REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 264 OF 2003

APOLLO INSURANCE CO. LTD..... RESPONDENT/APPELLANT

VERSUS

SHAH & PAREKH…….....….APPLICANT/RESPONDENT

JUDGEMENT

This appeal, brought under rule 11(2) of the Advocates (Remuneration) Order, and dated 30th June, 2004 sought the setting aside of the taxing master's decision delivered on 20th November, 2003; further sought that the matter be referred back to the taxing master, with directions on the conduct of taxation; and also sought that the costs of the appeal be provided for.

The grounds in support of the appeal are as follows:

(i) that, the ruling and/or reasoning of the taxing master has no basis in law;

(ii) that, the taxing master erred by not taking into account the applicable schedule of the Advocates (Remuneration) Order and the provisions of paragraph 58 of the Advocates (Remuneration) Order;

(iii) that, in taxing the entire bill of costs and particularly item 1 thereof, the taxing master failed to appreciate that the applicable edition of the Advocates (Remuneration) Order was the one in force at the time of receipt of instructions;

(iv) that, the taxing master exceeded his discretion in allowing a blanket increment-by-half to cater for advocate-client fees, without regard to the edition of the Advocates (Remuneration) Order applicable for each item of the bill of costs;

(v) that, the taxing master committed errors of principle, and so the Court has jurisdiction to interfere with his decision on taxation.

On the same day, 1st July, 2004 the application was filed, the Applicants herein, by virtue of rule 11(i) of the Advocates (Remuneration) Order, filed a notice of objection to the taxing master's decision and made a request for reasons for the same.

Learned counsel, Mr. Mutua for the Applicant submitted that the taxing master had fallen into error in several respects: with regard to instruction fees, he based his calculations on the 1997 edition of the Remuneration Order and this led to error, as instructions had been given on 8th October, 1993 and so the operative Remuneration Order was the 1993 edition. The 1993 edition had entered into force on 1st September, 1993. Counsel contended that, from the fact that the matter in respect of which counsel had

performed professional work was concluded in 2000, the taxing master must have presumed that the applicable edition of the Remuneration Orders was that of 1997. He submitted that instruction fees are earned at the time of receipt of instructions, and the actual date of completion of the professional task assigned was of no moment. Counsel contended that the only relevance of the duration of an advocate's professional services is that it can give a discretion to the taxing master to increase the level of fees. Instruction fees as such is based on the value of the matter being handled, and so it can be objectively determined in advance and so in essence should remain constant.

Counsel averred that while the taxing master did indeed take note of the value of the matter, he failed to address his mind to the terms of rule 58 of the Remuneration Order, which related to costs in the Subordinate Courts. The judgement was given in the year 2000, and it was for the sum of Kshs.280,000/=. Counsel submitted that costs ought to have been limited to the proper scale applicable to Subordinate Courts; but the taxing master appears to have been guided by Schedule 6 of the Remuneration Orders which applies only to the High Court. Counsel submitted that the applicable schedule would have been Schedule 7, which applies to Subordinate Courts. He contended that the action of the taxing master had not been guided by any Court Orders specifying that the matter could only be determined on the basis of High Court scales.

It became clear that part of the Applicant's complaint arose from its conviction that the judgement sum of Kshs.280,000/= being within the pecuniary jurisdiction of the Subordinate Courts, only the scales applicable to Subordinate Courts should apply even if the matter had been decided in the High Court.

Counsel contended that the taxing master had erroneously cut across both the 1993 and the 1997 editions of the Remuneration Orders; because he appears to have given a blanket increment by half, whereas an increment by half was applicable under the 1997 edition but not the 1993 edition of the Remuneration Orders. He averred that under the 1993 edition, the applicable level of increment was only one-third. As a result, counsel contended, in the taxing master's orders, *those items which should have come under the 1993 edition of the Remuneration Orders have been exaggerated, to the detriment of the Applicant*. The quantum of fees assessed in relation to the judgement figure (Kshs.280,000/=), taxed at 123,607/66, was in the view of counsel manifestly high and this, as counsel urged, reflected an error of principle.

Learned counsel, ***Mr. Mutua*** relief on the Court of Appeal case***, Steel Construction & Petroleum Engineering (E.A.) Ltd. v. Uganda Sugar Factory Ltd*** (1970) E.A. 141 to support his submission. The basic principle regulating the Court's jurisdiction in taxation matters is thus stated in that case (p.143 **–** ***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."***

In that case ***Sir Charles Newbold, P*** had occasion to make remarks about "an assessment [that is] manifestly extravagant" (p.146):

> ***"In my view the instruction fee allowed by the taxing officer was too high in relation to the amount recovered and having regard to other items allowed in the bill."***

Counsel submitted that the taxing master had committed errors of principle, and that this created jurisdiction for the High Court to interfere.

Learned counsel, ***Mr. Tiego*** for the Respondent attached significance to the fact that what was before the Court was an *Advocate-Client bill of costs*. The Advocates, Shah & Parekh Advocates (who are the Respondents) had instructed Appollo Insurance Co. Ltd (the Appellants) to defend against a suit filed in the High Court. Owing to the fact that the costs are Advocate-Client costs, learned counsel submitted, these could only be assessed under Schedule 6 of the Remuneration Orders. ***Mr. Tiego*** stated that the

award given was not Kshs.280,000/=, as the Court assessed damages at Kshs.400,000/=. This judgement amount, counsel stated, was only reduced to 280,000/= after making an allowance for contributions on liability; so, under Schedule 6(1)(a) of the Remuneration Orders, the value of the subject-matter was Kshs.400,000/= - and value here means the *quantum awarded*.

Mr. Tiego stated that the judgement in question had been awarded on 9th May, 2000; and contended that the bulk of the work had been done after the 1997 edition of the Remuneration Orders entered into force. Counsel perceived this state of affairs against the tenor and effect of Schedule 6(1)(a), which he submitted gives a *wide discretion to the taxing master*, exercisable in relation to the remuneration orders in place.

As at 1993, learned counsel submitted, the value of the subject-matter could not have been ascertained, and this became known only in 2000 when judgement was delivered, in a personal injury case. It was further submitted that Schedule 6(a) had application where the value of the subject-matter can be determined from the pleadings; but this could not be known at the time of the pleadings. Under Schedule 6(1)(a) the value can be determined by (i) the *pleadings*; or (ii) the *judgement*; or (iii) by *settlement*. Counsel remarked that the *pleadings were only claiming general damages; and it is only at the end of the suit, brought about by judgement, that the value could now be ascertained*.

Mr. Tiego contested the contention made for the appellant, that "the taxing master erred by not taking into account …the provisions of paragraph 58 of the Advocates (Remuneration) Order"; because the provisions of rule 58 refer only to *party-and-party costs*, and the purpose is to control the mischief apt to be committed by Plaintiffs who bring their suits to the High Court when the Subordinate Courts would have been more appropriate.

Was the taxing master in error when he increased costs by half, across the board? ***Mr. Tiego*** contended that the Appellant had shown no valid case that when professional work extends in time from one Remuneration Order to the next, then the assessment of costs may be split between the prescriptions of the two Remuneration Orders. It is, of course, plausible to raise too the question whether any authority exists for the position that no such split between the Remuneration Orders may be effected. Indeed, one could also ask whether, *if no such split is effected*, then the reference point must be the *later*, rather than the *earlier*, of the two Remuneration Orders. I think this is uncertain ground, and its difficulties can only be solved by applying the *most practical formula* as determined by the taxing master.

On that question of practicality, learned counsel contended that, where the two Remuneration Orders in reference carried differing increment indices, such as one-third and one-half respectively, a split as proposed by the Appellant, between the two Remuneration Orders is not practicable. This, I think, may be so; and again the matter belongs to the sensible exercise of discretion by the taxing master. I think that where the taxing master adopts any particular formula in that regard, his ruling should expressly indicate the preference taken, assigning reasons for the same.

In his response, learned counsel ***Mr. Mutua*** contended that it was not relevant whether the judgement award had been Kshs.280,000/= or Kshs.400,000/=, because both figures fall within the jurisdiction of the Subordinate Courts.

Mr. Mutua also submitted that while paragraph 58 of the Advocates (Remuneration) Order appears to deal only with party-and-party costs, Schedule 6B was the one dedicated to Advocate-client costs; but that in the 1997 edition of the Advocates (Remuneration) Orders, Advocate-and-Client costs represented a proportional increment on what is awarded in Schedule 6A – and that this means it is a fraction of what is paid as party-and-party costs. Counsel submitted, on that basis, that the taxing master must first determine the party-and-party costs before coming to the Advocate-Client costs. He considered it wrong that the taxing master should have effected an across-the-board increase on costs by half.

Counsel submitted that the Advocate drawing up the bill of costs should have drawn a line between the 1993 and the 1997 Remuneration Orders; and that the taxing master erred by increasing costs uniformly by the factor of one-half rather than one-third. He also impugned the failure by the taxing master to state whether he was exercising a discretion conferred by law.

The judge's role in matters of taxation of costs is clear from authority. *It is not for him to conduct an assessment of the costs. But it is his responsibility to ensure compliance with the law, on the part of the taxing master*. That law is to be found mainly in the Advocates (Remuneration) Orders, even though, as in the instant case, those Orders are not always plain in their meaning and requirements.

One point of disagreement is *whether a case falling within the pecuniary jurisdiction of the Subordinate Courts but which is heard in the High Court should be the subject of fees on the Subordinate Court scale or the High Court scale.* Counsel have not called forth any authorities on this point. I for my part, would think that it is the responsibility of parties to determine at a very early stage, *in what Court they should file and prosecute their case*. Regardless of the monetary value of a case, if the parties choose to prosecute it in the High Court, then I think the applicable fee scale should be the normal one for the High Court. The High Court requires certain standards of advocacy, and these apply whether a case is one of low, medium or high monetary value. Applying this principle to the instant case, I would not agree with counsel for the Appellant that the taxing master should have assessed the costs on the footing that the subject of the judgement was one that properly belonged to the Subordinate Courts.

It follows that I am in agreement with counsel for the Respondent, that the judgement sum was Kshs.400,000/= and not Kshs.280,000/=; and so it is on the basis of that higher value that costs could have been properly assessed; and thus in this regard there is no departure from the law on the part of the taxing master.

On the question whether the taxing master could give a blanket increment of *half*, rather than adopt the *half-level* increment for some and the *one-third level* for others, as I have already stated, *practicality* is the vital consideration here; and I would hold it in favour of the taxing master that he would have duly exercised his discretion in a practical manner. As I indicated earlier, it would be most appropriate *if the taxing master upon exercising his discretion as aforesaid would consistently record the factors that have guided him.*

On the question whether the taxing master could partially rely on the 1993 edition of the Remuneration Orders and partially apply the cost levels specified in the 1997 edition, again, I think, practicality is the most important question here. I would take it in favour of the taxing master that he would have taken such a practical approach. Ideally, of course, the taxing master's ruling should carry a record of the manner in which such a practical question has been dealt with.

In the light of the positions that I have taken on those pertinent questions, is it possible to say that there is any extravagance in the costs as taxed, which could show misdirection on a matter of principle? I am not able to say so. I do not think the taxing master got into any excess in his assessment of costs, such as would justify the Court's interference.

I will, therefore, make the following Orders:

1. The Appellant's prayer that the Court do set aside the taxing master's decision on taxation, delivered on 20th November, 2003 is refused.

2. The Appellant's prayer that this matter be referred back to the taxing master with directions on the proper manner of taxation, is refused.

3. The Appellant shall bear the costs of this appeal.

DATED and DELIVERED at Nairobi this 28th day of January, 2005.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For the Respondent/Appellant: Mr. Mutua, instructed by M/s. Mereka & Co. Advocates

For the Applicant/Respondent: Mr. Tiego, instructed by M/s. Shah & Parekh Advocates