

REPUBLIC OF KENYA**IN THE HIGH COURT OF KENYA****AT NAIROBI (MILIMANI COMMERCIAL COURTS)****Miscellaneous Civil Case 393 of 2008****KAGWIMI KANG'ETHE & CO. ADV.....APPLICANT****VERSUS****O-LERAI NURSERIES LTD.....RESPONDENT****RULING**

On 29th January 2009, the taxing officer of the court taxed the advocate – client bill of costs at Kshs.2,460,925/= plus 16% VAT of Kshs.393,748.03. The taxing officer added additional disbursements of Kshs.9,950/= making it a grand total of Kshs.2,864,623.03. The taxing officer gave credit to the client in the sum of Kshs.1,500,000/= that had earlier been paid to the advocate. The client was therefore required to pay the balance of the taxed costs at Kshs.1,364,623/=. The client was aggrieved by the said assessment of the costs due to the advocate. The client filed reference to this court challenging the taxation of certain items in the advocate's bill of costs. In particular, the client was aggrieved by the taxation of items No. 1(a), 1(b), 2(a), 2(b) and 3. The client was further aggrieved that the taxing officer had failed to take into account the fact that the client had paid to the advocate a total sum of Kshs.5,535,000/= . The client was of the view that the taxing officer had erred in law and in fact in assessing the questioned items in the bill of costs. It faulted the taxing officer for awarding getting up fees to the advocate yet the case had not been fixed for hearing. The client was of the view that the taxing officer had applied the wrong principles of the law in assessing fees due to the advocate that was in the circumstances excessive. The reference is supported by the annexed affidavit of James Singh Gitau, the advocate of the client. The reference is opposed. George Kang'ethe, the sole proprietor of the firm of Kagwimi Kang'ethe & Co. Advocates swore a replying affidavit in opposition to the reference. He also filed notice of preliminary objection to the reference.

At the hearing of the application, I heard submissions made by Mr. Singh for the client and Mr. Kang'ethe for the advocate. According to Mr. Singh, the taxing officer erred when he assessed items 1(a) and 1(b) of the advocate's bill of costs on the basis that the subject matter of the suit was Kshs.68 million. He submitted that the client had filed suit seeking to be paid damages for breach of contract, and other declaratory orders including the rendering of accounts. He submitted that there was no specific sum pleaded by the client in its pleadings and therefore under the provisions of Schedule VI of the Advocates Remuneration Order, the only sum that could be awarded to the advocate was Kshs.6,000/=. He maintained that the taxing officer erred in ascribing a value to the subject matter of the suit when the same had not been specifically quantified. It was his view that the value of the subject matter of the suit would only be ascertained after the conclusion of the suit. He submitted that the plaintiff did not contain any complex pleadings that would entitle the taxing officer to award the unjustified sum of Kshs.600,000/= as instruction fees. He explained that the taxing officer failed to advance any good reason for the assessment of the said instruction fees which in his view was excessive and unreasonable. He urged the court to review the said assessment and give an award that is reasonable in the circumstances. He submitted that the advocate was not entitled to be paid getting up fees since the suit had not been confirmed for trial. He took issue with the fact that the taxing officer failed to take into account the legal fees that the client had already paid to the advocate. He explained that the client paid to the advocate the sum of Kshs.5,535,000/= and therefore the taxing officer fell in error when he only gave credit for the sum of Kshs.1.5 million. He urged the court to allow the reference so as to ensure that the advocate is not improperly paid.

Mr. Kang'ethe for the advocate opposed the reference. He submitted that the reference, in so far as it was in respect of a non-existent ruling, cannot be granted. He was of the view that the court cannot be asked to review a ruling which was not the subject matter of the taxation. He submitted that a judge, in a reference, cannot interfere with the taxation by the taxing officer on the basis of quantum. The judge can only interfere with the assessment of costs if the taxing officer had made a mistake that amounts to an error of principle. He explained that the substantive issues pleaded in the plaint were complex and required skill in drafting the plaint. He was of the view that since the plaint ran to fourteen (14) pages, the issues pleaded therein justified the award that was made by the taxing officer as instruction fees. He disagreed with the client that the taxing officer had committed an error in principle when he ascribed a value to the subject matter of the suit. He submitted that if the client succeeded in its suit, it was entitled to be paid damages of the sum of US\$977,000. He maintained that the taxing officer had documents which enabled him to reach the conclusion that the subject matter of the suit was Kshs.68 million. He submitted that the advocate had prepared the suit for trial by filing the plaintiff's list of documents and therefore was entitled to getting up fees. He explained that the only legal fees he had paid in the suit was Kshs.1.5 million which he had admitted to and the taxing officer had given credit for the same. He maintained that there was no evidence that he had been paid legal fees of Kshs.5,535,000/= as claimed by the client. He urged the court not to be persuaded by the document that the client had filed in the course of this reference which had been filed without the leave of the court. He urged the court to dismiss the reference.

I have carefully considered the rival arguments made by counsel for the parties in this reference. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. I have also perused the ruling of the taxing officer which is the subject of this reference. The principles that guide the court in determining whether or not to allow a reference are well settled. The Court of Appeal in the case of Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board [2005] 1KLR 528 set out the principles to be considered by this court in determining whether a reference from taxation by a taxing officer should be allowed. At page 533, the Court of Appeal held that:

“On a reference to a judge from the taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In Arthur vs. Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this Court said at page 492 paragraph 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 interfere only in exceptional cases’.

An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see Arthur vs. Nyeri Electricity Undertaking (supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see Devshi Dhanji vs. Kanji Naran Patel (No.2) [1978] KLR 243.”

In the present reference, the client has challenged the assessment of the advocate's costs by the taxing officer essentially on three broad grounds: firstly, the client was aggrieved that the taxing officer had assessed the instruction fees payable to the advocate without taking into account the fact that the pleadings of the client had not specified any value that could be applied to determine the said instruction fees. The client was aggrieved that the taxing officer had adopted the figure of Kshs.68 million as the value of the subject matter of the suit without any supporting evidence.

I have perused the plaint filed on behalf of the client by the advocate. While it is true that the prayers sought by the plaintiff were essentially in respect of damages for lost capital and resources, and loss of business opportunity, it was clear that in its pleadings, the client pleaded that it had applied for a short term loan of US\$500,000 from the defendant bank. In my considered view, this was the figure that ought to have been applied by the taxing officer as the subject matter of the suit instead of US\$977,000 that was adopted by the taxing officer. It was speculative for the advocate to state that the client would have been awarded general damages of US\$ 977,000 if he had won the case. In any case, the client lost its

application seeking to restrain the defendant bank from exercising its statutory power of sale. I therefore hold that the client has a case when it argues that the taxing officer erred in principle when he applied the wrong figure as the subject matter of the suit. To that extent therefore, I hold that in so far as the basis of the assessment of the instruction fees was US\$977,000 the taxing officer committed an error in principle. I will therefore review and set aside the assessment in respect of item No.1(a) and 1(b) of the advocate's bill of costs and substitute it with a lawful assessment by this court based on the value of the suit being US\$500,000. Applying the exchange rate of Kshs.70 to a US Dollar (*that was applied by the taxing officer*), the value of the subject matter of the suit is therefore Kshs.35 million. Under schedule VIA(1) of the Advocates Remuneration Order the advocate was entitled to instruction fees of Kshs.487,500/= . I therefore assess instruction fees under item No. 1(a) at Kshs.487,000/=. On item 1(b), under schedule VIB of the Advocate Remuneration Order, the advocate is entitled to one half of the amount in item No. 1(a). He shall be paid Kshs.243,750/=.

The advocate stated that he was entitled to be paid getting up fees because he had prepared the case for trial. There is no evidence that the suit was confirmed for hearing. I think the objection by the client is merited. From affidavit evidence, it appeared that the advocate expended much energy in prosecuting interlocutory applications and not in actually preparing the main suit for hearing. The advocate is therefore not entitled to getting up fees of Kshs.599,799.54. That amount is taxed off the amount that was assessed as due and payable to the advocate. All the other items in the advocate's bill of costs were not disputed and in my view were taxed in accordance with the Advocates Remuneration Order. Apart from item 1(a) and item 1(b) which has been adjusted by this court, and item No.3 which has been taxed off, all the other items in the advocate's bill of costs shall remain as taxed. The 16% VAT shall be charged on the adjusted figure.

As regard whether the taxing officer had properly credited the amount that had been deposited by the client as legal fees to the advocate, I hold that the taxing officer reached the proper conclusion when he gave credit for the sum of Kshs.1.5 million that was admitted by the advocate as having been paid to him. Although the client alleged that he had paid to the advocate upward of Kshs.5 million, upon evaluation of the affidavits filed in this reference, it was clear that the client had instructed the advocate to undertake various legal work other than the present suit. The cumulative legal fees that was paid to the advocate was in respect of the present suit and the other suits that the advocate was instructed to act on behalf of the client. The client cannot therefore claim that the entire amount that was paid to the advocate was in respect to the present suit. I disallow the client's objection in that regard.

The client has been partially successful in its reference. I award it half of the costs of this reference. It is so ordered.

DATED AT NAIROBI THIS 15TH DAY OF JULY 2009.

L. KIMARU

JUDGE