



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL SUIT NO. 4008 OF 1993**

**KENYA POST OFFICE SAVINGS BANK. .... PLAINTIFF**

**VERSUS**

**GILBERT GWARO ARIGA ..... 1<sup>ST</sup> DEFENDANT**

**JOHN R. NYAUMA ..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. The 2<sup>nd</sup> Defendant brought a Chamber Summons application before this Court under Certificate of Urgency dated 17<sup>th</sup> October, 2016 based on the provisions of **Rule 11 (2)** of the *Advocates' (Remuneration) Order* and all enabling provisions of the law. The 2<sup>nd</sup> Defendant seeks orders that the decision of the taxing officer under order dated 3<sup>rd</sup> of October, 2016 be set aside, the Honourable court be pleased to remit the Bill of Costs dated 22<sup>nd</sup> day of August, 2016 to the Deputy Registrar for fresh taxation, with directions on the conduct of the taxation and costs of the application be provided for.

2. The 2<sup>nd</sup> Defendant's grounds of Application are that: the applicant objects to the assessment of items No. 1 and 58 of the Bill of Costs, the Taxing Officer erred in principle and misdirected herself in determining the value of the subject matter from the amount claimed in the Plaint as opposed to the said judgment; and that the taxing officer proceeded on mistaken principles and consequently failed to exercise her discretion judiciously to justify interference by this Honourable Court.

3. The 2<sup>nd</sup> Defendant's said Application was supported by the Affidavit of **Dr. John R. Nyauma**, the 2<sup>nd</sup> Defendant herein and much of what was contained in the Supporting Affidavit was detailed in the Grounds in support of the Application. Annexed to the Affidavit is a copy of the decree dated 5<sup>th</sup> October, 2010 wherein the case against the 2<sup>nd</sup> Defendant was withdrawn with the learned judge Hon. Lady Justice Kalpana Rawal condemning the plaintiff to pay the 2<sup>nd</sup> Defendant costs at the lower scale and a judgment was entered in favour of the Plaintiff against the 1<sup>st</sup> Defendant for the sum of Kshs. 1,983,660.90 together with interest as at 16<sup>th</sup> day of August, 1993.

4. The Plaintiff filed Grounds of Opposition dated 27<sup>th</sup> January, 2017 and a Replying Affidavit dated 3<sup>rd</sup> March, 2017 sworn by John Kimani Mwangi. The Plaintiff deponed in Affidavit that the taxing officer considered all the legal parameters as well as the nature and importance of the subject matter in exercising her discretion and followed the guidelines upon which a bill of costs should be taxed and thus did not err in holding that Kshs. 109, 314/= was justifiable costs to the Applicant. That it is a well settled principle

that the value of the subject matter maybe determined from the pleadings, judgement or settlement of the Parties and that the taxing officer has a choice to go by any option. In this matter, the taxing officer considered the subject matter as per the pleading rather than the judgment.

5. The Parties canvassed the instant application by way of written submissions. The 2<sup>nd</sup> Defendant submitted that in assessing and arriving at the quantum of the fees allowed, the taxing officer made an error in principle by purporting to base the value of the subject matter from the amount claimed in the plaint being Kshs. 1,983,660.90 as opposed to the amount awarded in the judgment which is inclusive of interest as it could not be said that the 2<sup>nd</sup> Defendant's Advocate was instructed to defend not only the principal sum but also together with the interest which totals to Ksh. 6,070,763.20. The Applicant made reference to the case of **Jeroth Vs. Kigano and First American Bank of Kenya** where the court stated that it would interfere where the taxing officer has made an error of principle. On that premise, the Applicant submitted that it was an error of principle on the part of the taxing officer to fail to take into consideration or include the figure arrived at after the computation of the interest awarded at the trial. I have also read the other authorities relied upon by Applicant

6. On the other hand, In the submissions by the Plaintiff, it brings to the court's attention that the instant application seeks to set aside the decision of the Taxing Officer in regards to items 1 and 58 of the Bill of Costs dated 22<sup>nd</sup> August, 2016. The applicant reiterates the principles for consideration by the taxing master in determining the subject matter as were set out in the case of **Joreth limited Vs. Kigano Associates (2002) 1 E.A 92** (supra) The Plaintiff submits that since the claim against the 2<sup>nd</sup> defendant herein was withdrawn, no judgment was entered in his favour and thus there was no legal reason for the taxing officer to award instruction fee on the basis of the award in the judgment as claimed by the 2<sup>nd</sup> Defendant. In order to illustrate that the taxing officer was in order in not considering accrued interest, the Plaintiff relied on the case of **Bank of India Vs. Surgilabs Limited & 3 others** where the court stated that, *"...It cannot therefore be said that where the Plaintiff pleads that he should be awarded interest on the principal amount then such element of interest is automatically taken into account when assessment of costs is being made."* Further the Plaintiff made reference to **Bio Medical Laboratories Ltd Vs. Attorney General** where the court found that **interest as awarded was to restore the Plaintiff's pecuniary interest in the matter given the nature and unique circumstances which gave rise to the contractual obligations of the parties. The court considered the pleadings value of Kshs. 8,225,000/= as quantum for purposes of calculating instructions fees instead of the amount of Kshs. 110,698,173 which was the judgement amount including interest.**

7. I have read with interest the Ruling of the Honourable Taxing Officer dated 3<sup>rd</sup> October, 2016. The Taxing Officer commences her Ruling by stating that the Applicant has charged a sum of Kshs. 174,000/= as the instruction fees. The Taxing Officer recorded that:

a. *"Instruction fees are calculated from the value of the subject matter which is derived from the pleadings, judgement and or settlement. This suit was commenced vide a Plaint dated the 30/7/93 which sought orders a) special damages of Kshs. 1, 983,660.95/=, b) costs of the suit, c) interest on (a) and (b)..."*

b. In her ruling, the learned taxing officer noted that, *"the suit was then withdrawn and matter was marked as settled on the 5/10/10. The value of the subject matter is Kshs. 1,983,660.95."*

c. The taxing officer then proceeded to explain the arithmetic calculations for items 1 to 58 based on the subject matter as per the pleadings and arrived at a figure of Kshs. 109,314/=.

8. The circumstances under which a Judge of the High Court can interfere with the taxing officer's exercise of discretion were well stated in the case of **First American Bank of Kenya vs. Shah and Others**. These principles are,

a. that 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;

b. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause 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;

c. if the Court considers that the decision of the Taxing Officer discloses error of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

d. it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;

e. the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;

f. the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;

g. the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.

9. Further in **Premchand Raichand Ltd & Another vs. Quarry Services E. Africa Ltd (1972) E.A. 162.** it has been held that the Court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job; the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case;

10. The Taxing Officer subjected her mind to the circumstances prevailing in this specific case in considering the subject matter as the case against the 2<sup>nd</sup> Defendant was withdrawn and judgment was only entered against the 1<sup>st</sup> Defendant thereby necessitating the subject matter to be ascertained from the pleadings. The learned Taxing Officer was well aware of the principles guiding taxation as well captured in her ruling and therefore it cannot be said that she erred in principle or misdirected herself in determining the value of the subject matter from the amount claimed in the Plaintiff as opposed to the judgment.

11. Therefore, I find no merit in the 2<sup>nd</sup> Defendant's Chamber Summons dated 17<sup>th</sup> October, 2016. The Taxing Officer did not breach any principle in relation to the taxation of the 2<sup>nd</sup> Defendant's said Bill of Costs to justify any interference by this Court. The 2<sup>nd</sup> Defendant's Application is hereby dismissed. No order is made as to the costs of the reference.

**Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of July, 2017.**

.....

**L. NJUGUNA**

**JUDGE**

*In the presence of*

..... *for the Plaintiff.*

..... *for the 1<sup>st</sup> Defendant.*

..... *for the 2<sup>nd</sup> Defendant.*