

4. The Petitioner sought for an order of injunction as against the Respondent from offering its shares in a rights issue, listing them or in any way dealing with the shares of the Company by way of renounceable rights issue of 1,447,169,549 new ordinary shares at a price of Kshs. 14 per KQ ordinary share (Rights Issue Offer Price).

5. It is also the Respondent's case that the taxing officer failed to appreciate the loss the Respondent stood to suffer if an interlocutory injunction was issued to stop the rights issue which would be in excess of Kshs. 620 million. It is the Respondent's position that the risk posed by the Petition could have caused the Respondent the opportunity to raise Kshs. 20.6 billion and that the Respondent's business could have been severely damaged.

6. The Respondent contends that the taxing officer erred in principle in applying the wrong provision of the Advocates Remuneration Order when taxing items 5 and 37 of the Bill of Costs. It is the Respondent's position that the taxing officer should have applied Paragraph 1 (o) (vi) of Schedule VI for item 5 and Paragraph 1 (o) (viii) of Schedule VI for item 37. It is also the Respondent's contention that the taxing officer erred in not exercising her discretion to increase the minimum fee on items 5 and 37 due to the urgency, importance and complexity of the application. It is the Respondent's case that the taxing officer failed to appreciate the fact that the injunction application was complex, filed under Certificate of urgency and extensive research was carried out to successfully oppose the injunction application.

7. The Petitioner opposed the application by way of written submissions. The Respondent also filed written submissions in support of their application. Both parties highlighted the submissions before me on **20th January 2015**.

8. I have considered the application, the submissions as well as the authorities cited. I have also perused the Ruling on taxation dated **29th November 2012**. Having done so, I take the following view of the matter.

9. I will deal with the matter by addressing the items objected to by the Respondent each at a time. I will begin with the instruction fees.

Item No. 1; Instruction Fees

10. Counsel for the Respondent submits that the taxing officer erred in principle in taxing the instruction fee in the sum of **Kshs. 200,000/=** on the basis that the Petition was struck out before it was fully heard. It is the Respondent's position that the striking out of the Petition was irrelevant. It was Counsel's submission that the instruction fee was earned the moment the Respondent filed its Replying affidavits.

11. Counsel for the Respondent is of the view that considering the pecuniary interest in this matter, they asked for **Kshs. 60,000,000/=** as instruction fees. The pecuniary interest according to the Respondent was in the region of **Kshs. 20.6 billion**.

12. The subject value of the current suit cannot be pegged at **Kshs. 20. 6 billion** with certainty. I agree with the Petitioner that at the point of filing the suit it was not certain whether or not the shares would be fully subscribed to. It is further submitted for the Petitioner that the Respondent went ahead with the Rights issue as planned and therefore there was neither loss nor prejudice suffered by them. To that extent I support the Petitioner's submission. If the Petitioner's case would have led to the cancellation of the rights issue, then that would have been a different case.

13. 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.”

It therefore follows that the taxing officer has the discretion to ascertain instruction fees using other parameters other than the value of the subject matter if the same is not ascertainable from the pleadings.

14. The amount of **Kshs. 60,000,000/=** the Respondent indicated as instruction fees is on the higher side. I refer to the case of **Premchand Raichand Ltd & Another vs. quarry Services of East Africa Limited & Another [1972] E.A 162** in which the Courts held that while a successful litigant ought to be fairly reimbursed for the costs he has to incur, costs should not be allowed to rise to such a level as to limit access to the courts. The same Courts also held that the remuneration should not be too low as to discourage new recruits of the profession. The amount of **Kshs. 60,000,000/=** as instruction fees is almost punitive to the Petitioner. Such an amount will obviously restrain litigants from accessing Courts.

15. In her ruling, the taxing master held that the Respondent did not demonstrate the complexity of the matter. She however acknowledged that the matter was urgent and that great responsibility was placed upon the Respondent’s Counsel to expedite it. The taxing officer also held that the rights issue involved colossal sums of money which the Respondents intended to raise. To this extent it is evident that the Taxing Officer took into account the nature and importance of the matter as well as the value of the subject matter.

16. However in considering the instruction fees of **Kshs. 200,000/=** it seems that the taxing officer placed emphasis on the fact that the Petition had been struck out upon application by the Respondent.

17. It is not in dispute that the matter was concluded in less than a month. However, the time and manner of conclusion has no bearing on the instruction fee which is static and should be earned in full once an Advocate has taken instructions.

18. The principle is that instruction fee is static. It is earned at the time of taking instructions and is not affected by the stage a suit has reached. In the case of **First American Bank of Kenya versus Shah and Others [2002] 1EA 64** the Court held as follows:-

“Though the issue of when an advocate became entitled to the instruction fee was the subject of apparently conflicting appellate decisions, the better position was that the instruction fee was an independent and static item, not affected by the stage a suit had reached.”

19. In view of the above, in determining the instruction fees, the taxing officer ought not to have taken into account the fact that the Petition was struck out and that the Petition did not proceed to full hearing. For the Petition to be struck out, it is evident that the Respondent fully considered the Petition by responding to the same.

20. With regard to the complexity of the matter, I stand guided by the pleadings. The volume of the documents might not be out of the ordinary in comparison to the various cases filed in Court whether or not of a similar nature.

21. I am of the view that the facts that led to the dismissal of the Petition were readily available to the Respondent as can be seen in the supporting affidavits of Alex Mbugua and Amish Gupta. The law as well as the documents relied on were also clear as to the position the Respondent resorted to with regards to the rights issue. I would therefore be hesitant to find that the matter was a complex one. The urgency of the matter and the great responsibility placed upon Counsel was taken into account by the taxing officer in determining the instruction fees.

22. In view of the above findings, it is my view that the taxing officer exercised her discretion properly and according to the law save for the fact that in determining the instruction fees, she took into account

the fact that the Petition was struck out. It has already been established that instruction fee is static. In the circumstances, I consider the instruction fee of **Kshs. 600,000/=** to be fair and reasonable.

Items 5 and 37

23. With regard to items 5 and 37, it is the Respondent's case that the taxing officer erred in principle in applying the wrong provision of the Advocates Remuneration Order when taxing the items. It is the Respondent's position that the taxing officer should have applied Paragraph 1 (o) (vi) of Schedule VI for item 5 and Paragraph 1 (o) (viii) of Schedule VI for item 37. Paragraph 1 (O) (vi) of Schedule VI provides for a fee of Kshs. 3,000/= in presenting an application for a temporary injunction order if the same is opposed. Paragraph 1 (O) (viii) of the same schedule provides for a fee of not less than Kshs. 3,500/= for presenting or opposing an application not provided for in the schedule if the same is opposed.

24. On the other hand, it is the Petitioner's case that the applicable rule in assessing instruction fees for opposing proceedings brought under section 211 of the Companies is Schedule VI (1) (f) (ii) and (iii) of the Advocates Remuneration Order 2009.

25. It is not in dispute that the applicable schedule in taxing items 5 and 37 is Schedule VI of the Advocates Remuneration Order. The said Schedule deals with costs of proceedings in the High Court whereby Part A deals with party and party costs. Schedule VI (1) (f) (iii) provides for the fees applicable when presenting or opposing any other proceedings under the companies Act at Kshs, Act as Kshs. **4,200/=**. Though the taxing officer did not make reference to the specific schedule, I believe she was referring to the aforesaid Schedule in holding that the remuneration order provided for Kshs. **4, 200/=** for items 5 and 37 respectively. In her ruling she went ahead to exercise her discretion in increasing the fee of item 5 from Kshs. 4,200 to Kshs. 5,000/=. Item 37 was taxed at Kshs. 4,200 as provided for in the remuneration order.

26. I have perused the said schedule VI (1) (f) (iii) which provides for the fees applicable when presenting or opposing any other proceedings under the Companies Act. In my view, the injunction application (item 5) and the application to strike out the Petition (item 37) fall under the definition of 'any other proceedings under the Companies Act'. This is due to the fact that the Petition had been brought under the Companies Act. With regard to item 5, the Respondent is of the view that Schedule VI paragraph 1 (O) (vi) is applicable as it provides for presenting an application for temporary injunction. That is correct. However, the minimum fee provided for is Kshs. 3,000/= which is less than the amount of Kshs. 4,200/= provided for in schedule VI (1) (f) (iii). The same applies to item 37 in which the Respondent contends that Schedule VI paragraph 1 (O) (viii) should apply. It provides for a minimum of Kshs. 3,500/=. Therefore, I do not see any prejudice the Respondent would suffer, in the event that the taxing officer were to revert to these provisions.

27. Therefore I see nothing wrong in the fact that the taxing officer applied schedule VI (1) (f) (iii) of the Remuneration order in taxing items 5 and 37. The taxing officer went ahead and exercised her discretion in increasing the fee for item 5 to Kshs. 5,000/=. There is nothing to show that the exercise of her discretion in taxing these items and in particular increasing the fees to Kshs. 5,000/=. was flawed. As already stated in this ruling, the taxing master took into account the urgency of the matter and the great responsibility placed upon the Respondent's Counsel to expedite it. In any case, I am of the view that the efforts and resources put by Counsel in this matter has been adequately compensated for under item 1.

28. In the upshot, the Respondent's Chamber Summons dated **2nd May 2013** is successful to the extent that the instruction fees under item 1 has been reviewed from **Kshs. 200,000/=** as allowed by the taxing master to Kshs. 600,000/=. Each party to bear their own costs of the application.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for Petitioner

Tugei for Respondent

Teresia – Court Clerk