TAXATION OF COSTS

- Applicable principle.

- Whether High Court has Jurisdiction and a discretion to reassess a bill.

- When is basic instruction fees earned.

- Factors to consider in increasing basic instruction fee.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 2255 OF 2000

FIRST AMERICAN BANK OF KENYA LTD.....PLAINTIFF

VERSUS

GULAB P. SHAH.....1ST DEFENDANT

PANACHAND JIVRAJ SHAH.....2ND DEFENDANT

DIPACK PANACHAND SHAH.....3RD DEFENDANT

RULING

This is a reference to this court from a decision of the Taxing Officer on the 2nd and 3rd defendants' bill of costs. The reference is under rule 11 (2) of the Advocates Remuneration Order.

From the record the facts of the matter are as follows:

On 22nd December 2000, the Plaintiff instituted suit against the three defendants claiming from each of them the sum of Kshs. 105,247,351.35 together with interest thereon at the rate of 20% p.a. with effect from 31.1.2000 until payment in full on account of guarantees given by the said defendants to the Plaintiff to secure the indebtedness of a debtor. The defendants were all served by way of substituted service in the form of an advertisement in a local daily newspaper. The Third defendant entered appearance twice by different firms of Advocates. First on 11th July 2001 through Wasuna & Company Advocates and secondly on 12th July 2001 through Pheroze Nowrojee Advocate. Both memorandums of appearance were drawn of 11th July 2001. The second defendant for his part entered appearance on 13th July 2001 through Pheroze Nowrojee Advocate. Then on 10th August 2001, both the 2nd and 3rd defendants filed their separate written statements of defence through Pheroze Nowrojee and Wasuna and Company Advocates. The record does not show how or when the issue of representation of the 3rd defendant was resolved as between the two firms of Advocates. Be that as it may, on 13th August 2001, the Advocates for the Plaintiff filed a notice of discontinuance of the Plaintiff's suit against the 2nd and 3rd defendants. The notice was addressed to Wasuna and Company Advocates. On 17th August 2001, both defendants made identical requests for Judgement for their costs. On 22nd August 2001, the Deputy Registrar signed the Judgements for costs as requested. The 2nd and 3rd defendants then filed identical bills of costs on 27.8.2001. The same were set down for taxation on 19.9.2001. On the said date, Mr. Wandabwa, the 2nd defendant's Advocate prayed for the bill of costs to be taxed as prayed. The ruling thereon was delivered on 27.9.2001. What is of concern in this reference is the instruction fees. Each defendant claimed a sum of Kshs.3,500,000/-. The Taxing Officer taxed off Kshs.800,000/- and awarded a sum of Kshs.2,700,000/- to each defendant. The reference is solely against the decision of the Taxing Officer in respect of the instruction fees to defend the suit. For a full appreciation of the arguments before this court, I think it is convenient to set out the substance of the Taxing Officer's ruling on Taxation.

The Taxing Officer stated that she had looked at the Bills of Costs against the provisions of schedule VI of the Advocates Remuneration

Order under which the bills fell. She then noted that the claims were for Kshs.105,247,351.35 with interest thereon at 20% p.a. from 31.1.2000 until payment in full. She then observed that by a letter dated 13.8.2001 from the Plaintiff's Advocate, the Plaintiff's suit was discontinued. She also observed that by then the defendants had filed their defences. She then expressed the view that the defendants were accordingly entitled to instructions fees based on the subject matter of the suit. She also expressed the opinion that it was clear from the defences that the applicants had put in some good research on law and they put in what appeared like well researched defences. When she considered the above issues, she felt inclined to increase the fees payable and did so by giving instruction fees in respect of each bill at Kshs.2.7 million only.

That decision is strongly criticised by the Plaintiff's Advocate and also strongly supported by the defendants' Advocates. On behalf of the Plaintiff, it is contended that the Taxing Officer misdirected herself and exercised her discretion on wrong principles. The misdirection pointed out is that the Taxing Officer did not recognize that she had first to set the basic instruction fees before determining the appropriate fees in the matter. In that regard, it was pointed out that she did not state whether the basic fee was Kshs.l.5 million or Kshs.2.5 million or any other sum. The error of principle allegedly made by the Taxing Officer were failure to consider certain relevant factors. In that regard it was submitted that the Taxing Officer did not consider the fact that the Plaintiff's suit was withdrawn as against the 2nd and 3rd defendants only three days after it had been instituted and that no hearing had taken place. It was contended that if these factors had been considered, the Taxing Officer would have concluded that the basic instruction fees should be reduced. It was argued that the Taxing Officer has a discretion not only to increase but also to reduce the basic instruction fees. It was emphasized that the suit having been withdrawn three days after its institution, the only work done by the defendant's Advocates was the preparation and filing of a memorandum of appearance and defence. The Plaintiff's Advocate contended that the instruction fees is earned over the entire period of the case and matures on conclusion of the case; it is not earned in its entirety on receipt of instructions. It was contended that that was another consideration not appreciated by the Taxing Officer. The case of **MAYERS VS. HAMILTON** (1975) E.A 13 was relied on for the proposition that the entitlement under the instruction fees grows as the matter proceeds. It was also submitted that the Taxing Officer failed to consider the importance of the suit. In that regard, it was argued that the importance of the suit is not to be perceived from the point of view of the parties but from the point of view of the law. The present case was a straight forward one of liability under a guarantee. The Plaintiff's Advocate also submitted that the court can interfere with an award on taxation if it considers that the same is excessive. The case of **ELMANDRY & OTHERS VS SALIM** (1956) E.A. C.A. 313 was relied upon for the proposition.

The last submission by counsel for the Plaintiff was that if the court comes to the conclusion that the taxing master had acted on wrong principles, the matter should be remitted back to the taxing officer with appropriate directions. The case of **JORETH LTD VS. KIGANO & ASSOCIATES** (C.A No.66 of 1999) (unreported) was relied upon for that proposition. I was urged to remit the Bill in question to another Taxing Officer.

On behalf of the 2nd defendant, it was submitted that the Taxing Officer had not exercised her discretion on wrong principles. In support of the ruling it was argued that she had addressed her mind to the relevant schedule of the remuneration order and was cognisant of the basic fee and had decided to increase it. It was contended that it was not necessary for a Taxing Officer to set out in detail what was arithmetically obvious before the same could be increased. It was further argued that the Taxing Officer took into account the fact that the suit had been withdrawn and the complexity of the matter. It was contended that the fact that the defence had been filed soon after the service of the summons to enter appearance should not be used against the defendant. It was further submitted that the mere complaint that the fee awarded is too high could not warrant interference with a taxation. The case of **NANYUKI ESSO SERVICE VS. TOURING SPORTS CABS LTD** (1972) E.A. 500 was relied on. It was further submitted that if the only complaint was that the quantum awarded was so excessive as to indicate an error of principle, the court had a discretion to reassess the same. The case of **STEEL & PETROL (E.A.) LTD VS. UGANDA SUGAR FACTORY** (1970) E.A 141 was relied on for the proposition. The 2nd defendant's Advocate distinguished the case of **ELMANDRY & OTHERS** (supra) on the grounds that whereas in that case, the court had set out the considerations which the taxing officer had omitted, there were no such omissions in this case. **MAYERS VS. HAMILTON** (Supra) was distinguished on the basis that the reference to a minimum instruction fees was in a situation where a matter had been withdrawn before any step had been taken. Here, it was pointed out, an action, namely, the filing of a defence had been taken.

The 3rd defendant's Advocate associated himself with the submissions of the 2nd defendant. In addition he submitted as follows. The basic instruction fees must be awarded and cannot be reduced once instructions have been given. The discretion given to the Taxing Officer is only to increase. He construed the phrase "The fee for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it" in schedule VI (1) of the Advocates remuneration order to mean that unless there was a specific provision in the order providing for reduction of instruction fees, there was no discretion to do so. It was also submitted that the correct approach is for the taxing officer to consider the basic instruction fees and then find out whether there existed any other factor to make him increase the same. If he found even one such factor, he may increase the fees. As regards the amount of the increase, it was submitted that the same was discretionary. The case of **THOMAS ARTHUR VS. NYERI ELECTRICITY UNDERWRITERS** (1961) E.A. 492 was relied upon. It argued that in the instant matter, the Taxing Officer set out the subject matter of the suit, she was conscious of the basic fee and gave reasons for the increase. She also taxed off Kshs.800,000/-. In those circumstances the court could not substitute its own figure. It was also submitted that once instructions are taken and a defence filed, the instruction fees is earned and the opinion expressed in Richard Kuloba's **JUDICIAL HINTS ON CIVIL PROCEDURE** Vol.I that instructions fees covers the taking of instructions and advising thereon, the application of the law to the facts, the preparation of the matter for hearing and the actual hearing is not a correct statement of the law. In counsel's submission, preparation for the hearing is catered for by getting up fees and the actual hearing is catered for by attendance at the hearing. The case of **JORETH LTD VS. KIGANO & ASSOCIATES** (Supra) was said to support that submission. It was further submitted that as the instruction fee had been earned, it was not an error in principle or a misdirection not to have considered that the suit was withdrawn 3 days after the defence was filed. In Counsel's view, the only issue in this matter was whether the increase of instruction fees by 71% was so manifestly excessive as to amount to an error or misdirection. He submitted that in light of **THOMAS ARTHUR VS. NYERI ELECTRICITY UNDERWRITERS** (Supra) it was not.

I have considered the above submissions. First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle. (See **STEEL & PETROLEUM (E.A) LTD VS. UGANDA SUGAR FACTORY** (Supra). Of course. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates Remuneration Order itself, some of the relevant factors to take into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge. Needless to state not all the above factors may exist in any given case and it is therefore

open to the Taxing Officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer for re-assessment unless the Judge is satisfied that the error cannot materially have affected the assessment. (see **NANYUKI ESSO SERVICE V TOURING CARS LTD; STEEL & PETROLEUM (E.A.) LTD V UGANDA SUGAR FACTORY; THOMAS JAMES ARTHUR V NYERI ELECTRICITY UNDERTAKERS** and **JORETH V KIGANO & ASSOCIATES**). However, the Judge does have jurisdiction and it is within his discretion to reassess the bill himself; (See **STEEL & PETROLEUM (E.A.) LTD** and **THOMAS JAMES ARTHUR**). The court is not entitled to upset a taxation because in its opinion, the amount awarded was high (See **STEEL CONSTRUCTION & PETROLEUM ENGINEERING (E.A.) LTD**. The other general principle is that it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and that the amount of the increase or reduction is discretionary. (See **THOMAS JAMES ARTHUR V NYERI ELECTRICITY UNDERTAKERS**). In that respect, I must reject the submission made on behalf of the third defendant that the taxing officer has no discretion to reduce the basic instruction fees. On the contrary, I accept the submission made on behalf of the plaintiff that such discretion exists and that the only fees which cannot be reduced are those in respect of which it is provided that the amount thereof shall not be less than what is prescribed. An example is schedule VI (1) (g) (i): the instruction fees in matrimonial causes.

Considering the above basic principles, I think the only pertinent questions in this ruling are whether or not it has been shown by the plaintiff that the Taxing Officer acted on the wrong principles or arrived at a manifestly excessive taxation. The first error of principle complained of is that the basic instruction fees was not set out. That is correct. In my opinion, the Taxing Officer must first set out the basic fee before venturing to consider whether to increase or reduce it. The Taxing Officer did not do so in this case and the matter is left to inference. That is not a correct approach. The second error alleged is the failure to consider that the suit was withdrawn only three days after the defences were filed and that the suit did not proceed to hearing. Again, that is correct. Although the Taxing Officer mentioned the fact that the suit was withdrawn only three days after the defences were filed, it is not manifest from the reasons given for taxation that this factor weighed one way or the other in her consideration of the appropriate quantum of instruction fees. So the only question is whether that factor was relevant in the circumstances of this case. From the ruling it is manifest that the factor's importance in the mind of the taxing officer was that the withdrawal of the suit took place ***after*** the defences had been filed and accordingly, in her opinion, the full instruction fees had been earned. Counsel for the plaintiff's complaint is that the basic instruction fees is not earned or it does not mature until the conclusion of the suit. The defendant's position on the other hand is that the entire instruction fees was earned immediately the defences were filed. I confess the matter is not cut and dried. In **MAYERS V HAMILTON** (Supra) the East African Court of Appeal opined that whereas an Advocate becomes entitled to an instruction fee the moment he is instructed, he will not ordinarily become entitled at the moment of instruction to the whole of the fee which he may ultimately claim and that the entitlement under the instruction fees grows as the matter proceeds. That view accords with what is stated in **JUDICIAL HINTS ON CIVIL PROCEDURE** VOL.1 at page 143. The present Court of Appeal has on the other hand expressed the view that in principle the instruction fee is an independent and static item, chargeable only once and is not affected or determined by the stage the suit has reached. Faced with these apparently conflicting appellate decisions, I prefer the decision in **JORETH LTD V KIGANO & ASSOCIATES** (Supra). I completely agree with the submission made on behalf of the 3rd defendant in that respect. In my opinion, the full instruction fees to defend a suit is earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees. In the premises I don't consider that the taxing officer erred in not taking into account that the suit was withdrawn only three days after it was filed and that no hearing had taken place.

As regards the increase of the instruction fees, I accept that is a matter for the discretion of the Taxing Master. However the decision must be exercised rationally. Now the only reason given by the Taxing Officer here to increase the fees is that the defendants had done some research on the law and they had put in well researched defences. That, to my mind, is not one of the factors for taking into account in increasing the instruction fees. I am of the view that, if a defendant does research before filing a defence and then puts a defence informed by such research, he has done no more than expected. It is nothing extra ordinary. The research is not necessarily indicative of the complexity of the matter. It may well be indicative of the advocate's unfamiliarity with basic principles of law. Such unfamiliarity should not be turned into an advantage against the adversary. The latter would appear to be precisely the case here as the action was based on simple contracts of guarantee. It was a straight forward matter involving application of the facts to basic principles in contracts of guarantee. In that, I can see noting which would have led the Taxing Officer to increase the instruction fees here.

To summarise this matter, I find only two errors of principle on the part of the Taxing Officer, namely, an omission to set out the basic instruction fees and the act of increasing the same in the absence of any factors that would have justified an increase. I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees and then consider not increasing it as there are no factors to warrant an increase. I am convinced in my mind that that would be a waste of Judicial time in the circumstances of this case. It would also saddle the parties with further unnecessary costs.

I think the just course of action in this matter is for this court to exercise its discretion in a reference on taxation to determine the matter with some finality. I should therefore determine the basic instruction fees to defend a claim for Kshs.105,247,351.35 and vary the order on taxation accordingly. According to Schedule VI (l) (b) and (d) the instruction fees for defending a suit where the value exceeds Kshs.l million shall be a fee as for Kshs.1 million plus an additional 1.5%. Now the fee for Kshs.l million is Kshs.55,000.00 And 1.5% of the amount over and above that (which is Kshs.104,247.351.35) is Kshs. 1,563,710.30. If my arithmetic is correct, the basic instruction fees for each of the defendants is in the premises Kshs. 1,618,710.30.

In the result, the reference is allowed with costs to the plaintiff and the instruction fees for each of the defendants is varied from Kshs.2,700,000.00 to Kshs. 1,618,710.30.

Orders accordingly.

DATED at Nairobi this 25th day of April 2002.

A.G. RINGERA

JUDGE