**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL SUIT NO. 47 OF 2006**

**FORMERLY MOMBASA HCC NO. 595 OF 2005**

**SEA STAR MALINDI LIMITED …….…….PLAINTIFF**

**VERSUS**

**MALINDI MUNICIPALITY TOWN CLERK & TWO OTHERS …..DEFENDANT**

**RULING**

The Chamber Summons application dated 11th April 2009 is made under Rule 11 (2) and (3) of the Advocates (Remuneration) Order challenging the decision of the Taxing officer given on 26th November 2008, regarding items 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 23 and all other items taxed off in a bill of costs filed by the plaintiff/applicant on 8th May 2008.

It is based on ground that:

(1) In refusing to award costs claimed in items 1-6 and 8-17, the taxing officer erred into appreciating that the same amounted to costs occasioned by the adjournment and are therefore recoverable.

(2) In assessing, getting up fees, the taxing officer erred in not appreciating that before doing so, she had to first set what she deemed as instruction fees, taking into account the complexity of the matter, the quantified value of the property and its importance to the parties, including the fact that the suit was previously defended and defence was struck out and dismissed.

In failing to do so, she erred and under-assessed the getting up fees.

(3) The taxing officer under-assessed the service fees claimed in items 18-19 for formal proof, in view of the clear provisions of schedule VI (9).

(4) The award on travelling costs by two advocates at kshs. 10,000/- per advocate, did not accord with the provisions of schedule VI. The fee should have been increased to take into account the actual cost of air travel which was the mode used at all times by the Advocates. At no time did the advocates travel otherwise, and the return air tickers costs between kshs. 14,000- 19,000/- per trip depending on when the ticket is bought.

(5) The court record of proceeding before the Hon. Judge show, and it is not disputed by Counsel for the defendant, that the plaintiff's professional witnesses (4 in number) were present in court and had travelled

with their advocates from Nairobi and back by air. It was therefore not open to the Taxing officer to refuse to award costs of the witnesses when the defendant's advocate moved the court to chambers to make an application which resulted in the adjournment and transfer of the suit from Malindi to Mombasa

(6) The awards by the taxing officer were manifestly low that it reflects misdirection by the taxing officer, of the necessary material facts and law, for fair assessment of the costs incurred by the plaintiff.

(7) The taxing officer erred in failing to place any significance to the fact that the suit against the defendants was complex, involving several serious issues of law, requiring serious research and preparations, including taking briefs from professional architect, quantity surveyor, land economist and accountant. The instruction fees therefore ought to have been enhanced way above the basic instructions fees and the getting up fees would be proportionately calculated.

The plaintiff's claim in the application of the amount required as the plaintiff's costs is fair and justified. The defendants in their attempt to challenge the taxation, failed to come to court to prosecute the defendant's objection on 7th June 2008, and the preliminary objection was dismissed with costs to the plaintiff.

(8) After the ruling of 26th November 2008, the plaintiff's advocates, immediately on 29th November 2008, did apply to the taxing officer vide letter dated 29th November 2008, for reasons for the taxation on all the items in the bill.

The application is opposed on the following grounds that:

(1) The applicant has not attached the Registrar's reasons for the decision and the application and so the application is incomplete.
(2) The objection purports to be a reference from the Registrar's decision then it is outside the 14 days limitation period and is therefore bad in law or being out of time.
(3) The Registrar properly exercised her discretion on the well known and laid down principle and considerations and there is no error to justify interference with the exercise of discretion.
(4) Items 1-6 and 8-17 were properly reflected as not being costs occasioned by the adjournment.
(5) No getting up fees were payable and the matter was not really for trial, as there was a pending application for amendment of pleadings and discovery hadn't been done.
(6) Item 18 and 19 were properly assessed.
(7) The court properly assessed what were reasonable travel expenses in the absence of any evidence to show how the advocates got to court. The attempt to introduces figures in part 4 at this stage is sneaking on evidence through the back door.
(8) It was never stated the mode of transport the plaintiff's witnesses used to come to court.
(9) The applicant failed to demonstrate how a suit for special and general damages was complex. The amount claimed was excessive and with no basis. The dismissal for want of prosecution of the defendants preliminary objection is not a bar to another suit, is not res judicata, does not amount the estoppels and does not assist the applicant.

Counsel in this matter agreed to dispose of the reference by way of written submissions. It turned out that the Deputy Registrar had already given reasons for the taxation on 26th November 2008. Mr. Wasunna indicated to the court, on behalf of the application that they were abandoning the first six items, so that the items objected to at No. 7-17, 19, 21 and 22.

Item 7 – getting up – awarded kshs. 10000/- per the Taxing officer. In so doing, she referred to schedule VI of the advocate (Remuneration) Order where the amount of the subject matter is unknown, then instruction fee shall be such sum as may be reasonable but not less than Kshs. 6000/- it was pointed out that Getting UP fees under Schedule VI is at least one third (1/3) of instructions fee and that in any event throughout the prayers no special damages were pleaded, it is quite clearly seen that the plaintiff's claim was for the cost of reconstituting a multi-million shilling hotel, and the complexity of such a claim and the law involved before delving into the issue of damages awardable, called for consideration of an award of substantial fees for instructions and getting up fees. Further, that the taxing officer ought to have

considered that damages if proved by the plaintiff would be in hundreds of millions and getting up would be equally substantial. Also the substance of the claim should further have evinced from the facts that the plaintiff had to engage two counsel as well as call for the assistance of a professional witness, to wit, an architect, a quantity surveyor and an accountant.

The getting up fees seems to suggest that the instruction fees was only kshs. 30,000/-

It is Mr. Wasunna's argument, that the taxing officer ought to have taken into account what is prescribed in the provision (1) of schedule VI and that the principles were cited with approval by the Court of Appeal in the case of **JORETH LTD V KIGANO AND ASSOCIATES (2002)1 EA pg 92** as follows;

***"where the valve of the subject matter of a suit could not be determined from the pleadings, judgment or settlement, a taxing master was entitled to use his discretion in assessing the instruction for 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"***

Mr. Wasunna's contention is that the taxing officer failed to be guided by those principles. He submits that a fee of at least 1.5m for instructions is a fair estimate and the taxing officer should have awarded the sum of kshs. 500,000/- for getting up.

Unfortunately, as at the time of writing this ruling, the respondents' counsel had not filed any written submissions.
The taxing officer's reasoning was that on the date formal proof was set for hearing (i.e 21-2-08), the amended plaint dated 08-03-06 had no ascertained claim in the prayers. The application dated 20th February 2008 seeking further amendment of the plaint before formal proof, was yet to be heard. One cannot speculate on how that application would have been determined and it was on that account that she was guided by the plaint dated 8th March 2006.

The respondents' ground of opposition on this was that the matter was not ready for trial and there was even an application pending, and on that accounting the sum taxed was fair.

From the pleadings filed, the subject matter involved demolition and reconstruction of a hotel whose value was not pleaded. There were also prayers for loss of business and exemplary damages. The pleading indicated that the cost of reconstruction would be assessed and determined by quantity surveyors.

The taxing officer noted that the value of the subject matter could not be determined from the pleadings nor had the matter been determined was known what the outcome would have been.

She was thus guided by the provisions of schedule VI (1) L. She correctly observed the procedural requirements by first setting out the basic instruction fees. Her observation that the value of the subject matter could not be determined, does not appear to be contested, nor her reliance on the provisions of schedule VI (1) L of the Advocates Remuneration Order 1997. She however did not indicate whether she considered the matter a complex one or a simple one, only observing that the application to further amend the plaint before formal proof, had not been heard yet, and that the sum of kshs. 10,000/- was reasonable.

Going by the **Joreth Principle**, the factors to be taken into account include (a) the nature and importance of the cause.
(b) interest of the parties
(c) general conduct of the proceedings.

It was within the taxing officer's discretion to increase the fee, but set out what factors she took into account, so as to justify the kshs. 10,000/= or verify it.

It must be made clear that 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 manifesting excessive as to justify an interference that it was based on an error of principle. I refer to the decision in **STEEL AND PETROLEUM (EA) LTD V UGANDA SUGAR FACTORY (1970) EA 141.**

I recognize that it would be an error of principle, to take into account irrelevant factors or omit to consider relevant factors. Not every factor mentioned in the JORETH case has to exist in a case, and here the only error of principle I detect is that the taxing officer failed to give cogent reason regarding the increment to kshs. 10,000/- only, without setting out any factors other than that the application to recover pleadings had not been heard. That omission in my view, materially affected the assessment because there was discussions, correspondences and engagement of professionals.

I also have no doubt, from the nature of the claim, that the plaintiff must have suffered in its business and operations occasioned by the demolition, and the need to reconstruct. The professional input and industry by counsel in this matter is such that an award of kshs. 10,000/- in my view appears rather unreasonable and not commensurate with the nature of the matter, the time taken and all circumstances. Even though the taxing officer is given the discretion to award what is reasonable, that discretion ought to be exercised reasonably and judiciary. Some valid reasons or explanations must be given for the ward of a specific amount.

Items 8-17 are addressed by Mr. Wasunna under one head. These were;
(a) Drawing plaintiffs list of documents to be relied upon during formal proof and making copies thereof
(b) Attending court to file the same and service thereof of defendant's counsel
(c) Drawing supplementary list of documents and making copies and attending registry to file the same.

These were not awarded by the taxing officer on grounds that they did not relate to costs for adjournment for that day and the same were struck off. Her opinion was that those were costs which could have been incurred whether the formal proof proceeded on that day or on any other day.

Mr. Wasunna's submissions is that this was a misdirection by the taxing officer because the question was whether the plaintiff's advocates had done anything in preparation for the adjourned hearing that was chargeable under the Advocates (Remuneration) Order.
It was his contention that in order for the plaintiff's advocate to prepare for the hearing on 21st February 2008, they had to undertake the work charged for and incur the expenses claimed on the items and once the hearing failed to take off due to factors occasioned by defendants, the advocates were entitled to compensation.

The costs being taxed here are subsequent to the order that the appellant/defendants were to meet costs for the day including any expenses incurred by plaintiff in anticipation of the formal proof.

The question for consideration is, would the plaintiff's advocate have required to rely on the plaint at the hearing of the formal proof, what about list of documents, and serving of those on the defence counsel in the registry? I think the answer is positive for some e.g preparing list of documents and serving. The taxing officer was in error to strike the same out. The taxing officer ought to have given due consideration of the same and whether they were to scale or not and in failing to do so, she erred.

Item 19 was on service on the defendant's advocate which was reduced from kshs. 7000 to kshs. 1500/-.

Mr. Wasunna submits that the award is erroneous because the plaintiff's advocates are based in Nairobi while service on the firm of Khaminwa was effected at Malindi. Although an affidavit of service sworn by Gloria Dzuya dated 14th January 2008 shows that when she received the hearing notice from M/s S. K.

Ritho & Co. Advocates – she effected service on Khaminwa & Khaminwa Advocates Kencom House. Kencom House is in Nairobi. The Khamiwna offices in Malindi are known to be in Digua Masichini Chambers, Lamu Road, Malindi. It seems the address given by the firm of Khaminwa when they entered appearance was the Malindi office. This would then entitle the plaintiff to claim for service on Khaminwa at the hearing of the formal proof at a distance of Malindi – Nairobi, because that hearing notice was served on them in Nairobi. I take it that is what is intended by the claim on service on Khaminwa, since the same does not have a date reference. The taxing officer properly exercised her discretion on this item.

**Item 21** was on the travelling costs by the advocates at kshs. 78,000/-, a sum of 20,000/- was awarded, meaning kshs. 58,000/- was taxed off. The reason given by the taxing master was that there were no receipts to prove mode of transparent and she reasoned that for road travel then kshs. 10,000/- was adequate for each advocate. Mr. Wasunna submits that the plaintiff's advocate ordinarily travel by air as it is more economical and that air fare oscillates between at least 15,000/- per passenger return ticket. I think airlines issue tickets, and boarding passes – there was nothing to make the trial magistrate conclude that counsel came to Malindi by air and not by road. Secondly, there was no brochure or charging list from any airline plying the Malindi – Nairobi route to confirm that at the time, air fare was kshs. 15,000/- return and I cannot fault the taxing master's reasoning on this item.

**Item 22 –** was with regard to professional witnesses who had attended court in readiness for hearing of the formal proof.
The notes by Hon. Justice Ombija on 21st February 2008 merely shows the issue raised by defence counsel regarding one of the plaintiff's counsel, Mr. Wasunna, appearing before Hon. Justice Ombija who had been his partner in private practice in earlier years. There was no indication of any witnesses being present and that item has travel expenses for air services at Malindi at kshs 35,000/-, then the quantity surveyor and architect at kshs. 20,000/- and accountant at kshs. 47000/-. The costs on the so called professional were all struck out – and with good reason, there was no indication in the court record, that they were present in court. It is not even clear where they had travelled from or what means they had used.

The taxing master in her discretion awarded kshs. 5000/- for the services in Malindi, thus taxing of kshs. 30,000/- I can't fault that.

I would allow the reference to the extent that items 7, 8 – 17 be sent back to the Deputy Registrar for taxation. Since the Deputy Registrar who taxed this bill is no longer at this station, then the deputy registrar currently handling taxation matters.

Half costs of this application shall be borne by applicant, and respondent bears the other half.

Delivered and dated this **23rd** day of **March 2011** at Malindi.

**H. A. Omondi**
**JUDGE**