REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 133 OF 2011

CAROLYNE NASIMIYU.......................................APPELLANT/APPLICANT

VERSUS

AGRICULTURAL FINANCE CORPORATION.....................RESPONDENT

RULING

1. The Applicant herein took out the chamber summons/reference dated 7th September, 2018 under Sections 3A and 95 of the Civil Procedure Act; and Paragraph 11 of the Advocates (Remuneration) Order and sought for the following orders:

i) THAT this Honourable Court be pleased to set aside the decision delivered by the taxing master on 14th June, 2018 thereby awarding the Respondent Kshs.307,650/= as taxed costs.

ii) THAT this Honourable Court do order that the Respondent's bill of costs dated 29th March, 2018 be taxed afresh.

iii) THAT this Honourable Court do issue such further orders as it deems fit and just.

iv) THAT costs of the Application be provided for.

2. In her supporting affidavit, **Carolyne Nasimiyu** averred that she filed a case at the lower court, which was subsequently dismissed and parties ordered to bear their own costs. She thereafter lodged an appeal at the High Court, which appeal was similarly dismissed with costs to the Respondent. She added that the Respondent filed a party and party bill of costs on 5th May, 2016 and the same was taxed by Honourable F. Rashid and a decision made on 14th June, 2018 wherein the Respondent was awarded costs of Kshs.307,650/=.

3. The deponent averred that in arriving at the aforesaid decision, the taxing master failed to consider that the matter was straightforward in nature, hence the instruction fees of Kshs.250,000/= awarded was excessive and failed to consider the value of the subject matter. She further stated that since hers was a liquidated employment claim, the value of the subject matter was determinable; that VAT was not to be charged since this was a party and party bill of costs; that the taxing master failed to appreciate that the fees was in excess in comparison to the nature and amount of work done by the advocates and that the taxing master failed to consider the Applicant's submissions in calculating the instruction fees. It was the applicant's argument that the taxing master did not consider public policy and access to justice.

4. The Respondent filed a Replying Affidavit in opposition to the reference. In his affidavit sworn on 7th October, 2018, **John K. Mutuma** basically argued that the appellate court had addressed a number of issues; that the argument by the Applicant that parties submitted written submissions should not make a party any less entitled to costs and that the application should be dismissed.

5. The application was argued orally before court with the parties reiterating the contents of their respective documents.

6. The court has considered the reference, the response thereto and oral arguments presented by the parties. The bone of contention is essentially premised on the decision of the taxing master in respect of the bill of costs dated 29th March, 2016. As has already been established, the taxing master awarded costs amounting to Kshs.307, 650/= to the Respondent. The Applicant contended that the sum awarded is exorbitant. It is therefore the court's duty to determine the merits of the reference.

7. On the issue of the instruction fees, the Applicant submitted that the award of Kshs.250,000/= is excessive. It was also her submission that the taxing master erred in failing to consider the value of the subject matter in the pleadings. Conversely, the Respondent submitted that the Applicant sought five (5) different reliefs in the main suit and that it was not possible to quantify most of them. A reading of the taxing master's decision reveals that there was an appreciation of the fact that the value of the subject matter often comes into play when calculating

instruction fees. However, in this instance, the taxing master opined that the value could not be determined from the pleadings and judgment.

8. The court has recognized that the claim derives from an employment dispute. A perusal of the Plaint indicates that the Applicant sought unpaid dues in addition to other claims. This begs the question: would it have been reasonably possible to determine the value of the subject matter herein? The court's considered view is that there was no way of ascertaining the value, since the subject matter was tied to an employment dispute wherein the reliefs sought varied and could not have been ascertained with accuracy. The taxing master was therefore correct in disregarding the same.

9. The other issue is whether the matter was complex enough to warrant the instruction fees awarded. The Applicant maintained that the case was in no way complex and parties had filed written submissions. On the contrary, it was the Respondent's submission that filing of written submissions should not limit the instruction fees awarded and that the matter prolonged in court (from 2010 to 2018) and involved quite abit of research. Unfortunately, it appears the taxing officer did not shed light on the factors that led to the calculated instruction fees. That notwithstanding, the view of the court as concerns the complexity of the case is that there is no particular measure of the same; it all varies from case to case. I do agree with the Applicant, though, that the circumstances of the case were not complex as such, save that the matter went to appeal. It is unclear whether the taxing master had this in mind.

10. Also, the court observes that contrary to the averments made by the Respondent, the appeal was filed in 2011 and judgment delivered in 2016. Whereas the court will agree that the matter was in court for quite some time, the level of research and paper work undertaken on appeal was less demanding in comparison to the main suit.

11. Having established the above, it is imperative for the court to determine whether the instruction fees awarded was exorbitant. The court draws guidance from the case of ***Premchand Raichand Ltd & Another v Quarry Services E. Africa Ltd (1972) E.A. 162*** where the court held the following:

> ***"…every case must be decided on its own merits and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit…"***

The court also relies on its own reasoning in ***Rosa Associate v KTK Advocates [2018] eKLR*** that whereas an advocate is entitled to compensation, the instruction fees awarded should not be so excessive that it amounts to an injustice; rather, it should be reasonable and commensurate to the work done. The court also appreciated that the discretion of a taxing master should be exercised judiciously taking into account the facts of the case. In reaffirming its sentiments hereinabove, this court is unable to establish the factors that led the taxing master to calculate the instruction fees at Kshs.250,000/=. I make reference to Justice Rawal's ruling in ***J M Njenga & Co. Advocates v Kenya Tea Development Agency Limited [2011] eKLR*** where she opined that the taxing master should strive to consider every item on the party and party bill of costs so as to ensure the advocate gets what is due to him.

12. The court firmly believes that a party should not be allowed to unjustly enrich himself at the expense of the other. In the reference before court, it remains unclear how the instruction fees was arrived at, by the taxing officer and in such a situation, the court would be quite ready to interfere with the decision. In fact, a number of authorities have agreed that the court is entitled to interfere with a taxing officer's decision where the same is unreasonable and impedes the essence of Article 48 of the Constitution. To this end, the court agrees with the Applicant that the instruction fees calculated without a basis hindered her access to justice.

13. On the subject of VAT, there appears to be conflicting views on whether the same should be charged on a party and party bill of costs. In the case of ***Pyramid Motors Ltd v Langata Gardens Limited [2015]eKLR*** Justice Onguto vacated an award of VAT since the bill of costs was party and party in nature. On the other hand, the court in ***Four Farms Ltd Vs. Agricultural Finance Corporation [2015]eKLR*** determined that there was merit in awarding VAT. Having considered the two (2) persuasive decisions aforementioned, the court takes the view that VAT should not be charged in a party and party bill of costs.

14. In the end, the court is inclined to allow prayers 1 and 2 of the reference and orders that the reference be taxed afresh before a different taxing master. Each party shall bear its own costs.

Dated, signed and delivered at **Nairobi** this **29th** day of November, 2018.

L. NJUGUNA

JUDGE

In the presence of:

......................................for the Appellant/Applicant

....for the Respondent