REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 287 of 2009

EVANS M. GAKUU & 66 OTHERS .....PLAINTIFF/APPLICANTS

VERSUS
NATIONAL BANK OF KENYA LTD & 8 OTHERS…….DEFENDANT/RESPONDENTS

RULING

By Chamber Summons dated 25th September 2012 the applicants herein seek the following orders:

1. That the Taxation of the Bill of Costs (Party to Party) dated 9th March 2010 by the Deputy Registrar A. K. Ndungu (SPM) on 21st September 2012 at Kshs. 7,762,154 as against the Plaintiff/Applicants be set aside.

2. The Bill of Cost be re-taxed afresh by a different Deputy Registrar.

3. The costs of this application are provided for.

The application is based on the following grounds:

a) The taxed amount of Ksh. 7,692,154/= was excessive in the circumstances of the case amounting to an error in known principles of Taxation.

b) The Deputy Registrar erred in law and fact in failing to consider that the suit herein did not proceed to full trial nor was any interlocutory application heard as the suit was withdrawn by consent of both parties.

c) The Deputy Registrar erred in law and fact in failing to find that the plaint relates to Employment relation of unpaid dues and as such no complex issues arose prior to withdrawal of the suit.

d) The Deputy Registrar erred in law and fact in failing to find that the Applicants claims herein are not joint and several.

e) The Deputy Registrar erred in law and fact in failing to find that the Applicants claims are distinct and severable and the cost of the suit was supposed to be apportioned according to each plaintiff's claim.

f) That the Plaintiffs/Applicants reference will further be based on the grounds that;-

a) That the bill of cost as drawn was fatally defective or incurably incompetent which assertions were overlooked by the Deputy Registrar.

b) Each of the Plaintiff/applicant had a distinct claim and not a global general claim.

g) The application has been made without delay.

h) It is in the interest of justice that this application be allowed.

i) The Deputy Registrar erred in law and fact in holding that the suit herein was struck out yet the suit was withdrawn by consent of the parties before hearing of neither an application nor the main suit.

j) The Deputy Registrar erred in law, fact and Principle and acted in violation of the Advocates (Remuneration) order by warding costs on a higher scale in a suit which was withdrawn prior to hearing.

The application is supported by an affidavit sworn by **Evans M. Gakuu** sworn on 25th September 2012. According to the deponent, the taxed amount of Kshs. 7,692, 154/= was excessive in the circumstances of the case amounting to an error in known principles of Taxation. In his view the Deputy Registrar erred in law and fact in failing to consider that the suit herein did not proceed to full trial nor was any interlocutory application heard as the suit was withdrawn by consent of both parties. Further the Deputy Registrar erred in law and fact in failing to find that the plaint relates to Employment relation of unpaid dues and as such no complex issues arose prior to withdrawal of the suit. He is of the view that the Deputy Registrar erred in law and fact in failing to find that the applicants' claims herein are not joint and several and that the said claims are distinct and severable hence the cost of the suit was supposed to be apportioned according to each Plaintiff's claim. According to him the Deputy Registrar erred in law and fact in holding that the suit herein was struck out yet the suit was withdrawn by consent of the parties before hearing of neither an application nor the main suit. It is reiterated that the bill of cost as drawn was fatally defective or incurably incompetent which assertions were overlooked by the Deputy Registrar and that each of the applicants had a distinct claim and not a global general claim. Finally it is emphasised that The Deputy Registrar erred in law, fact and Principle and acted in violation of the Advocates (Remuneration) Order by awarding costs on a higher scale in a suit which was withdrawn prior to hearing. Since the application has been made without delay the deponent deposes that it is in the interest of justice that this application be allowed.

In opposition to the application the Respondents filed the following grounds of opposition:

1. The Application does not meet the minimum threshold for setting-aside an award.

2. The sum assessed is neither excessive nor on higher scale as claimed.

3. The claim before Court was one whole and there are no grounds to warrant setting-aside.

4. The apportionment of the costs among the plaintiff's is not a duty or function of a taxing officer. In any event no such prayer was made to warrant this application.

5. The Application is another waste of the limited judicial time.

The application was prosecuted by written submissions. While reiterating the contents of the supporting affidavit, it was submitted on behalf of the applicants that the taxing master failed to take into account that under schedule VI(ii) in suits determined in a summary manner, instructions fees is 75% of the fees chargeable under item 1(b). The finding by the Taxing Officer that the suit was struck out, it is submitted, was an error on the face of the record since the suit was withdrawn by consent as striking out entails an application as opposed to withdrawal. It is further submitted that even if the joint claim was for Kshs 358 million, under the Advocates Remuneration Order the fees would have been Kshs 4 million. In support of

the submissions the applicants rely on High Court Miscellaneous Application No. 653 of 2008 – **Lubulellah Associates Adsvocates vs. KNH** and High Court Miscellaneous Application No. 409 of 2006 – **Maina Kamau & Others vs. John Gakuo & Others**.

On the part of the Respondents it was submitted that the reference arises from the taxation of the Bill of Costs dated 9th March 2010 filed by the Defendants. According to the Respondents items 2 to 43 of the said Bill were not contested and were allowed by consent. Only item 1 being the instruction fee was contested which is what has led to the present reference seeking to set aside the award made on 21st September 2012. Although the Taxing Master gave due consideration to the matters in issue, it is submitted that the present application has disregarded the findings of the Taxing Officer since the applicant did not even bother to seek the said reasons before filing the present application. According to the Respondents, the Taxing Officer found that instruction fees was Kshs 10,000,000.00 which was discounted by 75% hence the instructions fees allowed was Kshs 7,500,000.00. According to the Respondent the Taxing Officer took into account the fact that the suit did not proceed to trial and hence the issue of whether or not the suit was determined before the trial was duly applied. The Respondents also submit that the Taxing Officer gave the reasons for finding that the mater was complex. In their view, the award was not excessive and that Courts have repeatedly declined to interfere with issues of quantums by taxing officers. Relying on **James Arthur vs. Nyeri Electricity Undertaking [1961] EA 492**, it is submitted that where there has been an error in principled 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 cases. Further the fact that the fee is higher than seems appropriate in a matter which must essentially be one of opinion does not make the same manifestly excessive to justify treating it as indicative of the exercise of wrong principle. According to the Respondent the claim was in the sum of Kshs 358,108,515.00 which claim attracted a fee of Kshs 4,303,356.40 together with other 7 prayers seeking drastic remedy of dismantling of the Defendant's pension scheme and therefore in awarding Kshs 10,000,000.00 the taxing officer was cautious and restrained since the fee cannot be said to have been too high hence on the authority of **Premchand Raichand Limited & Another vs. Quarry Services of East Africa Limited and Others No. 3 [1972] EA 163**, it is submitted that the Court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party and the award herein of Kshs 7,500,000.00 has not been shown to fall in that category. In the respondent's view, the award of Kshs 7,692,154.00 is not excessive in the circumstances of this case. Since the issue of the legality of bill was raised and dismissed, the same could not be raised again as the matter was *res judicata*. In the Respondent's view, no item has been shown to have been awarded on a higher scale or contrary to the rules. With respect to the apportionment of costs, it is submitted that no such prayer was made to the taxing officer and if the same is necessary the applicants can seek apportionment amongst themselves without disturbing the award. Since the plaint had many prayers, it is submitted that the Taxing Officer was entitled to consider the other non-monetary claims in assessing instruction fees and that the Taxing Officer properly exercised his discretion in assessing the fee at Kshs 10 million and discounting the same. Apart from the foregoing, it is submitted that since the applicants have not sought or obtained reasons for taxation and did not file any objection to the taxation with the advocates as required under paragraph 11(1) and (2) of the Advocates Remuneration Order and prays that the application be dismissed.

In **Evans Thiga Gaturu vs. Kenya Commercial Bank Ltd High Court (Commercial and Admiralty Division) Miscellaneous Application No. 343 of 2011**, I held inter alia as follows:

"In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles. However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference. Otherwise mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for reasons, as it happened in the case of *Kerandi Manduku & Company vs. Gathecha Holdings Limited Nairobi (Milimani) HCMA No. 202 of 2005*,where the taxing officer had left the judiciary. Where reasons are contained in the decision, I share the view that to file the

reference more than 14 days after the delivery of the same would render the reference incompetent."

Accordingly, the mere fact that the applicants did not seek the reasons before filing the reference does not, ipso facto, render the reference incompetent. If the applicants, in their wisdom, believed that the decision was self-sufficient in terms of the reasons thereof, there was no need for them to seek the reasons. However, it would have been better to notify the respondents of their intention to object to the taxation. Failure to do so alone, however, where there is no allegation that the respondents have been thereby prejudiced ought not to lock the applicants from the seat of justice.

The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are, (1) that the Court cannot interfere with the taxing master's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to take into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge; (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high; (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (8) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of **First American Bank of Kenya vs. Shah & Others Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 64.**

Further it has been held that the Court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job; the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

Further guidance if necessary may be obtained in the case of **Joreth Limited vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] 1 EA 92**, *w*here the Court of Appeal held that a the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings,

judgement 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 the 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. It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing master has erred in principle he should refer the bill back for taxation by the same or another taxing master with appropriate directions on how it should be done. The Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle. In principle the instruction fees is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. The Taxing Officer whilst taxing his bill of costs is carrying out his functions as such only. He is an officer of the Superior court appointed to tax bills of costs.

When the Bill came up for taxation before the Taxing Officer, Mr Amadi, learned Counsel for the applicants herein raised two issues. The first issue was with respect to the competency of the Bill while the second issue was with respect to item 1 since counsel's view was that the respondent was not entitled to full fees thereon. It is correct that the competency of the Bill was dealt with by a ruling dated 8th June 2010 and the present matter is not a reference against the said decision. Accordingly that issue does not fall for determination in this reference.

With respect to the whether or not the respondents were entitled to full instructions fees as indicated above the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees.

On the issue of quantum the learned Taxing Officer found that before taking into account the other factors which he was supposed to take into account, the correct figure would have been Kshs 4,303,356.40. I do not understand the applicants to contest this figure. The Taxing Officer, however went ahead to increase the same to Kshs 10,000,000.00 taking into account the complexity of the matter and interest of the parties. That was more than 100% of the sum that was ordinarily due. He, however, appreciated the fact that the matter was determined in a summary manner and reduced the same to Kshs 7,500,000.00. Whereas the discretion to increase the instruction fees by the Taxing Officer ought not to be lightly interfered with, in my view an increase of instructions fees by over 100% would require very cogent grounds to justify especially where it is appreciated that the suit was determined in a summary manner. In fact from the proceedings the suit was terminated almost immediately after the defence was filed before any other step was taken in the matter. In my view the increase of 100% by the Taxing Officer had the effect of increasing the instructions fees to a sum which was manifestly excessive in the circumstances and amounted to an error in principle. Accordingly I would reduce the figure of Kshs 10,000,000.00 awarded to Kshs 6,500,000.00 which is approximate increase of the basic fee by one half. As there is no serious dispute with respect to discounting the sum due by 25% the said figure is so discounted with the result that the sum of Kshs 7,500,000.00 awarded is reduced to Kshs 4,875,000.00. The rest of the items in the Bill are not interfered with.

Orders accordingly.

Delivered at Nairobi this 11th day of March 2013

G V ODUNGA
JUDGE

In the presence of Mr Mwehuri for A Ojiambo for the Defendants