



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (Milimani Law Courts)**  
**Civil Case 263 of 2005**

**SOFTA BOTTLING COMPANY LTD & OTHERS..... PLAINTIFF**

**VERSUS**

**NAIROBI CITY COUNCIL.....DEFENDANT**

**RULING**

This is a reference against the ruling of the taxing master who awarded KShs.150,000/= as instruction fees. The principle complains against this award are that the taxing master failed to consider that the defendant/respondent was not served with Summons to Enter Appearance and in fact no appearance was entered nor was a defence delivered. The applicant's suit was struck out on a preliminary objection. In those premises, the applicant argued, the taxing master should not, as she did, apply schedule VI paragraph 1(a) of the Advocates (Remuneration) Order. In the applicant's view, full instruction fees is earned on the filing of a defence. For this proposition reliance was placed upon the decision of

Ringera J as he then was in **First American Bank of Kenya Limited –vs- Gulab P. shah & 2 Others: HCCC No.2255 of 2000 (UR).**

The applicant further argues that the plaintiff's claim was not quantified and the use by the taxing master of the figure for lost earnings which figure was in an affidavit in support of an interlocutory application was an error of principle. In the applicant's view the subject of the suit was whether or not the applicant was entitled to injunctive reliefs against the respondent. For that proposition reliance was placed upon another decision of Ringera J in **Rosaftric Ltd & Others –vs – The Central Bank of Kenya & Another: HCCC No.1389 of 2001 (UR).**

For the respondent it is submitted that full instructions fees had been earned as the Preliminary Objection which determined the entire suit was in fact a denial of the applicant's claim and the objection was raised after service of the interlocutory application and the plaint. In the respondent's view the cases

relied upon by the applicant dealt with different circumstances from the circumstances obtaining in the present case where in its view the value of the subject matter was clearly determinable from the pleadings. Infact according to the respondent if the taxing officer had considered all the prayers made by the applicant a higher figure of instruction fees would have been awarded. In the premises, the respondent prayed for dismissal of the reference.

The principles applicable upon a reference on a taxation by a taxing master are now well settled. 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 masters are particularly fitted to deal and the court will intervene only in exceptional cases. See **Thomas James Arthur –vs- Nyeri Electricity Undertaking [1961] EA 492.**

In the present case the action in respect of which the bill of costs was taxed was one for various injunctive reliefs, loss of earnings and general damages. At paragraph 7 of the plaint it was pleaded that the plaintiff had suffered immense fiscal loss and damage, particulars whereof were to be provided at the hearing. In support of the application for injunctive reliefs, the plaintiffs managing director swore an affidavit that the plaintiff was incurring daily losses of over KShs.80,000/= in lost sales and at paragraph 5, of the plaint the plaintiff furnished the effective date of breach by the defendant. In my view therefore the plaintiff itself gave the basis of computing its claim for lost earnings. That aspect of the plaintiff's claim was in my view clearly determinable from the pleadings and the plaintiff is not entirely correct in saying that the value of its claim could not be ascertained at all from the pleadings.

The case of **Rosaftric Limited and Others – vs - The Central Bank of Kenya and Another** Supra is therefore clearly distinguishable from the present case as in that case, the subject matter of the suit was injunctive and declaratory reliefs.

With respect to the submission that as no appearance or defence were filed by the respondent instructions fees were not earned, I am afraid that submission was misconceived. In my view, the respondent's preliminary objection was a form of denial and at the end of the day determined the applicant's entire suit. I detect no error of principle on the part of the taxing officer in finding that instruction fee had been earned. The respondent argued that it was served with the plaint as well as the interlocutory application. Its counsels were perfectly entitled to determine how best to handle the respondent's case. They chose to raise the preliminary objection. In my view instruction fee was clearly earned when the respondents Advocates acted on the instructions of the respondent by filing the Preliminary Objection. In my view, Ringera J as he then was in the First Bank of Kenya case (**Supra**) was not setting up an inflexible rule that instructions fees can only be earned the moment a defence is filed.

In the end, I am not persuaded that the taxing master committed any error of principle. The reference dated 10.5.2005 and filed on 17.5.2005 is dismissed with costs to the respondent/defendant.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JUNE, 2006.**

**F. AZANGALALA**

**JUDGE**

**23/6/2006**

Read in the presence of:-