



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, NAIROBI

Civil Case 2655 of 1996 (1)

TRANS-NATIONAL BANK LIMITED.....PLAINTIFF

VERSUS

ELITE COMMUNICATIONS LIMITED.....DEFENDANT

AND

SAM K. NYAMWEYA.....RESPONDENT

RULING

There are two applications herein, both brought under Rule 11(2) of the Advocates (Remuneration) Order. The first one is chamber summons dated 17th January, 2005 filed by SAM K. NYAMWEYA (hereinafter called Nyamweya). He objects to the decision of the taxing officer in allowing only Kshs.456,025/85 in respect to item No. 1 of the party/party bill of costs dated 26th April, 2004,. The three grounds for the objection as they appear on the face of the application are really one ground, that is, that the sum allowed was so low as to amount to an injudicious exercise of discretion.

The second application is by chamber summons dated 31st January, 2005 filed by the Plaintiff, **TRANS-NATIONAL BANK LIMITED**, in which the Plaintiff also objects to the taxing officer's decision in respect to the same item No. 1 of the same bill of costs. The grounds for the objection are more specific. They are as follows (as they appear on the face of the application)-

- (1) The taxing officer proceeded along a wrong principle by taxing item No. 1 under paragraph 1(b) of Schedule VI of the Advocates (Remuneration) Order.**
- (2) The taxing officer erred in failing to recognize that the bill of costs arose out of the dismissal of the Plaintiff's application by notice of motion dated 17th March, 2003 and that the taxation thereof with respect to instruction fee should have been under paragraph 1(o) (viii) of Schedule VI aforesaid.**
- (3) The taxing officer did not bear in mind that a successful litigant ought to be fairly reimbursed the costs he has had to incur and that such costs should be compensatory and not punitive. As a result the amount awarded in item 1 of the bill of costs amounted to unjust enrichment of a litigant.**

(4) The taxing officer otherwise exercised her discretion wrongly and thereby occasioned injustice to the Plaintiff.

The background of the present tustle is as follows. The Plaintiff obtained summary judgment against the Defendant, **ELITE COMMUNICATIONS LIMITED**, for Kshs.17,480,078/10 plus interest and costs. Decree was issued. The sums due upon the decree amounted to over Kshs.27 million. Attempts to execute the decree against the Defendant did not bear fruit. By an application by notice of motion dated 21st March, 2003 the Plaintiff sought orders to have the corporate veil of the Defendant lifted and, in effect, the decree to be executed against Nyamweya. That application was dismissed with costs on 5th December, 2003. Nyamweya thereafter filed the subject bill of costs which was taxed on 8th November, 2004.

Briefly, the arguments of the learned counsels before me were as follows. Mr. Amolo for Nyamweya submitted that the notice of motion dated 21st March, 2003 was a proceeding after the suit as Nyamweya was never a party to the suit. Therefore Schedule VI 1(b) of the Advocates (Remuneration) Order was applicable. Had the application succeeded against Nyamweya he would have been liable to carry the entire decree against the Defendant. Although under the said sub paragraph (b) the scale instruction fee is Kshs.456,025/85, taking the decretal sum of Kshs.27,735,057/25 as the value of the subject-matter, that scale fee must be viewed from the perspective that the Remuneration Order was last reviewed on 11th December, 1997 by Legal Notice No. 550. The taxing officer therefore, further submitted Mr. Amolo, should have allowed for inflation; she did not.

Mr. Amolo also submitted that the taxing officer did not take into account the complexity of the matter and the interest of the parties in the application. In his view, the facts that Njagi, J. took one morning and three afternoons to hear the application, that several authorities were quoted, and that the resultant ruling was 21 typed pages long, are indications of the complexity of the matter. The fact that over Kshs.27 million was at stake was indicative of the grave interest of the parties in the matter. The taxing officer should therefore have added a premium to the basic instruction fee.

Mr. Amolo finally submitted that as advocate/client costs will ordinarily be pegged upon the party/party costs he would be tied down by the award made by the taxing officer for instruction fee should he have to tender a bill of costs to his client. In his view taxation of costs should be such that the practice of advocacy is not discouraged. He urged this court to vary the amount taxed in item No. 1 of the bill of costs by appropriately increasing it. He relied on some six decisions, all of which I have read.

Mr. Oduol for the Plaintiff replied as follows. Nyamweya was not one of the original and principal parties. He was not suing or defending the suit. The notice of motion dated 21st March, 2003 was a proceeding in execution of decree. Therefore, the applicable provision is paragraph 1(o) (viii) and not paragraph 1(b) of Schedule VI. Even paragraph 1(l) of the same Schedule is not applicable. Under paragraph 1(o) (viii) the basic instruction fee is Kshs.2,500/00. The award of the taxing officer was therefore manifestly excessive. An error of principle is disclosed by taxation under the wrong provision.

Mr. Oduol further submitted that inflation is not one of the factors to be taken into account in the exercise of discretion in taxation. While conceding that the complexity of a matter should be considered he submitted that as observed by the taxing officer herself no material was placed before her to warrant an increase. It was now too late in the day for such material to be placed before this court. In any event, in his view, the matter did not involve exposition of any complex or novel principles of law. On the contrary the principles with regard to lifting the corporate veil are well known and established. Mr. Oduol therefore sought an order to remit back the matter to the taxing officer with directions that the item in question be taxed under the correct provision of Schedule VI of the Advocates (Remuneration) Order. He relied on two decision which I have also read.

I have considered the above arguments of the learned counsels. The issue is really simple. It is, under what provision of Schedule VI of the Advocates (Remuneration) Order was item No. 1 of the bill of costs taxable? But let us first consider the jurisdiction of this court in references under Rule 11(2) of the

Advocates (Remuneration) Order. The court will interfere where the taxing officer erred in principle. However, questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal, and the court will intervene only in exceptional cases, say, where the amount allowed is so manifestly excessive or manifestly inadequate as to be indicative of the exercise of a wrong principle. See the case of **THOMAS JAMES ARTHUR –VS- NYERI ELECTRICITY UNDERTAKING**, (1961) EA 492. It would in my view be an error of principle to tax a bill or an item of a bill under the wrong provision of the remuneration order. It would also be an error of principle, in the exercise of the taxing officer's discretion to increase or reduce an amount provided by any provision of the remuneration order, to take into account irrelevant factors or to omit to consider relevant factors.

Where an error of principle is disclosed the court will normally remit the matter to the taxing officer with appropriate directions. But the court does have jurisdiction to itself assess the disputed item or items when appropriate.

In the present case the decision of the taxing officer was that item No. 1 of the bill (that is, instruction fee) fell properly under paragraph 1(b) of Schedule VI of the remuneration order. She held that the value of the subject-matter was the decree, liability for which Nyamweya was resisting. She also held that the attempted execution against Nyamweya (in effect the notice of motion dated 21st March, 2003) was a proceeding after the suit as contemplated in paragraph 1(b) of Schedule VI. She therefore taxed item No. 1 at the basic sum of Kshs.456,025/85 based on the value of the subject-matter which was the decretal sum of Kshs.27,735,057/25. Mr. Amolo for Nyamweya contends that the taxing officer correctly placed the instruction fee under paragraph 1(b) of Schedule VI, except that she erred in principle by not considering factors that would have led her to increasing the instruction fee appropriately. On the other hand Mr. Oduol for the Plaintiff contends that the instruction fee should have been allowed under paragraph 1(o) (viii) of Schedule VI.

My view of the matter is as follows. The notice of motion dated 21st March, 2003 was a proceeding *after* the suit. The suit had already been determined. After the Plaintiff failed to execute the decree against the Defendant the not insubstantial issue whether the corporate veil of the Defendant company should be lifted and Nyamweya be held personally liable to satisfy the decree then arose. The notice of motion was certainly not a matter arising *during* the proceedings; it was a matter arising *after* the proceedings, the proceedings here being those that resulted in the judgment and subsequent decree. The taxing officer therefore correctly taxed the instruction fee under paragraph 1 (b) of Schedule VI. The instruction fee could not have been taxed under paragraph 1(o) (viii) of Schedule VI or indeed under any other paragraph or sub-paragraph of Schedule VI. The value of the subject-matter could be determined from the judgment. It was the sums awarded in the judgment and crystallized in the decree at Kshs.27,735,057/25. In my judgment therefore, in as much as the taxing officer taxed the instruction fee under the correct provision of the remuneration order she did not commit any error of principle.

A plea to increase the basic instruction fee was made before the taxing officer. She held that no convincing reason was given to warrant an increase. Whether to increase the instruction fee or not was entirely a matter for her discretion. Undoubtedly it was a discretion to be exercised rationally and judicially. But nothing has been urged before me that is indicative of an error of principle in the exercise of that discretion. I do not subscribe to the view that inflation is a factor that the taxing officer should take into account. It would certainly be a factor for the Chief Justice to consider when reviewing the remuneration order. Costs are not an award of damages.

On the issue of complexity of the matter, I would observe that the length of the counsels' submissions, or indeed the length of the judge's decision, are not necessarily indicative of the complex nature of the matter. Learned counsels have been known to take days in submissions where an hour or two would have sufficed. Crafting judgments and rulings is an art that improves with experience, and conciseness and appropriate brevity come with time. There was nothing particularly complex or novel about the notice of motion dated 21st March, 2003 as to warrant an increase of the basic instruction fee. The substantial interest of the parties in the matter was already catered for by the value thereof which was determined from the judgment.

Mr. Amolo's submission that as advocate/client costs are ordinarily pegged upon the party/party costs and that he would therefore be tied down by the instruction fee awarded should it become necessary for him to tender a bill to his client is interesting. But the short answer to it is that the adverse party should not be unnecessarily penalized so that an advocate can overcharge his successful client!

From all the foregoing, both references have no merit and are hereby dismissed with no order as to costs. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF APRIL, 2005.

H.P.G WAWERU

JUDGE

DELIVERED THIS 22ND DAY OF APRIL, 2005