



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

**Misc Appli 942 of 2005**

**D. NJOGU & COMPANY ADVOCATES..... APPLICANT**

**VERSUS**

**PANAFCON ENGINEERING LIMITED..... RESPONDENT**

**RULING**

Before me is an application expressed to be brought under Rule 11(1) of the Advocates Remuneration Order (Under Cap 16 of the Laws of Kenya) and all enabling provisions of the Law. The application is by Panafcon Engineering Limited (hereinafter “**the client**”). The client is seeking primarily one order and that is that the Taxing Master’s decision on 16.3.2006 taxing the Advocate’s/Client Bill of Costs dated 26.10.05 at KShs.224,913.00 be set aside and or reviewed. The reasons for the application are as follows:-

- (i) That the Taxing Master in assessing instruction fees, item No.1, misinterpreted and misapplied the ruling in **Mayers and Another –vs- Hamilton [1975] E.A.**
- (ii) That in assessing instruction fees, the Taxing Master did not take into consideration the nature, circumstances, volume (lack of), difficulty (lack of), and extent of work done by the advocates.
- (iii) That the Taxing Master in reaching her decision did not consider that the advocates had not charged for fees for getting up for trial and as such had not prepared the matter for trial so as to be entitled to full instructions fees.
- (iv) That the Taxing Master erred in failing to find that the advocates had already assessed and advised the client that instruction fees in the matter would be KShs.50,000.00 and was bound by such assessment.
- (v) That the Taxing Master in reaching her decision misunderstood and misapplied Schedule VI part B of the Advocates Remuneration Order and thereby fell into error of principle, and reached a wrong decision.
- (vi) That the taxed costs are so excessive as to be oppressive.
- (vii) That in dealing with the item of V.A.T., the Taxing Master went outside her jurisdiction and the Advocates Remuneration Order and thereby fell into error of principle.

The application is supported by an affidavit sworn by one Joseph Njuguna Ngae a director of the client. The application was opposed and there are grounds of Opposition filed by the advocates. I heard

the arguments on 19.9.2006. The item involved in this reference is the instruction fees. To my mind the chief complaint against the Taxing Master's award in a nutshell appears to be that the full instruction fees had not been earned by the advocates as the Taxing Master found. The foundation of this complaint is that by the time a change of advocates was made in the suit giving rise to the bill of costs the advocates had only filed a plaint and perused subsequent pleadings by the defendant. There was no research done, no reply to defence was filed and no hearing date had been taken. In the premises the Taxing Master should have awarded less than the full instruction fees to reflect the work done. The client's further basis of complaint against instruction fees awarded by the Taxing Master is that in an "interim" fee note raised by the advocates only a sum of KShs.50,000/= had been claimed as instruction fees and that is the sum that should have been awarded especially as a Notice of Change of Advocates had been served. In the premises the client contends that the sum awarded as instructions fees was so excessive as to be oppressive.

The principles applicable upon a reference on a taxation by a Taxing Master are 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] E.A. 492.**

In the present case the action in respect of which the bill of costs was taxed is not in dispute. The advocates demanded and subsequently filed suit for recovery a principal sum of KShs.8,446,000.00. The value of the subject matter of the suit was therefore clearly ascertained. It is clear to me that that is the value that the Taxing Master applied. Was there basis for awarding less than the instruction fees awardable? In **Joreth Ltd – vs – Kigano and Another [2002] 1 E.A 92** the Court of Appeal observed at page 100 as follows:-

**"By the first ground thereof the Respondent states that Instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. In principle that is correct" underlining mine.**

Although the decision in that case would appear to contradict the decision of the Court's earlier decision in **Mayers and Another –vs – Hamilton and Others[1975] E. A. 13,** in reality there is no contradiction. At page 16 of that case their Lordships stated as follows:-

"I accept that the moment an advocate is instructed to sue or defend a suit, he becomes entitled to an instruction fee but it is necessary .....to realize that an advocate will not ordinarily become entitled at the moment of instruction to the whole of the fee which he may **ultimately claim.** Suppose for example, that within a few minutes of receiving instructions to defend a suit, an advocate were informed that the plaintiff had decided to withdraw. **The advocate would as I see it be entitled to claim the minimum instruction fee** but he could not properly claim in respect of work he had not done. (underlining mine)."

To my mind it is clear that on being instructed an advocate is entitled to the minimum instruction fee. The figure may be increased at the discretion of the Taxing Master.

The High Court is bound by those Court of Appeal decisions. Ringera J as he then was in **First American Bank of Kenya –vs – Shah and others [2002] 1 E.A. 64** followed the decision of the Court of Appeal in **Joreth Ltd – vs – Kigano and Associates (Supra).**

I have perused the Ruling of the Taxing Master being challenged; I do not detect any error of principle. She did not misinterpret or misapply the ruling of the Court of Appeal in **Mayers and Another –vs – Hamilton and others (supra).** Indeed she has the support of the Court of Appeal in its decision in **Joreth Ltd – vs – Kigano and Another (Supra).** I also do not find as serious the complaint that the Taxing Master should have awarded the sum of KShs.50,000.00 which had been demanded in an interim fee note by the advocates. I also do not find as fatal the Taxing Master's consideration of the V.A.T. payable by the advocates.

Having found that the Taxing Master did not commit any error of principle in arriving at the figure of instruction fees that she awarded, the reference dated 14.6.2006 and filed on 15.6.2006 is without merit and I dismiss it with costs to the advocates.

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 12<sup>TH</sup> day of OCTOBER, 2006.**

**F. AZANGALALA**

**JUDGE**

**12/10/2006**

Read in the presence of:-