



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 287 OF 2012

REAL INSURANCE COMPANY LIMITED PLAINTIFF/APPLICANT

VERSUS

BOARD OF GOVERNORS,

VICTONELL ACADEMY.....DEFENDANT/RESPONDENT

RULING

1. Real Insurance Company Limited, the Applicant herein, took out the Summons dated 22nd November, 2018 pursuant to the provisions of Rule 11 (2) and (4) of the Advocates (remuneration) Order whereof it sought the following orders:

i. That this application be certified as urgent and service thereof dispensed with in the first instance - spent

ii. That pending the hearing and determination of this application, this Honourable Court be pleased to order stay of the entire decision of the taxing officer delivered on the 8th day of November, 2017 in relation to the taxation of the Respondent's Bill of Costs dated 28th June, 2017.

iii. That this Honourable Court be pleased to set aside and/or adjust the figures and reassess the fees due to the Respondents within the set minimums as provided by the Advocates Remuneration Order 2006, 2010 and 2014 in respect to items 1, 2, 13, 16, 17, 19, 23, 29, 36, 37, 41, 45, 54, 57 and/or in the alternative the matter to be remitted to such other taxing master as the court may direct for re-assessment ab initio.

iv. That the cost of this application be provided for.

2. The background to this reference is a suit in which the plaintiff sought an order that it was not bound to pay or indemnify the defendant against any claim arising from a motor vehicle road accident that occurred on 29th July, 2011 along Kericho-Kisumu road involving the Defendant's motor vehicle registration number KAK 096R and motor vehicle registration number KBA 773B. Judgment was entered in favour of the Defendant whose counsel in turn prepared a Party and Party Bill of Costs dated 28th June, 2017 which was taxed by Hon. Omido, the Deputy Registrar, on 8th November, 2017 at Kshs. 1,012,450.30. The Deputy Registrar in taxing the instruction fee, item no.1, stated that the matter was novel and complex as it arose from 12 suits involving 5 law firms which suits were filed at the Kericho Magistrate's Court.

3. He noted that the file was bulky and took 5 years to conclude and that the parties engaged in heavy research. Having taken the aforementioned into account, he found that Kshs. 700,000 as being reasonable. He noted that in accordance with the Advocates Remuneration Orders, the getting up fees should be a third of the instruction fees under item no. 1 and not one half, hence Kshs. 233,333.33. On items 13, 17, 22, 36, 37, 38, 41, 46, 51 and 57, he taxed each item at Kshs. 2,040. For the other items, he found them to be reasonable bringing the total bill of costs to Kshs. 1,012,450.33.

4. The Plaintiff/Applicant was aggrieved by the amounts taxed under items 1, 2, 13, 16, 17, 19, 23, 29, 36, 37, 41, 45, 54 and 57 citing that the amount taxed was higher than the stipulated amounts under the various Advocates Remuneration Orders. This led to the institution of this reference by the aggrieved Plaintiff/Applicant as they argue that the Defendant/Respondent had issued notice on intention to execute for the taxed cost and execution was imminent.

5. The reference was supported by the Affidavit of Amaan Kassam Advocate sworn on 22nd November, 2017. He stated that the bill of costs was taxed at Kshs. 1,012,450.33. He objected the taxation costs and sought reasons for the same. He argued that the taxing master erred in law by taxing the above-listed items above the stipulated amounts as prescribed under the respective Advocates Remuneration Orders with

no legal justification. He argued that Kshs. 700,000 instruction fees for a determination on whether the Applicant was to indemnify the Respondent was higher than the allowable amount under Schedule V1 of the Advocates Remuneration Order, 2006.

6. Counsel further stated that the Respondents had served the Applicant with the certificate of costs together with a notice of intention to execute. He stated that the Applicant would be prejudiced and suffer irreparable loss and damage. He urged court to grant stay orders pending the hearing and determination of this reference and to also set aside and/or adjust the figures and reassess the fees due.

7. The Defendant opposed the reference vide the Replying Affidavit sworn by Anthony Gikaria, Advocate. He deposed that the taxing master properly directed himself on a matter of principle and exercised his discretion in taking into consideration various factors *inter alia*, nature of the matter, interests of the parties and all other relevant circumstances. He further deposed that the reference was premised on quantum and that court's jurisdiction was limited to interfere only in exceptional cases where a taxing officer misdirected himself on a matter of principle and where the decision was unjudicial and unreasonable. He urged the court to dismiss the reference.

8. The reference came up for hearing and it was agreed that the same be disposed of by way of written submissions which the parties duly filed. I have considered the grounds stated on the face of the reference and the facts deposed in support and against the reference. It is the Applicant's argument that the instruction fees was not commensurate with the services rendered as the work involved did not go beyond the ordinary work of counsel to warrant the awarded amount. They submitted that the taxing officer did not describe or specify the nature of forensic responsibility. They submitted further that the matter was not novel as it concerned a repudiation of a contract of insurance and determining whether or not that repudiation was lawful or not within the confines of the contract.

9. On their part, the Respondents submitted that the reference was pegged on quantum and lacked merit. They argued that the tax master's decision was regular and within the parameters of the applicable law by taking into consideration the nature and importance of the matter, the interest of the parties and the general conduct of the proceedings and all other relevant factors in ascertaining the value of the subject matter. They further submitted that the court lacked jurisdiction to re-tax a bill even if it was of the opinion that the amount awarded was too high.

10. From my consideration of the rival affidavits and submissions aforesaid, the main issue for determination is whether the taxing officer erred in principle with regard to the amount awarded under items number 1 and 2 only.

11. The principles that guide a court in considering a Reference have been stated in many decisions. In **James Arthur v Electricity Undertaking (1961) EA 492** the court emphasised the principle that taxation is a matter of discretion of the taxing master and that the High Court can interfere with the taxing master's discretion on matters of quantum only in exceptional cases. See also **Kipkorir Tito & Kiara Advocates v Deposit Protection Fund (2005) eKLR 528**. In the case of **Republic v Minister of Agriculture & 2 Others Ex-parte Samuel Muchiri W. Njuguna & Others (2006) eKLR** the Court (Ojwang J. as he then was) enumerated the guiding principles as follows:-

- i. The taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;**
- ii. The taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;**
- iii. So far as apposite, comparability should be applied in the assessment of advocate's instruction fees;**
- iv. Objectivity is to be sought, when applying loose-texture criteria in the taxation of costs;**
- v. Where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be identified and stated; secondly, complexity is to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;**
- vi. Where responsibility borne by advocates is taken into account, its nature is to be specified;**
- vii. Where novelty is taken into account, its nature is to be clarified;**
- viii. Where account is taken of time spent, research done, skills deployed by counsel, the pertinent details are to be set out in summarised form.**

12. In his ruling, Hon. Omido stated that he took into consideration *inter alia*, the complexity of the matter, the research undertaken, the law firms involved and the duration taken in the matter. He also noted that the matter was novel as it arose from 12 suits filed in the Kericho Magistrate's Courts. However, he failed to establish and describe the novelty brought out by the matter as is required. The lack of such justification or demonstration of the complexity or novelty in the litigation was significant in justifying the amount awarded under instruction and getting up fees.

13. I have looked at the judgment in the suit. The suit was primarily a declaratory suit seeking to avoid indemnity. The judgment manifests no complexity in the suit at all and does not show that the advocate did more than he was required to do in his professional task. The multiple suits alluded to by the taxing master were primary suits arising out of the same accident and there is nothing in the pleadings of the applicant to suggest that there was a corresponding number of declaratory suits. The complexity and novelty referred to by the taxing master was not explained at all. My conclusion is that the taxing master erred in principle in awarding the sum of Kshs. 700,000/- in instruction fees and kshs. 233,333.33/- getting up fees respectively.

14. Accordingly, I find merit and issue the following orders:-

i. The decision of the taxing master with respect to instruction and getting up fees is hereby set aside.

ii. The instruction fees and getting up fees to be remitted for fresh taxation by another Taxing Master other than Hon. Omido.

iii. I have looked at the amounts taxed under items number 13, 16, 17, 19, 23, 29, 36, 37, 41, 45, 54 and 57 against the relevant remuneration order and find them to have been taxed reasonably.

iv. Each party to bear its own costs of this reference.

Ruling signed

R.LAGAT KORIR

JUDGE

Ruling delivered, dated and signed at Nakuru this 19th Day of December, 2018

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Janet Mulwa

JUDGE

In the presence of:

.....Court Clerk

..... For the Applicant

..... For the Respondent