



REPUBLIC OF KENYA

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

Misc Civ Appli 56 of 2006

S. MUSALIA MWENESI ADVOCATES.....APPLICANT

VERSUS

KAN GENERAL SUPPLIERS LTD.....1ST RESPONDENT

AGNES KARUANA NYAMU2ND RESPONDENT

BENJAMIN MUSEMBI NGANDA.....3RD RESPONDENT

JOSEPHINE MUTHINI NGANDA.....4TH RESPONDENT

RULING

The 3rd and 4th Respondents clients are the Applicants in this reference. They have filed this Notice of Motion under **Rule 11(4)** of the **Advocate (Remuneration) Order**. They seek to have the whole of the Taxing Master's decision made on 14th July 2006 set aside or reviewed. Their complaint is that they were dissatisfied with the reasons given in the Taxing Master's ruling in regard to the Instruction fee item. **Ms. Kamende** who argued this application on behalf of the two clients submitted that since the Taxing Master had concluded that the value of the subject matter could not be ascertainable from the pleadings, then she ought to have applied the statutory remuneration. **Ms. Kamende** also complained that the Taxing Master erred when she failed to consider the Respondent's submissions that since the Advocate did not finalize the matter, the full instruction fees was not earned. For this preposition, Counsel relied on the case of **Machira & Co. Advocates vs. Arthur Magugu, Milimani HCCC No. 151 of 2001.**

Miss Njeri for the Advocate supported the ruling of the learned Taxing Master and opposed the application. Learned Counsel submitted that the Bill of Costs was drawn to scale and that the taxation complied with the Remuneration Order and therefore ought not to be challenged.

The Respondents had instructed the Advocate with the Bill to institute proceedings on their behalf and seek injunctive orders from the court. It is not in dispute that the Advocate did file the suit seeking injunctive relief on behalf of the Respondents. That suit was dismissed for want of attendance by the

Advocate and his clients.

Having considered the submissions by counsel and cases cited, I have the following view.

The Advocate quoted 250,000/- for instruction fees but this was taxed at Ksh.120,000/-. The 3rd and 4th Respondents have not challenged the schedule under which the Bill was taxed. What they lament about is the decision reached, which they claim to be excessive.

It is trite that a court cannot interfere with the Taxing Master's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle. See **STEEL & PETROLEUM (EA) Ltd vs. UGANDA SUGAR FACTORY 1970 EA 141**. It is also trite that the court is not entitled to upset a taxation because in its opinion, the amount awarded was high. See **STEEL CONSTRUCTION & PETROLEUM ENGINEERING (EA) LTD.,** Supra.

According to the Advocates Remuneration Order, some of the relevant factors to take into account include the nature and importance of the cause or 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.

The learned Taxing Master has clearly stated what she considered before arriving at her decision. After making a finding that the value of the subject matter could not be determined from the pleadings, judgment or settlement of the parties, the learned Taxing Master went on to state as follows:

***“Where the value of subject matter is not so ascertainable the taxing officer is to use his discretion to assess such instruction fees as he considers just taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction of the trial Judge and all other relevant circumstances.*”**

Based on the importance of the matter to the parties and the complexity and the responsibility placed on the shoulders of the applicant advocate I assess item 1 at Kshs.120,000/-.”

From the foregoing it is quite clear that the learned Taxing Master addressed her mind to the relevant issues before making her decision. The learned Taxing Master was of the view that the matter was important to the parties and complex and that it placed responsibility on the shoulders of the Advocate. The Court of Appeal in the **Joreth Limited vs. Kigano & Associates CA No. 66 of 1999** held:

***“We would at this stage point out that the value of the subject of a suit for the purposes of taxation of a Bill of Costs ought to be determined from the pleadings judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction of the trial judge and all other relevant circumstances. That is what C.K. Njai Esq. did when he said: -*”**

“As we do not know the capital value of the property in dispute, our believe is left to determine the matter on the general discretion donated to the taxing officer to tax a bill; based on the importance of the matter to the parties, the complexity and the responsibility placed on the shoulders of Counsel.”

From the foregoing decision of the Court of Appeal, and the Advocate Remuneration Order, it is quite

clear that the learned Taxing Master applied the correct principles in assessing the instruction fee due to the Advocate.

Ms. Kamende relied on **Mwera, J's** ruling of **Mashira & Co. Advocates**, supra, for the proposition that the extent of the instruction fees covers the taking of instructions, the preparation of the suit for hearing and the actual hearing. **Ms. Kamende** argued that since the Advocate did not prosecute the matter to the end, he was not entitled to the full instruction fees.

There are conflicting decisions on this issue. In **Mayers vs. Hamilton [1975] EA 13**, the Court of Appeal for Eastern African were of the opinion that whereas an Advocate becomes entitled to an instruction fee the moment he is instructed, he will not ordinarily become entitled to the whole of the instructions fee at the moment of instruction and that the entitlement grows as the matter proceeds.

In **JORETH LTD. vs. KIGANO & ASSOCIATES CA No. 66 of 1999** (unreported) the Court of Appeal has expressed the view that in principle the instruction fee is an independent and static item, chargeable only once and is not affected or determined by the stage the suit has reached.

Ringera, J. in **First American Bank of Kenya Limited vs. Gulab P. Shah & Others Milimani HCCC No. 2255 of 2000** opined that the full instruction fees to defend a suit is earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees.

Faced with the conflicting decisions on this point, I am opined to agree with the Court of Appeal decision of **Jorethi Limited**, Supra. The instruction fee is an independent item earned once and the subsequent progress of the matter is irrelevant to the instruction fees item.

As regards the basis upon which the instruction fee was arrived at, the learned Taxing Master ruled thus:

“Based on the importance of the matter to the parties, the complexity and the responsibility placed on the shoulders of the applicant advocate, I assess item 1 at Kshs.120,000/-.”

The Taxing Master applied the correct principles in arriving at the decision she did. She did not err. The exercise of discretion cannot be interfered with in the circumstances.

Having come to this conclusion, I find no merit in the application before me.

I dismiss it with costs to the Advocate.

Dated at Nairobi this 8th day of February, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Ms. Kamende for Applicant/3rd and 4th Respondent

Ms. Thuku for Advocate

LESIIT, J.

JUDGE

-