REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

MISC. APPLICATION NO. 173 OF 2008

KIPKENDA, LILAN & CO. ADVOCATES.....APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI.....RESPONDENT

RULING

1. The Notice of Motion that is the subject of this Ruling is dated **2nd September, 2008.** It was brought under Rule 11 (2) of the Advocates **Remuneration Order for the following orders:**

1. **That the Court be pleased to set aside the taxing master's decision taxing item 1 of the Bill of Costs at Kshs. 350,000/=.**

2. **That upon granting prayer one above, the Court be pleased to set aside the taxing master's decision taxing the bill at Kshs 378,827/=.**

3. **That the court be pleased to re-tax the said bill itself or remit the same to the taxing master for the taxation of the said items afresh.**

4. **That costs of the application be costs in the cause.**

2. The grounds raised in support of the application are that the taxing master in taxing the Advocate/Client's Bill of Costs at Kshs. 378,827/- proceeded on an error of principle in connection with the manner in which item 1 was assessed. It was the Applicant's contention that the taxing officer failed to set out clearly, candidly and sufficiently the criteria that guided her in exercising her discretion even after admitting that the matter was weighty; and that she ought to have taken into account such relevant factors such as:

a. **That substantial progress had been made in the suit.**

b. **The complexity in drafting the pleadings.**

c. **The amount of work done by the Applicant.**

d. **That public policy demands that costs be such rates as make the legal profession attractive**

to new recruits.

Counsel further urged the court to note that even the calculation of the total amount was wrong for the reason that the unopposed items alone added upto Kshs. 52,547/=, and as such the total award ought to have been at least Kshs. 402,547/= and not Kshs. 378,827/= as was awarded.

3. The application was also supported by the affidavit of **James Makuri Advocate**, sworn on 2nd September, 2008 along with the annextures thereto as well as a Further Affidavit filed on 22ndMay, 2015 sworn by Stephen Kipkenda Kiplagat, an Advocate in the Applicant firm.

4. The Bill of Costs filed by the firm of Kipkenda, Lilan & Company Advocates on 21st February, 2008 asked for a sum of Ksh 58,360,001/= as Advocate/Clients Costs pursuant to Schedule VI of the Advocates (Remuneration) (Amendment) Order of 2006. The costs were claimed for services rendered for the Respondent, the City Council of Nairobi, in **Nairobi HCCC No. 360 of 2006.** That Bill of Costs was taxed before **Hon. F. Mokaya**, then Deputy Registrar. In her Ruling delivered on 27th June, 2008 the Deputy Registrar taxed the Bill in the sum of Kshs. **378, 827/=.** Thereupon, the Notice of Motion dated 2nd September, 2008 was filed, seeking that that decision be set aside as aforestated.

5. In the Written Submissions filed by Counsel for the Advocates/Applicants it was posited that the matter was exceptional, involving voluminous documents that required a lot of research and time and that the suit land was valued at Kshs. 2,336,600,000/=. To support their contention that the suit was complex the following points were raised by the Applicants:

a. That the case was instituted by more than 358 tenants.

b. That the Taxing Master by her own admission stated that the matter was complex and intricate yet contradicted herself in not taking this into consideration in the final amount if taxed costs.

c. That the Taxing Master recognized and acknowledged that the papers filed were numerous and bulky, but thereafter failed to give due consideration to the same.

6. It was therefore submitted on behalf of the Applicant that there was an error in principle as the costs allowed was so minimal as to justify an inference on the ground that the Taxing Officer acted on erroneous principles. The Applicant defended their claim for **Kshs. 50,199,000/=** as instructions fees for resisting the claim for orders of injunction as being reasonable and justifiable, given the importance of the matter and the exceptional circumstances entailed thereby. It was further submitted that the matter was of such immense importance to the parties and emotions so high that the Advocates ***"took quite a beating."*** That therefore for the taxing officer who acknowledged all the foregoing, to award a sum of Ksh 350,000/= as instructions fees cannot be justified.

7. It was further the contention of the Advocates/Applicants that the taxing officer ought to be faulted for not assigning any reasons to her decision as this is a mandatory requirement of Paragraph 11 (1) of the Advocates (Remuneration) Order and that this omission in itself is a good ground for reference. Reliance was placed on the cases of ***Mereka & Company Advocates Vs National Bank of Kenya and Kipkorir Titoo & Kiara Advocates Vs Deposit Protection Fund Board (2005) eKLR*** to support the Application.

8. The final ground raised in support of the application was that the taxing officer failed to consider any of the items in the Bill of Costs which were unopposed and which amounted to **Kshs. 52,547/=.** That had she done so, the total award would have been Kshs. 402,547/=. It was also argued that the total sum taxed ought to have been increased by one half as required by the Advocates Remuneration Order, something which the taxing officer failed to do.

9. It was thus for the foregoing reasons that the Applicant prayed that this Reference be allowed and the Ruling and Orders of the taxing officer dated 27th June, 2008 be set aside and the bill of csts dated 21st

February, 2008 be referred back for taxation by another taxing officer with appropriate directions. In the alternative, the Applicant prayed that this court proceeds to exercise its discretion in the matter and tax the bill.

10. The Client/Respondent filed Grounds of Opposition dated 29th September, 2008 contending that the application is frivolous, vexatious and an abuse of the Court process and should therefore be dismissed as the costs were properly taxed. Thereafter, directions were given on 25th May, 2015 for the Respondent to file a Replying Affidavit and Written Submissions, but no such documents were filed by the Respondent. A further opportunity was given by the court on 22nd July, 2015 in the presence of Mr. Abwao, Counsel for the Respondent, for the Respondent to file and serve Written Submissions by 27th July, 2015. This too was not taken advantage of by the Respondent. Thus no submissions have been filed to date by the Respondent and no attendance was made on their behalf on the 9th October, 2015 when the application came up for further directions as to its disposal.

11. There is no dispute that the subject bill of costs was properly placed before the Deputy Registrar for taxation under Schedule VI of the Advocates Remuneration Order, 2006 and that the taxing officer proceeded to dispose of it accordingly, bearing in mind the discretion donated by the proviso to Paragraph 1 of that Schedule, which provides thus in respect of Instructions Fees:

> ***"...provided that the taxing officer in the exercise of his discretion shall take into consideration the other fees and allowances of the Advocate (if any) in respect of the work to which any such allowances applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial Judge and all other relevant circumstances."***

12. With regard to the foregoing paragraph the Court of Appeal, in the case of ***Joreth Limited Vs Kigano & Associates (2002) 1 EA 92***, held thus:

> ***"The value of the subject matter of a suit for purposes 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 fees as he considers just, taking into account amongst other matters, the nature and importance of the cause or the matter, the interests of the parties, the general conduct of Proceedings."***

13. Looking at the Ruling of the taxing officer, it is evident that she took the following factors into account:

> a. The prayers sought, namely: Permanent Injunction, Declaration, and extension of period of sale;
>
> b. That the monetary value of the subject matter was not indicated in the pleadings, judgment or settlement of the Court;
>
> c. That there was no election made to tax the bill under Schedule V of the Advocates Remuneration Order.

14. She then proceeded to render her decision thus:

> **"Since there is no specific sum provided for in the prayers sought for in the plaint the [bill] can be considered under paragraph 1 (l) which provides for Ksh. 6000 in the minimum. The taxing officer has discretion to increase this sum based on the complexity of the matter the labour required, the interest of the parties, public interest, exceptional dispatch and the type of defence put forward. In my view the file was bulky and it shows the work done was intensive. I would in the premises consider a sum of Kshs. 350,000/= as Instructions Fees on Item 1. I have worked out all the other items on this bill and accordingly I tax this bill at Kshs. 378,827/=. The Applicant did not ask for increase of this sum by half. I will thus not**

make any orders in that regard…"

15. The matter before the court was for Permanent Injunction and Declaration. As noted by the taxing officer, no specific value was provided in the pleadings or judgment. The taxing officer was thus entitled to use her discretion on the basis of the material placed before her. It is plain therefore that the taxing officer took into consideration the relevant principles including the complexity of the matter and the bulky documents involved to warrant the exercise of discretion on her part in increasing the Instructions Fees from the applicable scale fee to Kshs. 350,000/=.

16. In all matters of this nature, it is imperative to bear in mind the principles set out by the Court of Appeal in the case of ***Premchand Raichand Limited & Another Vs Quarry Services of East Africa Limtied& Another (1972) EA 162,*** namely:

a. That costs should not be allowed to rise to such a level as to limit access to the Courts to the wealthy only;

b. That a successful litigant ought to be fairly reimbursed for the costs has to incur;

c. That whereas the general level of remuneration of advocates must be such as to attract recruits to the profession, there must be a sense of proportionality and consistency in the awards made.

I have no doubt that the taxing officer had these principles in mind in coming to the conclusion she did.

17. With regard to the other items in the bill of costs, though Counsel argued that they were unopposed, the taxing officer had the ultimate duty to ensure they were drawn to scale or otherwise deserved, and that the disbursements were verified and supported by receipts. It is evident that she did so as reflected in the taxed off column of a copy of the bill filed herein on 21st February, 2008. It is these sums that increased the amount taxed from Kshs. 350,000/= to Kshs. 378,827/=. I therefore find no merit in the Applicant's contention that those items were completely ignored.

18. I fully endorse the observations of the court in **the Premchand Case thus:**

"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 and 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."

I do not think, on the basis of the material placed before me, that the award was so low for the work done by the Applicants as to amount to an injustice to them. In similar vein, I have considered the allegation that the taxing officer failed to assign any reason to her decision, but find that not much turns thereon, granted that the reasons are contained in the Ruling on Taxation.

19. There is however a valid point raised by the Advocate/Applicant regarding the requirement that the taxed amount be increased by half. This was not done by the Taxing Officer on the basis that the Applicant did not ask for it. What the Advocate Remuneration Order provides for in Schedule VI B is as follows:

"As between advocate and client the minimum fee shall be--

(a) the fees prescribed in A above, increased by one-half; or

(b) the fees ordered by the court, increased by one-half... as the case may be..."

Since this provision is peremptory in its terms, the taxing officer was under obligation to comply therewith whether or not counsel made a specific request in that regard. Accordingly, I take the view that

the Applicants were and are entitled to the taxed sum of Kshs. 378,827/= plus one-half thereof, namely: **Kshs. 568,240.50** as Advocate/Client costs.

Save to the extent aforesaid, the Notice of Motion dated 2nd September, 2008 is otherwise lacking in merit and is hereby dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2015

OLGA SEWE

JUDGE