



**REPUBLIC OF KENYA**

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

**CIVIL MISC. APPLICATION NO. 499 OF 2012**

**MEREKA AND CO. ADVOCATES.....PLAINTIFF**

**VERSUS**

**NEW KENYA COOPERATIVE CREAMERIES LIMITED (NKCC).....DEFENDANT**

**RULING**

1. On 22<sup>nd</sup> October 2013 the taxing officer, awarded Mereka & Co. Advocates, the Plaintiff/Advocate herein a sum of kshs.200,000/- being the instructions fee, vide the advocate-client Bill of Costs dated 13<sup>th</sup> September 2012. In the aforesaid Bill of Costs, the advocate had asked to be awarded kshs.82,536,494/- as instructions fee. He based his claim on the value of 16 landed properties estimated to be kshs.750,000,000/=. Being dissatisfied, the advocate filed a reference before this court pursuant to paragraph 11(2) of the Advocates (Remuneration) Order vide the chamber summons dated 22<sup>nd</sup> November, 2013. In the aforesaid summons, the Plaintiff sought for the following orders interalia:
1. ***THAT the decision of the Taxing Officer delivered on 22<sup>nd</sup> October 2013 in so far as the same relates to item 1 of the Bill of Costs dated 13<sup>th</sup> September, 2012 be and is hereby set aside.***
2. ***THAT the Honourable court be pleased to refer the matter back to the Taxing Officer for re-taxation of item 1 of the Bill of Costs and with proper directions thereof.***
3. ***THAT in the alternative to prayer 2 above, the Honourable Court be pleased to re-tax item 1 of the Bill of Costs.***
4. ***THAT the costs of this application be borne by the Respondent.***
2. The advocate also filed a further supplementary ground which was also accompanied by a supplementary affidavit. New Kenya Cooperative Creameries Ltd, the client defendant filed grounds of opposition to resist the reference. When the reference came up for hearing, learned advocates recorded a consent order to have the same disposed of by written submissions.
3. I have considered the rival submission together with the authorities relied upon. There is no doubt that the Plaintiff/advocate was instructed by the Defendant /client to act for it with respect to the following properties.

2. **L.R. No. 3734/87 Nairobi**
3. **L.R. No. 330/449 Nairobi**
4. **L.R. No. 3734/24**
5. **L.R. No. 37/22 Nairobi**
6. **L.R. No. 1870/VIII/87 Nairobi**
7. **L.R. 37/457 Nairobi**
8. **L.R. No. 37/450 Nairobi**
9. **L.R. No. 37/471 Nairobi**
10. **L.R. No. 37/544 Nairobi**
11. **L.R. No. 37/458 Nairobi**
12. **L.R. No. 37/459 Nairobi**
13. **L.R. No. 37/460 Nairobi**
14. **L.R. No. 37/454 Nairobi**
15. **L.R. No. 37/456 Nairobi**
16. **Block 11/44 Nakuru**

4. It appears from the material placed before this court that the Plaintiff advocate had been instructed by the Defendant client to proceed and issue notices for the return of the properties listed hereinabove whose total value was estimated to be 750,000,000/=. The Plaintiff/Advocate explained in detail the brief he was given by the Defendant client. He stated that the client told him that the Defendant's properties had been illegally appropriated by third parties. The Applicant said he held various meetings with the Defendant to obtain instructions to pursue all those claiming proprietary interest over the client's aforesaid properties. The applicant exhibited various documents and correspondences he exchanged with the client.
5. The taxing officer took into account the material placed before her. What has emerged from the submissions is that the Applicant was given instructions to do the following:
  - i. Advertise a caveat emptor notice to the public.
  - ii. Draft individual affidavits for 16 title deeds
  - iii. To deal with legal issues that would arise as a result of the aforesaid notices.
6. The learned taxing officer appreciated the fact that the advocate carried out the tasks he was given to do until the client withdrew the instructions. She applied schedule V of the Advocates (Remuneration) Order, 2009 and awarded kshs.200,000 as sufficient award on instructions fees.
7. The taxing officer's decision prompted the Plaintiff/advocate to file this reference. It is the submission of the Plaintiff/Advocate that the Defendant/client had as of 11.10.2010 estimated the value of its assets to be ksh.250,000,000/= on 3.11.2010. The latter figure was contained in the letter of Peter K. Ombati, the Defendant's Ag. Managing Director. It is the Plaintiff's submission that the learned taxing officer should have based the award on instructions fee on this figure. The Plaintiff relied on the case of **Joreth Ltd = vs=Kigano & Associates C.A no. 66 of 1999** where the court of Appeal held inter alia:

***“value of the subject matter for the purpose of taxations of costs ought to be determined from the pleadings, judgement or settlement.....”***

8. The Plaintiff Advocate also argued that paragraph 22(1) of the Advocate (Remuneration) Order gives the Advocate the right to an election under Schedule V but such an election must be communicated in writing which the Plaintiff avers he did by his letter of 18.09.2012. The learned advocate pointed out that under Schedule V the instructions fee due to him based on kshs.750,000,000/= would have been kshs.16,507,380/=. It was pointed out that the learned taxing officer ignored the circumstances under which instructions were given. The Plaintiff/Advocate complained that instructions fees cannot be reduced to drawing sand perusals. It was further argued that the fact instructions were withdrawn by the client was not a relevant factor when it comes to assessing instructions fee. The Plaintiff/advocate also pointed out in his

supplementary affidavit that the taxing made contradictory decisions over similar matters involving the same advocate. He also complained that the learned taxing officer had been influenced by an opinion she sought from a judge of this court in arriving at her decision. It is said the unnamed judge had issues with the Plaintiff/Advocate. For the above reasons this court was urged to find that the learned taxing fell into error of principle.

9. The Plaintiff/Advocate further argued that the taxing officer when asked to supply reasons for her decision simply stated

**“as per the ruling.”**

10. The Defendant/client on the other hand urged this court to find that the taxing did not commit any error of principle in assessing the instructions fee. The Defendant client pointed out that from the nature of instructions issued by the Respondent meant that schedule V of the Advocates Remuneration Order, part II paragraph 1 was applicable in this case. This part provides that instructions fee should be assessed based on the labour required, the number and length of papers perused. The client also argued that the advocate prepared one caveat emptor notice for all the 16 titles and 13 affidavits in execution of the Respondent’s instructions. The Defendant client further argued that the value of the properties for the purpose of determining the instructions fees in relation to dealing with the foregoing matters. The Defendant/client pointed out that the authorities relied by the Plaintiff/Advocate relate to situations where suits had been filed in court.

11. After a careful consideration of the rival arguments and the material placed before this court, it is now clear to me that the learned taxing officer applied Schedule V of the Advocates (Remuneration) Order of 2009 in assessing the instructions fee and on the basis of the labour required and the number and length of papers involved. It is apparent that the learned taxing officer did determine the question as to whether or not the value of the assets provided for should have been used to assess instructions fees. It was important for the learned taxing officer to determine this question either way.

12. On this ground alone I am convinced that the taxing officer fell into error. Consequently I find the reference to be well founded. In the circumstances of this case a fair order to make which I hereby direct is to set aside the award on instructions fee and direct that the Bill of costs be heard afresh before another taxing officer of competent jurisdiction other than Hon. Wangila. Costs of the reference is given to the Plaintiff Advocate.

**Dated and delivered in open court this 30<sup>th</sup> day of July 2015**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant