the instruction fees was properly assessed as well as the VAT.

The other Application dated 30<sup>th</sup> September, 2017 seeks to set aside and vary the costs as taxed by the Deputy Registrar on 17<sup>th</sup> August, 2017. The application is supported by the Affidavit of **JOE KATHUNGU** on the grounds that the taxing master erred in law in failing to realise that she was dealing with an Advocate/Client Bill of costs and not party/party bill of costs and as such she ought to have increased the costs taxed by 50%. The Application was opposed by the Respondents via Grounds of Objection dated 3<sup>rd</sup> November, 2017. The grounds of opposition are that the Application was filed after a delay of more than 19 days, the application is incompetent as it seeks fees awardable to an Advocate appearing for the Appellant and that the Applicant was only served with the Appeal as the Advocate who was on record for the Respondents therefore he is entitled to minimal fees.

The two applications were argued together in court. Mr. Gaturu appearing for the Respondents submitted that the Deputy Registrar ought to have relied on schedule 6 j (a) in calculating the instruction fees. He also told the court that the Applicant had only been served with the Appeal from another law firm but did not prosecute the same and prays the award be reduced to Kshs. 25,200/=. On the application dated 30/9/2017, he submitted that the statutory 14 days for filing the reference were ending on 13/9/2017 and therefore, application having been filed on 3/10/2017 was 19 days out of time.

On the other hand, Mr. Kathungu appearing for the Applicant submitted that after the bill of costs, he wrote to the DR on 28/8/2017 objecting to the taxation who replied back on 12/9/2017 which letter was sent by post and was received on 23/9/2017. That according to rule 11(2), time starts from the date of receipt of the reasons and not from the date of the ruling. He further submitted that the instruction fees were in respect of an appeal where he had represented the Respondents. That he had instructions to oppose the Appeal filed thereafter by the Defendant and therefore the taxing officer used the correct schedule in calculating the instruction fees only that she did not realise that she was dealing with Advocate/Client Bill of Costs and not party/ party costs. In a rejoinder, the Respondent's Counsel submitted that the Applicant was adducing evidence from the bar in that he had not pleaded in his Affidavit when he received the letter dated 12/9/2017 from the Deputy Registrar.

I have considered the two applications, the Affidavits on record as well as the submissions of the Counsels. Both Applications are brought under the provisions of Rule 11 (2) of the Advocates (Remuneration) Order. Rule 11 (1) & (2) provides that-

*“(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.”*

In determining the instruction fees, a taxing master is bound to exercise his/her discretion in a manner which is just and fair considering the circumstances of the case and the general conduct of the proceedings. In **Jeroth Limited Vs. Kigano & Associates Civil Appeal No. 66 of 1999 (2002) 1 EA** the Court stated that,

*“We would at this stage point out that the value of the subject matter of a suit for the 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 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 other relevant circumstances.”*

It has been argued by the Respondents that the Applicant did not prosecute the appeal in question. That he was only served with the Appeal and the Applicant has not disputed the allegation and in his submission, the Advocate for the Applicant admits that the conduct of the Appeal was taken over by another Advocate. The taxing officer calculated the instruction fees based on the schedule 6 (b) which provides for instruction fees to

*“sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties”*

In determining the instruction fees a court will consider the value of the subject matter which is derived from the pleadings, judgment and or settlement. The deputy registrar used the correct schedule in calculating the instructions. Schedule 6 (1) (j) (a) deals with instruction fees on appeals in cases where the value of the subject matter cannot be determined as per schedule 6 (1) (b). Schedule 6 (1)(j)(a) provides for instruction fees

*“ To present or oppose an appeal in any case not provided for above; such sum as may be reasonable but not less than Kshs 25,200”*

This court will only interfere where the fees awarded is manifestly high or low so as to occasion an injustice or where the taxing officer failed to consider a relevant factor or considered an irrelevant factor.

In the case of **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W’njuguna & 6 Others, Ojwang, J** (as he then was) expressed himself *inter alia* that:

*“...A Court will not, therefore, interfere 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 officer’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 inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge.”*

In this case, it is my considered view that even though the taxing officer used the correct scale in calculating the instruction fees there is a relevant factor that she did not consider being the fact that the Applicant was only served with the Appeal having represented the Respondents in the lower court. There is no evidence that the Applicant was instructed to prosecute the same and indeed he did not prosecute the appeal. I find that the award was therefore excessive in respect of the foregoing. The Deputy Registrar ought to have awarded such a minimal and reasonable amount in instruction fees for the work done, which was to receive the Appeal.

In my humble view, fees chargeable by advocates are facilitative of access to justice and should be reasonable as espoused in **Article 48 of the Constitution** that:-

*“The state shall ensure access to justice for all persons, and, if any fee is required, it shall be reasonable and shall not impede access to justice”.*

The above Constitutional provision is in tandem with holding by the Court of Appeal in the case of **Premchand Raichand vs. Quarry Services EA Ltd No. 3 (1972) EA 162** that *“... costs should not be allowed to rise to a level as to confine access to the courts to the wealthy and that a successful litigant ought to be fairly reimbursed for the costs he has to incur.”*

On the application dated 30th September, 2017, it has been submitted by the Applicant that he received the letter from the Deputy Registrar

on the reasons for the ruling on 23<sup>rd</sup> September, 2017 hence his application was not filed out of time having being filed on 3<sup>rd</sup> October, 2017. This evidence was brought in during the submission and the Respondents' Counsel objected to its admissibility. The rules of evidence are clear that parties are not permitted to bring new evidence during submissions. In the case of **General Motors East Africa Limited v Eunice Alila Ndeswa & another [2015] eKLR, Justice Aburili** held that,

***“Parties do not provide new evidence in submissions and therefore one cannot adduce evidence by way of a submission to challenge evidence or documents which in this case did not form part of the pleadings.***

***...Submissions, in my view, cannot be taken to be a party's evidence as it was not taken on oath and neither was it subjected to cross examination by the adverse parties to test his demeanor, credibility and or the veracity of his averments.”***

My finding on the Application dated 30<sup>th</sup> September, 2017 is that it was filed out of time and the Applicant did not seek leave of the court. The explanation and evidence sought to be adduced during submissions ought to have been pleaded in the Affidavit. In the circumstances, the court is unable to ascertain when the said letter from the Deputy Registrar was received and therefore, I can reasonably conclude that the application was filed out of time. The application is therefore dismissed.

On the Application dated 12<sup>th</sup> September, 2017, the finding of the court is that the award on instruction fees was excessive and that the taxing officer ought to have considered the fact that the Applicant was only served with the Appeal but did not prosecute the same. The orders of this court are therefore that the Deputy Registrar do re-asses the item on instruction fees and VAT in the Applicants Bill of Costs dated 2<sup>nd</sup> December, 2016 and award a reasonably minimal fee commensurate to the work done.

It is so ordered.

**Dated, Signed and Delivered at Nairobi this 12<sup>th</sup> Day of March, 2018.**

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... *For the Objector/Applicant*

..... *For the 1<sup>st</sup> Respondent*

..... *For the 2<sup>nd</sup> Respondent*