



**REPUBLIC OF KENYA**

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

**MISC APP NO. 50 OF 2015**

**IBRAHIM, ISSACK & COMPANY ADVOCATES .....ADVOCATE/RESPONDENT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....CLIENT APPLICANT**

**RULING**

Before the court is a chamber summons application dated 29th December 2015 and filed in court on 4th January 2016. In that application, brought under **Rule 11 (2)** of the Advocates (Remuneration) Order, the Applicant/client seeks for orders setting aside the taxing master's ruling delivered on 23/9/2015 with regard the Advocate-client bill of costs dated 24/4/2015. The client also wants this court to re-calculate the amounts taxed and allowed by the taxing master with emphasis on items number 25,40,46 and 60 thereof or in the alternative remit the bill of costs back to the taxing master for re-calculation.

The grounds adduced in support of the application were that the bill had been drawn at Kshs. 9,000,084/-, Kshs. 735/-, Kshs.3,000,000/-, Kshs. 75,000/- and Kshs. 94,185/- for items number 2,25,40,46 and 60 which were the contested items in the bill. The taxing master in her ruling taxed and allowed the said contested items numbers 2,25,40,46, and 60 at kshs. 300,000/-, Kshs.0.00, Kshs. 100,000/-, Kshs.3,500/- and Kshs.91,770/- respectively whereas disbursements were allowed at Kshs.610. That however in determining the overall figure, the taxing master failed to take into account the amounts taxed off in items numbers 25,40,46, and 60 and only considered item number 2 which was the instructions fees thereby arriving at an erroneous total of Kshs. 3,642,022/-. That had the taxing master taken into account all the items she would have arrived at a correct figure of Kshs. 667,372/- having subtracted the amounts taxed off.

It was the Client's view that the taxing officer considered all the relevant factors including the written submissions by counsel and awarded the advocate a fairly but made an error in computation of the final figure.

The application was disputed by way of a replying affidavit sworn on 9th February,2015 by Catherine N. Mwangi an advocate practicing with the firm of the advocate. The deponent maintained that the amount taxed off by the taxing master was the right figure owed to the Advocate and that the Client's application was just a delay tactic. Catherine was of the view that should the court decide to interfere with the decision of the taxing master then it should do so in favour of the advocate.

In his submissions, the advocate was of the view that Kshs. 300,000/- awarded for item No. 2 that is instructions fees was an unfair if one was to consider the complexity of the matter and the fact that the Client had been sued for malicious prosecution whereby the plaintiff was prosecuted for stealing £3,500,000/- and equivalent of Kshs. 420,000,000/-. Counsel was of the view that the taxing master did not exercise his discretion judiciously and that she failed to appreciate the complexity of the facts and the

industry of the advocate in awarding Kshs. 300,000/- for instructions fees. He submitted further that though the firm received Kshs. 300,000/- from the client as instructions fees that was not the final figure but just a deposit. He referred the court to the case of **GREEN HILLS INVESTMENTS VS.- CHINA NATIONAL COMPLETE PLANT EXPORT CORPORATION [2004] eKLR** where the Honourable **Ibrahim J.** stated thus:

**"I am of the view that first there is a question of principle in this case, namely, that discretion ought to be exercised within reason, fairly and judiciously. And also, the officer ought to take time to look at issues of complexity of the facts and the law and industry and time put in the matter..."**

### **DETERMINATION**

I have considered the rival pleadings and submissions by counsel. The circumstances under which a Judge of the High Court interferes with the taxing master's exercise of discretion are now well known. 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; 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, see. **FIRST AMERICAN BANK OF KENYA VS. SHAH AND OTHERS [2002] 1 EA 65.**

**IN REPUBLIC VS. MINISTRY OF AGRICULTURE & 2 OTHERS EX PARTE MUCHIRI W'NJUGUNA & 6 OTHERS** (supra), **OJWANG, J** (as he then was) expressed himself *inter alia* as follows:

**The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. 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.**

Going back to the taxing master's ruling, It is evident that she took into consideration the submissions of both parties and the documents filed by each party. In her ruling she noted thus:

**"The respondent has submitted that the client had an agreement with the advocate which was accepted. I have seen the correspondences between the advocate and the client on the list of documents dated 23/7/2015...The respondent also submits that instructions fees was paid as per the agreement at a sum of Kshs. 358,000/- ...I find that the advocate and client have(sic) an agreement and they are bound by section 45(6) of the advocates Act."**

The taxing master also went ahead to interrogate the whopping Kshs. 420,000,000/- on which the advocate based his instructions fees. She concluded that the figure was raised in the criminal case in which the plaintiff had been charged and not in the civil suit for damages arising from malicious prosecution at the instigation of the client.

From the foregoing it is my finding that the taxing master took into consideration all the relevant factors and exercised her discretion judiciously. The reasons provided by the Taxing Master for her decision were self-explanatory and are very clear and it is not for this court to interfere with her exercise of discretion. Apart from the fact that the advocates act outlaws undercutting and as long as an advocate does not agree on a fee which is below the minimum provided, the sky is the limit in so far as the advocate's contractual fees as against his client is concerned. As long as there is an agreement between an

advocate and his client the court would not interfere. As such the Advocates claim that the instructions fees should be raised must fail.

The Client has claimed that the taxing master erred arithmetically in arriving at the sum total of Kshs. 3,642,022/- A reading of her ruling reveals the following:

**Item No. 2 -Instructions fees drawn at Kshs. 9,000,084 was allowed at Kshs. 300,000/- thus the amount taxed off was Kshs.8,700,084/-**

**Item No. 25- Drawing a notice of change drawn at Kshs.735 and allowed at Kshs. 0.00/- thus amount taxed off was Kshs. 735**

**Item No. 40- Getting up fees drawn at Kshs. 3,000,000/- allowed at 100,000/- thus amount taxed off Kshs. 2,900,000/-**

**Item NO. 46- filing of notice of motion drawn at 75,000/- allowed at 3,500/- thus amount taxed off Kshs. 71,500/-**

**Item No. 60- drawing clients bundle of documents drawn at 94,185/- allowed at 91,770/- thus amount taxed off Kshs. 2,415.**

**Disbursements allowed at Kshs.610/-**

The total of the amount taxed off would therefore be Kshs. 11,955,234/- and not Kshs. 8,900,584/- as indicated by the taxing master. I therefore agree with Counsel for the client that there was an arithmetical error which ought to be corrected. In D'sonza v Ferrao [1960] 602, it was stated at page 605 as follows:

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**“Though the general practice is as indicated in the foregoing passages the reviewing judge can and sometimes does deal with the matter (taxation) himself.”**

I shall therefore proceed to tax the bill as follows:

<b>Bill drawn at</b>	<b>Kshs. 12,622,606</b>
<b>less amount taxed off</b>	<b><u>Kshs. 11,955, 234</u></b>
<b>Amount allowed</b>	<b>Kshs. 667, 372</b>
<b>Less Disbursements:</b>	<b><u>Kshs. 610</u></b>
	<b>Kshs. 666,762</b>
<b>Add VAT @16%</b>	<b><u>Kshs. 106,681.92</u></b>
	<b>Kshs. 773,443.92</b>
<b>Add Disbursements</b>	<b><u>Kshs. 610</u></b>
	<b>Kshs. 774,053.92</b>
<b>Less fees paid</b>	<b><u>Kshs. 393,650.00</u></b>
<b>BILL TAXED @</b>	<b>Kshs. 380,403.92</b>

Each party shall bear their respective costs.

**Dated, signed and delivered this 27th day of April 2016.**

**H. K. CHEMITEI**

**J U D G E**