



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC 229 OF 2016

HON. S.O ARAMA.....PLAINTIFF/APPLICANT

VERSUS

FAMILY BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

Application

1. This ruling is in respect of the Chamber Summons application dated **13/09/2021** which was filed in court on **15/10/2021**. The application seeks the following orders:

1) ...Spent.

2) ...Spent.

3) That this honourable court be pleased to order that the reasons sought for in the applicant's letter dated 15/09/2021 be deemed to be contained in the ruling delivered on 8/09/2021 and that this application be deemed properly filed.

4) That this honourable court be pleased to set aside the decision of the honourable taxing officer delivered on 8/09/2021 as far as the same relates to the taxation of the party and party bill of costs dated 28/09/2019 the quantum awarded thereon and the reasoning with respect to the said award.

5) That this honourable court be pleased to re-tax the said party and party bill of costs or in the alternative, this court be pleased to remit the bill of costs dated 28/09/2019 for re-taxation before a different taxing master with appropriate directions thereof.

6) That costs of this application be provided for.

2. The application is supported by the sworn affidavit of **Hon. S.O. Arama** sworn on **13/10/2021**. The grounds on the face of the application and the supporting affidavit are that the party and party bill of costs was taxed in the sum of **Ksh. 684,478.20/=**; that the applicant has never been supplied with reasons relied on in arriving at the above taxed amount and that the taxing master failed to take into consideration the principles of taxation; that the taxing master failed to give weight to the relevant factors on record and well settled principles of law in considering quantum pertaining to **items 1-99** and consequently awarded an excessive fee.

The Response

3. The respondent filed a replying affidavit sworn by **C. Mburu Koigi** on **9/09/2021**. He deposed that the application is frivolous and an abuse of the court process; that the value of the subject matter, **Ksh. 9,831,745** can be ascertained from the pleadings; that the respondent took steps to prepare for trial and that court records confirms the same; that the bill of costs taxed at **Ksh. 684,478** was modest and that the applicant failed to annex reasons for the taxing officer's decision and hence he cannot demonstrate any error in principle committed by the taxing officer; that the applicant merely alleged that the taxed costs are excessive but did not provide a cogent reason to support his assertion and that the applicant is using this reference to have another bite at the cherry hence delaying justice and that the court ought to dismiss the reference with costs.

Submissions

4. The applicant's submissions on the record are dated **10/01/2022** and were filed on the same day. The respondent filed their submissions dated **03/12/2021** on **07/12/2021**.

5. The applicant raised for determination the issues as to whether the learned taxing master applied all the principles of taxation properly and whether she applied her discretion judiciously. He submitted that **item 1** and **item 2** were in his opinion excessively taxed and according to him the amounts therein awarded should be substituted with a lesser amount. He further argued that the suit did not go to full trial, that no party testified and that the suit was dismissed for want of prosecution and that there was no complexity in the matter. He also argued that his suit was for injunctive orders and not for a pecuniary claim. He argued that the taxing master erred in finding that the value of the subject matter was **Ksh 9,831,745.00** of which there had been no mention in the plaint, and that the plaint had simply stated that he had secured a credit facility of **Ksh. 3,000,000/=** which later on accrued to the tune of **Ksh 8,055,322.00**. He based his computation of the proposed fee of **Ksh 261,106.00** on **Schedule 6 Order 1 (b)** of the **Advocates Remuneration Order 2014**.

6. The further grievance of the applicant is that even if the sum adopted as the proper value were presumed to have been proper, the appropriate instruction fee based thereon would not be **Ksh 416,634.90** as assessed by the taxing master but **Ksh 296,634.90**.

7. In addition, he stated that considering that the suit was dismissed for want of prosecution the instruction fee thus should have been **75%** of the aforesaid **Ksh 261,106.00** which is **Ksh 195,829.50**. This argument he premised on **Schedule 6 Order 1(b)** of the **Advocates Remuneration Order 2014**. He submitted that owing to the provisions of **Schedule 6 Order (b)** the instructions fees ought not to have been taxed at a sum exceeding **Ksh 75,000/=**. Finally, he submitted that owing to the provisions of **Schedule 6 Order 2** of the **Advocates Remuneration Order 2014**, the getting up fee should have been “*entirely taxed off.*”

8. The respondent on the other hand submitted on two main issues, one, whether the applicant met the conditions requisite for the grant of the orders sought where it submitted that the figure of **Ksh. 684,478.20** is not so excessive as to amount to an injustice and that the applicant failed to demonstrate any error in principle. The applicant relied on the decision in **Republic Vs Ministry of Agriculture & 20 Others Ex Parte Muchiri W’Njuguna 2006 eKLR**, **Nyangito & Co Advocates Vs Donyo Lessos Creameries Ltd 2014 eKLR** and the case of **Joreth Ltd Vs Kigano & Associates 2002 eKLR**. It also relied on **KANU National Elections Board & 2 others vs Salah Yakub Farah 2018 eKLR** and **Premchand Raichand Ltd Vs Quarry Services of East Africa Ltd (No 3) 1972 EA 162**. It submitted that the applicant is not entitled to be granted the prayers sought.

Determination

9. I have considered the application, the responses thereto and the submissions. The main issue for determination arising from the present application is whether the applicant has made out a case for the granting of the principal orders sought in the application and which are replicated verbatim at the beginning of this ruling.

10. The applicant is challenging the taxation of **item No. 1** on instruction fees which was taxed at **Ksh. 416,634.90**. He submits that the same was taxed excessively and the suitable amount ought to have been **Ksh. 296,634.90/=**. He argues that there was no complexity in the matter and that the taxing master erred in finding that the value of the subject property was **Ksh. 9,831,745.00** yet the plaint stated he had secured a loan of **Ksh. 3,000,000** which accrued to **Ksh. 8,055,322**.

11. The Court Of Appeal in the case of **Joreth Ltd v Kigano & Associates NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR** in determining the issue of instruction fees stated as follows:

“We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

12. The taxing officer in her ruling delivered on **8/09/2021** indicated that the value of the subject matter could be ascertained from the amount of money summed up at **Kshs. 9,831,745.00/=** and she proceeded to tax the same at **Ksh. 416,634.90/=**.

13. The Court of Appeal in the case of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR** stated that:

“On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.”

14. This is also the holding by **Ringera J.** (as he then was) in the case of **First American Bank of Kenya vs Shah and Others [2002] 1 E.A. 64 at 69** where it was stated as follows:

“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”.

15. Upon perusal of the ruling by the taxing master delivered on **8/09/2021**, it is this court’s observation that she applied **Schedule 6A** of the **Advocates (Remuneration) Order, 2014**.

16. In taxing **item 1** instruction fees, the taxing officer while considering the guiding law and principles based the same on **Ksh. 9,831,745.00/=** which was the figure in the defence and counter-claim filed by the respondent. It would not be appropriate for this court to ignore the fact that a counterclaim is for all intents and purposes a separate suit distinct from the plaint. In the instant case, the main suit never proceeded to hearing since it was dismissed for want of prosecution. The respondent filed their application dated **10/5/2019** seeking

that the suit be dismissed for want of prosecution. Prayer 2 of its said application only sought for costs of the entire suit. As far as the record is concerned, there were no directions issued prior to the fixing hearing date regarding the hearing of the defence and counter-claim; it appears that the respondent failed to seek any directions on the issue and the court inadvertently omitted to advert its mind to it. The consequence is that the counterclaim cannot be said to have ever been fixed for hearing and the taxing master should not have relied on it in taxing the bill of costs; instead she should have relied on the applicant's plaint dated 27/06/2016.

17. From the above, it is therefore this court's view that the taxing master erred in principle in basing her calculations on **Ksh. 9,831,745** as opposed to **Kshs. 8,055,322** being the figure in the plaint.

18. The suit not having been set down for hearing, it is this court's opinion that **item 1** ought to have been taxed in line with the provisions in **Schedule 6 1(b)** of the **Advocates Remuneration Order (2014)** which provide as follows:

1. Instruction fees Subject as hereinafter provided, the fees for instructions shall be as follows—

(a) To sue in an ordinary suit in which no appearances is entered under Order IX A of the Civil Procedure Rules where no application for leave to appear and defend is made, the fee shall be 65% of the fees chargeable under item 1(a).

(b) To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b).

19. Turning to the applicant's claim that there was no complexity involving this matter, it is not in dispute that though the respondent's advocates performed their obligations to their client and acting on the latter's instructions, they prepared and filed the relevant pleadings in order to advance their client's case whilst the applicant's indolence resulted in his suit being dismissed for want of prosecution at the respondent's instance. There is no doubt that though the suit never proceeded to hearing, some work was put into the case by the respondent's counsel. This court must recognize the labour put in by the respondent's counsel upon receiving instructions, the importance of the matter and value of the property involved.

20. The taxing master gave her reasons for the taxation in that she stated that the value of the subject matter could be ascertained from the counterclaim and that the **ARO 2014** applies to this case. However, as I have observed herein before her reliance on the amount in the defence and counterclaim was erroneous as no directions for the hearing of the counterclaim had been issued. Her reliance on the figure therein necessarily resulted in a higher taxation sum for the applicant to settle which is quite an undesirable effect. Consequent to the foregoing, the taxing master therefore erred in principle in taxing instruction fees at **Ksh. 416,634.90/=** as opposed to **Ksh. 75,000/=** since the counterclaim was never set down for hearing. The further reason for holding that the taxing master erred in principle in arriving at the said instruction fee is that even if the taxation had been computed in line with the provisions of **Schedule 6 1(b), item 1** should have been taxed at **Ksh. 75,000/=**.

21. If this court remits the bill to another taxing master for taxation it may consume time and effort on the part of the parties and the only expedient action is for the court to tax the bill as sought by the applicant in this reference.

22. In conclusion, I in re-taxing the said bill, I find that the appropriate instruction fee is **Ksh 75,000/=**. However, keeping in mind the importance of the matter and the work put in by the respondent's advocate in advancing his client's case to the extent of even requesting the applicant to set down the matter for hearing, the court cannot ignore this fact and thus it is this court's view in exercising its discretion increases the above instructions fee by **Ksh. 25,000. Item 1** as therefore taxed as follows:

Item 1 - Ksh. 75,000 + Ksh. 25,000

TOTAL - Ksh. 100,000

23. The above sum of **Ksh 100,000/=** shall therefore be substituted for the sum of **Ksh 296,634.90** previously awarded by taxing master.

24. With regards to **Item 2** on getting up fees, the applicable provision of law is set out under **Paragraph 2 of Schedule 6A** of the **Advocates (Remuneration) Order 2014** where getting up fees is one-third of the instruction fees and chargeable once the matter has been confirmed for hearing. In the instant case, at no point did the court direct that the main suit be set down for hearing. It is this therefore court's view that the taxing master erred in principle in awarding getting up fees at **Ksh. 138,878.30** and in the circumstances, this court is bound to interfere with the same; the getting up fee of **Ksh 138, 878.30** is therefore struck off completely.

25. Regarding the other **items 3- 99**, I find that the applicant failed to substantiate his arguments and looking at the same, it is this court's view that the taxing master did not err in principle in taxing the said items as she did.

26. In view of the foregoing, **items 1** and **2** are re-taxed by this court as follows:

Item No: Amount Charged Amount Taxed Off

Item 1 – Ksh. 1, 200,000 Ksh. 1,100,000/=.

Item 2- Ksh. 400, 000 Ksh. 400,000/=

Item 3-99 - Ksh. 211,150 Ksh. NIL/=

27. The total taxed amount shall therefore be **Ksh 311,750** comprised as follows:

Item 1 – Ksh. 100,000/=;

Item 2 - Ksh. Nil/=

Item 3-99 - Ksh. 211,750/= (as taxed by the taxing master.)

Total - Ksh 311, 750/=

28. In conclusion, the Chamber Summons application dated **13/09/2021** succeeds in terms of prayers Nos. **(c)** and **(d)**. Prayer No. **(e)** is granted to the extent that this court has exercised its mandate and has re-taxed the bill of costs at the global sum of **Ksh. 311,750/=** as stated herein above and certificate shall therefore be issued for the above sum. There shall be no orders as to costs of the application.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 28TH DAY OF FEBRUARY, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU