



**REPUBLIC OF KENYA**

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

**HCCC NO 505 OF 2003**

**NATIONAL HOSPITAL INSURANCE FUND**

**BOARD OF MANAGEMENT.....APPLICANT**

**VERSUS**

**THE DEPOSIT PROTECTION FUND BOARD**

**(As Liquidator of Euro Bank Limited (in Liquidation))**

**EURO BANK LIMITED (In Liquidation)**

**SOLOMON BUNDI MUTHAMA**

**JOHN PAUL WACHIRA MUNGE**

**FIRDOSH EBAHIM (SIC) JAMAL.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Chamber Summons application dated 13<sup>th</sup> April 2003 and filed on 14<sup>th</sup> April 2003 was brought pursuant to the provisions of Rule 11 of the Advocates (Remuneration) Order Cap 16 of the laws of Kenya, Order XX1 Rule 22, Section 3A of Cap 21 and all other enabling provisions of the law. It sought the following orders:-
  1. **THAT the court be pleased to set aside in its entirety the ruling of the Taxing Master dated and delivered on 31<sup>st</sup> October 2003.**
  2. **THAT this Honourable Court be pleased to stay execution of the 6<sup>th</sup> Defendant's taxed bill pending the hearing and determination of these proceedings.**
  3. **THAT costs be in the cause.**
2. The application was predicated upon the following grounds which were generally:-
  - a. **THAT the Taxing Master misdirected herself and acted contrary to established principles of law and that her decision was not based on any known law or established legal principles.**
  - b. **THAT the Taxing Master failed to appreciate the fact that there was no cause of action against the "6<sup>th</sup> Defendant" as there was no service of summons and plaint against him.**
  - c. **THAT the Taxing Master failed to appreciate that the "6<sup>th</sup> Defendant's" bill of cost (sic) was**

**unmaintainable in law for the reason that the 6<sup>th</sup> Defendant was not party to the suit.**

### **AFFIDAVIT EVIDENCE AND NOTICE OF PRELIMINARY OBJECTION**

3. The application was supported by the Affidavit of Dawid S. Abdulrahman which was sworn on 13<sup>th</sup> April 2003. He reiterated the grounds that had been set out in the face of the application. He pointed out that the 6<sup>th</sup> Defendant was not a party to the suit when he filed his belated purported Defence. He stated that the proceedings attached to his affidavit and marked Exhibit “AMA 3” showed that the Amended Plaintiff deleting the 6<sup>th</sup> Defendant’s “Defence” was filed later in the day after service of the Amended Plaintiff up on the “6<sup>th</sup> Defendant’s advocates.
4. He averred that the court had the power, jurisdiction and discretion to set aside the faulty decision of the taxing master and prayed that the Plaintiff’s application be allowed as prayed.
5. In response thereto, the 6<sup>th</sup> Defendant filed a Replying Affidavit on 23<sup>rd</sup> April 2004. The same was sworn on 19<sup>th</sup> April 2004. He said that he had gone to great expense and suffered prejudice as the suit was a big media event of great public interest and that the Plaintiff’s application was its attempt to escape from liability as he had entered appearance on 5<sup>th</sup> September 2003. He stated that Mr Dawid, advocate for the Plaintiff was present in court on 29<sup>th</sup> October 2003 when his advocate informed the court that the Plaintiff had withdrawn its case against him.
6. He pointed out that the affidavit in support of the application was untenable on the ground that the same was unauthorised by the corporation, the deponent was adducing evidence from the bar and that he had failed to disclose his source of information. He added that the taxing master taxed the costs in accordance with Schedule VI of the Advocates Remuneration Order and her ruling having been well reasoned, ought not to be disturbed by this honourable court. It was his averment that the present application was an attempt to review the order of Njagi J who had exercised his discretion judiciously and that this court could not act as an appellate court in respect of its own order.
7. He also filed a Notice of Preliminary Objection dated 27<sup>th</sup> April 2004 on 28<sup>th</sup> April 2003 in which he stated:-
  - a. **THAT the said application was supported by an affidavit that was sworn by an unauthorised person and fell short of Order XVIII (3) of Civil Procedure Act Cap 21 and ought to be struck out.**
  - b. **THAT the supplementary (sic) affidavit dated 13<sup>th</sup> April 2004 ought to be struck out as it was unauthorized and filed without leave of the court.**

### **LEGAL SUBMISSIONS BY THE PLAINTIFF**

8. The gist of the Plaintiff’s written submissions dated 6<sup>th</sup> November 2013 and filed on 7<sup>th</sup> November 2013 was that the instruction fee was based on the Plaintiff whereas suit against the 6<sup>th</sup> Defendant had already been withdrawn. It was its submission that a bill of costs in respect of a cause of action that had not been brought to the attention of a party was unmaintainable in law and an abuse of the court process. It argued that a defendant should not file a defence when not served with Summons to Enter Appearance as a plaintiff could withdraw and discontinue the suit against such a defendant.
9. It contended that the 6<sup>th</sup> Defendant was on a frolic of his own when he filed a Defence without being served with the said Summons and was therefore the author of his own costs.
10. It submitted that the issue of the awarding of costs should be considered as a relevant issue herein as the Taxing Master had indicated that the said issue ought to have been raised in the High Court, which it had now done. It also averred that the Taxing Master could not have reached at a decision that the 6<sup>th</sup> Defendant had been served with the said Summons and that her assumption was not based on any evidence.
11. It therefore urged this court to find that the Taxing Master ought to have properly exercised her mind and that her taxation was utterly misplaced necessitating the dismissal of her decision.

## LEGAL SUBMISSIONS BY THE 6<sup>TH</sup> DEFENDANT

12. The 6<sup>th</sup> Defendant's written submissions were dated and filed on 20<sup>th</sup> November 2013. He set out the background of the case and denied having been served with the Amended Plaint as had been contended by the Plaintiff. He was categorical that the Plaintiff's argument that no costs were payable to him on the ground that he had not been served with any summons had been addressed before the Taxing Master who pointed out that the issue ought to have been raised in the High Court.
13. He stated that the awarding of costs was at the discretion of the trial court as Section 27 of the Civil Procedure Act provides that costs follow the event, unless the court shall for good reason or otherwise order. It was also his submission that the Taxing Master was only performing her duties as per the order of Njagi J, that no review or appeal was ever sought or lodged against the order of the said learned judge and that the issues raised by the Plaintiff were new and extraneous as the same were never placed before the trial court.
14. Regarding the issue of his appearance, he contended that his advocates attended court on several occasions but the Plaintiff did not object to the said attendance or object to the awarding of costs to him at the time it withdrew the suit against him.
15. It was his contention that the suit was instituted against him once the Plaint was registered as such in the registry and that since the reliefs sought by the Plaintiff were also against him, being vigilant, his advocates entered appearance on his behalf. He argued that the Plaintiff could not be heard to change its position and allege that it did not intend to carry on with the suit against him.
16. He urged the court not to set aside the orders by the Taxing Master as her discretion had not been challenged at all. He placed reliance on the cases of Kyalo Mbobu t/a Kyalo & Associates vs Patrick Njuguna Njoroge [2012] eKLR, Premchand Rainchand Limited & Another vs Quarry Service of East Africa Limited & Others (1973) EA 162 and First American Bank of Limited vs Shah & Others (2000) I.R. A64, the latter two (2) which had been cited with approval in the case of Ntoitha MMithiaru vs Richard Maoka Maore & 2 Others [2012] eKLR.
17. A summary of what the court understood to have been the principles emanating from the said cases were:-
  - a. **THAT a court could not strike out an entire bill of costs that had been taxed by a taxing master unless the request had come by way of an appeal.**
  - b. **THAT a court would not interfere with a Taxing Master's decision merely because the court thought that the taxed amount was either too low or too high but that it would only interfere if the amount was too low or too high as to amount to an injustice by one party to the other.**
  - c. **THAT a court would not interfere with the Taxing Mater's decision unless it was strictly shown that the decision was based on an error of principle.**

## LEGAL ANALYSIS

18. First and foremost, the court wishes to address, as a preliminary issue, the provisions of Order XX1 Rule 22 of the Civil Procedure Rules Cap 21 (laws of Kenya) under which the Plaintiff brought its application. This was replaced by Order 22 Rule 22 of the current Civil Procedure Rules that was enacted in 2010.
19. The said provision was and is not relevant in the circumstances of this case as there was no decree in respect of the 6<sup>th</sup> Defendant which would bring the Plaintiff's application within the ambit of the said provision. The court will therefore disregard the same. In any event, provisions of the Civil Procedure Rules are irrelevant in proceedings that have been brought under the Advocates (Remuneration) Order, and there being a complete and distinct code to deal with references to the High Court from the taxing masters.
20. However, as the Plaintiff also brought its application under the provisions of Paragraph 11 of the Advocates (Remuneration) Order, the application cannot be deemed to have been defective merely by the Plaintiff having relied on an irrelevant provision of the law. In addition, the deponent of the Supporting Affidavit deposed on matters that were well within his knowledge and belief as he was the one conducting the case on behalf of the Plaintiff herein. The affidavit was therefore proper

- and will not be expunged or struck out from the proceedings herein. The court will therefore determine the matter herein on the merits of the case.
21. The court found it necessary to address the question of the 6<sup>th</sup> Defendant filing his pleadings in this case vis-à-vis the taxation of his Bill of Costs with a view to establishing whether or not the Taxing Master erred in principle when she taxed his costs in the sum of Kshs 8,282,772/=.
  22. The Plaintiff herein was filed on 19<sup>th</sup> August 2003. The Exhibit marked "OSA 3" showed that the 6<sup>th</sup> Defendant entered appearance on 5<sup>th</sup> September 2003. On 12<sup>th</sup> September 2003, the firm of M/S Musyoka Annan & Co Advocates filed a Notice of Change of Advocates replacing the firm of M/S Mohammed & Muigai Advocates who were previously representing the 6<sup>th</sup> Defendant. On 16<sup>th</sup> September 2003, the 6<sup>th</sup> Defendant filed his Defence and a Chamber Summons application, seeking to strike out the Plaintiff's suit. Both the Defence and Chamber Summons application were dated 15<sup>th</sup> September 2003. The Plaintiff's Amended Plaintiff was also dated 15<sup>th</sup> September 2003 and filed on 16<sup>th</sup> September 2003.
  23. When parties appeared in court on 29<sup>th</sup> October 2003, Mr Mulecho, counsel for the 6<sup>th</sup> Defendant, informed Njagi J that his Chamber Summons application dated 15<sup>th</sup> September 2003 had been overtaken as the Plaintiff had withdrawn its entire case against the 6<sup>th</sup> Defendant. Mr Dawid, counsel for the Plaintiff confirmed that that was indeed the position. Having noted the withdrawal of the suit against the 6<sup>th</sup> Defendant, the said learned judge held that the 6<sup>th</sup> Defendant was entitled to costs for the main suit and the application. He therefore ordered that the 6<sup>th</sup> Defendant be paid such taxed costs as the taxing officer would determine.
  24. The 6<sup>th</sup> Defendant's Bill of Costs was dated 4<sup>th</sup> November 2003 and filed on the same date. He claimed instructions fees in the sum of Kshs 8,285,072/=. The same was based on the Plaintiff's claim of Kshs 549,004,811.12 shown in the Plaintiff. He had, however, sought a total sum of Kshs 11,027,767/= which was inclusive of getting up fees and other items therein.
  25. The court did not have the benefit of seeing the ruling of the Taxing Master as there did not appear to be any in the court file. However, the Certificate of Costs on the court record showed that the Taxing Master taxed the 6<sup>th</sup> Defendant's costs at Kshs 8,282,772/=.
  26. It was this determination that the Plaintiff sought to set aside when it filed its Notice of Objection to the Registrars Ruling dated 6<sup>th</sup> April 2004 on 8<sup>th</sup> April 2004 as well as the present application. It also filed a Notice of Appeal indicating its intention to appeal the said learned judge's ruling.
  27. The court did note the Plaintiff's submissions that the 6<sup>th</sup> Defendant was on a frolic of his own when he filed a Memorandum of Appearance and Defence before being served with the Summons to enter appearance. However, it is clear that the Memorandum of Appearance was filed and served upon the Plaintiff and that the 6<sup>th</sup> Defendant's advocates attended court on several occasions. There is nothing on the court record to show that the Plaintiff objected to the 6<sup>th</sup> Defendant's advocates' presence in court or sought to have his Memorandum of Appearance expunged or struck out from the court record.
  28. A party ought not to be penalised for being enthusiastic about defending himself in any matter. No prejudice was suffered by the Plaintiff by the 6<sup>th</sup> Defendant filing his Memorandum of Appearance before being served with Summons to enter appearance. A party who is sued would least expect a claim against him to be withdrawn.
  29. A prudent and reasonable man ought to take all precautions to protect himself. In fact it is a plaintiff who should be extremely careful not to sue just about any person without having facts to sustain a claim against such person. This is because filing suit against any party opens such a plaintiff to the risk or potential of paying other parties' costs if he loses a case or it is found that he ought not to have sued such a person in the first instance.
  30. In the same vein, the 6<sup>th</sup> Defendant ought not to have been penalised for having filed his Memorandum of Appearance before being served with any Summons to Enter Appearance. The 6<sup>th</sup> Defendant was also within his right to file a Defence in this matter. By suing the 6<sup>th</sup> Defendant, the Plaintiff opened itself to the risk of paying him costs in the event it did not have a cogent cause of action against him.
  31. The court has no jurisdiction to interrogate as to the time the Plaintiff filed the Amended Plaintiff, the time it served the 6<sup>th</sup> Defendant with the same or whether the 6<sup>th</sup> Defendant filed the Defence

- after being served with the Amended Plaintiff. It is also not within the mandate of this court to interrogate whether or not the 6<sup>th</sup> Defendant was served with Summons to Enter Appearance as he alleged or at all for the same reason that the court has no jurisdiction to re-open the facts of what transpired.
32. What is before this court is the Plaintiff's reference against the Taxing Master's decision and at this juncture, the court is only interested in establishing whether or not the Taxing Master departed from the legal principles of taxation.
33. There was no indication whether or not the Plaintiff pursued its appeal against Njagi J's ruling at the Court of Appeal. In the absence of any order from Court of Appeal setting aside or overturning the said learned judges' decision, this court finds its hands tied and is unable to depart from the consequences of his order as the same was made by a court of equal and competent jurisdiction such as this one.
34. In his written submission, the 6<sup>th</sup> Defendant averred that his basic instruction fees was calculated as follows:-

a. On the 1 <sup>st</sup> Kshs 1,000,000/=, fee was	Kshs	55,000/=
b. On the balance Kshs 548,004,811.12 x 1.5/100		
<b>fee was</b>		<b><u>Kshs 8,270,072.16</u></b>
		<b><u>Kshs 8,285,072.16</u></b>

35. The Advocates (Remuneration) (Amendment) Order 1997 was at all material times, the applicable order in respect of the 6<sup>th</sup> Defendant's Bill of Costs. Notably, the Advocates (Remuneration) Order was subsequently amended in 2006 and again in 2012. Save for changes in the amount of graduated fees over the years, the formulae has largely remained the same.
36. A perusal of Schedule V1 Paragraph 1 (b) of the Advocates (Remuneration) (Amendment) Order 1997 is very clear that where a defence or other denial had been filed where the value of the subject matter could be determined from the pleading judgment or settlement between the parties, the basic instruction fee where the value was between Kshs 750,000/= - Kshs 1,000,000/= would be Kshs 55,000/=. Where the value of the subject matter exceeded Kshs 1,000,000/=, the basic instruction fee would be a fee as for Kshs 1,000,000/= plus an additional 1.5 % of the balance.
37. Bearing in mind that the Taxing Master taxed costs in the sum of Kshs 8,285,072.16 as against the sum of Kshs 11,027,767/= the 6<sup>th</sup> Defendant had claimed in his Bill of Costs, it does appear to this court that the Taxing Master rejected all the other items his Bill of Costs and awarded him the basic instruction fee only. She was within her discretion to do so.
38. The 6<sup>th</sup> Defendant filed a Memorandum of Appearance and Defence on 16<sup>th</sup> September 2003. Having done so, he was entitled to costs on the higher scale. The value of the subject matter could be ascertained from the Plaintiff's claim and consequently, as at the time the taxation was done, the calculation of the basic instruction fees adopted by the Taxing Master was correct.
39. She applied the legal principles of taxing costs where a defence has been filed pursuant to a court order of Njagi J who rightly exercised his discretion to award costs to the 6<sup>th</sup> Defendant in accordance with Section 27 of the Civil Procedure Act. This provision empowered him power to make orders in respect of the costs of and incidental to a suit and to determine by whom and out of what property and to what extent such costs are to be paid.
40. Accordingly, having considered the pleadings, the written and oral submissions and the case law relied upon by the parties, the court finds that the Plaintiff did not demonstrate that the Taxing Master departed from the legal principles of taxing costs or establish any of the grounds it set out in the face of its application. To the contrary, the court finds that the Taxing Master applied the correct principle when assessing the 6<sup>th</sup> Defendant's costs herein.

## **DISPOSITION**

41. For the aforesaid reasons, the court finds that the Plaintiff's Chamber Summons application dated 13<sup>th</sup> April 2003 and filed on 14<sup>th</sup> March 2004 was not merited and the same is hereby dismissed

with costs to the 6<sup>th</sup> Defendant.  
42.It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 28<sup>th</sup> day of July 2014

**J. KAMAU**

**JUDGE**