



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI HIGH COURT**  
**MISC CIVIL APPLICATION NO. 602 OF 2012**

**METRO PETROLEUM LIMITED.....APPLICANT**

**VERSUS**

**ONYANGO OLOO & CO. ADVOCATES.....RESPONDENT**

**RULING**

1. For the determination of the Court is the application dated 24<sup>th</sup> October 2014. The application was brought pursuant to the provisions of Rule 11 of the Advocates (Remuneration) Order, and Sections 3 & 3A of the Civil Procedure Act. The applicant seeks the following prayers *inter alia*;
  1. **The decision by the taxing master made on 30<sup>th</sup> September 2014 awarding the sum of Kshs 1,399,544.29 as instructions fees and Kshs 466,514.76 as getting up fees in taxation of the Bill of Costs dated 15<sup>th</sup> October 2012 be set aside.**
  2. **This Court do make an appropriately reduced award in place of the instruction fees in taxation of the Bill of Costs dated 15<sup>th</sup> October 2012 or give appropriate directions as to the taxing of the said items by another taxing master.**
  3. **Costs of this application be provided for.**
2. The application was premised on the grounds that the taxing master erred in her assessment of the instructions and getting up fees, thereby arriving at an inordinately high award, and, that the taxing master failed to take into consideration the nature of the matter giving rise to the taxation. The affidavits sworn on even date by the Applicant further in support of the application, reiterated the grounds as adduced, and further contended that taxing master did not consider the submissions and authorities filed in opposition of the Bill of Costs, It was deposed to that the taxing master in her taxation of the Bill of Costs, had awarded getting up fees yet the matter had not been set down for hearing and that the instruction fees, in so far as they were in accordance with the Remuneration Order, did not conform with the prevailing circumstances of the matter. The application was also supported by the Supplementary Affidavit sworn and filed on 13<sup>th</sup> April 2015.
3. In opposing the application, the Respondent filed its Statement in Opposition dated 6<sup>th</sup> November 2014. It was stated that the application was premature as the Applicant had not properly invoked the Court's jurisdiction under Rule 11 of the Advocates Act, that the Court has no jurisdiction to issue order against non-suited parties, and further, that the Court had no jurisdiction to grant the

prayers sought as no reference had been filed. It was averred that the Applicant had come with unclean hands as it had issued cheques in settlement of the claim upon agreement yet still filed the instant application.

The Applicant's contention was that the taxing master awarded sums to the Respondent that were manifestly excessive, and did not take into consideration the prevailing circumstances on the matter. They relied on the case of **Mayers & Another v Hamilton & Other (1975) EA 13** where the Court held that one would not be entitled to the whole fee which the advocate may ultimately claim, and that entitlement grows as the case progresses. They further relied on the case of **Modern Coast Builders & Contractors & Another v David Kinusu T/A Sifuna & Co. Advocates Civil Appeal No. 45 of 2005** where the Court of Appeal reduced instruction fees based on the non-complexity of the issues in the instant suit. It was further the Applicant's contention that the taxing master could not award getting up fees if the matter had not been set down for hearing (see **Mbugua & Mbugua Associates v Kenindia Assurance Co. Ltd Misc. Application No 687 of 2007**), and further as illustrated in the case of **Ouru Power Ltd v Intertrek International Ltd & 2 Others**. It was stated that the discretion of the taxing master should not be interfered with, unless it is determined from the facts that the award was manifestly excessive, as was determined in the case of **Steel Construction & Petroleum (EA) Ltd v Uganda Steel Factory Ltd [1970] EA 141**.

5. On its part, the Respondent contended that the complexity of a matter was not determined by the voluminous documents that had to be filed in Court, but rather a determination was to be made on the numerous applications and prosecution of the same. This, it was reiterated, was evidence that the matter was not simple and straight forward, and that therefore the taxing master considered the complexity therein. Reliance was accredited to the case of **F M Mulwa Advocates v Patrick Mutheke Ndeti (2006) eKLR**, and stated, further, that the instruction fees of Kshs 1,399,544.30/- as awarded was less than what was scheduled in the Advocates (Remuneration) Order. The Respondent relied on the case of **Nguruman Limited v Kenya Civil Aviation Authority & 3 Others [2014] eKLR**, where Lenaola, J interpreted Schedule VI para 2 of the Advocates (Remuneration) (Amendment) Order where he held that once there was denial of liability, getting up fees were payable.
6. The parties dispute is premised in two particular issues; (1) the instruction fees; and (2) getting up fees. As with regards to instruction fees, the case of **Rogan Kamper & Grosvenor [1989] KLR**, the Court held that;

***“The taxing master may allow a fee for instructions which he shall consider reasonable; the Judge, on a reference to him, may make a deduction or addition thereto which will render the bill reasonable only if he is of the opinion that a bill of costs as taxed, in all the circumstances, is manifestly excessive or manifestly inadequate.”***

In the case of **Danson Mutuku Muema v Julius Muthoka Muema & Others Civil Appeal No. 6 of 1991** Mwera, J (as he then was) held *inter alia*;

***“Then the taxing officers while applying the schedules should know and seriously apply their minds, within the discretion allowed, with due seriousness to their exercise. They should ensure that only proper, lawful and justified bills roll of their desks.”***

7. In arriving at the instruction fees as awarded in the taxation, the taxing master in her decision dated 7<sup>th</sup> October 2014, issued in compliance with Rules 11(1) and (2) of the Advocates (Remuneration) Order, in considering the Applicant's objection, considered both the value of the subject matter, and the provision of Schedule VI paragraph (b) of the Advocates Remuneration Order 1997. She rendered that the amount as claimed in the Bill of Costs was less than the minimum allowed under the Remuneration Order, and therefore allowed the sum as claimed.
8. The instruction fees as per the Schedule was Kshs 1,399,544.30/-. In the Respondent's Bill of Costs dated 15<sup>th</sup> October 2012, the amount charged was Kshs 1,244,953/-. This, as correctly stated by the taxing master, was less than the minimum allowed under the Advocate Remuneration Order. Further, and in the cases of **Desai, Sarvia & Pallan Advocates v Jambo Biscuits (Kenya)**

**Limited [2014] eKLR** and **Oyatta & Associates v Nilam Doshi [2013] eKLR**, both Kimondo, J and Havelock, J (as he then was) in the respective cases, were of the considered opinion that the value of the subject matter was a proper measure for instruction fees to be awarded. In the latter case, it had been held that;

*“As regards HCCC No. 802 of 2002 – I have perused the Ruling of the Taxing Officer delivered on 4th of October 2012. She detailed that the value of the subject matter of the suit was not disputed in the amount of Shs. 21,093,780.80. This figure relates to the amount claimed in the Plaint dated 26th June 2002. I have perused the Taxing Officer’s calculations as regards to the Instruction fee which she allowed at Shs. 356,406.71. I would endorse the calculations in that regard.”*

9. In **Joreth Ltd v Kigano & Assoc. Civil Appeal No. 66 of 1999 (unreported)**, the Court of Appeal had observed therein as follows:

*“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, judgement or settlement (if such be the case) but if the same is not so 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 the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”*

10. Considering the provisions of Schedule VI, paragraph (b) of the Order, as well as the value of the subject matter, it cannot be said that the amount taxed off was manifestly excessive. In accordance with the determination of Ochieng, J in **F M Mulwa Advocates v Patrick Muthoka Ndeti** (supra), the taxing master exercised her discretion and considered the value of the subject matter in arriving at her final award. For exercising that discretion correctly, she cannot therefore be faulted for having awarded a manifestly excessive award. The Appellate case of **Modern Coast Builders & Contractors v David Kinusu T/A Sifuna & Co. Advocates** (supra) is distinguished. There was no value claimed on the Winding-Up Petition. The Court rightly considered that the only work involved was the filling of the Petition. It was merely a presentation made before the Court for the winding up of the Company. There was recovery claim, as in the instant suit, nor was there any objection filed to the Winding-Up Petition. These circumstances are distinctly dissimilar from those presented in the instant suit, and therefore, cannot be applicable in the instance.
11. With regards to the second issue pertaining to getting up fees, the Applicant had contended that the matter had not been set down for hearing, and that therefore, there shouldn’t have been an award for getting up fees. This was the position adopted by the Court in the cases of **Ouru Power Ltd v Intertrek International Ltd & 2 Others** (supra) and **Mbugua & Mbugua Advocates v Kenindia Assurance Co. Ltd** (supra). In both instances, the Court refused to award getting up fees as the matter had not been set down for hearing as envisaged under Schedule VI of the Advocates (Remuneration) Order. Under sub-paragraph (ii) it is provided that;

## **2. FEES FOR GETTING UP OR PREPARING FOR TRIAL**

**In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:**

**Provided that –**

- i. this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;**
- ii. no fee under this paragraph is chargeable until the case has been confirmed for hearing, but**

**an additional sum of not more than 15 per cent of the instructions fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;**

iii. **in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.** (Underlining and emphasis own).

12. As enunciated, it is only after the case has been set down for hearing, that it can be determined that the matter was set to heard and therefore, getting up fees can be charged. As was reiterated by Lenaola, J in **Nguruman Ltd v Kenya Civil Aviation Authority & 3 Others** (supra), the parties had prepared for trial, had attended hearing thereof and that the same was verifiable by the dates which the parties had attended Court. This was not the case in the instant suit; the Respondent only stated that there had been several applications which had been filed that required for them to prepare and urge before the Court. Nothing has been said, or stated, that the main suit had been set down for hearing, from which therefrom, getting up fees would arise.

13. In **Desai, Sarvia & Pallan Advocates v Jambo Biscuits (Kenya) Limited** (supra), Kimondo, J reiterated as follows;

*“Taxation of a bill of costs, like all other aspects of litigation, is based largely on evidence. It is also an adversarial process. As the bill was contested, it behoved the applicant to present to the taxing master all documents and materials in support of its claim. Having shirked that responsibility in the litigation, the applicant cannot shift the blame to the umpire. In the circumstances, the applicant was the author of its own misfortune.”*

The Respondent had not presented any evidence to the taxing master that indeed the matter had been set down for hearing. Preparation for trial is not the same as actually attending Court for trial.

14. It cannot be said that either the Respondent, or the Applicant, had attended to Court for the hearing of the suit. Further, there is no evidence on record that either of the parties had made concerted efforts to have the matter set down for hearing, or that the hearing of the applications precluded the parties from setting down the matter from hearing. As was in the case of **Oyatta & Associates v Nilam Doshi** (supra), presentation of evidence that the matter had been set down for hearing was vital in making claim for getting up fees. None has been presented by the Respondent in the instance.

15. The parameters in which the Court can interfere with the decision of the taxing master was succinctly enunciated in the case of **First American Bank of Kenya v Shah & Others [2002] E.A.L.R 64** at 69, Ringera J (as he then was) delivered himself thus;

*“First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle”.*

16. The term error of principle was defined in the case of **Kagwimi Kang’ethe & Company Advocates v O-lerai Nurseries Limited [2009] eKLR** as follows;

*“An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles- see Arthur v Nyeri Electricity Undertaking (supra) or where the taxing officer has over-emphasized the difficulties, importance and complexity of the suit (see Devshi Dhanji v Kanji Naran Patel (No 2) [1978] KLR 243”*

In the present case, the taxing master awarded getting-up fees where there was no evidence that the matter had been set down for hearing. This, in regards to the foregoing definition in **Kagwimi Kang’ethe & Co. Advocates v O-lerai Nurseries Ltd** (supra), could be inferred to be an instance where the taxing master acted on an erroneous principle, and made an award that could not be

justified by evidence (see **Desai, Sarvia & Pallan Advocates v Jambo Biscuits (Kenya) Limited** (supra)). It being determined that the taxing master acted on an erroneous principle, the Court is therefore empowered to interfere with the taxing master's award, limited only to the extent of the erroneous act.

17. In consideration of the foregoing, the application by the Applicant through the Notice of Motion dated 24<sup>th</sup> October 2014, is only allowed in terms of setting aside Item 34 on getting-up fees. The remainder of the application is without merit, save as to costs, and is hereby dismissed. As each party has partly succeeded, they are to each bear their own costs.

**Dated, signed and delivered in court at Nairobi this 17<sup>th</sup> day of February, 2016.**

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**C. KARIUKI**

**JUDGE**