



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC MISC NO.38 OF 2019**

**IN THE MATTE ROF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA**

**-AND-**

**IN THE MATTER OF THE ADVOCATES REMUNARATION ORDER , 2014**

**-AND-**

**IN THE MATTE ROF THE PARTY AND PARTY BILL OF COSTS**

**DATED 28<sup>TH</sup> JUNE 2018 ARISING FROM ELC CASE NO. 208 OF 2017**

**EQUITY BANK (KENYA) LIMITED.....APPLICANT**

**-VERSUS-**

**THE AIR TRAVEL & RELATED STUDIES LIMITED.....RESPONDENT**

**RULING**

1. This is a Ruling in respect of Chamber Summons dated 28<sup>th</sup> February 2019. It is a reference arising out of the Ruling of Hon Barasa, Senior Deputy Registrar (as she then was). The Ruling arose out of a taxation of the Applicant's party and party bill of costs dated 28<sup>th</sup> June 2018.
2. The Applicant contends that the taxing officer was wrong in basing instruction fee on the outstanding loan amount of 203,887,397.44 as being the subject matter of the suit. The Applicant argues that the subject matter of the suit were two properties namely LR No.11916/18 and LR No. 11916/19 and that by the taxing officer taking the outstanding loan as the subject matter, she committed an error in principle and that this court ought to interfere with that finding.
3. The Applicant also faults the taxing officer in declining to award getting up fees on grounds that the suit which resulted in the taxation had not been confirmed for hearing. The Applicant argues that it had complied with the pre-trial directions by filing bundle of documents, witness statements and list of documents and that therefore the taxing officer was wrong in declining to award getting up fees.
4. The Applicant also faults the taxing officer on her decision on item Nos 3(a), to (f), 4 5, 6, 7,8, 9,12, 13, 14, 16,17, 19,20 ,21,22 ,23,24, 25,26 ,28,29,30,31,32,and 35. The Applicant argues that the taxing officer did not give any comments on items 3(a) to (f) among others and that this failure constituted an error of principle which warrants this court's interference.
5. On items touching on court attendance, the Applicant argues that the taxing officer reduced the amounts for attendance based on the lengthy of the proceedings in court file without taking into account that at times, parties are kept in court for long due to delay occasioned by court starting late .
6. On the issue of disbursements, the Applicant faults the taxing officer for disallowing most items on grounds that there was no proof of the same.
7. The Respondent opposed the Applicant's reference arguing that the taxing officer was correct in the taxation and the Applicant's complaints that the taxing officer did not comment on some items is without basis. The Respondent argues that in all items where there were no comments by the taxing officer, those items were allowed as shown in the amounts awarded under part "A". The Respondent further

argues that the case was withdrawn before hearing and that the taxing officer was right in basing the value of the subject matter at Kshs.203,887,397.44.

8. I have carefully considered the submissions by the Applicant as well as those of the Respondent. To determine what the subject matter in this suit was, a brief background is necessary. The Applicant had advanced the Respondent a loan of Kshs.194,546,000/= . The Respondent offered its two properties as security. The properties were LR No.11916/18 and LR No. 11916/19. The Respondent was in arrears and could not make the monthly repayments as agreed.

9. The Applicant served the Respondent with all requisite demands and statutory notices as required under the law. The Applicant finally advertised the two properties for sale. This is what prompted the Respondent to move to court and filed ELC case No. 208 of 2017 [The **Air travel & Related Studies Limited Vs Equity Bank (Kenya) Limited**]. The Respondent was initially granted a temporary injunction stopping the Applicant from selling the two properties. When the application by the Respondent was heard inter partes, the same was dismissed. The Respondent moved to the Court of Appeal but its application was too dismissed. The Respondent later withdrew its suit with costs to the Applicant.

10. Given the above brief background, the issue which emerges for determination is whether the subject matter of the suit was the outstanding loan amount at the time the suit was filed or the two suit properties. It is clear from the prayers in the Plaintiff that the subject matter of the suit was the two properties. The Respondent wanted to save the two properties from being auctioned. The subject matter of the suit which the Applicant filed a defence was not the outstanding loan amount. The taxing officer was therefore wrong when she held that the subject matter of the suit was the outstanding loan amount.

11. The taxing master in arriving at her finding stated thus:-

**“ I am of the considered amount (sic) that the subject matter of the suit was the amount outstanding on the debt that Equity bank had advanced to the Plaintiff and not the value of property that had been charged to secure the credit facility and which was later sold to recover the outstanding amount on default. The outstanding amount as at 24<sup>th</sup> April 2017 was Kshs.203,887,397.44, shown in the defendant’s defence to the suit. I will therefore take this amount as the subject matter of the suit”.**

12. In my view, the subject matter of the suit were the two properties. It is the impending sale of these properties that the Respondent wanted to salvage. The amount of the outstanding loan was just mentioned in the defence by the Applicant to explain why there was no need for the court to stop the sale of the two properties. The Applicant averred that if the sale of the two properties was stopped, the loan would grow and surpass the value of the two properties. The loan was never the subject of the suit. It is on this ground that I find that the taxing master erred in principle by holding that the subject matter was the outstanding amount of the loan.

13. There was no difficulty in ascertaining the value of the subject matter. There were valuations which were annexed to the affidavits by both the Applicant and the Respondent. The Applicant had annexed a valuation which returned a combined value of the two properties at Kshs.400,000,000/= . This was as 7<sup>th</sup> March 2017. In fact, in the earlier valuation reports which the Respondent exhibited, it was contending that the valuation by the Applicant was a gross under valuation. The Respondent’s valuation reports which were interim as the properties were being developed was much higher in value as at 2015.

14. The suit herein was withdrawn before pre-trial was done. The case was referred for pre-trial after the dismissal of the Respondent’s application. The suit was thereafter withdrawn when the Respondent realized that it was going nowhere. Schedule 6 part A 2(ii) of the Advocates Remuneration Order of 2014 is clear that no getting up fee is chargeable until the case has been confirmed for hearing. The Applicant argued that it had prepared the case by filing bundle of documents and witness statements. It is a requirement of the law that parties file their bundle of documents, list of witnesses as well as witness statements on filing suit or defence. This does not amount to a case being ready for hearing. There is a pre-trial conference to be followed before a case is confirmed for hearing. This process had not been undertaken and the case had not been confirmed for hearing. I therefore agree with the taxing officer that the Applicant was not entitled to getting up fees.

15. The Applicant argued that the taxing officer did not comment on a number of items. I have gone through each and every item where the taxing officer did not make any comments. I however notice that where there were no comments, that item was left intact. This can be confirmed from the final figure which she arrived at under part “A”. The taxing officer allowed 2,450,000/- under instruction fee. The total of part “A” is shown as **Kshs.2,547,730/=** . The difference between the total of part “A” and the instruction fee is **Kshs.97,730/=**. This forms the total amount for the items which were not taxed. Perhaps the taxing officer should have simply said that save for the items which had been reduced, the rest remained as presented. This would have avoided this argument that there was no comment on some items. Save for this observation, I do not fault the taxing officer and I have no reason to interfere with those items.

16. The other issue taken up by the Applicant is that the taxing officer reduced the amount for attendance. In each case where there was reduction, the taxing officer explained the reduction. There is therefore no basis for this court to interfere with the manner in which the taxing officer exercised her discretion.

17. On the issue of disbursements, the taxing officer disallowed most of the items on the grounds that there was no proof. Whereas I am alive to the fact that at times it is almost impossible to render proof of telephone calls, it was at least expected that the Applicant would have produced client’s telephone attendance list to show the days and duration of calls to act as a basis for award of such kind of charges. I am also aware that most advocates have their own copiers. An advocate is expected to keep a record of all the copies made on account of each particular client. A photocopy of that list would have guided the taxing officer. Other items like transport and postages should have receipts. There was no proof of any of this. I therefore have no ground to fault the taxing officer.

18. It is clear from the above analysis that the only item which has been set aside is on instruction fee. This matter is remitted back for re-

taxation on instruction fee by a taxing officer other than Hon. Barasa.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF JANUARY 2021**

**E.O.OBAGA**

**JUDGE**

In the Virtual presence of:-

M/s Omutimba for Applicant

M/s Mugambi for Respondent

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**