



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS APPLICATION NO. 472 OF 2011

SINGH GITAU ADVOCATES.....APPLICANT

• VERSUS –

CITY FINANCE BANK LIMITED.....RESPONDENT

RULING

1. City Finance Bank Limited (hereinafter *the respondent or client*) has challenged the ruling on taxation by L.M. Njora, PDR delivered on 28th October 2010. The taxation related to an advocate–client bill of costs dated 13th May 2011 lodged by Singh Gitau Advocates (hereinafter *the advocate*). The bill was allowed as drawn in the sum of Kshs. 2,127,059.52.
2. The client takes up cudgels on the decision on three primary grounds: first, that there was an error of principle in granting *separate* instruction fees against *each* of the three defendants; secondly, that *no* reasons were given for allowing the bill as drawn; and, thirdly, that getting up fees were not deserved as the parent suit had not been *confirmed* for hearing.
3. The motion is contested. There is a replying affidavit sworn by James Singh on 7th May 2013. Its pith and substance is that the taxing master found that the bill “*was not exaggerated*” and allowed it as drawn. Since the ruling was delivered in the presence of all the parties, it was incumbent for the client to challenge it within 14 days. That was not done. The motion is thus not properly before the court. It is also contended that since the client had sought costs against *each* defendant in the parent suit, it is disingenuous to deny the advocate similar costs. Lastly, the advocate states that the main suit had been fixed for hearing on 10th December 2002, 12th November 2003 and 26th May 2009. The advocate was accordingly entitled to getting up fees.
4. In the meantime, the advocate took out a separate motion dated 28th June 2013 seeking to enforce the impugned certificate of costs.
5. On 4th March 2014, I directed, with concurrence by the parties, that the motion be determined on the basis of the pleadings, depositions and written submissions. The client filed submissions on 18th March 2014; the advocate replied on 20th March 2011.
6. 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).

7. 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.
8. 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”.

9. The taxing master delivered her ruling on 28th October 2011. It was a short ruling which I will reproduce in full –

“Before me is the advocate client bill of costs dated 13/5/2011. The court has considered the wise submissions put forth by the counsels as well as the authorities supplied. I have done my calculations and I find the bill as drawn is not exaggerated. I also find that the judgment entered was not entered jointly and severally and as such the advocate was entitled to fees from the clients. Having so found, the bill of cost dated 13/5/2011 is taxed in its entirety as drawn”.

10. The ruling was read in the presence of Mr. Mwanyale for the client and Mrs. Waweru for the advocate. Paragraph 11 (1) of the Advocates (Remuneration) Order states as follows:-

“Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects”.

The client concedes that its lawyer's letter of 31st October 2011 to the taxing officer did not specify the contested items. The ruling I have set out earlier was so brief and general that it did not mention any item in the bill or the decision thereof. The respondent's letter in the circumstances cannot be impugned for generality. But even assuming I am wrong on that point, article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act enjoin me to do substantial justice to the parties.

11. This overriding principle is a guiding beacon for the court:

“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing”.

Harit Sheth Advocate Vs Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] e KLR. See also Miraflowers Apartments Limited Vs Caleb Akwera and another Nairobi, High Court ELC case 633 of 2011 [2012] e KLR, Chimanlal K.N. Shah & others Vs Trust Agencies Limited Nairobi, High Court case 1387 of 2001 [2012] e KLR, Unga Limited Vs Magina Limited Nairobi, High Court case 1250 of 1999 [2014] e KLR. See also Rapius Kirogothi Muhindi &

another Vs. Muchangi Nduati & Co. Advocates for the proposition that failure to state the items of taxation objected to is not always fatal.

12. This is not to say that procedural rules have been thrown out of the window. See Westmont Power (K) Ltd Vs. Commissioner of Income Tax Nairobi, Civil Appeal 128 of 2006 [2010] e KLR. I think the point to be distilled from the rival positions is that procedural rules must remain *handmaidens* of justice. As the typed proceedings in this case were only availed to the client on 25th January 2012, I find the reference filed on 9th February 2012 is properly before the Court.
13. I would then return to the contested ruling. I do not entirely agree with the applicant that *no* reasons for the decision were given. The taxing master in her brief decision stated that she had *done [her] calculations and [found] the bill as drawn [was] not exaggerated*. She could have done a little better. The bill dated 13th May 2011 had 54 items. She could have at the very least commented on the instruction fees claimed of Kshs. 909,096 or the getting up fees of Kshs. 303,032 which were the two substantial items in the bill. Her findings are then so general as to afford this court little or no platform to gauge whether she applied *correct* principles.
14. In a synopsis, I find the reasons given in the taxation insufficient. I will expound a little more: At the taxation, the applicant filed eight pages of submissions in support of the bill; the respondent filed three pages of submissions. The learned taxing officer casually states that she has *“considered the wise submissions put forth by the counsels as well as the authorities supplied”*. Absolutely no word about the positions taken by the parties in their rival submissions. Failure to provide sufficient reasons runs counter to the requirements of rule 11 (2) of the Advocates (Remuneration) Order. See also Kipkorir, Titoo & Kiara Advocates Vs. Deposit Protection Fund Board [2005] 1 KLR 528.
15. There is then the matter of instruction fees allowed separately against *each defendant* in the parent suit. To start with, this was an advocate–client bill of costs; *not* a party and party bill of costs. As against the client, the advocate received instructions to prosecute only *one* suit involving three defendants.
16. I have studied the defence filed in the parent suit HCCC 914 of 1999 City Finance Bank Limited Vs. Rukan Limited and 2 others. Although the plaintiff sought judgment jointly and severally against the defendants, only *one* statement of defence was filed contesting the claim for Kshs. 17,535,471.60. The plaint itself did not seek *separate* or distinct sums or reliefs against the three defendants: It sought a *global* relief in the *liquidated* sum above, costs and interest. I am thus hard put to accept the advocate’s submission that he was entitled to instruction fees of Kshs. 303,032 as against *each* of the three defendants. That trebled the instruction fees to Kshs. 909,096. Under item 2 of the bill, it also escalated the getting up fees to Kshs. 303,032. Since this was an advocate–client bill of costs, it was increased under paragraph B of schedule VI by 50%. That became another Kshs. 611, 224.
17. On that score, I am persuaded that the taxing master employed *wrong* principles. See Nyamogo & Nyamogo Vs. Kenya Bus Services High Court, Nairobi Misc. App. 587 of 2007 [2006] e KLR. Order 1 rule 3 and 4 (b) of the Civil Procedure Rules or Schedule V1 A1 (b) that the respondent advocate relies on are not on point in this case. In a nutshell the taxing officer failed to justify, from the pleadings or nature of services rendered, why the advocate was entitled to instruction fees as against *each* of the defendants. In the end, by applying the *wrong* principles, the fee allowed became manifestly excessive. In the result, I am persuaded to disturb the findings of the taxing master. Having reached that conclusion, it is futile to make a finding on whether the parent suit had been confirmed for hearing for purposes of the getting up fees. For the same reasons, I need not consider the advocate’s motion dated 28th June 2013 seeking to enforce the impeached certificate of costs.
18. It is not the true province of a Judge to re-tax or re-assess the bill of costs. See First American Bank of Kenya Vs. Shah and others [2002] E.A.L.R 64. Whereas the judge has discretion to re-tax a bill, the proper course is to remit it to the taxing master. If the bill is to be re-assessed on different principles, it should be placed before a different taxing master. Steel Construction & Petroleum Engineering (E.A.) Ltd Vs. Uganda Sugar Factory Ltd [1970] E.A 141, D’souza Vs. Ferrao [1960] E.A 492. See also Desai, Sarvia & pallan Advocates Vs. Jambo Biscuits (Kenya) Limited High Court, Nairobi Misc App 3 of 2013 (unreported).
19. In the result, I order as follows:-

- a. **THAT** the entire advocate–client bill of costs dated 13th May 2011 and filed in Court on 16th May 2011 be remitted for taxation to any taxing master of this Court *except* L.M. Njora PDR.
- b. **THAT** the advocate’s notice of motion dated 28th June 2013 seeking to enforce the certificate of costs arising from the impeached taxation is hereby stayed pending the fresh taxation.
- c. **THAT** I grant the client, City Finance Bank Limited, costs of the present motion for review.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 8th day of April 2014.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for Singh Gitau Advocates.

Mr. D. K. Njoroge for the client instructed by Macharia-Mwangi & Njeru Advocates.

Mr. C. Odhiambo, Court clerk.