



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**MISC. APPLICATION NO.700 OF 2003**

**KIPKORIR TITOO & KIARA ADVOCATE :::::::::::::::::::: PLAINITFF**

**VERSUS**

**AFRICAN BANKING CORPORATION LTD :::::::::::::::::::: DEFENDANT**

**RULING**

This is a reference from an Order on taxation made by the Taxing Officer on 6th February, 2004 with respect to the Advocate/Client bill of costs lodged in Court on 23rd July, 2003.

The reasons for the reference are in the Chamber Summons dated 28th June 2004 and filed on 1st July, 2004 and in the Supporting Affidavit of Njoroge N. Mungai Advocate sworn on 28th June 2004 for the Client. The main complaints are that the Taxing Master erred in principle in treating the matter as a debt collection exercise and failed to appreciate that the Advocate never carried out instructions of his client to file suit and instead merely gave an opinion. There is also a complaint that the Taxing Officer arrived at instruction fees based on schedule V paragraph 8(f) instead of Schedule V paragraph 6 of the Advocates (Remuneration) Order. There is also a further complaint that the Taxing Officer did not take into account the written submissions of the client. In Counsel's view the above are clear errors of principle and this Court should interfere with the decision of the Taxing Officer by setting it aside or reviewing it.

Reliance was placed on the decision in the case of Thomas James Arthur –v- Nyeri Electricity Undertaking (1961) E.A.492 where the Court of Appeal held that:-

***“Where there has been an error in principle the Court will interfere .”***

Reliance was placed on the case of First American Bank of Kenya Ltd –v- Gulab P. Shah & 2 others: Nairobi H.C.C.C. No.2255 of 2000 (unreported) for the proposition that the High Court may interfere with a decision of the Taxing Officer where the fee awarded is so manifestly excessive as to justify an inference that it was based on an error of principle.

Counsel for the Client also placed reliance on the decision in the case of: Steel & Petroleum (E.A.) Uganda Sugar Factory (1970) E.A. 141 in which a Judge's decision was reviewed on the ground that he had adopted a multiplying factor that lead him to reduce the instruction fee too severely.

On the above authorities Counsel for the client urged me to allow this reference by reviewing the decision of the Taxing Officer or by setting it aside and remitting the Advocate/Client's Bill of costs for fresh taxation.

Responding to the submissions made on behalf of the client the Advocates argued that there was no error of principle made by the Taxing Officer. In the Advocate's view the reference amounts to a challenge on quantum which should not be the basis of a reference. He submitted that an Advocate on receiving instructions does not and should not act as a robot. He should act as he deems fit. In his view the challenge made that he did not act on the instructions given by his client is misconceived. The instructions to file suit did not exclude the giving of his opinion as to chances of such a suit. He maintains that he set in motion recovery proceedings by the demand he made on behalf of his client. Counsel submitted that he lawfully and properly brought his bill for taxations under Schedule V of the Advocates (Remuneration) Order and that the minimum fee allowed was not different from the figure proposed by the Advocates for the client. Reliance was placed on the authorities cited by Counsel for the client in support of the Advocates argument that the Court should not interfere with the Taxing Officer's decision as no error of principle had been shown and no other basis had been laid for this Court's interference with the taxation.

Finally the Advocate submitted that this reference is incompetent as it was filed out of time and without leave. For this proposition Counsel relied upon the decision in the case of Machira & Co. Advocates –v- Arthur K. Magugu & Another: Nairobi HC. Misc. Appl. No.358 of 2001 (unreported).

In a brief reply Counsel for the client submitted that the reference is not incompetent as it was filed within the prescribed time.

I have now considered the application, the rival submissions, the affidavits filed, the authorities cited and the record. Having done so I have taken the following view of the matter. First on the issue of the competency of this reference, I have found that the same was filed within the prescribed time. The reasons for taxation were received by the client's Advocates on 17th June, 2004. This reference was filed on 1st July, 2004. This was the last day on which this reference was to be filed in accordance with paragraph 11 (2) of the Advocates (Remuneration) Order. The objection raised by the Advocate on the competency of this reference is accordingly rejected.

Turning now to the merits or demerits of the reference, I have found as follows: By its letter dated 24th September, 2001, the Client instructed the Advocate to institute suits against one D.S. Dogra and Vulpine Investments Limited for the recovery of Kshs 9,869,722/= and 34,133,007 respectively. Letters of demand were issued by the Advocate and correspondence exchanged between the advocate and his client culminating in the letter from the advocate dated 23rd January, 2003 addressed to his client. This letter was in the following terms:-

***“We refer to the above matter in which we have not received your further instructions. Herewith find our fee Note which settle to enable us proceed to close our file.”***

The fee note referred to showed Kshs 668,290.93 as instruction fees.

However, when the Advocate filed an itemized bill, the sum claimed as instruction fees was Kshs 1,520,245.10 and the total bill came to Kshs 1,772,661.08 including V.A.T. at 16%.

The Taxing Officer applied Schedule V paragraph 8(f) as urged by the Advocate.

The paragraph provides as follows:-

***8. DEBT COLLECTION In respect of non -contentious debt collection matters, an advocate may enter into a general agreement with a client to charge therefor upon the following inclusive scale in lieu of charging per item for work done ...”***

The Taxing Officer accepted the word of the Advocate on the face of it. There was no suggestion by the Advocate that he had entered into a general agreement with the client provided under the said paragraph. Indeed the record does not show that such a general agreement existed or was implied. It is obvious however, that the client's instructions were to file suits which were not filed. Indeed in respect of

instructions against Vulpine Investment Limited the Advocates had opined that a suit would not be advisable. No further instructions were forthcoming in the light of this opinion. In my view therefore instructions against Vulpine Investment Limited could not be treated as a debt collection exercise. In the circumstances, I hold that paragraph 8(f) of the Schedule V was not applicable. The Taxing Officer erred in principle in basing the taxation on the wrong provision of the Remuneration Order. In my view the Advocate's instruction fees ought to have been taxed under paragraph 1 of Part II of Schedule V of the Advocates Remuneration Order. The paragraph provides as follows:-

“PART II - ALTERNATIVE METHOD OF ASSESSMENT

1. Instructions

***Such fee for instructions as, having regard to the case and labour required the number and length of the papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all other circumstances the case , may be fair and reasonable, but so that due allowances shall be given in the instruction fee for other charges raised under this schedule!.***

In the end I allow the reference and remit the Advocates Bill of Costs back for fresh taxation before a different Taxing Officer with a direction that the instruction fee should be taxed in accordance with paragraph 1 of Part II of Schedule V of the Advocates Remuneration Order. The Taxing Officer will no doubt take into account the instructions given, “***the case and labour required, the number and length of the papers perused, the nature and importance of the matter the amount involved, the interest of the parties complexity of the matter and all other circumstances of the case***” as the said paragraph of the Remuneration Order provides. This direction does not exclude the urging of such other matters as the parties may wish to urge.

As this reference has been allowed on grounds other than those urged by the client I make no order as to costs of this reference.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF OCTOBER

2004

**F. AZANGALALA**

**AG. JUDGE**

Read in the presence of: