



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

HCC MISC. APPLICATION NO. 653 OF 2008

LUBULELLAH & ASSOCIATES, ADVOCATES.....

.....APPLICANT

VERSUS

KENYATTA NATIONAL HOSPITAL.....

.....RESPONDENT

RULING

1. The application before court is the Client's Chamber Summons dated 15/02/2010 and filed in court on 16/02/2010. The same is brought under paragraph 11(4) of the Advocates (Remuneration) Order and Section 3A of the Civil Procedure Act seeking an order setting aside in its entirety the ruling of the Taxing Master delivered on 22/12/2009 taxing the Advocate's/client bill at Kshs.2,001,770.00. The Applicant also prays that this court be pleased to adjust the figures re-assess fees due and find that the fees as taxed are exorbitant and unreasonably high. The Applicant also prays for costs of this reference.

2. The application is premised on the supporting affidavit dated 19/02/2010 sworn by Wilkister Morara and on grounds that:-

- (a) *The Bill of Costs dated 17/11/2008 was taxed at Kshs.2,001,770.*
- (b) *The amount taxed is excessive and unreasonably high.*
- (c) *The decision of the taxing master is oppressive.*
- (d) *The decision of the taxing master is not justified.*
- (e) *The Respondent is not entitled to the amount as taxed by the taxing master.*
- (f) *The taxing master misdirected himself while taxing the bill thereby committing an error of principle.*

3. The application is opposed vide the Replying Affidavit dated 01/04/2010 sworn by **Wilfred Akhonya Mutubwa** and filed in court on 08/04/2010. The deponent avers that the Chamber Summons application dated 15/02/2010 is incurably defective for want of compliance with the mandatory provisions of the Advocates (Remuneration) Order and is therefore liable to being struck out with costs to the Advocate. The deponent also avers that the taxing master was correct in his assessment of the instruction fees herein, having based the same on the principles provided for in the Advocates (Remuneration) Order and based on the urgency, complexity and importance of the matter to the parties and the value thereof.

4. The deponent also avers that the application has been brought mischievously and in bad faith with the sole aim of delaying and frustrating the Advocate's realization of their entitlement in fees. The deponent also avers that it is the character of the Applicant not to pay fees until taxation and that this is not the only matter in which the Applicant has given trouble to the Respondent over the Advocate's fees. The deponent wants the application dismissed with costs.

5. At the hearing of this application, the Applicant Kenyatta National Hospital, (KNH) was represented by Mr. Geoffrey Nyaanga, advocate, while the Respondent, M/s Lubulellah & Co. Advocates were represented by Mr. Mutubwa, advocate.

6. Counsel for the Applicant submitted that the taxing master made an error of principle in doing the taxation, namely that the taxation ought to have been under Schedule 6 Rule 1(J) under the High Court Schedule – 1997. Counsel contended that what had been before the court was a Judicial Review Application for which the Respondent should have charged Kshs.20,000/= as opposed to the Kshs.2,001,770/= allowed by the Taxing Master. Counsel submitted that there was no justification for such exorbitant percentage increase of 10,000% in a matter that was not complex by any standards.

7. Secondly, counsel argued that this court is clothed with the discretion and power to set aside the discretion of the taxing master as the said discretion was not exercised judicially. Counsel relied on a number of authorities to support his arguments in urging the court to allow the application.

8. The first of these authorities was the case of **Republic v Minister for Agriculture ex parte W'Njuguna and Others [2006] IEA 359**. The case involved a reference under rule 11 of the Advocate's (Remuneration) Order seeking to set aside an order by the taxing master to increase the basic instruction fee in the Respondents' Bill of Costs from Kshs.20,000 to 20 million on the grounds *inter alia* that the matter was novel, the volume of work involved, the responsibility entrusted to the counsel and the importance of the matter to the parties were high. Like in this present case, the Bill of Costs arose out of judicial review proceedings (**W'Njuguna v Minister for Agriculture [2000] LLR 417 (HCK)**); where the Respondents successfully challenged the Tea (Elections) Regulations, 2000 made by the Minister for Agriculture in purported exercise of his powers under Sections 34 and 25 of the Tea Act (Chapter 343). It was held that the correct perception of a discretion donated by law is that such a discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria. It was further held that:

(i) *Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law or a particularized justification of the mode of exercise of any discretion provided for.*

(ii) *The complex elements in the proceedings which guide the exercise of the taxing officer's discretion must be specified cogently and with conviction.*

(iii) *The nature of the forensic responsibility placed upon counsel when they prosecute the substantive proceedings must be described with specificity.*

(iv) *If novelty is involved in the main proceedings the nature of it must be identified and set out in a conscientious mode.*

(v) *If the conduct of the main proceedings necessitated the deployment of a considerable amount of industry and was inordinately time consuming, the details of such a situation must be set out in a clear manner.*

(vi) *If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated apart, of course, from the need to show if such works have not already been provided for under a different head of costs.*

9. In the above case, the court set out the following guiding principles to be applied by a taxing officer engaged in the taxation of Advocates/Client's Bills of Costs in Judicial Review proceedings:-

- (i) *The proceedings were purely public law proceedings and are to be considered entirely free of any private business arrangements or earnings of the relevant sector*
- (ii) *the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done.*
- (iii) *the taxation of advocate's instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;*
- (iv) *so far apposite, comparability should be applied in the assessment of advocates' instruction fees;*
- (v) *objectivity is to be sought when applying loose textures criteria in the taxation of costs.*
- (vi) *where complexity of proceedings is a relevant factor, firstly the specific elements of the same are to be identified and stated: and secondly, complexity is to be judged on the basis of the express or implied recognition and mode of treatment of the trial judge.*
- (vii) *where responsibility borne by an advocate is taken into account, its nature is to be specified*
- (viii) *where novelty is taken into account, its nature is to be clarified.*
- (ix) *where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarized forms.*

10. Counsel for the Applicant submitted that the taxing master in the present case was not guided by the above principles and accordingly asked this court to allow the application as prayed.

11. The second authority relied upon by counsel for the Applicant is **Mombasa Court of Appeal Civil Appeal No. 45 of 2005 – Akhtar Shahid Butt & Another (Appellants) –vs- David Kinusu Sifuna T/A Sifuna & Company Advocates**. The facts of the case were that the 1st Appellant instructed his advocates, David Kinusu Sifuna T/A Sifuna Company Advocates, the Respondent to file a Petition in the Superior Court at Mombasa to wind up M/s Modern Coast Builders & Contractors, the 2nd Appellant. The instructions were carried out with the filing of the petition on the 24/05/2002. The petition was never set down for hearing after the 1st Appellant and the Respondent settled the matter out of court within 12 days of the filing of the Petition. Thereafter, a consent order marking the petition as withdrawn was filed in court on 05/06/2002. The Respondent then filed his Bill of Costs for taxation, claiming a sum of Kshs.1,860,000 in respect of the instruction fee to file the petition, based on a value of Kshs.80,000,000 of the 2nd Appellant's assets.

12. The taxing officer reduced the instruction fee by Kshs.860,000 and awarded Kshs. 1 million. The Applicant being dissatisfied with the taxation, filed a reference in the High Court at Mombasa under rule 11(2) of the Advocates (Remuneration) Order. That reference was dismissed on the grounds that the taxing officer had:-

- *considered in detail the matter on instructions*
- *formed the opinion that the petition before the court was quite complex and complicated*
- *agreed with the submissions of the Plaintiff that the parties had to go through voluminous documents before commencing the matter;*
- *considered the importance and amount of work undertaken by the Plaintiff before filing the petition.*

13. On appeal, the 1st Appellant argued that the sum of Kshs. 1 million as taxed instruction fee was

manifestly excessive and unjust on the ground that there was nothing complicated about the brief that resulted in the filing of the petition; that in any event, the petition was compromised when the matter was settled within 12 days of filing the petition. The Appellant also contended before the Court of Appeal that the Superior Court took into account irrelevant factors in reaching its decision.

14. The Court of Appeal held that the matter was not complex and that no voluminous documentation was involved before the filing of the petition. The court further held that the Superior Court had failed to apply the principles set out in **Joreth –vs- Kigano [2002] 1 EALR 92**. The principles are, *inter alia*,

- *where a judge comes to the conclusion that the taxing master erred in principle, the correct course of action would have been [is] to refer the bill back for taxation by the same or a different taxing master (Steel Construction Petroleum Engineering (EA) Ltd. –vs- Uganda Sugar Factory Limited [1970] EA 141 applied)*

- *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.*

- *There was nothing to suggest that in determining the instruction fee the taxing master had taken into account the stage that the suit had reached. The trial Judge however, had erred in saying that one half of the work done qualified for one half instruction fee.*

I shall return to these principles later.

15. In response to submissions by counsel for the Applicant, Mr. Mutubwa for the advocate/Respondent submitted firstly that the Applicant’s application should be dismissed for failure to comply with Rule 11(1) of the Advocates’ (Remuneration) Order. Counsel submitted that there is no notice of objection as required under Rule 11(1) which provides:

“11(1) *Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.*

(2) *The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned setting out the grounds of his objection.*

(3) *Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with leave of the judge, but not otherwise, appeal to the Court of Appeal.*

(4) *The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days’ notice in writing or as the court may direct and may be so made notwithstanding that the time sought to be enlarged may have already expired.”*

16. Counsel submitted that objection is the first step in challenging any taxation and that without it, the substratum of the Applicant’s application is removed. Counsel said that the letter dated 06/01/2010 can not be equated to an objection on the part of the Applicant and that in any event, the letter does not specifically state that the Applicant is objecting to the decision of the taxing master. It was the view of counsel that a mere request for reasons for the taxation did not amount to an objection as envisaged by Rule 11(1).

17. Secondly, counsel for the advocate/Respondent contended that even if the court were to find that the letter under reference amounted to the requisite notice, the said notice was filed out of time, the requirement under Rule 11(1) being that such a notice be filed within 14 days after taxation is done. Counsel submitted that in the instant case, taxation having been done on 22/12/2009, the notice of objection ought to have been filed earlier since Rule 11 does not take account of the Christmas vacation.

18. Counsel also placed reliance on Order 47 rule 4 of the Civil Procedure Rules to the effect that where special rules of procedure not contained in these Rules which may have been or may be made by the High Court shall, where they conflict with these Rules, such rules shall prevail and be deemed to govern the procedure in the matter therein maintained. Counsel further submitted that the Applicant herein also failed to exercise its option to apply for enlargement of time and that in the circumstances, the application as filed cannot stand.

19. Counsel for the advocate/Respondent also took issue with the Applicant's Further Affidavit which he said was filed without leave of the court. Counsel urged this court to strike out the said affidavit and to reject the Applicants plea from the bar to have the affidavit admitted into evidence.

20. On the issue of instruction fees, counsel for the Respondent submitted that having offered instruction fee of Kshs.350,000/= before the taxing officer, the Applicant is estopped from descending from that amount to the sum of Kshs.20,000/= which the Applicant now wants this court to award.

21. Counsel also submitted that there is no basis on which this court could interfere with the discretion exercised by the taxing officer. Counsel contended that the matter before court was a matter of national importance as duly highlighted in the media during the hearing and that if it had not been resolved, there would have been a national strike to the detriment of the Respondent. Counsel also submitted that as an agent of the Kenya Revenue Authority, the Respondent was required to charge Value Added Tax (VAT).

22. Counsel for the Respondent relied on a number of authorities as per the list filed in court on 13/04/2010. The first case was **Mayers & Another –vs- Hamilton & Others [1975] EA 13** which dealt with the issue of getting up facts and whether or not there was a reference to the High Court. This was a case where one of the Plaintiffs had been discharged from the suit. The Court of Appeal held, *inter alia*, that consideration should always be given to making a divided order for costs when one party is dismissed from a suit; and therefore that an advocate was not entitled at the moment of instruction to the whole of the fee he may ultimately claim. The court also held that where there was justification for charging a getting up fee, the same was allowable. In this regard, counsel for the Respondent urged the court to find that the Advocates (Remuneration) Order allows for minimum fees.

23. Counsel also placed reliance on the case of **Thomas James Arthur –vs- Nyeri Electricity Undertaking [1961] EA 492**. In the case, the Plaintiff in an action had been awarded substantial damages. The taxing officer allowed the successful Plaintiff an instruction fee of Kshs.8,000/=. The Defendant being dissatisfied with the taxing officer's decision, referred the decision to a judge of the Supreme Court who reduced the fee to Kshs.4,000/= on the ground that the fee allowed which was quadruple the scale fee was so manifestly excessive as to be of itself indicative of the exercise of a wrong principle. On appeal it was held:-

(i) *where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will intervene only in exceptional cases;*

(ii) *the fee allowed was higher than seemed appropriate, but in a matter which must remain essentially one of opinion, it was not so manifestly excessive as to justify treating it as indication of the exercise of a wrong principle.*

24. Counsel submitted that in the instant case, there was no error of principle as what is in question is a matter of discretion and opinion on the part of the taxing officer.

25. The third case relied upon by counsel for the advocate/Respondent was **Milimani HCCC No. 942 of 2005 – D. Njogu & Company Advocates –vs- Panafcona Engineering Limited**. The Applicant in the case questioned the taxing master's decision of taxing the Advocate/Client Bill of Costs at Kshs.224,913.00 on the grounds that the taxing officer had in assessing instruction fees *inter alia* misinterpreted and misapplied the ruling in **Mayers & Another case** (above). The court found that since there was no error of principle leading to the decision of the taxing master, the Applicant's complaint on the instruction fees was unmerited.

26. I have now considered the application as filed and the law cited to me by both counsel. As is clear from the grounds on the face of the application, the Applicant's complaint is that the taxing master committed an error of principle in assessing the instruction fee awarded to the advocate in this case. On the other hand, counsel for the advocate contends that what is in issue here is the exercise of discretion by a taxing master which cannot be said to be an error of principle. The Applicant's chief complaint is that the instruction fee is manifestly excessive and oppressive.

27. The principles applicable to applications of this nature are those set out in **Joreth Ltd. Case** and **Thomas James Arthur case** (above). The law is that this court will interfere with the decision of the taxing master only in exceptional circumstances and where there is evidence that the taxing master has committed an error of principle.

28. In the instant case, it is not disputed that the action in respect of which the bill of costs was taxed was there and that instructions to the advocates was given by the Applicant to defend the same. The advocates carried out the instructions in an effort to avert a strike by the Applicant's workers through their association. The advocates initiated negotiations which involved substantial amounts of money which were to be committed by the national Treasury. The advocates also prepared for hearing of the main motion which was at one time fixed for hearing on 28/06/2006. The advocates contended that the matter was an extremely sensitive and important matter which, if not resolved, could have crippled the Applicant.

29. In the authorities that were cited to the court, an advocate becomes entitled to minimum instruction fees the moment the instructions are given, but these minimum fees may be increased at the discretion of the taxing master.

28. In the instant case, it is not in dispute that the Applicant herein gave instructions to the advocate/Respondent in respect of the HC Misc. Application No. 242 of 2002. It is also not in dispute that the advocate/Respondent carried out the instructions. What is in dispute is whether the brief undertaken by the advocate/Respondent was so complex and so time consuming that it entitles the advocate/Respondent to an instruction fee of Kshs.1,500,000/=. For the advocate to successfully defend the instruction fee as taxed, he must satisfy the court as to the following

- *that the fee charged was to seek no more and no less than reasonable compensation for professional work done.*
- *that there was no prospect of unjust enrichment*
- *give specific elements of complexity of the matter, the nature of responsibility undertaken by the advocate and the length of time spent, research done and the skills deployed by counsel.*

29. What has come out from the documents on the file is that in this case, the advocates commenced negotiations which finally ended in a resolution of the matter. The case (Judicial Review) was fixed once for hearing on 28/06/2006 but the same did not proceed. The advocates herein contended that the matter was extremely sensitive and that if it had not been resolved at that every time, the Applicant would have suffered a serious crisis that would have crippled its operations.

30. I have had the opportunity to go through the taxing master's ruling in which he taxed advocates bill at Kshs.2,001,770. That decision was informed by the submissions made by counsel for the advocate. I

have read through the advocate's submissions. I have not come across details of specific elements of complexity and intricacy of the matter, nor do the submissions contain details of how much time was spent by the advocates in handling the brief. The submissions do not also contain any details of whether any research was done in preparation for the negotiations. In the circumstances, I am persuaded that the taxing master committed an error of principle in assessing the instruction fee to the advocate. This is the only reason why I am inclined to interfere with the taxation.

31. Counsel for the advocate had raised a number of other pertinent issues on which I will make brief comments. Counsel argued that this application should fail because the Applicant did not give requisite notice of objection to the taxation or that if such notice was given, the same was given outside the stipulated 14 days period. Reliance was placed on Rule 11(1) of the Advocates (Remuneration) Order which requires objection to be given within 14 days of the date of taxation.

32. The Applicant herein wrote a letter dated 06/01/2010. The letter refers to Regulation 11 of the Advocates (Remuneration) Order and says it is giving notice thereunder. They asked for reasons for the taxation to enable them file a reference to the High Court, and that reference is the subject of this ruling. I have carefully considered Rule 11(1) of the Advocates (Remuneration) Order. Whilst it requires a party objecting to a decision of the taxing master to do so within 14 days, the sub-rule does not specify the format of such a notice. In my view therefore, the letter of 06/01/2010 was complaint with the subrule. The letter also clearly indicated that the Applicant intended to file a reference to the High Court.

33. The next question that flows from the above, is whether, the said notice was given outside the required time. Counsel submitted that since the Advocates (Remuneration) Order is a complete code in itself, the provisions of Order 49 of the Civil Procedure Rules do not apply.

Order 49 rule 3A of the Civil Procedure Rules reads:

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the sixth day of January in the next year following both days included shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act;

Provided that this rule shall not apply to any application in respect of a temporary injunction.”

34. My view of the matter is that the notice given by the Applicant herein was well within time as per the above provisions. Should I be wrong in the above interpretation, I think that the two days which fell outside the 14 day period would still be excusable by operation of the provisions of section 3A, 1A and 1B of the Civil Procedure Act.

35. Counsel for the advocate also took issue with the Applicant's Further Affidavit which he said was filed without leave of the court. He urged the court to strike it out. The position taken by the Court of Appeal on documents filed contrary to procedure is that once such documents are on the record, the court cannot turn a blind eye to them. In my view therefore, I cannot turn a blind eye to the said affidavit. I therefore decline to strike it out.

36. In the premises and for the reasons above given, I allow the Applicant's application dated 15/02/2010. I set aside the ruling of the Taxing Master taxing the Advocate/Client Bill at Kshs.2,001,770.00 and refer the matter back for fresh taxation before a different taxing master. In order to expedite the process, this matter shall be placed before the Deputy Registrar Civil for mention within the next seven (7) days for fixing a fresh date for the taxation.

37. Each party shall bear its own costs.

It is so ordered.

Dated and delivered at Nairobi this 03 day of December, 2010.

R.N. SITATI

JUDGE

In the presence of:-

Mr. Mutubwa (present) For the Advocate/Respondent

Mr. Nyaangu (present) For the Client/Applicant

Jane Omasaba - court clerk