



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 467 of 2002

SATNAM SINGH BAHRAPLAINTIFF/APPLICANT

VERSUS

**JOSEPH MUNGAI GIKONYO T/A GARAM
INVESTMENTS.....DEFENDANT/RESPONDENT**

HOUSING FINANCE OF KENYA.....3RD PARTY/RESPONDENT

RULING

This is a reference expressed to be brought under the provisions of paragraph 11(2) & (A) of the Advocates (Remuneration) Order arising from the decision of the Taxing Office (the learned Honourable Deputy Registrar **Mr. Ndungu**) made on 10th August, 2012 in which the Taxing Officer taxed the Bill of Costs lodged by the applicant herein against the respondents in the total sum of Kshs. 662,148.00

The reference, as is the prescribed procedure is brought by way of Chamber Summons dated 30th August 2012 and filed in this court the same day seeks the following orders:

- 1. That this Application be certified as urgent and it be heard ex-parte at the suit instance.**
- 2. That leave be granted for the hearing of the Chamber Summons application dated the 30th day of August 2012, during the current vacation of The High Court.**
- 3. That the Respondents, their servants, agents and/or representative be restrained from commencing execution proceedings and/or the execution proceedings already commenced be stayed as against the claimants for the costs awarded pending the hearing and determination of this Application.**
- 4. That the decision of the taking offer in respect of the Party & Party bills of cost delivered on 10th August 2012 be set aside.**
- 5. That costs of this Application be provided for.**

The application is based on the following grounds:

- a) That the Taxing Officer erred in principle in assessing the taxed costs in respect of both bills at exorbitant costs without outlining the clear formulae he applied in assessing the same.**

b) That the Applicant has valid reasons for objecting as aforesaid since the same flies in the face of valid principles advanced by the courts.

The application is supported by an affidavit sworn by **Satnam Singh Bahra**, the applicant herein on 30th August 2012. According to the said affidavit, on 10th August, 2012, the Taxing Officer in delivering his impugned decision was inconsistent with relevant principles which hold a contrary view. According to the deponent, the said decision was a clear error in principle which allows the Honourable Court to intervene in order to protect the Applicant's valid interests herein. Further the learned Taxing Officer erred in principle by failing to outline the formulae used in reaching the said figure especially where he clearly found as a matter of fact that the value of the subject matter was not ascertainable from the pleadings on record herein. The learned Taxing Officer is also faulted in failing to consider the applicant's submissions thereby misdirecting himself on the relevant legal provisions applicable to the present matter. It is therefore in the applicant's view that he has a fit chance and valid reference.

In opposition to the said application the defendant filed the following grounds of opposition:

a) There is no error in principle in the assessment of the Defendant's Bill of Costs by the Taxing Officer.

b) The Taxing Officer judiciously and reasonably applied the settled principles as enunciated in Civil Appeal No. 66 of 1999, Joreth Limited VS Kigano & Associates Advocates in the assessment of the Bill of costs.

c) The Taxing Officer took into account the nature, importance of the cause or matter, the interest of the parties, the general conduct of the proceedings and the complexity of the issues involved in the assessment of the Bill of Costs.

d) The Taxing Officer rightfully exercised his discretion within reason, fairness and judiciously taking into account that the claim was not liquidated.

3. That the decision of the taxing Officer was elaborate and detailed the reasons upon which the assessment was made.

4. That the Defendant shall rely on the written submissions filed in the matter on 20th April 2012 and various pleadings filed herein.

The parties prosecuted the reference by way of written submissions with the third party opting to rely on the submissions filed before the Taxing Officer.

In the submissions filed by the applicant it is contended that whereas the applicant's claim was in respect of trespass, the Taxing Officer erred in applying the principles relating to defamatory matters. It is also submitted that the taxing officer erred in finding that the Third Party was also entitled to costs without demonstrating how the character and reputation of the Third had been damaged by the Applicant's suit. While admitting that an Advocate is entitled to instructions fees, it is contended that the same must be assessed fairly and within the applicable principles as outlined in **Joreth Ltd vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] 1 EA 92**, in which it was held that where the value of the subject matter could not be determined from the pleadings, judgement or settlement, a taxing officer was not entitled to use his discretion in assessing the instructions fees and in doing so the factors to be taken into account included the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings, any directions of the trial judge and all other relevant circumstances. In the applicant's view, the aforesaid principles were not applied by the Taxing Officer who ended up with an assumption that the character of the Defendant had been injured without any tangible evidence that would lead to one to make such an inference. Since the claim as sought by the plaintiff was not liquidated it is submitted that instructions fees (item 1) ought to have been awarded under Schedule VI(a) which provides the sum as Kshs. 28,000.00 since there was no complexity involved and the same ought to have been awarded in respect of both bills. It follows, in the applicant's submissions that item 2 (getting up fees) ought to have

been Kshs. 9,335/- being a third of the instructions fees while no such fees were claimed by the third party. Accordingly, it is submitted that the bill ought to be referred to another Taxing Officer for a fresh taxation.

On the part of the defendant it is submitted that since the applicant has not disclosed in the application the items complained about the application is ambiguous and bad in law. It is further submitted that the Taxing Officer's decision was well detailed and there was no error in the assessment of the Defendant's Bill of Costs. It is submitted that apart from special damages of Kshs.30,000.00 there was also a claim for general damages for trespass in respect of which the plaintiff's quantification was between Kshs. 400,000/- and Kshs. 1,200,000/-. It is submitted that the Taxing Officer in arriving at his decision properly applied the principles specified in Schedule V Part II of the Advocates Remuneration (Amendment) Order 2009 as well as the principles in **Joreth vs. Kigano** (supra). It is therefore submitted that there was no error in principle occasioned in taxing instructions fees at Kshs. 200,000/-. On item 2 it is submitted that since getting up fees is not less than one third of the instructions fees the taxing officer complied with the law when he taxed this item at Kshs. 66,666.66. On the fees for attendance it is submitted that the same was properly taxed in the sum of Kshs. 315/- as provided in paragraph 7(a) of Schedule VI aforesaid. In conclusion it is submitted that the Taxing Officer's decision judiciously and reasonably applied the settled principles of law and there was no error of principle nor was the award manifestly excessive and support is sought from **Green Hills Investment Ltd vs. China National Complete Plant Export Corporation T/A Covec Civil Case No. 572 of 2000** in which it was held that on questions of quantum, the decision of the taxing officer is generally speaking final and in an application for review of the decision of the Taxing Officer, the Court will not interfere with the award unless the Taxing Officer is shown to have gone wholly wrong. Accordingly the application ought to be dismissed with costs.

Having considered the application, the submissions made as well as the authorities cited this is the view in form of the matter. 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 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 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 be taken 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;** (Emphasis mine) (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; (7) 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 that 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** (supra) where 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 officer has erred in principle he should refer the bill back for taxation by the same or another taxing officer 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.

It is not in doubt that the Plaintiff's claim was in respect of Kshs. 30,000.00 special damages, general damages for trespass, aggravated damages, costs and interests. It is also not disputed that the suit was dismissed. Accordingly, save for the special damages, the rest of the claim could not be said to have been ascertainable from the pleadings, judgement or settlement. Whereas the fees in respect of Kshs. 30,000.00. falls, under Schedule VI(1)(a), between Kshs 0 and Kshs 500,000.00 whose prescribed fees is Kshs. 28,000.00, since there was a further claim in respect of general damages, I am not in agreement with the applicant that the instructions fees ought to have been limited to the said sum of Kshs. 28,000.00. The claim in respect of the balance therefore ought to have been considered as fess in respect of which the sum claimed could not be determined as aforesaid subject to the discretion of the Taxing Officer to take into account 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. However, as stated above the Taxing Officer is required to set out the basic fee before venturing to consider whether to increase or reduce it. In this case the Taxing Officer while addressing his mind to the factors he was entitled to take into account in deciding to increase the fees did not set out the basic fees. The decision whether or not the fees as taxed is manifestly excessive may depend on the basic fees as set out by the Taxing Officer hence the importance of setting out the basic fees.

For this reason I agree that the reference ought to be and is hereby allowed with respect to items 1 and 2 only since no basis was laid for interference with the other items. In the result, the Bills of Costs herein are remitted for taxation before any other Deputy Registrar other than **Honourable Mr. Ndungu** to tax items 1 and 2 of the said bills in accordance with the provisions of Schedule VI of the Advocates Remuneration Order and taking into account the guidelines set out in the said Order.

In the circumstances of this case and as the error was not caused by any of the parties herein I make no order as to costs.

Dated at Nairobi this 30th day of October 2012

G V ODUNGA
JUDGE

Delivered in the presence of Mr Wambua the Respondent