



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. APPLICATION NO. 101 OF 2019

NYACHOTI & COMPANY ADVOCATES.....ADVOCATES

=VERSUS=

SAYANI INVESTMENT LIMITED.....CLIENT

RULING

Background

1. On 14/6/2019, M/s Nyachoti & Company Advocates (hereinafter referred to as “**the advocate**”) lodged an advocate-client bill of costs dated 11/6/2019 against Sayani Investments Limited (hereinafter referred to as “**the client**”). The bill of costs totaled Kshs. 4,113,534.67. The taxing officer of this court (Hon I N Barasa) taxed the said bill on 6/11/2019 at Kshs 2,497,423.8516. Dissatisfied with the decision of the taxing officer, on 14/11/2019, the client lodged a notice of objection to the taxing officer’s award in relation to items 1, 23 and the accruing Value Added Tax. Subsequent to that, on 19/11/2019, the client brought a reference through a chamber summons application dated 18/11/2019, challenging the taxing officer’s award and inviting the court to review, revise, adjust and reduce the award and give credit relating to the sum of Kshs 755,500 which they contended had already been paid to the advocate. The said reference is the subject of this ruling.

Client’s Case

2. The reference was premised on the grounds that: (i) the taxation of the bill was wrought and/or fraught with errors of principles; (ii) the taxing officer erred in computing, reckoning and calculating the instruction fee due and payable; (iii) the taxing officer misconceived and/or used the wrong principle in awarding instruction fee; (iv) the taxing officer exercised her discretion wrongly in awarding instruction fee; (v) as a result of the erroneous award on item 1, the taxing officer arrived at a wrong award on item 23; (vi) as a result of the erroneous award on items 1 and 23, the taxing officer arrived at a wrong award on Valued Added Tax; (vii) the learned taxing officer erred in principle by not factoring in the undisputed credit of Kshs 755,500 which had been paid to the advocate; and (viii) the award of costs to the advocate was contrary to the spirit of the **Advocates (Remuneration) Order** and the current jurisprudence.

Client’s Submissions

3. The Client’s Case reference was supported by an affidavit sworn on 19/11/2019 by the client’s advocate, Mr Edwin Omari Mongeri. The application was canvassed through written submissions dated 23/11/2020, filed by M/s Mongeri Kinyanjui & Co Advocates. Counsel itemized the following as the two issues falling for determination in the reference: (i) whether the taxing officer erred in awarding the advocate instruction fee of Kshs 1,423,726: and (ii) whether this court has discretion to reduce the legal fee on the advocate-client bill of costs.

4. On the first issue, counsel submitted that instruction fee in the material bill was governed by parts VI Schedules A and B of the **Advocates (Remuneration) (Amendment) Order** (hereinafter referred to as “**the Remuneration Order**”). Counsel argued that the taxing officer failed to consider the circumstances of “this case” where the advocate failed to act on instructions given by the client and exposed the client to the risk of judgment of over Kshs 80,000,000 being entered against it by failing to file witness statements and bundle of documents in support of the client’s case. Counsel contended that there was an intention by the advocate to reap where he did not sow. Counsel added that the taxing officer should have disallowed instruction fees in its entirety or exercised her discretion to reduce the amount substantially. Counsel contended that the taxing officer failed to set out the basic fee before venturing to consider whether to increase or reduce it. Counsel further argued that the advocate’s act of filing a bill of costs relating to a matter when he did not do any work was appalling. Counsel urged the court to take into account the foregoing and review the

instruction fee awarded by the taxing officer

5. On the second issue, counsel submitted that it was an established law that the moment an advocate is instructed to act in a matter, he becomes entitled to instruction fee but the advocate does not ordinarily become entitled to the whole of instruction fee at the point of instructions. Counsel argued that entitlement to instruction fee under the Remuneration Order “grows” as the matter proceeds. Reliance was placed on **Mayeri & Another v Hamilton & Others [1975] EA 13** to reinforce this point. Counsel added that the advocate was not entitled to any fee at all since he never acted on the client’s instructions in the first place.

6. Counsel for the client further argued that the advocate was not entitled to the instruction fee of Kshs 1,424,726.34 because the sum of Kshs 80,811,156 sought by the defendant as damages in the counterclaim had not been awarded by the court. Counsel added that in the event that the taxing officer properly found that the advocate was entitled to instruction fee, she ought to have exercised her discretion and reduced the fee or disallowed it altogether on the ground that the advocate had failed to act on the client’s instructions. Lastly, counsel argued that the taxing officer arrived at an erroneous figure on the final award because she failed to take into account the sum of Kshs 755, 500 which had been paid by the client. Counsel urged the court to grant the prayers sought in the application.

Advocate’s Case

7. The advocate opposed the application through a replying affidavit sworn on 28th July 2020 by Mr. Philip Nyachoti. He deposed that the allegation that the advocate failed to attend to Milimani ELC No 985 of 2014 were entirely baseless, unsubstantiated and lacked any merit because the advocate had at all times acted in the best interest of the client, prepared periodic status reports for all matters under their conduct, and shared the status reports with the client’s auditors. Regarding the deposit of Kshs 755,500, the advocate deposed that the Deputy Registrar fully took the figure into consideration because in the last paragraph of her ruling, she directed the parties to settle accounts taking into account the taxed fees. The deponent added that it was the advocate’s understanding that even though the certificate of taxation reflected a sum of Kshs 2,479,423.83, since the deposit of Kshs 755,500 was never disputed, the client was at liberty to deduct it from the final payment.

Advocate’s Submissions

8. In their submissions dated 27/11/2020, the advocate argued that it was a settled principle of law that the court would not interfere with a decision of the taxing officer unless it is established that the taxing officer’s decision was based on an error of principle. The decision in **B Mbai & Associates Advocates v Clerk, Kiambu County Assembly & Another [2017]** was cited to support this view.

9. The advocate reiterated that the allegation that they were not entitled to instruction fee because they neglected to attend to Milimani ELC No 985 of 2014 were baseless because they had at all times acted in the best interests of the client, held meetings with the client’s Director, Mr. Karim Jetha, and provided periodic status reports. Counsel added that instruction fee became chargeable and accrued immediately upon furnishing of instructions by a client. Counsel argued that they became entitled to instruction fee upon receipt of instructions.

10. Counsel further argued that instruction fee is chargeable strictly in accordance with the Remuneration Order, taking into account the value of the subject matter which, as a matter of principle, is determined from the pleadings, and assessment thereof is at the discretion of the taxing officer who exercises the discretion judiciously. Counsel added that because there was no judgment in the primary suit, the reference material was the pleadings where the money claims were clearly spelt out. He added that the money claim in the primary suit was Kshs 80,811,156 and there were other prayers in the primary suit and in the counterclaim. Relying on the Court of Appeal decision in **Joreth Limited v Kigano & Associates, CA No 66 of 1999**, counsel argued that instruction fee is a static item that is not dependent on the stage that the suit has reached. It was the advocate’s position that they became entitled to instruction fee on receipt of instructions. Counsel added that the plea to the court to disallow instruction fee on account of the client’s dissatisfaction with the advocate’s handling of the brief had no legal basis.

11. Counsel further submitted that the taxing officer had disallowed getting up fees on the ground that the advocate did not prepare for trial in accordance with the provisions of the Advocates Remuneration Order.

12. On item 23 of the bill of costs and on the award on Valued Added Tax, the advocate submitted that the respective figures were arrived at in strict adherence to the relevant legal frameworks. On the deposit of Kshs 755,500, the advocate submitted that the taxing officer took the deposit into consideration and directed parties to take accounts based on the taxed costs. The advocate added that since the deposit had never been disputed, the client was at liberty to deduct it from the final payment. Counsel urged the court to dismiss the reference with costs.

Analysis and Determination

13. I have considered the reference, the response thereto, and the parties’ respective submissions. I have also considered the relevant legal frameworks and jurisprudence. In their notice of objection dated 14/11/2019, the client only objected to three items, namely: (i) item 1; (ii) item 23; and (iii) Valued Added Tax. Item 1 relates to instruction fee. Item 23 relates to the ½ increment which accrues to the advocate on an assessment relating to an advocate-client bill of costs. Valued Added Tax is a static statutory figure that an award relating to advocate-client costs attracts under the relevant tax statute. What follows from the foregoing therefore is that there are two key issues in this reference. The first key issue in the reference is whether the taxing officer erred in her assessment of instruction fee. The second key issue is whether failure by the taxing officer to deduct or reckon the deposit of Kshs 755,500 is an error that warrants interference by this court. I will make brief sequential pronouncements on the two issues in the above order.

14. Taxation of costs is a discretionary jurisdiction vested in the taxing officer. In exercising that jurisdiction, the taxing officer is guided by the legal framework in the Advocates Remuneration Order as amended from time to time and by various principles laid down by Kenya’s superior courts. The jurisdiction of a judge of a superior court to interfere with the taxing officer’s decision is exercised on well settled principles. [see **Republic vs Minister of Agriculture and 2 Others; Exparte Muchire W’ Njuguna & Others (2006) eKLR.**] Firstly, a

judge of a superior court will not 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 manifestly excessive or manifestly low as to justify an inference that it was based on an error of principle. Secondly, it would be an error of principle on part of the taxing officer if she were to take into account irrelevant factors or if she failed to consider relevant factors. Thirdly, some of the relevant factors to be taken into account are set out in the Remuneration Order and include the nature and importance of the case 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.

15. Secondly, the principle to be applied by the taxing officer when assessing instruction fee relating to a suit are well settled. The Court of Appeal in the case of **Joreth Ltd vs Kigano & Associates** outlined the principle as follows: -

“We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just, taking into account, among other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances”.

16. The client's gravamen in this reference relates to instruction fee which the taxing officer assessed at Kshs 1,412,167.34/=. The client faults the taxing officer on the ground that she failed to take into account the fact that the advocate failed to act on instructions given by the client and exposed the client to the risk of judgment of Kshs 80,000,000/- being entered against it by failing to file a witness statement and bundle of documents. The taxing officer rendered herself on this issue as follows:

“I have carefully perused the bill of costs and the court record in ELC 985 of 2014; Caner Investments Limited v Sayani Investments Limited & Patrick Ng'ang'a Mburu t/a Virmir Auctioneers. I have also considered the submissions of the parties on the bill of costs. The respondent has stated that the applicant's right to tax the bill of costs has not crystalized and the bill of costs ought to be struck off the court record”.

17. From the above excerpt, it is clear that the taxing officer considered the court record of the primary suit against the allegations which the client had made in opposition to the bill. It is therefore not true that the taxing officer failed to appraise herself on the general conduct of the suit or on the services rendered by the advocate. Secondly, if the client was dissatisfied with the level of professional services rendered by the advocate, that was not an issue to be ventilated before a taxing officer or a basis for disallowing the prescribed instruction fee. Thirdly, the prevailing jurisprudence on the subject of instruction fee is that it is a static item that is not affected by the stage that the suit has reached [see **Joreth Limited v Kigano & Associates, CA No 66 of 1999**].

18. The client contended that the taxing officer failed to set out the basic fee before venturing to consider whether to increase or reduce it. This contention is without basis because in the last paragraph at page 3 of the impugned ruling, the taxing officer rendered herself on the subject of basic fee as follows:

“In ELC 985 of 2014, Cancer Investments Limited sought the following orders against Sayani Investments Limited; a permanent injunction, an order for accounts, Kshs 80,811,156.00/-, damages for breach of contract, costs and other reliefs. The applicant was instructed in the year 2015 when the ARO 2014 was in force. The instruction fee on this amount is as follows: Kshs. 120,000/- for the 1st 1,000,000 + 2% of 19,000,000 = Kshs 380,000/- + 1.5% of 60,811,156 = 912,167.34 totaling to Kshs 1,412,167.34/-. Instruction fees is taxed at Kshs 1,412,167.34/-. Kshs 620,000/- is taxed off.

19. In light of the foregoing, I find no error of principle to warrant interference with the award of the taxing officer.

20. The second issue is whether failure by the taxing officer to deduct the deposit of Kshs 755,500 is an error that warrants interference by this court. Payment of the sum of Kshs 755,500 to the advocate is not disputed by the advocate. Indeed, the advocate has admitted receipt of the money. Secondly, in the last sentence of the impugned ruling, the taxing officer stated thus:-

“The respondent has indicated that they paid the applicant fees on account. Let the parties settle their accounts taking into account the taxed fees”.

21. It is clear from the above excerpt that the taxing officer took into account the deposit paid by the client and directed the parties to settle their accounts. Secondly, the client's fear that the advocate would enforce the award without reckoning the sum of Kshs 755,500 is premature. I say so because, the advocate will be obligated to reckon the sum already paid when applying for enforcement of the award. Enforcement in this regard will require a motion for adaption of the award as a judgment of the court. The client will be entitled to be heard on the motion. Further, during execution, the advocate must reckon the sum already paid when applying for warrants. In the circumstances, it is my finding that failure by the taxing officer to reckon the deposit of Kshs 755,500 is not an error that warrants interference by this court.

22. Lastly, the client faulted the taxing officer for awarding costs of the bill to the advocate. Firstly, I have examined the ruling of the taxing officer and I have not seen the award relating to costs of the bill. Secondly, in their notice of objection preceding the chamber summons, the client did not raise this issue. It would be improper for this court to entertain the issue at this point.

23. In the end, I find no merit in the client's reference brought through the chamber summons dated 18/11/2019. The same is dismissed with costs to the advocate.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF FEBRUARY 2021

B M EBOSO

JUDGE

In the Presence of: -

Mr Kinuthia holding brief for Mr Nyachoti for the Advocate

Mr Mongeri for the Client

Court Clerk: June Nafula