



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc Civil Case 264 of 2005

OKOTH & KIPLANGAT ADVOCATES.....APPLICANT

VERSUS

THE BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND.....RESPONDENT

RULING

What is before me for determination is the chamber summons application dated 5th July, 2006 under Rule 11(2) of the Advocates Remuneration Order. The prayers in the application are:

1(a) that the decision of the taxing officer delivered on 24th June, 2005 be quashed and/or set aside,

Alternatively

(b) That the errors of calculation/computation contained in the taxing master's decision made on 24th June, 2005 be corrected and/or remitted to the taxing master for correction and specifically;

(i) The increment by ½ of the instruction fees of Kshs.1,223,556 in the sum of Kshs.661,779/= be disallowed and deducted.

(ii) The getting up fee be allowed only in the sum of Kshs.401,336/= as per the decision of the taxing master.

(c) That costs of this application be provided for.

The grounds set out in support of the reference are:

(1) That the learned taxing master erred in law in allowing a getting up fee in the absence of reasonable progress made by the Advocates in defending the mother suit.

(2) That the learned taxing master erred in fact by increasing instruction and other fees by ½ when she had already factored in the increment.

(3) Alternatively having allowed Kshs.401,336/= as getting up fees, the learned taxing master erred in fact in adding Kshs.661,779/= as getting up fees in the calculation.

(4) That the learned taxing master made mathematical/calculation errors in arriving at the sum allowed.

Mr. Masinde learned counsel for the applicant submitted as follows: that the taxing master erred in awarding full instruction fees under item 1 and that she did not consider the work that was done by the previous Advocate/respondent. That is a factor that should have been put into consideration. He contended that whereas an Advocate is entitled to some instruction fees, such fees can only be pegged on the work done. And more importantly the progress made in the matter. The matter never proceeded for hearing any one time when the respondent was acting for the applicant. The matter came up for hearing once, therefore the respondent Advocates cannot say that they are entitled to full instruction fees particularly because of their conduct.

The applicant also challenged the getting up fees which was awarded under item No.27 in the bill of costs. **Mr. Masinde** Advocate submitted that under Schedule 6 paragraph 2 says that getting up fees is not chargeable unless the case has been confirmed for hearing. And that since the case was never confirmed for hearing the respondent is not entitled to any getting up fees, because they participated in the adjournment of the matter. In short Mr. Masinde submitted that the award under item I in the bill of costs was excessive and manifestly high as awarded by the taxing master, while the award under item No.27 was misplaced.

No! Says **Mr. Mwagona** Advocate who opposed the application on behalf of the respondent Advocates. He submitted that an Advocate is entitled to full instruction fees immediately he receives instructions from the client. The taxing master allowed only the basic instruction fees and there was no increase made in the instruction fees. According to **Mr. Mwagona** the taxing master exercised her discretion properly as provided in schedule. What was initially prayed for was Kshs.11 million but the taxing master only allowed a sum of Kshs.1.8 million, which is the minimum figure allowed by the Remuneration Order.

Mr. Mwagona further contended that when the respondent Advocates came on record, they prepared a very detailed amended defence. The preparation of that defence required a lot of preparation research and work because the suit related to a construction contract, which required the Advocate to go into novel areas in the construction industry therefore, in allowing a minimum fees, the taxing officer was within her discretion, which she exercised properly.

Regarding getting up fee, **Mr. Mwagona** Advocate submitted that Schedule 6 sub-section 2 is very clear and since the case was set down for hearing twice the respondent Advocate was entitled to the sum awarded by the taxing master. As soon as a suit has been set down for hearing a party is entitled to getting up fees. In the instant case the respondent Advocates were entitled to instruction fees and getting up fee the moment a defence was filed, and the matter confirmed for hearing twice. He therefore urged me to dismiss the reference with costs.

There is no dispute that appearance and defence were filed by **M/S M. Matemu** Advocates. The respondent Advocate took over the conduct of the matter one year after pleadings had closed. Immediately it assumed the conduct of the matter, the respondents undertook a task of amending the defence. It made an application to amend the defence and introduced some amendments to the defence earlier filed. It is alleged that the respondent did not take any further instructions or steps towards progressing the matter to conclusion. The respondent Advocate is alleged to have precipitated, caused and/or acquiesced to some various adjournments of the matter.

The question for my determination is whether the taxing officer committed manifest misdirection, errors and/or omission to justify an interference of her decision. It is trite law that this court cannot interfere with the taxing officer's decision unless it is shown that either the decision was based on an error of principle. It means this court is not entitled to upset a taxation because in its opinion the amount awarded is high. The starting point is that each bill of costs and reference arising therefrom has to be considered and treated on its own peculiar circumstances and facts available, the guiding principle being the Advocates Remuneration Order.

On instruction fees the taxing master awarded a sum of Kshs.802,6721/= and in doing so took into consideration that the respondent had filed an amended defence, list of authorities and statement of issues. In the opinion of the taxing master, the respondent Advocate undertook the prerequisite steps for

preparing the matter for trial. It was also the position of the taxing master that the respondent Advocates are entitled to full instruction fees for they expended time on research to ensure that the matter was ready for trial.

The taxing master was persuaded that there was no need to increase on the instruction fees awarded, because proceedings in the case have not taken place. And that the case is far from being determined.

On getting up fees, the taxing master awarded a sum of Kshs.401,336/= for she was satisfied that the respondent had prepared for the trial of the matter.

Let me say that Advocates should be fairly, appropriately and justly be remunerated for the services rendered by them to their clients depending on the nature, complexity, gravity, weight and importance of the brief undertaken. The court in granting the appropriate reward must be mindful of the general implication of manifestly excessive figures which can have unintended effects on the administration of justice. I agree, it is within the discretion of the taxing officer to exercise his/her discretion as law provided. The discretion has to be exercised judicially and in complete regard to the nature of the matter before court for taxation.

It is therefore, perfectly legitimate for a taxing master to factor in essential consideration of the matter at hand without disturbing the general equilibrium in the administration of justice.

My position is that it is incumbent upon a party seeking to set aside a taxation to satisfy the High Court of the existence of an apparent error in principle committed by the taxing master. I reckon that instruction fees is an independent and static item chargeable once and is not effected or determined by the stage the suit has reached. The progress of a matter and the steps undertaken is not a factor in computing instructions fees provided it is shown that the Advocates had been instructed to undertake a brief. And by virtue of the said instructions, he took certain steps in fulfillment of the instructions of the client. It is essential to show, that the Advocate had been instructed and pursuant to that instructions, he undertook some steps in ensuring the instructions is reduced into pleadings. It is enough to show and/or put the cause of action or defence before court to be entitled to instructions fees.

In my view instructions fees to defend a suit is earned by an Advocate, the moment a defence has been filed and/or he comes into the matter and files an amended defence like the present case. In my view full instructions fees is earned when the notice of appearance and defence is filed by an Advocate on behalf of a defendant. The subsequent progress and/or development has no relevance to that item known as instruction fees. As regards the increase of the instruction fees, I agree that the matter is at the discretion of the taxing master. However, the yardstick is that the decision must pass the test of judicial discretion. I therefore, see no reason to interfere with the decision of the taxing officer as regards instruction fees awarded.

Here there is no dispute that the respondent is entitled to getting up fees for there is sufficient evidence to show the matter had been set down for hearing at least twice. Getting up fees is only restricted to trial and a party is entitled to a getting up fees when he gets up or prepares a case for trial. In this case, the matter was set down for hearing and in the process preparation for trial was undertaken by the respondent. According to schedule 6 a fee for getting up or preparing a case for trial is allowed in addition to the instructions fees, provided the case has been set downs for hearing and preparation for its trial made by the Advocate. The taxing master may also increase this fee as he may consider reasonable. The onus is on the applicant to satisfy that there is no ground for increasing the basic fee on account of work not undertaken. This court cannot substitute its own figures to the amount awarded by the taxing master. It is my decision that there is misdirection or misapprehension committed by the taxing master in awarding a getting up fees contrary to the provisions and requirement found under schedule 6 sub-section 2 of the Advocates Remuneration Order. Such fees allowed and/or awarded sub-section 2 may be increased as the taxing officers considers reasonable. Schedule 6B states;

“As between advocate and client the minimum fees shall be;

- a) **the fees prescribed in A above increased by one half or**
- b) **the fees ordered by the court increased by one-half or**
- c) **the fees agreed by the parties under paragraph 57 of this order increased by one-half as the case may be, such increase to include all proper attendances on the client and all necessary correspondences.**

It is clear in my mind that Schedule 6A (1), (2) and Schedule 6B allows the taxing master to increase the award, therefore I do not see any reason to interfere with her discretion. In my view the only issue in this matter was whether the increase of instruction fees and getting up was so manifestly excessive as to amount to an error or misdirection. As the amount of the increase, the taxing master had the option to increase one half or use her discretion otherwise. She chose to increase one-half, which is permissible under Schedule 6B and I think by increasing one half she was conscious of the said provision.

In short it has not been demonstrated or shown that the taxing master took into consideration irrelevant or extraneous matters in arriving at her decision. I am satisfied that there was no misapprehension committed by the taxing master. She was perfect in her determination and was guided by the correct principles of the law and the facts as presented by the parties.

In conclusion, I have come to the decision that the reference is without merit and the application dated 5th July, 2006 is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 18th day of May, 2007.

M. A. WARSAME

JUDGE