REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI(MILIMANI COMMERCIAL COURTS)

Civil Case 15 of 2000

ROYAL MEDIA SERVICES…..……..... …. PLAINTIFF

VERSUS

TELKOM KENYA LTD.....……..…..... …1ST DEFENDANT
COMMUNICAITONS COMMISSION OF KENYA..... 2ND DEFENDANT
KENYA BROADCASTING COMMISSION…..….....3RD DEFENDANT
ATTORNEY GENERAL ……..…….....4TH DEFENDANT
NICHOLAS ETYANG……..….....5TH DEFENDANT
DANIEL MUSAU……..….....6TH DEFENDANT
FRANCIS WANGUSI……..….....7TH DEFENDANT
DANIEL WATURU……..….....8TH DEFENDANT
J. N. KAMUNGE……..….....9TH DEFENDANT
PHILIP N. KAMANGA……..….....10TH DEFENDANT
GEORGE KHOJALA……..….....11TH DEFENDANT
MUSA ETIKO……..….....12TH DEFENDANT
HENRY WEST……..….....13TH DEFENDANT
KAREN LANGATA DISTRICT ASSOCIATION.....14TH DEFENDANT
KENYA BROADCASTING COMMISSION…..….....3RD DEFENDANT

RULING

1. By a ruling of **Mr. S. A. Okato**, the Deputy Registrar which was delivered on 30th April 2009, the Defendant's party and party bill of costs was taxed and the Respondent was awarded a sum of Kshs. 394,004,112/= (three hundred ninety four million four thousand one hundred and four) being dissatisfied with that order of taxation, the Applicant, Messrs Royal Media Services filed this Chamber Summons under rule 11(2) of the Advocates Remuneration Order. They are seeking for orders that the taxing officer's determination of items Nos. 1, 16, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, and 39 be set aside and the matter be re-assessed for reasonable quantum due to the third Defendant.

2. This Application is premised on the grounds that the taxing officer acted contrary to the well settled principles of the law. He failed to give weight to the relevant factors on record; he also failed to give sufficient reasons or grounds to justify the quantum for the disputed items. The order is therefore manifestly excessive as to justify an interference by this court. The applicant is also supported by the affidavit of **Samuel Kamau Macharia** sworn on 30th July

2009. The matters deposed to in that affidavit elaborate on the above grounds in greater details. **Miss Mwangi**, learned counsel for the Applicant, in the course of submission stated that they were only objecting to item No. 1, that is the instruction fees.

3. Counsel argued that the 3rd Defendant was entitled to a sum of Kshs. 200, 000/- as instruction fee. The taxing officer committed an error of principal by applying the wrong schedule to determine the instruction fees. The Taxing officer erroneously agreed that the value of the subject matter was Kshs. 26 billion whereas the value of the subject matter could not be determined from the pleadings. The taxing Master, failed to take into account the suit was dismissed for want of prosecution, there was no judgment or settlement by the parties. Going by the prayers in the Plaint, there is no specified time upon which a computation of the specified time could be determined. The Applicant's prayers were mainly for declaration and injunctions. The only prayer for Kshs. 10,000/= per minute should have been assessed under **Schedule 6 paragraph 1(c)** of the **1997 Remuneration** Act.

4. The period of special damages was very uncertain, Counsel made reference to the cases of **F. M. Mulwa Advocate vs Patrick Mutheke Ndeti HCCC No. 789 of 2005, Joreth Ltd vs Kigano and Associate [2001] 1EA 92. In those** decisions, it was held that the Taxing Officer could not speculate a period upon which to peg the determination of special damages. The principles of reasonableness should always be construed as implied under the Remuneration Order. The court should also be guided by the principle that a party should be allowed to access the courts while noting that awarding outrageous and excessive fees will render litigants bankrupt and people will shun the courts as an independent arbiter of disputes.

5. This application was opposed by the 3rd Defendant Mr. Chege learned counsel for the 3rd Defendant, he relied on the replying affidavit sworn by **David Waweru** on 10th September 2009. It was submitted that the Taxing Officer was justified as he based his ruling of taxation under **Schedule 6 1(a)** and **(d).** He properly made a finding that the subject matter was determinable. Going by the prayers in the Plaint, and the interlocutory applications which were filed by the Applicant the subject matter was obviously the loss incurred per minute at the prize of Kshs. 10,000/=. Even if there was no judgment or settlement, the pleadings determined the subject matter of the suit.

6. There was a specific prayer for special damages and the particulars are stipulated as revenue from advertisement, at the rate of Kshs. 10,000/= per minute from the time of disconnection up to re-connection. The Applicants sought for loss which could be calculated

from the date the suit was dismissed as there had been no re-connection. The suit was dismissed on 26th November 2004 and that is how the subject matter was calculated based on the loss and the Taxing Officer properly followed schedule 6 in the assessment of the instruction fees.

7. Counsel relied on the case of **First American Bank of Kenya vs shah and Others (2002) 1EA 64.** Where the principle that instructions fees are earned when the defence is filed and subsequent progress of the matter is irrelevant to the item of the fees. Counsel also distinguished the several authorities relied upon by the Applicant. He also urged the court to ignore the submission that a sum of Kshs.200,000/= should be awarded as instructions fees because there is no basis for such an award. Finally it was argued that the court cannot merely set aside an order by the taxing officer unless it is shown the taxing officer erred in principle.

8. This application challenges the order by the Taxing Officer, the application challenges the assessment of item no 1 which relate to the instruction fees which was assessed for a sum of Kshs.393,835,062/= based on the provisions of Schedule 6 paragraph 1(b) of the Advocates Remuneration Order 1997. The principles to bring to bear while dealing with an application of this nature have been well settled in a long line of authorities especially the very persuasive case of; **First American Bank of Kenya vs. shah and Others (2002) 1EA 64.** The Ruling of **Ringera, J** (as he then was) where he held that:

> ***"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 (Steel Construction Petroleum Engineering (EA) Limited vs Uganda Sugar Factory [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.***
> ***Though the High Court had the jurisdiction and the discretion to reassess the bill itself (Steel construction Petroleum Engineering (EA) Limited v Uganda Sugar Factory (supra) and Arthur vs Nyeri Electricity Underwriters [1961] EA 492 followed), the normal practice where the Taxing Officer's decision disclosed errors was to remit it back to the Taxing Officer for reassessment unless the court was satisfied that the error did not materially affect the assessment (Nanyuki Esso Service v Touring and Sports Cabs Ltd [1972], Steel Construction Petroleum Engineering (EA) Limited v Uganda Sugar (supra) and Arthur v Nyeri Electricity (supra) followed)."***

9. According to the Ruling by the Taxing Officer, he based the assessment on paragraph 7 of the Plaint and the prayers for special damages of Kshs. 10,000/= per minute from 4.00 p.m. on

7th January 2000 until the date of reconnection which according to the Taxing Officer translated to a sum of over 26 billion. Applying the provisions of Schedule 6 paragraph 1(b), he arrived at the total sum taxed. The issue to determine is whether this assessment presents an error of principle. This suit was dismissed for want of prosecution therefore the suit did not proceed for hearing there is no judgment or settlement, thus the fees to be awarded can only be ascertained from the pleadings. It is common ground that the plaint was amended and re-amended and from paragraph 7 the Plaintiff was seeking for special damages being revenue from advertising consumer products, publishing notices of intended meetings and burial arrangements, and provision of a pager system at a rate of Kshs. 10,000/- per minute from its radio broadcast from 26th January 2000 from its Nyambene transmitter and from 2nd February 2000 in respect of the Nyeri Transmitter until the date and time of reconnection.

10. It was calculated that the loss claimed by the Applicants was calculable to Kshs. 14,400,000/= a day upto to 24th day of November 2004 presumably when the suit was dismissed. I find that the special damages was indicated per day at Kshs.14,400,000/= a day. However, the upper limit was dependent on the reconnection of the frequency, since the suit was dismissed for want of prosecution; the date of dismissal of the suit was deemed by the taxing master as the date up to when the damages should be assessed.

11. Was the Taxing Officer in error by capping the upper limit of the assessments of the special damages on the date the suit was dismissed? Was he supposed to apply the principle of reasonableness bearing in mind that suit did not proceed for hearing and also borne in mind the principle articulated in the several authorities, especial the case of **Premchand Raichand Ltd and Another v Quarry Services of East Africa Ltd and other (No. 3)** East Africa Law Report [1972] E.A. page 162 in which the Court of Appeal set out the principle to take in account when assessing held:

> ***(i) The court must consider the following principles:***
> *(a)* ***That cost be not allowed to rise to such a level as to confine access to the courts to the wealthy;***
> *(b)* ***That a successful litigant ought to be fairly reimbursed for the costs the 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 or so low as to amount to an injustice to one party;***
> ***(iii) In considering bills taxed in comparable cases an***

allowance may be made for the fall in value of money;

12. In the case of **Joreth Ltd vs Kigano and Associates**, the Court of Appeal held:

> ***"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 instruction 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 circumstances. In this instance, the taxing master had followed this course and had not erred in doing so".***

13. Going by the pleadings, it is determinable the basis upon which the value of the subject matter was to be calculated from the date of the filing of the suit at Kshs.14,400,000/= per day. However, even if this suit proceeded to hearing it is highly unlikely and impossible for the court to award special damages of 26 billion going by the principle that is well established in our courts that a party is supposed to mitigate their losses. The Taxing Officer should have taken into consideration those principles to establish a reasonable upper limit of up to what period of time the applicant should have mitigated the losses.

14. Secondly, the award of costs should be within a range of settled matters and the award should resonate with the economic reality of the country. At the risk of sounding speculative, even if the suit had gone to hearing, and the court assessed damages, the general trends taken by courts is that a party seeking for loss of business is awarded damages calculated for a reasonable period because a party is supposed to take other proactive and reasonable measures to mitigate the losses.

15. For those reasons, the Taxing Officer erred in principle for failing to consider the principles applicable when the court is assessing damages and arrived at the wrong decision, for clarity this award is not being set aside for being excessive, it is being set aside for failure to take into account laid down principles and therefore arriving at an amount that is not only manifestly excessive but one which would make the courts un accessible to litigants wishing to pursue their claims for fear of being rendered bankrupt. The applicant asked this court to reassess reasonable fees. However as it was held in the case of **Thomas James Arthur v Nyeri Electricity undertaking (1961) E.A. page 492** where the Supreme Court held:

> ***"Where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as mater with which the taxing officers are particularly fitted to deal and the court will intervene only in exceptional cases"***

It is appropriate this matter be referred to another Taxing Officer. The ruling of Mr. S.A Okato is

set aside and item no 1 of the bill of costs is to be submitted to another Deputy Registrar who shall be guided by the above principles to assess the fees payable.

The application is allowed and the Applicant shall also have the costs of this application.

DATED AT NAIROBI THIS 17TH DAY OF SEPTEMBER 2010.

M. KOOME
JUDGE