



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAKURU**

**ELC MISC. NO. 22 OF 2020**

**MUGWERU & CO ADVOCATES.....APPLICANT**

**VERSUS**

**SANTABEN PREMCHARD SHAH.....1<sup>ST</sup> RESPONDENT**

**KIRANKUMAR GOVINDLAL SHAH.....2<sup>ND</sup> RESPONDENT**

**KIRIT GOVINDLAL SHAH.....3<sup>RD</sup> RESPONDENT**

**RULING**

1.The applicant vide the Chamber Summons dated the 26<sup>th</sup> October 2020 made under Order 11(2) of the Advocates Remuneration Order and Section 1A, 1B and 3A of the Civil Procedure Act sought for the following orders:

*1. That the ruling/decision of the Honorable N. Makau, Deputy Registrar of the High Court of Kenya, given on the 13<sup>th</sup> October 2020 on taxation of majority of the items in the Advocate-client Bill of Costs dated 9<sup>th</sup> September 2019 be and is hereby set aside.*

*2. That this honorable court be pleased to tax and or allow as it may deem appropriate in the circumstances of this case, more specifically in respect of instruction fees and getting up fees, advocate's court attendance fees, computation of folios and copies thereof in the advocate-client bill of costs dated 9<sup>th</sup> September 2019.*

*3. That the deputy registrar of the high court be and is hereby directed to re-tax/re assess the items of instruction fees and getting up fees, advocate's court attendance fees, computation of folios and copies thereof in the advocate-client bill of costs dated 9<sup>th</sup> September 2019.*

*4. That the honorable court be pleased to give the requisite factors and or guidance for consideration by the deputy registrar of the High Court of Kenya, in respect of the taxation/assessment of the items of instruction fees and getting up fees, advocate's court attendance fees, computation of folios and copies thereof in the advocate-client bill of costs dated 9<sup>th</sup> September 2019.*

*5. That costs of this application be provided for.*

2. The application is supported on the grounds on the face of the application and the supporting affidavit of Jennifer Mugweru sworn on 26<sup>th</sup> October 2020. She averred that she filed their advocate-client bill of costs dated 19<sup>th</sup> September 2020 in the sum of Kshs.1,072,579. She also averred that the bill of costs was taxed on 13<sup>th</sup> October 2020 in the sum of Kshs. 370,189.50. She stated that the taxing officer acted contrary to the provisions of Schedule 6 of the Advocates Remuneration Order in assessing the instruction fees to be Kshs.100,000/= and getting up for trial fees at Kshs.33,333/=.

3. She further averred that in Nakuru ELC 246 of 2014, Hon. N. Makau as the taxing officer had on 2<sup>nd</sup> October 2020 ascertained the value of the subject matter and assessed the instruction fees to be Kshs.429,500/= in the party and party bill of costs dated 18<sup>th</sup> April 2018 but failed to ascertain the same in the Advocate –Client bill of costs that arose from the same matter. That the instruction fees allowed was under charged as they failed to be adequate compensation and prayed that the same be set aside and re-taxed.

4.The respondents filed their statement of grounds of opposition in response to the applicant's application together with a replying affidavit sworn by Kirit Govindlala Shah the 3<sup>rd</sup> respondent on 15<sup>th</sup> March 2021. He averred that there is no legal entity known as the applicant and that some of the items were taxed without verification to their detriment. He also averred that the instruction fees were taxed generously as the applicant only took over the matter after it had already been instituted. That after appointment, the applicant was paid Ksh. 100,000/= and after taxation, they paid the taxed amount.

5. The application was canvassed by way of written submissions. The applicant submitted that on the instruction fees, the bill of costs dated 9<sup>th</sup> September 2019 arose from the plaint dated 19<sup>th</sup> April 2013 and sought for instruction fees of Kshs.422,500.00 and showed how that figure was reached. The applicant further submitted that while the taxing officer was taxing the party and party bill of costs arising from the same matter, arrived at the figure of Kshs.429,500/= as instructions fees. The applicant submitted that the taxing officer ascertained the value of the subject matter from the pleadings when taxing the party and party bill of costs but failed to assume the same value while taxing the advocate-client bill of costs and therefore awarded the applicant instructions fees that were too low in the circumstances.

6. On the getting up fees, the applicant submitted that they ought to be a third of the instructions fees. That since the ascertainable instruction fees was Kshs.429,500/= then a third of it would be Kshs.140,833/= and that is what ought to have been assessed. The applicant further submitted that the court attendance fees ought to have been assessed at Kshs.7,100 as attendances lasted over an hour instead of Kshs 2,300/= as assessed. On computation of folios, the applicant submitted they ought to have been assessed at Kshs.2,340/=, that item no. 15 ought to have been taxed at Kshs.350/= and item no. 60 ought to have been taxed at Ksh.1000/=. The applicant prayed that the taxing master's decision be set aside and the same be re-taxed.

7. The respondents submitted that the advocate-client bill of costs dated 9<sup>th</sup> September 2019 arose out of **Nakuru ELC case No.246 of 2015 between Santaben Premchand Shah & 2 others vs. Meya Agri-traders Limited** and was taxed on 13<sup>th</sup> October 2020. On instructions fees, the respondents submitted that the suit was dismissed with costs and therefore the sum of Kshs.75,000/= was sufficient as per the provisions of schedule 6 paragraph 1 of the Advocates remuneration order. They relied on the cases of **First American Bank of Kenya Ltd vs Gulab P Shah & 2 Others [2002] IEA 64 page 70-71** and **KANU National Elections Board & 2 Others V Salah Yakub Farah [2018] eKLR** and submitted that the taxing officer exercised her discretion judiciously and on the right principles.

8. The respondents further submitted that the getting up fees were rightfully taxed as per paragraph 2 of schedule 6 of the Advocates Remuneration Order which provides that it should be a third of the instructions fees. On attendances, the respondents submitted that the taxing officer assessment was appropriate and relied on the case of **Manyonge Wanyama & Associate v County Government of Kirinyaga [2019] eKLR** and argued that no order was issued from the court from which the taxation arose that the same should be taxed on a higher scale. On correspondences, copies and folios, the respondents submitted that the amount taxed ought not to have been given as they were not supported by vouchers.

9. In conclusion, the respondents submitted that they had paid the applicant a deposit of Ksh.100,000/= which was not refunded after taxation and that the applicant is not a legal entity capable of suing or being sued.

10. After considering the application, the grounds of opposition, replying affidavit and submissions, the singular issue for determination is whether there are sufficient grounds to warrant this Court to interfere with the taxing officer's ruling dated 13<sup>th</sup> October 2020.

11. The Court of Appeal in the case of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR** stated that,

*“On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.”*

12. The applicant is challenging the taxation of the instructions fees on the grounds that they sought instructions fees in the sum of Kshs.422,500.00 based on the pleadings before the court and the taxing officer in her ruling dated 13<sup>th</sup> October 2020 taxed the instructions fees at Ksh.100,000/=. The court of appeal in the case of **Joreth Ltd v Kigano & Associates NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR** in determining the issue of instructions fees stated that;

*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 fee 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.*

13. The taxing officer from her ruling delivered on 13<sup>th</sup> October 2020 indicated that the value of the subject matter could not be ascertained. The applicant relied on a document which was a handwritten ruling which was not certified and not accompanied by the pleadings and proceedings. Even though the respondents have not raised any issues on the same, the specific part of the ruling that is relevant stated that:

*“This falls under the ARO of 2006 and 2014 and not 1997 as submitted by the respondent as such this item is taxed at Kshs.429,500/= reason being schedule 6(2) of the ARO of 2006 and the value of the subject matter can be ascertained from the pleading and also the same has been submitted by the respondent save they used a different ARO”*

14. The taxing officer in her ruling dated 13<sup>th</sup> October 2020, applied the provisions of schedule 6 of the Advocate's Remuneration Order, 2014 and stated that the value of the subject matter could not be ascertained and therefore taxed the instructions fees at Ksh.100,000/=. The applicant's argument is that, the taxing officer in her ruling on the party and party bill of costs ascertained the value of the subject matter and taxed the instruction fee at Ksh.429,500/=. She consequently ought to have applied the same value in the taxation of the advocate client bill of costs.

15. The advocate-client bill of costs which is the subject of this reference, lacked the necessary details as to how the advocate came up with the figure of Ksh.422,500.00 as instruction fees. A perusal of the record also shows that the applicant did not attach the pleadings in **Nakuru ELC No. 246 of 2015 between Santaben Premchand shah & 2 others vs. Meya Agri-traders Limited** or bring to the court's attention, the already taxed party and party bill of costs.

16. Upon perusing the **Nakuru ELC No. 246 of 2015 between Santaben Premchard shah & 2 others vs. Meya Agri-traders Limited** file, there is indeed a taxed party and party bill of costs. The taxing officer in her ruling dated 2<sup>nd</sup> October 2018 taxed the instruction fees at Kshs.429,500/= as had been submitted by the applicants.

17. The court of appeal in the case of **Otieno, Ragot & Company Advocates v Kenya Airports Authority [2021] eKLR** held that;

*‘Once the instruction fee in the party and party costs are ascertained, they become the basis of the computation of the instruction fees in the Advocates and client bill. The instruction fees in the party and party bill is then increased by one-half to arrive at the instruction fees for the Advocate and client bill’*

18. The applicants ought to have brought to the attention of the taxing master the fact that the party and party bill of costs in the matter they represented the client had been taxed so that the taxing master could be guided accordingly. The instruction fee on the party and party bill of costs having been taxed at Ksh.429,500/= the taxing officer on the client advocate bill of costs ought to have increased these by one-half as provided under schedule 6 part 5 of the ARO.

19. The getting up fees as per the Advocates Remuneration Order ought not to be less than a third of the instruction fees.

20. On the Advocates Court attendance fees, the applicants submitted that the taxing officer erroneously applied the lower scale and yet the matter was defended. **Section 50** of the Advocates Remuneration Order provides as follows:

*‘Subject to paragraphs 22 and 58 and to any order of the court in the particular case, a bill of costs in proceedings in the High Court shall be taxable in accordance with Schedule 6 and, unless the court has made an order under paragraph 50A, where Schedule 6 provides a higher and a lower scale the costs shall be taxed in accordance with the lower scale.’*

21. In my view the taxing officer exercised her discretion judiciously on the taxation of the court attendance fees.

22. The applicants also challenged the computation of folios with regards to item No. 45 based on the taxation of item no. 44. Item No. 44 is taxed at Kshs.540/= as per paragraph 4d of schedule 6. Schedule 6 paragraph 5 provides for the computation of copies of folios at Kshs.25 per folio. Since item 44 was taxed as three folios then the calculation would be 25 x 3. It is my view that the taxing officer rightly exercised her discretion in the manner in which item No. 45 was taxed.

23. The applicants further challenged the taxation of item 97 which is the written submissions on the bill of costs. After perusal of the written submissions in question, it is twelve folios and therefore under paragraph 4d of schedule 6 the calculation ought to be 180 x 12.

24. On Item 15, the said replying affidavit is three folios and therefore applying paragraph 8 schedule 6, it ought to be 50 x 3. Item No. 60 can be taxed under paragraph 6 of schedule 6 as sought by the applicants.

25. The court in the case of **4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan Vs Misnak International (UK) Limited; Total Link Logistics & 2 others (Interested Parties) [2021] eKLR** held that:

*I also wish to add that where a Judge comes to a conclusion that the taxing officer has erred in principle in reaching his decision, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment. I also reiterate that it is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle, he/she should refer the bill back for taxation.*

26. In the result I am satisfied there was substantial irregularity in the taxation of the client advocate bill of costs to warrant a referral of the bill back to the taxing officer for a re assessment of the same. The taxation of the bill of costs on 13<sup>th</sup> October, 2020 is set aside and the advocate client bill of costs dated 9<sup>th</sup> September, 2019 is remitted back to the taxing officer for re assessment. Each party to bear their own costs of the reference.

**RULING DATED AND SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 4TH DAY OF NOVEMBER 2021.**

**J M MUTUNGI**

**JUDGE**