



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANICOMMERCIAL COURTS)**

Civil Case 730 of 2006

D. NJOGU & CO. ADVOCATES..... ADVOCATE/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LTD..... CLIENT/RESPONDENT

RULING

1. The notice of motion dated 16th April 2010 was taken out by the Advocates/Applicants. They are seeking for stay of execution of the party and party costs awarded to the respondent by the decision of the Taxing Master dated 22nd January 2010. They are also seeking for the decision by the Taxing Master of 22nd January 2010 be set aside and the bill of costs be submitted for taxation by another taxing master.

2. This application is based on the grounds that the advocate is aggrieved by the decision of the taxing master. The respondents have issued a notice to execute the party and party costs awarded in the sum of **Ksh.662,465.13**. It is further contended that the taxing master erred in principle in assessing the Bill of costs under **Schedule VI (1) (d)** of the **Advocates Remuneration (Amendment) Order 1997** instead of applying **Schedule VI (A) (1) (L)** of the **Advocates (Remuneration) Order 1997**. The taxing master erred in principle by holding the bill of costs is a pleading like any other and by disregarding the advocate's submissions which were filed in support of their position. This application was also supported by the affidavit of **Mr. David Njogu** sworn on 16th April 2010. This supporting affidavit elaborates the above grounds in greater detail.

3. This application was opposed by the client/respondent; reliance was placed on the replying affidavit by **Mr. Aldrin Ojiambo** sworn on 20th April 2010. Counsel for the client faulted the procedure through which this reference was filed that is by way of a notice of motion. A reference is supposed to be filed by way of chamber summons as provided for under **rule 11** of the **Advocates Remuneration Order**. The Advocates Remuneration Order provides its own procedure, it is a complete code and there is no provision to invoke the provisions of the Civil Procedure Rules, there is no provision for the order of stay of payment of costs, thus the application is defective and should be struck out.

4. On the merit of the application, there was no error in principle, the Taxing Master properly applied the correct schedule and in his ruling he explained the basis of the taxation, it was a party and party Bill of Costs which was struck out. The subject matter that was indicated was a total of **Ksh.39,194,009.03/-** which was the total fees in the unsuccessful bill of costs. The Taxing Master found that the bill of cost was a pleading. The taxing master could not import any other meaning to the Bill of Costs other than what is prescribed under **Schedule VI of the Advocates Remuneration Order**. Several authorities were cited in support of this proposition. Especially the cases of; **Machira & Co. Advocates vs. East Africa Standard No.2 (2002) 2 KLR 63** and **Machira & Co. Advocates vs. Magugu (2002) 2 E.A. 428**

5. This application raises three issues as I see them, firstly the merit of the application has been challenged on the grounds that it offends the provisions of the Advocates Remuneration Order in that it is an omnibus application seeking for stay of execution and the setting aside of the orders. It is also brought by way of a notice of motion instead of the prescribed chamber summons. Secondly, it is contended that an order of stay can not be made in respect of costs which have already been taxed because the Advocates can always pay the costs. Thirdly, on the merit of the application, it is contended that there is no error of principle when the taxing master exercised his discretion and based the application on the correct schedule.

6. The **Advocates Remuneration Order Rule 11** prescribes that an application regarding the objection on items taxed by the taxing master be filed by way of chamber summons. The party objecting to the decision of the taxing master is supposed to give notice in writing indicating the items that he objects to and they are supposed to apply to be furnished with the reasons. When the reasons are furnished the party is supposed to apply to a Judge in chambers for the determination of those issues. The objection that the applicant came to court by the wrong procedure is valid. The procedure provided under rule 11 of the Advocates Remuneration Order is a chamber summons. There is no justifiable reason why the applicant departed from the laid down procedure purely for their own convenience. This court is vividly aware of the adage that procedure should never be elevated to the fetish level of the mistress of justice especially on the face of the provisions of sections 1A and 1B of the civil procedure that provides the guidelines on the overarching principles in the administration of justice. This is not a matter under the civil procedure moreover, rules of procedure regulates the order of proceedings and provides predictability in the administration of justice and cannot be disregarded at will. 7. I will however go further to examine the merit of this application, the first prayer for stay of execution is dependent on whether the order by the taxing master is based on an error of principle. When dealing with the issues arising out of an order from the taxing master, the principles to bring to bear on whether or not the taxing master erred in the assessment of costs, have been settled in the long line of authorities in particular the case of **Premchand Raichand Ltd and Another v. Quarry Services of East Africa Ltd and Others EALR [1972] E.A.** The court of Appeal in that case held that;

“(I) the court must consider the following principles:

(a) That costs be not allowed to rise to such a level as to confine access to the courts to the wealthy;

(b) That successful litigant ought to be fairly reimbursed for the costs he has

Had to incur;

(c) that the general level of

Remuneration of advocates must be such as to attract recruits to the profession; and

(d) That so far as practicable there should be consistency in the awards made;

- (ii) **The court will only interfere when the award of the taxing officer is so high**

- (iii) **Or so low as to amount to an injustice to one party;**

- (iv) **In considering bills taxed in comparable cases an allowance may be made for the fall in value of money;”**

8. I am also persuaded by the principles set out in the case of **First American Bank of Kenya vs. Shah and Others EALR (2002) 1EA Page 64** the judgment of **Ringera J** (as he then was) held:-

“The High Court was not entitled to upset a taxation merely because, in its opinion, the amount awarded was high and it would not interfere with a Taxing Officer’s decision unless the decision was based on an error of principle or the fee awarded was so manifestly excessive as to justify and inference that it was based on an error of principle. (Steel Construction Petroleum Engineering (EA) Limited v Uganda Sugar Factor (1970) EA 141 followed. Under the Advocates (Remuneration) Order, some of the relevant factors to be considered were the nature and importance of the 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.”

9. I have gone through the ruling by the taxing master the submissions made by both counsel for the advocate and the client, the item that was challenged according to the submissions by the counsel for the applicant was the instruction fees. Mr. Njenga submitted that the taxing master erred in principle by applying the provisions of Schedule VI (1) (d). He further submitted that the bill of costs which was struck out with costs cannot be deemed as pleadings. It ought to have been taxed under Item (K) which is in regard to;” *to sue or defend in any case not provided for above; such sum as may be reasonable but not less than Ksh.8,400/-“.*

10. On the part of the client Mr. Ojiambo submitted that the Bill of costs which was filed for taxation was a pleading. It contained a statement of claims which were for the assessment and these are pleadings within the meaning of paragraph 1 of Schedule VI of the Advocates Remuneration Order. In that bill of cost the advocate indicated the instruction fees and others for assessment amounting to Ksh.39,194.009.03/-. Going by the Bill of Costs which was field under a Miscellaneous Application No. 730 of 2006 I am not able to depart from the findings of the Taxing Master that it was a pleading, and the subject matter that was for determination was stated as 39,194.009.03. It is the applicant who drew the bill of costs and estimated the value of his bills, if he had exaggerated the value of his services; he has now to face the costs out of his own doing.

11. The upshot of the above analysis is that I find no error in principle and there is no basis for granting the applicant the order of stay, this application is dismissed with costs to the respondent.

RULING READ AND SIGNED ON 25TH JUNE 2010 AT NAIROBI.

M.K. KOOME

JUDGE