



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Miscellaneous Application 301 of 2008

D.M (a minor suing through the next friend R.O.O).....PLAINTIFF/RESPONDENT

VERSUS

MICHAEL KAMAU KARINGA.....DEFENDANT/APPLICANT

RULING

Pursuant to paragraph 11 of the Advocates Remuneration Order, **MICHAEL KAMAU KARINGA**, the Defendant/Applicant herein, took out the Summons dated 10th September 2009 in which he sought for the following orders:

1. *That the decision of the taxing officer, taxing the bill in this matter in the sum of Kshs.99,004/=, be reviewed and/or be set aside.*
2. *That in the alternative the Hon. Court be pleased to substitute its own decision thereof or be remitted back to the taxing officer for reassessment.*
3. *That cost of this application be provided for.*

The Summons is supported by the affidavit of Azim Taibjee sworn on 10th September 2009. **D.M** (suing as next friend to R.O.O) opposed the Summons by filing the Replying Affidavit of Gathiga Mwangi, sworn on 22nd September 2009.

When the Summons came up for inter partes hearing, learned counsels from both sides recorded a consent in which they agreed to have the Summons determined by written submissions which they duly filed. It is the submission of the Applicant that the taxing officer erred when he determined the instructions fee, that is, item No. 1 at 75,000/=. It is said the award was exaggerated, exorbitant and without any basis. It is also argued that item no. 5 was taxed in excess as a replying affidavit could not attract a sum of Ksh.945/=. The award of Ksh6,000/= on item 8 has been attacked on the basis that the Applicant's counsel was served in court with the Replying Affidavit hence service was not done in Nairobi. It is said the figure awarded is excessive hence it ought to be taxed off. It is also argued that the learned taxing officer erred when he taxed the attendance fee (item 9) of the Miscellaneous Application at Ksh.10,080/=. The award of Ksh.1,000/= as postal charges (item 18) as service at to Nairobi to be erroneous. There is an argument that item no. 18 was repeated as item no. 21.

The Respondent on her part urged this court to dismiss the Summons for lacking in merit. It is said the taxing officer properly exercised his discretion when taxing item no. 1. It is said he took into account the nature and importance of the matter, the interest of the Plaintiff, the general conduct of the proceedings and applied the provisions of the Advocates Remuneration Order. It is said the Applicant had failed to provide the proceedings and ruling of the taxing officer hence there is no sufficient material to determine whether or not the taxing master erred in arriving at his decision. It is further pointed out that the advocate who filed the reference had withdrawn from acting

for the Applicant on 22nd April 2009 hence he had no capacity to file the reference on behalf of the Applicant.

The background of this reference is straightforward. The Applicant herein is the Defendant in Nyeri C.M.C.C. No. 151 of 2000 in which the Respondent is the Plaintiff. The record shows that the Applicant raised a preliminary objection against the suit which objection was dismissed. Being dissatisfied, the Applicant took out the Motion dated 18th December 2008 in which he applied for *inter alia* leave to appeal and for the extension of time to appeal against the ruling. He also applied for a stay of execution of proceedings in Nyeri C.M.C.C. No. 151 of 2008. Lady Justice Kasango heard the motion and dismissed it in her ruling of 12th February 2009. The Respondent filed the bill of costs dated 7th April 2009 which was finally taxed at Ksh.99,000/=-.

There is no doubt that the taxing officer awarded the Respondent a sum of Ksh.75,000/= as instructions fee. Under *Schedule VI paragraph (0) Viii* of the Advocates Remuneration Order (2006) the Minimum amount to be awarded as instructions fees is fixed at Ksh.3,500/=-. The taxing officer stated that he gave the award as drawn because the amount was reasonable bearing in mind the nature of the application and interest of the parties. The learned taxing officer did not state whether or not the application was complex. I have carefully perused the application which gave rise to the taxation. It is a fairly straightforward application. There was nothing complex about it. There was nothing to show that the same involved voluminous documents. I am of the view that the instruction fee awarded to the Respondent is manifestly excessive, unjust and completely out of proportion to the work carried out by the Respondent. The Court of Appeal in the case of **JORETH LTD =VS= KIGANO ASSOCIATES [2002] E.A.L.R. 92**, stated the principles to be considered by taxing officers at page 93 as follows:

“Where the value 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 instructions fee 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 factors.”

The taxing officer in this matter simply stated that he considered the nature and importance of the case. The taxing officer was required to give detailed information as to why he thought the matter was important and as to what were the peculiar circumstances of the case. I am satisfied that the award on item no. 1, that is, instructions fee must be set aside. The same is set aside and is substituted with an award of Ksh.15,000/=-.

The Replying Affidavit only concentrated in opposing the objection in respect of item no. 1, that is, the instruction fee. There is an attempt by the Respondent to tackle the objection as against the award of items no. 8 and 9 in her submissions. It is her submissions that those items were taxed in accordance with the Advocates Remuneration Order (2006). In item no. 8, the Respondent was awarded Ksh.6,000/= as service fees. A careful perusal of *Schedule VI paragraph 9 (a)* of the Advocates Remuneration Order will reveal that the amount is set at Ksh.1000/=-. The Respondent's advocate has not denied the averment that he was served in court. I am convinced the taxing officer fell into error. Consequently I set aside the award of Ksh.6,000/= in respect of item no. 8 and substitute it with an award of Ksh. 1,000/=-. In item no. 9, the Respondent was awarded Ksh.10,080/=-. I agree with the submissions of the Applicant that the award is in respect of attendance of a whole day as per the Advocates Remuneration Order. I have perused the record, the same does not state the amount of time the parties took to have the application argued and determined. I do not think the parties argued the application for a whole day. I am convinced they took less than an hour. The taxing officer therefore gave an exorbitant award which was not commensurate with the time taken. Consequently I will set aside the award given in item no. 9 of Ksh.10,080 and substitute it with an award of Ksh.1,680/=-. The objection in respect of the other items, that is, 5, 18 and 21 were not contested by the Respondent. I have considered the awards made in the aforesaid items *vis-à-vis* the relevant provisions of the Advocates Remuneration Order. The same were taxed in accordance with the

Advocates Remuneration Order save that item no. 21 was taxed twice, that is, as item no. 18. This has to be taxed off.

In the end the Summons dated 10th September 2009 is allowed in the following terms:

- (i) **Instruction fee (item no. 1) of Ksh.75,000/= is set aside and substituted with an award of Ksh.15,000/=.**
- (ii) **Objection in respect of item no. 5 is dismissed hence the award of Ksh.630 shall stand.**
- (iii) **The award in respect of item no. 8, that is, Ksh.6,000/= is set aside and is substituted with an award of Ksh.1,000/=**
- (iv) **The award in respect of item no. 9 of Ksh.10,080 is set aside and is substituted with an award of Ksh.1,680/=.**
- (v) **The objection against no. 18 is dismissed hence the award of Ksh.1,000/= shall stand.**
- (vi) **The award in item no. 21 is set aside since the same was given as item no. 18.**
- (vii) **The rest of the items shall remain as taxed by the taxing officer.**
- (viii) **Costs of the reference is given to the Applicant.**

Dated and delivered at Nyeri this 26th day of February 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Ombongi holding brief Magiya for Defendant/Applicant. No appearance for Respondent.