



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

Civil Case 427 of 2002

BRAEBURN LIMITED.....PLAINTIFF

VERSUS

TONY GACHOKA.....1ST DEFENDANT

PRISCILLA CHARI GACHOKA.....2ND DEFENDANT

RULING

The chamber summons dated 29th May 2009 is brought under rule 11(2) of the Advocates Remunerations Order. The applicant who is the plaintiff in this matter seeks for an order to set aside the decision of the taxing officer delivered on 19th March 2009 in so far as it relates to taxation of item No.24 of the Bill of Costs dated 28th August 2008. The applicant also seeks for orders that the item be referred to another taxing officer for re taxation or the court be pleased to re tax item No.24 of the Bill of Costs. This application is based on the grounds stipulated on the body thereto.

Briefly stated, the applicant filed a bill of costs on 28th August 2008. The parties agreed on all the items except No.24 of the Bill of costs. Both the applicant and the respondent filed written submissions for the determination of the fees payable under item no 24. The taxing master delivered a ruling on 19th March 2009, in which he taxed off Ksh.497,500/- from item No.24 and allowed Ksh.2,500/= as instruction fees. The applicant is aggrieved by that decision. Counsel argued that item No.24 was in respect of instructions fees for defending or opposing a notice of motion by way of a constitutional reference. The respondents challenged the order of committal to civil jail for non payment of a decretal sum. Counsel had charged ksh.500,000/- for instruction fees but the taxing master allowed a sum of Ksh.2,500/- which is the bare minimum provided by the Remuneration Order. Counsel submitted that the taxing officer erred in law for failure to consider that Item No. 24 was based on the provisions of schedule 6, of the Advocates Remuneration Order.

The taxing officer was faulted for failure to consider the complexity and the nature of the matter when he allowed the minimum which is manifestly low and justifies an inference that it was based on an error of principle. It was argued that the taxing officer misdirected himself when he held that there was no reason why the instructions fees should be increased from Ksh.2.500/- and in that way he ignored several factors.

The respondent's application was not an ordinary application but a very complex matter challenging the mode of execution and the provisions of Civil Procedure Act which provides for committal of a debtor to civil jail. The suit was transferred to a specialized division of the High Court where the Chief Justice constituted a bench of two judges to hear the application. The application had fourteen prayers. The Attorney General took an interest in the matter and entered appearance as *amicus curiae*. The respondents although they were represented by **Messrs Ndonyo, Mbugua Atundo Advocates**, appointed

Hon. James Orengo to argue the application which further underscores the seriousness of the matters raised. Several authorities were cited ranging from the United Kingdom to South Africa.

The judgment by the constitutional court was 60 pages long and even the Judges admitted the matter was complex. The application was dismissed and the respondents were ordered to pay the costs. Had the taxing officer considered these factors, the instructions fees could not have been taxed at ksh.2500/-. It was also erroneous for the taxing master to hold the charge of Ksh.450/- under Item No.1 was the instructions fees for execution. There was no double charge of instructions fees. Counsel therefore urged the court to be guided by the decision in the cases of; **Green Hills Investments Limited vs. China National Complete Plan Export Corporation (complaint) t/a Covec [2004] I KLR 74 and Kibet & Co. Advocates vs. Central Bank of Kenya Limited, HC Misc. Civil Case No.1498 of 2001 at Nairobi [2005] eKLR.**

In both decisions the court held that the taxing master is given discretion to award fees that are reasonable. In determining the instruction fees, the value and the amount of work done by an advocate must be taken into consideration.

This application was opposed; the respondent relied on the replying affidavit sworn by **Tonny Gachoka** sworn on 9th July 2009. Counsel argued that the filing of the notice of motion did not change the character of the proceedings from the execution proceedings to a different case. He supported the decision of the taxing officer who is obligated to consider other fees charged in connection with the same kind of work. The taxing master considered other fees and allowances and in exercise of his discretion found the instructions fees of Ksh.500,000/- manifestly excessive. Counsel urged the court to dismiss the application with costs.

This being an application under r11 of the Advocates Remunerations Order the taxing master is given discretion to assess the quantum of the fees payable to the advocates. As in all matters involving the exercise of discretion, it should be exercised based on reasons, facts and the law. The decision by the taxing master in this case is challenged by the applicant and the issue for determination is whether the taxing master properly considered Item No.24 the instructions fees in this matter.

I have gone through the ruling of the learned taxing master especially the holding that;

“When the applicant received instructions to execute the decree herein on 28.7.03, the instruction fee covered the entire execution process including the notices of motions he had to defend or rather opposes. In the case of the First American Bank of Kenya Vs Shah & Others (2002), EA 64 and 70 Ringera J as he then was espoused the law thus”

“The present court of Appeal has on the other hand expressed the view that in principle the instructions fee is an independent and static item chargeable only once and is not affected or determined by the stage the suit has reached”

...

in view of the foregoing I find and hold that the instruction fee is chargeable only once and that is what the applicant charged in Item No.1 and the same cannot be affected by the fact that applications being constitutional referred were later filed. Having found as above I see no need to belabor the reasons why I should exercise my discretion to increase the instruction fee accordingly I tax off Ksh.497,500/- from Item 24 and allow the same at ksh.2500/-“

The taxing master found that the instruction fees were taxed for execution of the decree on 28th July 2003 which covered the entire execution process including the notice of motion. Am afraid the taxing master misapprehended this issue because the notice of motion herein was a constitutional reference which was referred to the specialized division of the High Court. A bench of 2 judges was constituted to deal with the matter and I certainly appreciate the complexity of the matter going by the ruling delivered by the two Judges.

This constitutional matter changed the character of the litigation; it cannot be termed as a mere execution proceedings. Moreover, if the taxing officer made a finding that the instructions fees were earlier charged, it follows that he should not even have awarded Ksh 2500/=. I find the taxing master erred by finding no reasons to assess the amount of work involved and arrive at a fair quantum. Should this matter go back for the reassessment of the instruction fees. The award of Ksh.2,500/- appears unreasonable and not commensurate with the complexity of matter time taken and all circumstances. The reasons given by the taxing master clearly misapprehended the issues before him. The principles to bring to bear when dealing with the references of this nature were well articulated in **S R D 'Souza & Others vs. C Ferrao & Others (1960) EA 602** which was a Court of appeal decision. It adopted the principles stated by Buckley J in the estate of Ogilvie: *Ogilvie vs. Massey (1910) P 243*.

“On questions of quantum the decision of the taxing master is generally speaking final. It must be a very exceptional case in which the Court will even listen to an application or review his decision. In question of quantum the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed; the Court will not interfere unless the taxing master is shown to have gone wholly wrong. If a question of principle is involved it is different; on a mere question of quantum in the absence of particular circumstances the decision of the taxing master is conclusive. I think that the learned judge ought not to have interfered.”

Sending this matter back to the Deputy Registrar will not serve the interest of justice especially considering the age of this matter. It will be expedient if this court can assess the fees payable under item no 24 to save on judicial time. The respondent filled a notice of motion, the basic fees provided under schedule 6 is Ksh 2500/= considering the complexity of the matter and the time taken to prepare and considering other fees payable that basic fees should be increased by 50%. The ruling by the taxing master is set aside and the sum of Ksh 2500/= is hereby substituted with a sum of Ksh 125,000/=. The applicant shall have the costs of this application.

RULING READ AND SIGNED ON 9TH OCTOBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE