



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

H.C.C.C NO. 80 OF 2005

REV. JEREMIAH MUKU.....PLAINTIFF

VERSUS

METHODIST CHURCH IN KENYA TRUSTEES REGISTERED.....1ST DEFENDANT

REV. JOSEPH NTOMBURA.....2ND DEFENDANT

J U D G M E N T

1. The plaintiff/applicant through Chamber summons dated 4th June, 2014 brought pursuant to provisions of Article 50(1), 159(2),(d),162(1), of the Constitution of Kenya, 2010, Section 1A, 1B and 3A of the Civil Procedure Act(Cap.21) Laws of Kenya, Paragraph II(2) and 11(4) of the Advocates Remuneration Order of the Advocates Act, Chapter 16 Laws of Kenya, the inherent power of the court and all other enabling provisions of the Law sough the orders as follows:-
 - i. *That this Honourable court be pleased to order enlargement of time for filing of this reference.*
 - ii. *That the application herein be deemed to have been properly filed.*
 - iii. *That this Honourable Court be pleased to set aside and review and/or revise the decision of the Deputy Registrar(Taxing Officer) dated 4th April, 2014.*
 - iv. *That the plaintiff's Bill of Costs dated 19th July, 2013 be taxed afresh more specifically in respect of items 1,2,19,31,58,63,70,79,85,93,138,158,22,211,106,6,11,12,15,25,26,41,45,52,53,54,74,81,96 ,97,99,112,113,114,118,28,26,49,66,95,109,110,111,117,224,225,10,16,17,22,27,33,35,40, 42,44,48,67,68,75,102,103,108,115,116,119,120,121,124,125,126,128,130,133,134,140,14 3,145,147,149,152,155,166,168,169,170,173,174,175,177,180,183,186,187,188,189,189,1 90,192,193,200,201,204,205,206,215,216,267,296,302,309,296,298,300,290,311,220,222, 223,226,229,230,231,232,233,235,236,237..... to 310.*
 - v. *That consequent upon the foregoing, this court be pleased to issue certificate of costs reflecting the correct costs payable to the plaintiff,*
 - vi. *That costs of this application be provided for.*
2. The plaintiff/applicant's application is premised on the grounds inter alia; that on 4th April, 2014 the Honourable M/S Nasimiyu Deputy Registrar of the High Court of Kenya, being the Taxing Master in this suit, taxed the claimant's Bill of costs dated 19th July, 2013 and allowed the same in the sum of Kshs.747,471; that the plaintiff/applicant is aggrieved by the aforesaid ruling on taxation, that the said sum is too low to constitute a fair reimbursement to the plaintiff/applicant for costs incurred in successfully prosecuting the suit as well as defending the counterclaim; that

the Deputy Registrar misdirected herself on the discretion bestowed upon her by law and omitted to take into account relevant factors during the taxation, thus in the circumstances constitutes a misdirection of law so as to justify interference, that the Deputy Registrar acted contrary to well established principles of law and guidelines set out by the court and that the awarded costs were contrary to the applicable Advocates Remuneration Order and the Taxing master misapprehended and/or misconceived the principles applicable in the taxation of party and party costs.

3. The plaintiff/applicant further averred that the Deputy Registrar erred in law when she failed to tax the Bill of Costs in conformity with the current Advocates(Remuneration) Order,2011 and by departing from this, the Honourable Deputy Registrar committed a fundamental error of principle. He further urged that the Deputy Registrar erred in failing to appreciate the complex nature of the matter, the duration taken and the several applications that were made in the course of the trial, the voluminous documents amongst others which would ordinarily justify the instructions fees sought in the Bill of Costs. The plaintiff/applicant further argued the Deputy Registrar erred in law by failing to exercise power conferred upon her under Rule 13(A) especially on the items concerning transport from Nairobi to Meru as well as accommodation by both the Advocates and his client, and/or make for provisions for the same. The plaintiff/applicant faulted the Deputy Registrar for taxing attendances at the lower scale.
4. The plaintiff/applicant submitted the Deputy Registrar misdirected herself on discretion bestowed upon her by law and omitted to take into account relevant factors underpinning the taxation hence constituting a misdirection of law so as to justify interference, urging further the awarded costs were contrary to the applicable Advocates' Remuneration Order and as such the applicant the Deputy Registrar arrived at erroneous amount which is an error in principle.
5. The respondent opposed to the plaintiff/applicant's application through a Replying Affidavit dated 12th July, 2014 urging that the court cannot interfere with a decision of the taxing officer unless it is shown that the Taxing erred in principle, pointing out that the applicant has not demonstrated how the Taxing master erred in principle, while taxing the Bill of Costs. On taxation on instruction fees, the defendant/respondent contended that the Taxing Master was right in applying the 1997 Advocates(Remuneration) orders and not 2011 as contended by the applicant/plaintiff and further pointed out as a matter of fact the alleged 2011 Advocates(remuneration) Order does not exist.
6. The defendant/respondent supports the taxation by the Deputy Registrar urging that the assessment of costs was fair, reasonable and that the Taxing Master was conscious of and indeed she applied all relevant factors and principles including; costs allowed must at all times be reasonable, that costs should not be allowed to rise to a level that will make access to costs a preserve of the rich, costs should not be violative or hindrance of right to access justice; costs should not offend the overriding objective of civil litigation; costs must never be manifestly excessive adding that the case was not extraordinary or complex as it was a case where an employee alleged unfair dismissal and claiming salary arrears.
7. On court attendances, the defendant urged that the taxing master was right in applying the lower scale, since there was no specific order made by the High Court Judge that costs awarded to the plaintiff were to be taxed on the higher scale in terms of paragraph 50A of the Advocates Remuneration Order.
8. I have very carefully perused the plaintiff/applicant application dated 4th June, 2014, the Bill of Costs dated 19th July, 2013, the defendants replying affidavit dated 12th July, 2014, the reasons for the ruling, the parties respective submissions as well as oral submissions made before me. The issues for consideration can be summarized as follows:-
 - a. ***Whether the plaintiff/applicant has raised sufficient reasons to enable the enlargement of time for filing of this reference.***
 - b. ***Whether the application can be deemed to have been properly file?***
 - c. ***Whether the court can set aside and or review or revise the decision of the Deputy***

Registrar(Taxing Officer) dated 4th April, 2014?

d. Whether the applicant has raised sufficient reasons to enable the enlargement of time for ruling of this reference and whether the application can be deemed to have been properly filed?

9. The decision of the Taxing Master was made on 4th April, 2014 when the plaintiff's Bill of Costs was taxed at kshs.747,471. The Deputy Registrar's ruling as well as the reason for her decision was issued on 7th May, 2014 and it took considerable period to reach the plaintiff's counsel in Nairobi by which time the 14 days period for filing a reference had lapsed necessitating this application for enlargement of time. The plaintiff avers the delay was pursuant to delay in receiving of the reasons and giving instructions to his counsel on the ruling. That upon receipt of the ruling the reference was filed without any undue delay within 20 days of a certified copy of the ruling. The enlargement of time is at the discretion of the court on good and reasonable cause for delay being shown.

10. **Order 50 Rule 6 of the Civil Procedure Rules** provides:-

“ Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed”

11. My understanding of the above-mentioned order is to ensure that all parties in a litigation are allowed to exhaust all laid down mechanisms to achieve justice or meet the ends of justice and especially where delay in taking necessary steps is shown to have been caused by good, reasonable and excusable cause and not by deliberate action of the applicant to defeat the ends of justice. I find in such situations court should not deny the applicant enlargement of time.

12. Having taken into account the length of delay, the reasons for delay to which the respondent has not controverted and the chance of success of the reference I find that the application for enlargement of time for filing of the reference to be merited and ought to be granted and the application to be deemed as properly filed.

Whether the court can set aside and/or review or revise the decision of the Deputy Registrar(Taxing Officer) dated 4th April, 2014?

13. The plaintiff/applicant's main contention in this reference is on the instruction fees urging that the Deputy Registrar reached her decision by considering the value of the subject matter in isolation which position the respondent supports. The respondent urged the court not to interfere with the Taxing Master's ruling urging that High Court should not interfere with a decision of the Taxing Officer unless the decision is based on an error of principle and that the amount awarded is manifestly excessive or too low as to justify an interference. The respondent in support of that proposition referred to the case of **FIRST AMERICAN BAN V SHAH(2002) 1EA 64.**

14. The respondent submitted that the Taxing Officer correctly applied Schedule VI Paragraph 1(b) of the 1997 Advocates(Remuneration) Order on fees for instructions in suits. The said schedule provides:-

“ To sue in any proceedings described in paragraph(a) where a defence or other denial of liability is filed; or to have an issue determined arising out of interpleader or other proceedings value of the subject before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and.....”

15. The respondent on his part submitted that the said paragraph is clear that whether to increase the basic instruction fees is the discretion of the Taxing Officer. The respondent averred the Taxing Officer is proceeding to calculate the instruction fees, she based the same on the judgment and the amount sought in the counter-claim and made no error in principle. The respondent further urged the matter was not complex and that all the work done had been charged separately in the bill of costs including drawing of the pleadings, instruction fees, for applications, perusal and all other services rendered. The respondent further contended the amount awarded was not manifestly too low as according to the respondent the amount of Kshs.214,673/- for instruction fees and total aggregate costs of Kshs.747,471/- in a claim where judgment was entered for Kshs.2,390,887 cannot be said to be manifestly too low as to attract an inference of a wrong principle. They further agreed with the Taxing Master's reasons as regards to all other items urging the plaintiff/applicant concentrated only on instructions fees demonstrating that the Taxing Officer did not err in principle.

16. The plaintiff/applicant averments are that in taxation the Taxing Master in reaching his/her decision should not only consider the value of subject matter in isolation referring to the several authorities in support of that proposition. In the case of **MURGOR & MURGOR V CENTRAL BANK OF KENYA & ANOTHER MISC CASE NO. 694 OF 1998** in which case it was stated that instruction fees cover taking instructions and advising thereon, the application of law to the facts, the preparation of the matter for hearing and actual hearing. The applicant further referred to the case of **MAYERS AND ANOTHER V HAMILTON & OTHERS(1975) E.A 13** where it was held that entitlement under the instruction fee is not static but it grows as the matter proceeds. Further to the above in the case of **JORETH LTD V KIGANO AND ASSOCIATES(2002) 1EA 92** the Court of Appeal stated:-

“.....in assessing the instruction fee and in doing so the factors to be taken into account included the nature and importance of the cause, the interest of all the parties, the general conduct of the proceedings; any directions of the trial judge and all other relevant circumstances. In this instance, the taxing master had followed this course and had not erred in doing so.

Yet in the case of **FIRST AMERICAN BANK OF KENYA V SHAH AND OTHERS(Supra)** Ringera J, stated.

“Under the Advocates(Remuneration) Order, some of the relevant factors to be considered were the nature and importance of the 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.”

17. The respondent in opposing the applicant's application relied on the case of **ROGEN KAMPER V GROSVENOR(1989)** KLR 362 in which the Court of Appeal held:-

3. The tests to be applied both by a Taxing Officer in considering the instruction fee under rule 9(2) and by a Judge under sub-rule(2) may do more than only vary, discharge or reverse the limited decision of the Judge.

Yet again the respondent relied on the case of **PREMCHAND RAICHAND LTD & ANOTHER V QUAY SERVICES OF EAST AFRICA LTD(1972) EA 162** the Court of Appeal held:-

1. That costs be not allowed to rise to such a level to confine access to the courts to the wealthy;

18. I have carefully considered the facts of this case and submissions by both Counsel as well as the authorities relied upon. The Taxing of the Bill of Costs based on the court's judgment and the application of the Advocates Remuneration Order of 1997.

19. In my view in assessing the Bill of Costs the Taxing Master should not restrict himself/herself to the value of subject matter only. The Taxing Master in assessing instruction fees under the Advocates Remuneration Order should have regard to the care and labour required, the number and length of papers to be perused, the nature and importance of the matter, the amount or value of the subject matter involved, the interest of parties, complexity of the matter and all other circumstances and what may be fair and reasonable. In such circumstances the Taxing Master is supposed to realize that instructions cannot be static over all the years the matter has been in progress. It is wrong to state the instructions must be static in spite of the life of the suit; this is because in taking such a stand the successful litigant may not be fairly reimbursed for costs he has had to incur. The value of the subject matter is not in my view the only determining factor in regard to instruction fees but combined factors as set out under the Advocates Remuneration which I have indicated hereinabove should be considered.
20. I have perused the pleadings both the plaint, defence, and counterclaim and it turns out that there are several prayers whose value cannot be determined by quick perusal of the pleadings in terms of the amount sought and whose instruction fees cannot be determined so easily. The Taxing Master is not limited to basing costs on the amount pleaded only amount or awarded but must consider other prayers in the pleadings as well or rather look at the substance of the claim. The Taxing Master in limiting herself to the amount of money pleaded in the plaint or awarded to determine the basic fees would in my view fall to an error in principle as the substance of claim is part of what the Taxing Master is required to consider.
21. I have no doubt in stating that in pleadings or judgment where amount of money is indicated it is one of the factors to be taken into account amongst other factors but not as the sole factor in determining instruction fees in a matter before a Taxing Officer. The Taxing Officer in addition to other factors is required to consider the pleadings as a whole, the proceedings, other fees duly allowed as profit, care and labour required number and length of papers to be perused, nature and importance of the matter, interest of parties, complexity of the matter and all other circumstances.
22. The court is alive to the fact that a matter that may appear to be simple or not complex may require a lot of care and labour and may be very important to parties in view of the nature or importance to the parties or the interest of parties; the length of the determination of the matter and its presentation.
23. The Taxing Master in assessing the Bill of Cost only considered the pleadings and judgment of the court and the fact that according to her the matter was not complex but failed to consider other factors which were relevant. I am of the view that such failure to consider all factors required to be considered is an error in principle on taxing the bill of costs and the amount awarded of instruction fees was based on an error of principle and as such the same is manifestly low.
24. Having considered the submissions and authorities relied upon by both counsel, I am satisfied there is the question of principle in this case, namely, that discretion ought to be exercised with reason, fairly and judiciously. That the taxing officer ought to have taken into account care and labour or industry and time put in the matter. Secondly while I ought not to interfere with the quantum generally (**See SR D'SOUZA & OTHERS V C.C. FERRARO & OTHERS (1969) EA 602** the amount awarded as instruction fees and fees for getting up was in view of all factors required to be considered outside the reasonable limits so as not to be manifestly inadequate to such extent it could be deemed fairly reimbursement for the costs incurred by a successful litigant. In this matter the value of the subject matter or amount awarded before deduction of the sum already paid was kshs.4,293,666/50 apart from sum sought and awarded there were other several prayers for consideration in the plaint and counterclaim. That apart from the amount there were also other orders granted by court which could not be quantified in terms of money. The points of law and facts in the matter before court contrary to the taxing master's finding were quite intricate and required research and careful consideration as evidenced by voluminous submissions or amount awardable before deduction of sum paid during the pendency of the suit stood at Kshs.4,293,666/50. There were also other prayers in the plaint. The defendant's counterclaim

was on amount of Kshs.6,687,336/- coupled with other prayers for delivery of books of accounts for accounting period running from 1998, 1999 and 2000.

25. In view of the foregoing I find merits in the applicant's application. I therefore make the following orders:-

- i. *The applicant's application for enlargement of time for filing of this reference be and is hereby granted.*
- ii. *The application for reference be and is hereby deemed as properly filed .*
- iii. *The reference is allowed and taxation is referred back to the Taxing Master for review but I direct that the review be done by another Taxing Master.*
- iv. *Costs of the reference is awarded to the applicant/plaintiff.*

DATED, SIGNED AND DELIVERD AT MERU THIS 22ND DAY OF JANUARY, 2015.

J. A. MAKAU

JUDGE

Delivered in Open court in the presence of:-

1. Mr. Mutula Kilonzo Jr for the plaintiff/applicant

2. Mr. G. Kamau Kuria for defendant/respondent

C/clerk Penina/Mwenda

J. A. MAKAU

JUDGE