



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.309 OF 2012

BETWEEN

PZ CUSSONS EAST AFRICA LIMITED.....PETITIONER/APPLICANT

AND

THE KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

Introduction

1. On 22nd May 2014, the Deputy Registrar of the High Court delivered a Ruling and gave his reasons on the taxation of the Petitioner's Bill of Costs dated 30th December 2013. By letter dated 26th May 2014, the Petitioner's Advocate gave notice to the Taxing Officer pursuant to **Rule 11 (2)** of the **Advocates (Remuneration) Order** of the Petitioner's objection to the decision and specifically, on item 1 of the Bill of costs. The Petitioner thereafter filed an Application dated 30th May 2014 for Orders that;

“(a) The Petitioner’s objection to the decision of the Taxing Officer on item 1 of the Applicant’s Bill of Costs filed 30th December 2013 be heard and decided.

“(b) The costs of the Application be provided for.”

This Ruling is therefore in relation to the above prayers.

The Applicant’s Case

The Applicant's case is contained in the Chamber Summons dated 30th May 2014 supported by an Affidavit sworn by Kiragu Kimani, Esq. Learned Counsel for the Applicant, on 3rd June 2014.

2. The objection to the decision of the Taxation Officer is made on the grounds that;

“(a) The Taxing Officer erred in holding that the instruction fee was Ksh.500,000/-.

b. The fees awarded are not commensurate with the work done as set out in the Bill of Costs.

c. The amount awarded is so low as to constitute an error in principle on the part of the Taxing

Officer.

- d. *The Taxing Officer failed to appreciate the complexity of the matter, industry put, time taken and work done.*
- e. *The Taxing Officer failed to appreciate that the two counsel for the Parties had arrived at the conclusion that the instruction fee in the matter could not go below Kshs.750,000.00 and this fact therefore constitutes an error in principle on the part of the Taxing Officer.*
- f. *The Taxing Officer failed to appreciate the principles set out in Premchand Raichand Ltd and Another vs Quarry Services of East Africa Ltd and Others (1972) E.A 162 that a successful litigant ought to be fairly reimbursed for the costs he had incurred in the litigation. That so far as practicable, there should be consistency in the awards made by Taxing officers in cases that are similar in nature.*
- g. *The Taxing Officer failed to consider the Ruling on taxation in H.C Misc. Civil Appl. No. 372 of 2007 – East African Cables Limited vs Public Procurement Complaints, Review and Appeals Board and Kenya Power and Lighting Company Limited where an instruction fee of Kshs.750,000/- was awarded and while that decision was made more than 6 years ago, the proceedings were not as involving as the present proceedings and further, that the Taxing Officer also failed to have regard to awards made in other recent but similar cases.”*

Submissions were also made along the above lines and I see no reason to repeat them.

The Respondent’s Case

3. The Respondent’s case is contained in a Replying Affidavit sworn by Wangui Mwaniki on behalf of the Respondent on 20th June 2014 and its written Submissions dated 25th August 2014.
4. It is its submission in answer to the contentions by the Applicant that there was never any agreement between Counsel for both parties that the instruction fee in the present matter could not go below Kshs.750,000/- but that the Respondent in its submissions at the Taxation had prayed that the instruction should be taxed down from Kshs.750,000/- but despite that submission, the Taxing Officer exercised her discretion and taxed down the fees to Kshs.500,000/-.
5. It is also the Respondent’s case that the Learned Taxing Officer did not err in holding that Kshs.500,000/- was justifiable as instruction fees as she gave reasons in her ruling to justify her decision and further that she considered all the legal necessary parameters as well as the nature and importance of the matter in exercising her discretion and in any event, she appreciated and followed the guidelines upon which a bill of costs should be taxed and considered the submissions of both parties before properly making her decision. Additionally, that the Taxing Officer also recognized that the proceedings were public law proceedings in which the Respondent was discharging a statutory duty and therefore a huge sum in taxation would not be in the public interest.
6. It is also the Respondent’s submission that the legal parameters within which a court can interfere with a taxing master’s decision are well settled and relies on the decisions in **First American Bank of Kenya vs Shah and Others (2002) EALR 64 at 69** and, **Premchand Raichand Limited and Another vs Quarry Services of East Africa Limited and Another (1972) E.A 162** to advance this argument and further adds that the Petitioners have not demonstrated any error in principle committed by the Taxing Officer to warrant this Court’s interference.
7. Further, that there is a general caveat on judicial review of quantum of taxation unless there is a clear error of principle or clear evidence that the sums awarded are either so manifestly high or low as to lead to an injustice. In any event, that no plausible grounds have been put forth by the Applicant to justify interference with the discretion and decision of the Taxing Officer and even if

the Court were to differ with the Taxing Officer on the instruction fee awarded, that would not be a sufficient reason to interfere with the award therein and additionally, the only exception to that general rule is where the Court thinks that the award is so high or so low as to amount to an injustice to one party which fact the Petitioner has not demonstrated in the present case.

8. It is also contended on behalf of the Respondent that the award of Kshs.500,000/- as instruction fee is reasonable and falls within the principles aforementioned and in addition, that the Taxing Officer applied the correct principles in arriving at the figure of the instruction fee that she awarded given the nature of the issues raised in the Petition and the amount of research done.
9. That from the foregoing, it is submitted that there is no merit in the Applicant's Chamber Summons dated 30th May 2014 and the same should be dismissed with costs.

Issues for Determination

10. From the foregoing, the main issue that I am supposed to determine is whether the Applicant's Chamber Summons aforesaid is merited. In other words, should this Court interfere with the Taxing Officer's decision?
11. In order to determine the above question, I will also have to determine whether the Taxing Officer observed and or considered the principles of taxation in exercising her discretion as a Taxing Officer.

Under What Circumstances Can a Court Interfere with the Taxing Officer's Decision On Taxation?

12. I should begin by stating the law, as I understand it, with regards to the above issue and in the case of **Paul Ssemogerere & Another vs Attorney General SCCA No.5 of 2001**. The Court stated thus;

"... In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which, sometimes, are against one another, in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that the advocates' remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for the intricate balancing exercise that the taxing officer's opinion on what is reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference".

13. The Court of Appeal of Uganda in **Zachary Olum and Another vs Attorney General Civil App No.1 of 2004** reaffirmed the above position and opined that;

"...a higher court should not interfere with the exercise of discretion by a lower court unless it can be shown that wrong principles were followed or that the award was excessive or manifestly too low in the circumstances."

The Judge in that case interfered with the award in taxation and in doing so stated that;

"...I have perused the record of the proceedings in the petition. The amount of time spent in prosecuting the petition was quite short because the hearing lasted one day. The petition was not complicated and the numbers of authorities cited were quite few.

However, the nature of the petition was novel and a historical precedent was established. The applicants are entitled to a reasonable figure and I find that the award by the taxing officer was manifestly too low in the circumstances of the case. I will interfere with the award by increasing the amount of instruction fee to Kshs.20 million which I consider to be reasonable in the circumstances of this case....On full consideration of the facts and circumstances of this case and taking into account the law and the authorities cited by both counsel, I will exercise my discretion and interfere with the award of the taxing officer. Consequently I will award the sum of Kshs.30,585,000/- as the total sum of the applicants' bill of costs. The sum should take care of the fee for appearing before the taxing officer and of this reference.”

14. Further, in the case of **Thomas James Arthur vs Nyeri Electricity Undertaking [1969] EA 492** Gould, J.A. rendered himself in the following terms;

“Where there has been an error in principle, the court will interfere, but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the court will intervene only in exceptional circumstances.”

15. In **L'oreal vs Interconsumer Products Limited Misc Application No 1089 of 2010**, the presiding Judge reaffirmed the decision in **First American Bank of Kenya vs Shah and Others (2002) EALR 64 at 69** when he stated that;

“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...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.”

16. The Court in the celebrated case of **Premchand Raichand Limited and Another vs Quarry Services of East Africa Limited and Another (1972) EA 162** went further and noted that;

“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 is 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.”

17. In South African, the Court in **Nicolaas Basson vs Standard Bank of South Africa Ltd (5222/2009, 5314/2009) [2011] ZAFSHC 22** on the same subject held that;

*“... [13] The court has the power to interfere and correct the taxing officer’s ruling on various recognised grounds but also when it is satisfied that he or she was clearly wrong... To do so a court must be in the same or better position than the taxing officer to determine the point in issue... The discretionary powers of the taxing officer to allow or disallow and the judicial powers of the court to oversee the taxation process by way of revisionary interventions were instructively outlined and contrasted in **PRELLER vs JORDAAN AND ANOTHER 1957 (3) SA 201 (O) at 203B – E**. There are two instructive features in the judgment by Smith AJP. The one is that the taxation of the bill of costs is primarily the prerogative of the taxing officer. The other is that the scope of intervention by the courts is limited. An important segment of the taxing officer’s discretion is that costs, which appear to the taxing officer to have been incurred by the claimant through over-caution, should be disallowed. The various grounds on which the court can interfere with the discretion of the taxing officer are enumerated in the passage... [20] In the case of **VAN ROOYEN v COMMERCIAL UNION ASSURANCE***

CO (SA) LTD 1983 (2) 465 (O) M T where Steyn J made some apposite comments about the role-players in a taxation matter as well as the process of taxation itself: At 469B – C he said the following about the court: ***“But the Court remains the ultimate arbiter and it is a well-established principle of review that the exercise of the Taxing Master’s discretion will not be interfered with ‘unless it is found that he has not exercised his discretion properly, as for example, when he has been actuated by some improper motive, or has not applied his mind to the matter, or has disregarded factors or principles which were proper for him to consider, or considered others which it was improper for him to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.”***

18. In another South African case of ***President of the Republic of South Africa and Others vs Gauteng Lions Rugby Union (CCT16/98) [2001]ZAZZ 5; 2002 (1) BCLR 1; 2002 (2) SA 64 (CC) 1 November 2001***. Kriegler J pointed out as follows:

“... [10] Before considering the specific issues raised by the application for review, some preliminary observations should be made about the nature of this Court’s review jurisdiction in a case such as this as also about the test it should apply in deciding whether or not to interfere with the taxing master’s exercise of her powers... It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision identified in the time-honoured classification of Innes CJ in the case of Johannesburg Consolidated Investment Co. vs Johannesburg Town Council 1903 TS 111... This means . . . that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him . . . viz that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Master’s view of the matter differs so materially from its own that it should be held to vitiate his ruling... To this there is a qualification, however, not all decisions by the taxing master are equally insulated from judicial interference. In some instances, for example, where the dispute relates to the quantum of fees allowed by the taxing master, the courts are slow to interfere with the taxing master’s assessment. But there are other cases . . . where the point in issue is a point on which the Court is able to form as good an opinion as the Taxing Master and perhaps, even a better opinion...”

19. I stand guided by the principles in the above authorities on my decision whether I should interfere with the Taxing Officer’s decision in the present case and in summary, those principles include the following;

1. That the instruction fee should cover advocates work including taking instructions as well as other work necessary for presenting the case for trial or appeal as the case may be.
2. That there is no mathematical formula to be used by the taxing officer to arrive at a precise figure. Each case has to be decided on its own merits and circumstances.
3. In a variable degree, the amount of the subject matter involved may have a bearing in the final award to be made.
4. That the taxing officer has discretion in the matter of taxation but he must exercise the discretion judicially and not whimsically.
5. While a successful litigant should be fairly reimbursed for the costs he has incurred, the taxing master owes it to the public to ensure that the costs do not rise above a reasonable level so as to deny the poor access to the Court.
6. So far as practicable there should be consistency in awards made.

20. Turning to the Application before this Court and applying the above principles, I will first start by noting parts of the Taxing Officer's decision that I consider to be of great relevance to the Application before me. I hereby reproduce them as herebelow;

“The Petitioner filed submissions that I have duly considered. The instruction fees is taxed under Schedule (vi) (1) (j) where the Advocates Remuneration Order provides for a minimum of Kshs.28,000/- The Taxing Master has a discretion to increase this figure taking into account a number of factors including the following: the nature and importance of the cause or matter, the amount or value of the subject matter, the interest of the parties, the general conduct of the parties, the complexity of the issues raised and novel points of law, the time, research and skill expended on the brief and the volume of documents involved. The discretion granted to the Taxing Officer must also be exercised judiciously and also subject to the principle of reasonableness. I am also guided by the Premchand Case (supra) and Republic vs Minister for Agriculture and 2 Others Ex-parte Samuel Muchiri W'njuguna and 6 Others (2006) eKLR... in my opinion, the said amount of Kshs.1,500,000/- which the petitioner is seeking as instruction fees is exorbitant...the jurisprudence that informs taxation of costs as between party and party is indemnity for the successful litigant for costs reasonably incurred in the course of proceedings. The stance adopted by the taxing officers ought not to be punitive as against those whom the costs are taxed or should not amount to unjust entrenchment of a party. In the current case the petitioner was challenging an act by the 1st Respondent committed in the exercise of their statutory duties. It is true that the petitioner's business risked to be shut... I find that instruction fees of Kshs.500,000/- is reasonable in the circumstances of this case...”

21. From the above, it is my view and I do hold that the Taxing Officer took into consideration the principles set out in the Premchand case (supra) and all the principles summarized above in exercising her discretion and even gave the reason that the amount that the Petitioner had asked for as instruction fee was exorbitant and furthermore, she went through the submissions of the Parties and took cognizance of the fact that the Respondent was discharging a statutory duty in the cause of the dispute, subject of the Petition herein.

22. Additionally, I wish to note that the Taxing Officer was not bound to adopt the decision in East African Cables Limited vs Public Procurement Complaints, Review and Appeals Board and Kenya Power and Lighting Company Limited HC Misc Civil Appeal No. 372 of 2007 as argued by the Applicant. In any event, although comparable awards are a useful pointer to quantum in taxation, each case must ultimately be looked at in its unique circumstances and a taxing officer is not obliged to blindly follow past comparable decisions, important as they may be.

23. I wish to further state that questions solely of quantum are regarded as matters with which Taxing Officers are particularly fitted to deal with and this Court will intervene only in exceptional circumstances and this case has not, in my view, raised such an exceptional circumstance.

24. Regarding the work done, complexity of the issues raised in the Petition, time taken and industry applied, on perusal of the Petition and other pleadings, I am not convinced that the Taxing Officer failed to take account of all the above issues and I am satisfied that her reasoning cannot be faulted.

25. The issue of an alleged agreement between the Counsel for the parties is neither here nor there as the same has in any event been denied by Counsel for the Respondent. I will say no more about that issue.

26. I hereby therefore find and hold that this Court is reluctant to interfere with the Taxing Officer's decision for the reasons stated above and therefore the Application dated 30th May 2014 is hereby dismissed.

27.Let each party bear its own costs.

28.Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 21ST DAY OF NOVEMBER,
2014**

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Kimani for Applicant

Miss Ngugi holding brief for M/s Mwaniki for Respondent

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE