



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

Misc Appli 569 of 2003

IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF TAXATION OF COSTS

BETWEEN

DANIEL OGEMBO OGOLA (t/a Ogembo Ogola & Co. Advocates)...APPLICANT

AND

BASHIR MUSE MOHAMMED (t/a Jitihadi Shopping Complex)...RESPONDENT

RULING

By his chamber summons dated 27th February, 2004 the Client/Applicant herein has challenged the taxation of the Advocate/Respondent's bill of costs dated 29th May, 2003. The taxation was on 6th November, 2003. The bill was drawn at KShs. 1,702,365/00. KShs. 742,755/00 was awarded.

From the submissions of the learned counsel for the Applicant, the taxation is challenged upon the following grounds:-

1. That KShs. 293,000/00 that had been paid by the Applicant toward the Respondent's fees was not taken into account.
2. That the sum of KShs. 10,000/00 awarded for each of items 6A and 73 (which were professional undertakings) were excessive.
3. That the sum of KShs. 650,000/00 awarded for instruction fee was excessive.

In his reply learned counsel for the Respondent conceded that KShs. 293,000/00 paid by the Applicant had not been taken into account by the taxing officer. He made no comment upon the complaint with regard to items 6A and 73. He confined himself to the instruction fee.

I have considered the submissions of the learned counsels. No authorities were cited. I have also read the ruling of the taxing officer. There is no dispute regarding the value of the subject-matter. It was KShs. 22,200,000/00. It is also common ground that under the relevant parts of Schedule VI (as then applicable) of the Advocates (Remuneration) Order, the minimum instruction fee allowable to the Respondent was KShs. 387,000/00.

The Applicant's complaint is that the taxing officer committed an error of principle in allowing KShs. 650,000/00 upon the basis that the hearing of the suit was very acrimonious whereas there had not been any hearing of the action, the suit having been settled at a preliminary stage.

A taxing officer has the discretion to award an amount greater than the minimum provided for. If the only issue is quantum the court will usually not interfere with the taxing officer's discretion. But there may be instances where an amount awarded is so excessive as to amount to a wholly erroneous award. Or the amount awarded may have been based upon a misapprehension of a material fact as to amount to an error of principle. In those instances the court may interfere.

In the present case I do not think the amount awarded as instruction fee is so excessive as to amount to a wholly erroneous award. But the taxing officer obviously proceeded upon the misapprehension of fact that the suit had been heard. He said:-

“Going by the acrimony in the taxation of this bill I am of the considered view that the hearing of the main suit must have been worse.”

Well, there was no hearing of the main suit. The suit was settled at a preliminary stage. The taxing officer committed an error of principle by awarding KShs. 650,000/00 as instruction fee upon the erroneous factual basis that there had been a hearing of the main suit and that such hearing was very acrimonious.

The court is therefore entitled to interfere with the award, and I hereby do so by reducing it from KShs. 650,000/00 to the minimum allowed of KShs. 387,000/00.

Although learned counsel for the Respondent did not comment on items 6A and 73 (professional undertaking), I do not agree with the Applicant's learned counsel that professional undertakings should be treated as mere correspondence. They are not. There is always the risk that the advocate may be called upon to honour the professional undertaking. In the present case the undertakings were for KShs. 20,000/00 each. The taxing officer awarded KShs. 10,000/00 on each of the two items which was half of the sum of the professional undertaking. This was a fair award in the circumstances.

In the result I will allow the reference only as it affects the instruction fee, which is hereby reduced from KShs. 650,000/00 to KShs. 387,000/00, a reduction of KShs. 263,000/00. The taxed sum will also be reduced by the sum of KShs. 293,000/00 paid by the Applicant but not taken into account by the taxing officer.

The taxed sum of KShs. 742,755/00 is therefore reduced to KShs. 186,755/00 as follows:-

Taxed sum..... KShs. 742,755.00

Less..... KShs. 293,000.00

Less..... KShs. 263,000.00

KShs. 186,755.00

The reference is allowed only to that extent. In the circumstances of this case, I order that parties do bear their own costs of the application. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 5TH DAY OF DECEMBER, 2008