



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc Appli 722 of 2004
IN THE MATTER OF THE ADVCOATES ACT
AND
IN THE MATTER OF TAXATION OF ADVOCATE – CLIENT BILL OF COSTS
BETWEEN
MAINA MURAGE & COMPANY
ADVOCATES.....ADVOCATES/APPLIANT

VERSUS
**CHEVRON (K) LTD.....CLIENT/
RESPONDENT**

R U L I N G

The taxation between these parties has been the subject of a previous reference under paragraph 11 of The Advocates (Remuneration) Order. That previous reference was filed by the advocate with the bill. That previous reference was filed by the advocate in that reference sought a finding that the taxing master cited the wrong value of the subject matter. The court did not find in favour of the advocate and found that the taxing master did not err in pegging the value of the subject matter to U.S. \$ 566, 555. 75. The court did find favour in the advocate’s plea that the taxing master had failed to take into account the non-financial claim. The judge stated:

“To that degree the applicant is right. The Bill f costs shall therefore be remitted to the same taxing officer, for the assessment of costs for the said non-financial claims.”

It is now the assessment of non-financial claims that has led the client to file the present reference.

The client has filed a chamber summons under paragraph 11 [2] of The Advocates (Remuneration) Order. The client seeks the following order: -

“This court be pleaded to review and set aside the ruling on taxation by the Deputy Registrar, Hon J Were, delivered on the 16th June 2006 taxing the instruction fees on the non-financial claims in

the bill of costs dated 27th August 2004 at Kshs 1, 000, 000.

The bill of costs dated 27th August 2004 be remitted for taxation on instruction fees on the non financial claims before a different Taxing Officer of this court.”

The client in argument stated that the taxing master was only obliged to take into account the non-financial claim in the plaint, which the client enumerated as: -

- The client had no right to demand payment of monies without reconciliation of accounts and giving credit for the sum of US \$ 72, 317. 50;
- The client had no right to stop delivery of products and or incite authorized or tell other dealers not to supply petroleum products or any other products to the plaintiff;
- The client had no right to demand payment while it held enforceable securities;
- Accounts be taken between the plaintiff and the defendant in respect of amounts not credited into the plaintiff’s account by the client.

To that list, however, there ought to be the plaintiff’s plea that the defendant/client had no right to take possession of the Kisumu depot. The client did consider this to be an important issue for it instructed the advocate in filing the defence to answer to the same.

The client further erroneously stated that the taxing master made consideration to the defence filed, thereof, by the advocate and more specifically paragraph 8,9,11,13,14,15 and 16, and went on to find that the issue raised in those paragraphs of the defence “**are substantial non monetary claims.**” The client proceeded to argue that in the absence of a counter-claim, these items in those paragraphs did not constitute the non-financial claims upon which an assessment should have been undertaken. The client was in error on this submission because the defence runs from paragraphs 1 to 9. It is clear that the taxing master referred to the plaint in the aforesaid paragraphs and not to the defence as submitted by the client.

Client further submitted the taxing master made irrelevant considerations, which included the finding that the claim included defamation, guarantees, charges and leases. The client was of the view that this irrelevant consideration justified the court to interfere in the taxation of those non-financial claims. The court in this regard does not accept the client’s argument. The issues of securities, that is guarantees and charges were pleaded by the plaintiff.

The plaintiff further pleaded that the defendant/client had verbally instructed other petroleum dealers, their affiliates and agents not to supply any products to the plaintiff. That plea I believe is what the taxing master categorized as defamation. I accept that looking at it one cannot say per se that it was defamation but I believe that how it is categorized is not important. What is important is that it was a non-financial claim made by the plaintiff. The issue of leases was captured in the defence filed on behalf of the defendant/client. I do not accept the client’s submissions the the taxing master was not justified to consider the defence in calculating the non-financial claims, Schedule VI provides that the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties. The taxing master was therefore entitled to be so guided in taxation.

Client relied on the case **FIRST AMERICAN BANK OF KENYA VS SHAH AND OTHERS 2002 VOL I E.A. 64**, for the proposition that the taxing master erred in failing to set out the basic instruction fee before increasing the same. Client particularly relied on the following passage of that case: -

“.... The taxing officer must first set out the basic fee before venturing to consider whether to increase or reduce it. The taxing officer did not do so in this case and the matter is left to inference. That is not a correct approach.”

Client in that argument was entirely in correct in that the taxing master in his ruling stated: -

“There is no doubt that the starting place herein is schedule to part A where the minimum fee is Kshs 6, 000/-.”

The taxing master having stated the minimum fee proceeded to analyse the authorities before finally making a find; after the exercise of his discretion, the amount the advocate was entitled to in regard to the non-financial claim.

Client argued that the increase from the minimum fee to Kshs 1, 000, 000/- was manifestly excessive and it was irrational. This the client sought that there be a finding that there was an error in principle and that the bill of costs be either remitted to the taxing master for reassessment or that this court be pleaded to substitute its own decision.

The Advocate opposed the application and submitted that this court can only interfere with taxation where there is an error of principle or where the taxing master may have considered irrelevant matters. That in regard to quantum the court ought not ordinarily interfere. The Advocate relied on the case **HC MISC. NO. 108 OF 2005 MAINA MURAGE & COM – V – CALTEX OIL (K) LTD where the court relied on a passage from the case D’SOUZA V FERRAO [1960] EA 602** as follows: -

“On question of quantum the decision of the taxing master is generally speaking finally. It must be a very exceptional case in which the court will even listen to an application to review his decision. In question of quantum the judge is not nearly as competent as the taxing master to say what is proper amount to be allowed; the court will not interfere unless the taxing master is shown to have been wholly wrong. If a question of principle is involved it is different, on a mere question of quantum on the absence of particular circumstances the decision of the taxing master is conclusive.”

Having considered the argument placed before me I am unable to find that the taxing master erred on a matter of principle or that he considered irrelevant matters in arriving at his finding on non-financial claim. I find that the taxing master quite correctly considered the non-financial claims and analysed them and took into consideration the authorities and I find that there was no error in the award of Kshs 1, 000, 000/-. That amount does not give an inference of error in principle. The parties did accept that there was an error in the arithmetic of the taxation in that the taxing master failed to take account of an amount of Kshs 50, 000 awarded in the first taxation and which was not subject of the previous reference. The court in view of that agreement between the parties will increase the instruction fees by Kshs 50, 000 to bring it to the total of Kshs 1, 118, 102. 90. Having regard to that increase the amount of taxation will be reviewed in following terms.

Instruction fees Kshs 1, 118, 102. 90

Add ½ Advocate/Client Kshs 533, 051.00

1, 652, 154.35

Uncontested items Kshs 8, 580.00

1, 660, 734.35

Vat at 16% Kshs 265, 717.50

1, 926, 541.85

Disbursements Kshs 525.00

TOTAL **1,926,976.85**

The Advocate bill of costs shall therefore be for Kshs **1,926, 976. 85.**

It is so ordered.

MARY KASANGO

JUDGE

Dated and delivered this 17th day of October 2006

MARY KASANGO

JUDGE