



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU**

Civil Case 337 of 1995

MEA LIMITED.....PLAINTIFF

VERSUS

B.A.T. KENYA LIMITED.....DEFENDANT

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RULING

This is a reference made by the Defendant under **Rule 11 of the Advocates (Remuneration) order**, whereby the Defendant is seeking the orders of this Court that items No. 3 and No. 67 of the Defendant's bill of costs dated the 5th of December 2001 be referred back for taxation before a different Deputy Registrar. The grounds upon which the reference is based is that the Deputy Registrar had not given the basis upon which the instruction fees at Item No. 3 and the getting up fees at Item No. 67 of the Defendant's bill of costs was taxed. The Defendant further contended that the Deputy Registrar had taxed the said items contrary to the provisions of the **Advocates Remuneration Order**. The Defendant stated that the basis upon which the Defendant's bill of costs ought to have been taxed was Kshs 24,914,945/= which was the value of the subject matter as provided by **Schedule VI(a)(1)(b) of the Advocates Remuneration Order**. The reference is opposed. The Plaintiff has filed grounds of opposition to the reference. The Plaintiff has stated that the orders sought in the reference were incapable of being granted given the factual circumstances of the case. The Plaintiff further stated that the Defendant had not complied with the mandatory provisions of **Rule 11 of the Advocates Remuneration Order** which the reference was purportedly made under.

At the hearing of the reference, Mr Okeyo Learned Counsel for the Defendant submitted that the taxing master had made an error in taxing the Defendant's bill of costs in that he did not consider the value of the subject-matter of the suit. Learned Counsel submitted that the value of the subject-matter at the time judgment was entered was Kshs 24 million plus interest. The Value Added Tax (VAT) chargeable was Kshs 3.8 million. The Defendant submitted that the taxing master did not consider the amount involved, the complexity of the issues involved, the amount of labour and the number of documents involved in the preparation of the defence of the suit before arriving at the said taxation, which

the Defendant argued was erroneous. The Defendant urged this Court to exercise its discretion to prevent a miscarriage of justice. The Defendant prayed that this Court makes an order resubmitting the taxation of the Defendant's bill of costs before another Deputy Registrar other than the Deputy Registrar who taxed the initial bill of costs. Mr Okeyo submitted that the Defendant would be satisfied if the instruction fees would be taxed at Kshs. 400,000/= and the Getting up fees be calculated at one third of the instruction fees.

Mr Nyandoro for the Plaintiff submitted that the taxing master had rightly rejected the claim by the Defendant to be paid Value Added Tax (VAT). The Plaintiff submitted that Value Added Tax (VAT) had not been awarded by the Court. Learned Counsel submitted that the amount which had been awarded by the Court was Kshs 16 million plus interest and costs. The Plaintiff argued that the Deputy Registrar was right in basing his calculation on the amount awarded by the Court. The Plaintiff further submitted that **the Subsidiary Legislation (i.e. the Advocates Remuneration Order)** that the Deputy Registrar based his calculation was that of 1993 and not that of 1997. Learned Counsel submitted that even if the Deputy Registrar was to consider the value of the subject-matter of the suit at Kshs 24 million as submitted by the Defendant the taxed amount on instruction fees would be Kshs 277,647/=. The Plaintiff argued that the taxing master had exercised his discretion fairly in taxing the Defendant's bill of costs. The Plaintiff further contended that this Court did not have jurisdiction to interfere with a taxation by a Deputy Registrar. The Plaintiff argued that the Deputy Registrar, in taxing the Defendant's bill of costs, did proceed according to the established principles of the law.

In reply, Mr Okeyo Learned Counsel for the Defendant submitted that the Deputy Registrar had applied the wrong principles of the law. He further submitted that the High Court had jurisdiction under **Rule 11 of the Advocates Remuneration Order** to interfere with a taxation. Learned Counsel submitted that the discretion of the taxing master was a legal one which had to be exercised judicially.

I have considered the rival arguments made by the Counsel for the Plaintiff and the Counsel for the Defendant. I have also perused the court file and noted the items which the Defendant was aggrieved when the same were taxed by the Deputy Registrar. The Plaintiff has contended that this court did not have jurisdiction to interfere with the exercise of the discretion by the Deputy Registrar when he taxed the Defendant's bill of costs. This contention by the Plaintiff is however not supported by the law. **Rule 11(2) of the Advocates Remuneration Order** gives this Court jurisdiction to examine the items which an aggrieved party has objected to and make an appropriate finding. It was held in Nairobi HC Misc. App. No. 358 of 2001 Machira & Co Advocates –versus- Arthur K. Magugu & Anor (Milimani) (unreported) and in Nairobi HC Misc. App No. 151 of 2001 Machira & Company Advocates – versus- Arthur K. Magugu & Anor (Milimani) (unreported) that under the provisions of **Rule 11(2) of the Advocates Remuneration Order**, the High Court, when an appropriate reference is made to it, has power to consider and render a ruling on items which an aggrieved party disputes. In the instant case, the Defendant has properly made a reference by way of Chamber Summons as provided by **Rule 11(2) of the Advocates Remuneration Order**. The Plaintiff's objection to the jurisdiction of this Court is therefore without merit.

To address the substantive issue raised by the Defendant, it is not disputed that the amount which was the subject value of the suit was Kshs 16,463,491/20. The Plaintiff in his suit had sought to be paid the said principal amount plus interest which was to be calculated at the court rate of 14% per annum. The Plaintiff had also claimed for the costs of the suit and Value Added Tax at 18%. Learned Counsel for the Defendant submitted that putting into account the complexity of the matter and the hours expended in dealing with the issues raised, the Defendant's instruction fees ought to have been taxed at Kshs 400,000/= and not Kshs 250,000/= as taxed by the Deputy Registrar. The Plaintiffs suit was filed in 1995. Therefore the applicable **Advocates Remuneration Order** is that as amended in 1993 and not that of 1997. Learned Counsel for the Defendant has submitted that the value of the subject-matter which ought to have been considered by the taxing master was the principal sum sued for plus Value Added Tax, interest and costs. The Defendant therefore put the figure at Kshs 24 million.

After reading the judgment of the court, it is my view that the Deputy Registrar rightly used the principal amount of Kshs 16,463,491/20 which was pleaded by the Plaintiff as the basis of this taxation of the

instruction fees. Interest and costs always followed the event. There was no guarantee that the Plaintiff could have succeeded in his claim for Kshs 16,463,491/20. From what transpired on record, the Plaintiff lost the case. The Defendant's cost must therefore be taxed based on the sum claimed. Applying the 1993 **Advocates Remuneration Order under Schedule VI 1(b)** the amount which Item No. 3 ought to have been taxed at is Kshs 193,134.90. One third of the said amount taxed under Item No. 3 is Kshs 64,378.30 which is the getting up fees which ought to have been taxed under Item No. 67. The taxing master however taxed Item No. 3 at Kshs 250,000/=. I suppose the taxing master considered the complexity of the matter and the labour involved in the defence of the suit, that is why he increased the instructions fees by Kshs 56,866.00.

In the circumstances of this case, I do not find any merit in the reference filed by the Defendant. The Deputy Registrar considered all the relevant factors in arriving at the said taxation of Items No. 3 and No. 67. The reference therefore lacks merit and the same is dismissed with costs to the Plaintiff.

It is so ordered.

DATED at NAKURU this 15TH day of June 2004.

L. KIMARU

AG. JUDGE