



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

Misc Cause 729 of 2006

OCHIENG, ONYANGO, KIBET & OHAGA ADVOCATES...APPLICANT

VERSUS

ADOPT A LIGHT LIMITED.....RESPONDENT

RULING

This is a reference from the decision of the taxing master made and delivered on 4th December, 2006. By a letter dated 6th December, 2006 the applicant's advocates gave notice to the taxing officer pursuant to Rule 11(1) of the Advocates Remuneration Order of the applicant's objection to the decision in items 1 and 2 of the bill of costs. The applicant is aggrieved by the decision of the taxing master and has now filed the present reference before the High Court for intervention.

Before the taxing master the parties were in agreement that the bill should be taxed under Schedule V Part II of the Advocates Remuneration Order. The parties were also in agreement that the matter before the appeals board was for an order to quash and annul a decision of **Mombasa Municipal Council** awarding a tender to the applicant herein. No doubt the amount involved in that tender was unascertained but the taxing master was guided by the proposal put forward by the applicant herein in winning the tender award.

The taxing master in making his decision on instructions fees had this to say;

“From the said proposal it is apparent that the respondent was expected to collect revenue in the tune of Kshs.525,852,000/= out of which 20% was to be the client's share. The tender award was given for a period of fifteen (15) years. It therefore, follows that the respondent had a substantial interest in the matter and wanted to protect its interest in ensuring that the tender award is sustained rather than being quashed. Considering the respondent's interest in the tender award, the benefits it was going to loose should the tender be quashed and/or nullified cannot fail to appreciate that the applicant's responsibility and duty was placed at a high level. It therefore, becomes apparent that this matter is complex and required extreme care and labour putting into account all those matters including the value of income the tender if the same was quashed and annulled, I am inclined to this matter and allow under this item at Kshs.2 million”.

The applicant is therefore, aggrieved and contends that the amount awarded under instruction fees is excessive as to constitute an error in principle on the part of the taxing officer. **Mr. Kimani Kiragu** learned counsel for the applicant submitted that there was no evidence placed before the taxing officer to support the conclusion he reached. He complained that there was no material that justifies the conclusion of the taxing master, in particular;

- (1) **There were no papers filed by the Advocates on behalf of the client before the public procurement complaints review and appeals board. The Advocate was retained by the client to represent it in an application filed before the appeals board by Magnate Ventures Ltd.**
- (2) **There was no record before the taxing master for the time spent before the appeal board by the Advocates.**
- (3) **The taxing officer placed great reliance on the fact that the proposal which the client placed before Mombasa Municipal council in order to win the tender, which included substantial sums of money. The only thing which the Advocate filed was submissions.**

According to **Mr. Kimani Kiragu** Advocate every party to a litigation irrespective of the monetary consideration contents vigorously the issues at hand and makes every effort to support their position. He also submitted that the matter was just a proposal which had led to an award, therefore the taxing officer overlooked one fundamental issue which is the proposal. He asserted that the proposal was based on an estimated revenue collection and it was wrong to assume that the proposed revenue was the value of the subject matter. The taxing master was concerned about the substantial sums involved and in his view mistaken required extreme care and labour, hence there was no basis for the award of Kshs. 2 million. In support of his contention **Mr. Kimani Kiragu** Advocate relied on several authorities in particular;

- (1) **Steel Construction & Petroleum Engineering (E.A) Ltd v Uganda Sugar Factory Ltd**, where it was held by **Spry J. A.**

“I think the law is clear and well known. It is only the application of the law that causes difficulty. An appellate court will not interfere with an assessment of costs by a taxing officer, unless the taxing officer has misdirected himself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference. I think the assessment of the instruction fee by the taxing master was high but I do not think the learned judge would have been entitled to interfere on that ground alone”.

- (2) **HCCC No.167/1945 Hasham Kora v Abdul Mohamed Hussein Karmali** where it was held;

“The decision of the taxing master is not absolutely final even on a question of quantum. For instance a large sum ought to be allowed, but from the very fact of the amount the court might see that the master in arriving at so large a sum, must have acted on a wrong principle or have taken something into consideration which he ought not to have done. It doubtless requires an exceptional case to call for the interference of the court, but exceptional cases do occasionally arise”.

The reference was opposed by **Mr. Ohaga** Advocate who submitted that there has been no error on the part of the taxing officer and neither is the amount awarded manifestly excessive as suggested. The taxing officer had in mind the relevant provisions which were to guide him being Schedule 5 Part 2 of the Advocates Remuneration Order. And Part 2 does not assign a specific amount but it has to be taken as a bundle. And the taxing master was alive to that when he made his decision.

According to **Mr. Ohaga** Advocate what was in issue was a tender awarded to the client by **Mombasa Municipal Council**. And that the award of the tender had been challenged, therefore clearly the client must have obtained the award on the basis of the proposal placed before the council. And the council accepted the proposal, so that the proposal constitutes or gives as an indication the subject matter.

Mr. Ohaga submitted that the award was beneficial to the client and the benefits to the client addresses the interest of the parties. And by appointing the Advocates, the intention was to safeguard this potential contract. The Advocates then filed skeleton submissions before the appeals board which shows the gravity of the dispute to the parties. He therefore, urged me to disallow the reference and uphold the award of the taxing master.

I have taken into consideration the material presented before me by the rival parties. In particular, I

have put great weight on the submissions of **Mr. Kimani Kiragu** and **Mr. Ohaga**, who in my view elucidated the case of their respective clients. I must say their research and eloquence made my work straight forward situation.

The matter as correctly pointed by the Advocates fall under Schedule V part 2 of the Advocates Remuneration Order.

“Instruction

Such fee for instructions as having regard to the case and labour required, the number and length of the papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all other circumstances the case, may be fair and reasonable, but so that due allowances shall be given in the instruction fee for other charges raised under this schedule”.

No doubt that Schedule V Part 2 does not assign specific figures to guide the court in making an award. However, the court is given an indication of what to take into consideration in assessing instruction fees. As a start it is essential to understand that quantum is a matter of discretion and an appeal court would be reluctant to substitute its discretion to that of the taxing master. The law gives the taxing master some leeway but like all discretions it must be exercised judicially and in reliance to the material presented before court. The taxing master must consider the case and labour required in the matter, the nature or importance of the matter. More so the amount or value of the subject matter involved, the interest of the client in sustaining or losing the benefit and the complexity of the dispute. In assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject. And when the subject matter is unknown, the court is empowered to make what is available as a point of reference. In my view the point of reference is the figures proposed to and accepted by **Mombasa Municipal Council**. The law is that matters of quantum are regarded as matters with which the taxing master is particularly fitted to deal and the court sitting on an appeal will intervene only in exceptional cases.

It is accepted that the monetary value of the subject matter is the principle basis for assessing the amounts of costs attendant to dealing with a matter on behalf of a client. The sole reason put forward by the client is that the instruction fee is high. **Mr. Ohaga** Advocate says that this is not an exceptional case to enable this court to interfere with the decision of the taxing master. The taxing master acted on material which demonstrated the value of the subject matter. He had before him the decision of the tribunal in which the tribunal acknowledged the complexity of the tender, therefore he was clearly within his rights and discretion to award the amount he did.

I agree in an appropriate case, this court has the powers to interfere with the decision of a taxing officer in respect of quantum, which is manifestly excessive. The award in a particular case must not disturb the general economic equilibrium of the society where we live. Generally speaking high awards are constant threat to the interest of the general public and the right to access justice by the litigants. The scale of fees was intended to assist in securing uniformity of practice. And it is for that reason that we stress public importance of keeping legal fees within reasonable limits.

In Civil Appeal No.220/2004 Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board, the Court of Appeal held;

“On 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) E.A 497;

“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 case”.

Having considered the decision of the taxing officer, I am persuaded that there is no error in principle which was committed by him. The formula for taxation and assessment of the particular costs is provided under Schedule V Part 2. The taxing officer used the correct formula and arrived at the correct decision. In my view he gave due consideration to all the relevant and pertinent matters and circumstances preceding the award he arrived at. I agree that the matter was based on a proposal but it must be noted that the proposal had been accepted by **Mombasa Municipal Council**. The amount involved in the award was substantial and it would be wrong to suggest that the taxing master did not consider the value of the subject matter.

The client got a tender to collect revenue amounting to over 500 million out of which 20% was to be its share. The tender award was given for a period of 15 years. It is therefore clear in my mind that the client had a substantial interest in the outcome of the appeal board. If the appeals board would not have overturned the tender award, the client would have been home and dry, in terms of accrued financial benefits. One may be tempted to say that the court had a duty to look at the other side of the coin. One may say that the other side was a mere proposal but the fact remains that the proposal had been accepted as a true yardstick for the tender.

The Advocate was retained to enhance and protect the award given to the client by **Mombasa Municipal Council**. No doubt he provided services to the client and no doubt the client is liable to compensate the Advocate for the services rendered.

I have looked at the material described as a proposal and I am of the view that the Advocate had spent considerable amount of time and labour in comprehending and making a defence in support of that proposal. It is wrong to assume that the Advocate did not file papers before the appeals board. It is also a misdirection to say that the Advocate's fees cannot be pegged on the proposal made to the council. In my view the taxing officer did not fail to consider all the relevant material. He did not overlook or underestimate the issues at hand for his consideration. The decision of the taxing master was supported amply by evidence and material relevant to the case of the parties.

It is therefore my decision that there is no misdirection/misapprehension committed by the taxing master, hence the application is dismissed with costs.

Dated and delivered at Nairobi this 31st day of May, 2007.

M. A. WARSAME

JUDGE