



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS APPLICATION NO. 656 OF 2012

LUBULELLAH & ASSOCIATES ADVOCATES.....ADVOCATE

• VERSUS –

BARANYI BROKERS LIMITED.....1ST RESPONDENT/CLIENT

NITIN P. DAWDA.....2ND RESPONDENT/CLIENT

HASMUKH P. DAWDA.....3RD RESPONDENT/CLIENT

RULING

1. The respondents pray to set aside the decision of the taxing master, R.N. Nyakundi D.R, dated 27th June 2013. There are two fairly similar chamber summonses: the first is by the 1st and 2nd respondents dated 16th July 2013; the second is by the 3rd respondent dated 25th July 2013. I shall refer to the three respondents as the clients. The advocate in the impugned taxation had moved the Court to enforce the certificate of taxation of costs dated 27th June 2013. On 23rd September 2013, the latter application by the advocate was stayed pending the hearing of the applications for review by the clients.
2. On 22nd January 2014, the parties agreed that the applications for review be determined on the basis of depositions on record and written submissions. The submissions of the 1st and 2nd clients were filed on 4th October 2013; those of the 3rd client on 7th October 2013; while those of the advocate were filed on 18th October 2013.
3. The principal grounds for review can be gleaned from the depositions of Nitin Dawda sworn on 16th July 2013 and Hasmukh Dawda sworn on 25th July 2013. They are four-pronged: first, that the taxing master erred in principle by assessing instruction fees from the pleadings *instead* of the consent or settlement in the parent suit dated 8th October 2004; secondly, that he failed to consider that the 1st client was a separate and distinct legal entity from the 2nd and 3rd clients; thirdly, that the judgment against the 3rd client was in the sum of Kshs 25,000,000 only. Accordingly, it was erroneous to base the taxation on the sum of Kshs 222,576,610.60; and, fourthly, that there was no *proof* of a retainer between the advocate and the 3rd client. Both applications for review are contested by the advocate. I have considered the applications, the depositions and rival submissions.
4. The legal parameters within which the Court can interfere with the taxing master's decision are well settled. In *First American Bank of Kenya Vs Shah and others* [2002] E.A.L.R 64 at 69, Ringera J (as he then was) delivered himself thus;

“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”.

See also Steel Construction Petroleum Engineering (E.A) Ltd Vs Uganda Sugar Factory [1970] E.A 141, Khan & Katiku Advocates Vs Pamela Chepchumba Rechenbach Nairobi High Court Miscellaneous 23 of 2011 (unreported).

5. The views of Ringera J (as he then was) were not entirely novel: They were to be found in the old Court of Appeal decisions in Premchand Raichand Limited & another Vs Quarry Services of East Africa Limited and another [1972] E.A 162 and Arthur Vs Nyeri Electricity Undertaking [1961] E.A 492. The principles were also re-affirmed by the Court of Appeal in Joreth Limited Vs Kigano and Associates [2002] 1 E.A 92.
6. There is thus a general caveat on judicial review of quantum of taxation *unless* there is a clear error of principle or the sums awarded are either *manifestly* high or low as to lead to an injustice. This last element was well explained in Premchand’s case (supra):

“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”.

7. In Joreth Limited Vs Kigano (supra) the Court of Appeal stated that where the value of the subject matter cannot be discerned from the pleadings or judgment, the taxing master has discretion to assess it weighing a number of parameters:

“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 judgment 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 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. That is what CK Njai Esq did when he said:

‘As we do not know the capital value of the property in dispute; one I believe is left to determine the matter on the general discretion donated to the taxing officer to tax a bill, based on the importance of the matter to the parties, complexity and the responsibility placed on shoulders of Counsel.’

See also L’oreal Vs Interconsumer Products Limited Nairobi, High Court Misc. Civ. App. 1089 of 2010 [2014] e KLR.

8. The clients contend that the taxing master should have calculated instruction fees on the basis of the *settlement* dated 8th October 2004 in the parent suit, HCCC 910 of 2002. That settlement compromised the suit without any reference to sums. I thus doubt very much that it would have assisted the taxing master to *assess* the instruction fees. I accordingly find that the taxing master was entitled to calculate instruction fees from the amounts *disclosed* in the *pleadings*. See Joreth Limited Vs Kigano & Associates [2002] 1 E.A 92.
9. I have studied the plaint in HCCC 910 OF 2002 City Finance Bank Vs Baranyi Brokers Ltd, Nitin Dawda & Has Mukh Dawda. The respondents were sued *jointly* but for *separate* claims. At paragraph 5, the total sum due from the 2nd and 3rd defendants under the guarantee was Kshs 25,000,000. The total sum due from the 1st defendant, as principal debtor, was Kshs 197,576,610.60. The plaint at paragraphs 13 and 14 thus prayed for *separate* judgment as follows:-

“a) Judgment against the first defendant for Kshs 197,576,616.60 together with interest thereon at 25 percent per annum from 30th April 2001 and at such other higher rate shall be prevailing in the market when judgment is entered.

b. Judgment against the second and third defendant jointly and severally for Kshs 25,000,000 together with interest thereon at 25 percent per annum from the 30th April 2001 and at such other higher rate as shall be prevailing in the market when judgment is entered.”

10. This is the way the taxing master dealt with the matter of instruction fees –

“The law is very clear on how a taxing officer determines the value of subject matter. It is deduced from the pleadings, settlement or judgment of the court. The parties settled the matter way back vide consent dated 29/9/2004. The available source on quantum is therefore pleadings as between the parties to the suit. I apply schedule VI of 1997 Advocates Remuneration Order paragraph 1 (b) the value of subject matter as Kshs 229,576,610 is applicable. According to paragraph 1 (b) fees for 1000,000 is Kshs 55,000. Fees for over 1000,000 is calculated at 1.5 %. The amount of Kshs 221,576,610 subjected to a ratio of Kshs 1.5 & fees payable at Kshs 3,323,649. The subtotal on item 1 is therefore Kshs 3,378,649”.

11. Three things arise from those findings: first, the taxing master applied the correct principles in assessing quantum of taxation from the pleadings and *not* the general settlement. Secondly he was, with respect, *wrong* on the value of the subject matter. As against the company, the claim was for Kshs 197,576,610.60. It is trite that a company is a distinct legal person independent from the 2nd and 3rd defendants. Salomon Vs Salomon [1897] AC 22. The figure employed by the taxing master of Kshs 229,567,610 (that combined the claim on guarantee) was clearly erroneous. It follows that the award of Kshs 3,378,649 as instruction fees was without proper foundation. Judgment in the parent suit was *not* sought jointly and severally against the defendants for Kshs 229,567,610.

12. Thirdly, the claim against the 2nd and 3rd defendants was discernible from the claim. It was a *separate* and special claim for Kshs 25,000,000. The taxing master erred in principle by assessing the bill on the combined total of the claim of Kshs 229,576,610. By so doing, the quantum of costs as against the 2nd and 3rd defendants in the suit became *manifestly* high and unjust. In the result, I am inclined to disturb that finding. Premchand Raichand Limited & another Vs Quarry Services of East Africa Limited and another [1972] E.A 162, Arthur Vs Nyeri Electricity Undertaking [1961] E.A 492, First American Bank of Kenya Vs Shah and others [2002] E.A.L.R 64, Joreth Limited Vs Kigano and Associates [2002] 1 E.A 92. I however agree with the taxing master that the advocate was not entitled to a further claim of Kshs 500,000 on the counterclaim.

13. Regarding the retainer, I am not persuaded that the taxing master erred in principle. As I stated, all the defendants were sued jointly. The advocate filed a *joint* defence for all the defendants. The taxing master found as follows:-

“There is no dispute that on 3/9/2002 Lubulellah & Associates entered appearance for the third defendant/respondent to the bill of costs. There is no cogent evidence from the third defendant to challenge the memorandum of appearance. In this respect objection proceedings raised by third respondent lack merit and I do hereby dismiss the same. The defendants filed a joint statement of defence dated 16/9/2002. The bill of costs as filed against the respondents is jointly set out. There is a link between the 1st, 2nd respondents and the third respondent as it relates to the claim and statement of defence filed. The issues are intertwined on the basis that the 3rd respondent had guaranteed the 1st and 2nd respondent liquidated amount [sic] owed to the plaintiff to the suit”.

14. In a synopsis, the taxing master found correctly that a retainer had been proved. There were letters exchanged between the advocate and the 3rd client. Examples are at pages 57 and 62 of the advocate’s bundle of documents leading to the settlement of the primary suit. The 3rd client drew and forwarded settlement cheques to the advocate for transmission to the lender. I find that the 3rd

client is trying to resile from those instructions a little wee late in the day. It cannot now fall from the lips of the 3rd client that the firm of Lubulellah & Associates had no instructions to act for him in the suit. That part of the reference is devoid of merit.

15. Accordingly, the chamber summonses for review succeed *only* with regard to the item of instruction fees. I will remit the advocate-client bill of costs dated 26th October 2012 for re-assessment by any other taxing master of the Court *other than* R.N. Nyakundi D.R. The taxation shall be *limited* to the following matters only:

- a. *The instruction fees against the 1st respondent client shall be taxed on the basis of the value of the subject matter of Kshs 197,576,610.60.*
- b. *The instruction fees against the 2nd and 3rd respondents clients shall be taxed on the value of the subject matter of Kshs 25,000,000.*
- c. *The applicable scale shall be Schedule VI of the Advocates Remuneration (Amendment) Order 1997, L.N. 550 of 1997.*

16. Since both parties have succeeded in part, the order that commends itself to me to grant is that each party shall bear its own costs of this review.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of February 2014

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. E.L. Lubulellah for the advocate/respondent instructed by Lubulellah & Associates Advocates.

Mr. M. Gachoya for Mr. Kibanya for the 1st and 2nd applicants/clients instructed by Kibanya & Kamau Advocates.

Mr. M. Gitonga for the 3rd applicant/client instructed by Lumumba & Lumumba Advocates.

Mr. C. Odhiambo, Court clerk.