



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 36 OF 2017

TOM RADING KUYOH.....PETITIONER

=VERSUS=

JOSHUA NYIERA (Sued as Chairman of Fera Association).....RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT.....INTERESTED PARTY

RULING

1. Judgment on the petitioner's petition and the respondent's cross-petition was rendered by this court on 18/9/2018. The court dismissed the petitioner's petition and allowed the respondent's cross-petition. Further, the court ordered the petitioner to bear costs of the suit.
2. Subsequently, the respondent brought a party and party bill of costs dated 31/7/2019, drawn at Kshs 434,902. The said bill of costs was on 26/11/2019 taxed at Kshs 208,108 by the taxing officer of this court, Hon I N Barasa. The taxing officer disallowed the item relating to instruction fees on the cross-petition (Item 7) on the ground that instruction fees is earned once. She based her decision on the Court of Appeal decision in the case of **Joreth Limited v Kigano & Associates**.
3. Further, the taxing officer disallowed the item relating to getting up fees [Item 18] on the ground that the petition was determined by way of affidavit evidence and written submissions, hence getting up fees was not awardable.
4. Aggrieved by the taxing officer's decision on the two items, the respondent filed a notice of objection and subsequently brought a reference by way of chamber summons dated 17/12/2019 under paragraph 11(2) of the **Advocates (Remuneration) Order**, seeking review or setting aside of the taxing officer's decision on the two items. The said reference is the subject of this ruling.
5. The petitioner opposed the reference through grounds of opposition dated 14/1/2020. He contended that the reference offended the mandatory provisions of "Rule IIA of the Advocates Practice Rules since the same does not have provision for review". He added that the chamber summons application (reference) was an abuse of the court process because the respondent had proposed to "reference" the ruling on taxation. Lastly, he contended that the taxing officer was being invited to sit as an appellate court on her own decision.
6. The reference was canvassed through written submissions dated 16/12/2002, filed through the firm of Githara & Associates Advocates. Counsel submitted that the taxing officer erred in finding that instruction fees is charged only once and could not be charged separately on the original petition and on the cross-petition. Counsel added that reliance on the case of **Joreth Limited v Kigano & Associates** was wrong because the issues and the principles in that case were different from the issues in the bill before her. Further reliance was placed on the decision in the case of **Kagwimi Kang'ethe & Co Advocates v Nairobi Mamba Village Limited** where the Court held that the plaintiff and the counter-claim were separate claims independent of each other. Counsel reiterated the decision in the case of **Amon Bobbet [1889] 22 Q.BD 543** where it was held that, for purposes of taxation, the claim and the counter-claim must be treated as independent actions. Further reliance was placed on the decision in the case of **Odera Obar & Co Advocates v U Design & 2 others; Nairobi HC Misc Application No 392 of 2015** where the same principle was reiterated.
7. On getting up fees, counsel submitted that the requirements of paragraph 11 of the Advocates (Remuneration) Order were duly satisfied because the respondent filed a response to the petition and a cross-petition, and thereafter they prepared for hearing. The petition was heard and judgment was rendered. Counsel cited the decision in the **ELC Judicial Review Application No 8 of 2014; Nyeri Count Government v Central Kenya Coffe Mill Ltd**.
8. The petitioner filed written submissions dated 22/1/2021 through the firm of Ojienda & Co Advocates. Counsel identified the following as the two issues falling for determination in the Chamber Summons: (i) Whether the application offends the mandatory provisions of rule 11 of the Advocates (Remuneration) Order; and (ii) Whether the applicant is entitled to the orders sought.

9. On the first identified issue, counsel submitted that paragraph 11 of the Advocates (Remuneration) Order did not provide for review of the taxing officer's orders by the court on taxation of a bill of costs. Counsel cited the case of **First American Bank of Kenya v Shah & Others [2002] 1 EA 65** and the case of **Premchard Rainchard Ltd & Another v Quarry Services of East Africa Ltd & Another** and urged the court not to interfere with the discretion of the taxing master.

10. On the second identified issue, counsel submitted that instruction fee is earned once. Citing the decision in the case of **Joreth Limited v Kigano & Associates** to the effect that instruction fees is static and is earned once, counsel argued that the respondent's advocate was not entitled to instruction fees on the cross-petition. Lastly, counsel submitted that there was no error in the decision of the taxing officer. Counsel urged the court to dismiss the chamber summons.

11. I have considered the reference, the grounds of opposition, and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. The following three issues fall for determination in this reference: (i) Whether the chamber summons dated 17/12/2019 is improperly before this court; (ii) Whether the taxing officer erred in principle in declining to separately reckon and award instruction fees relating to the cross-petition; and (iii) Whether the taxing officer erred in principle in failing to reckon getting up fees on the ground that the petition and cross petition were canvassed through affidavit evidence and written submissions as opposed to oral evidence.

12. Before I analyse the three issues, I will summarise the principle which guides Kenya's superior courts when exercising jurisdiction to review a decision of the taxing officer under the Advocates (Remuneration) Order. It is now a settled principle of our civil law that the decision of a taxing officer would not be interfered with unless it was based on an error of principle or the fee awarded was so manifestly excessive or manifestly low as to justify an inference that it was based on an error of principle. [see (i) **First American Bank of Kenya v Shah & Others [2002] 1 EA 64**; and (ii) **Republic v Ministry of Agriculture & 2 others: Ex-parte Muchiri W'Njuguna & Others [2006] eKLR**. It is with the above principle in mind that I will consider the above three issues.

13. The first issue is whether the chamber summons application dated 17/12/2019 is improperly before this court. One of the grounds upon which the petitioner opposed the application was that it offended the mandatory provisions of rule 11A of the Advocates Practice Rules. First, in their submissions, counsel for the Petitioner did not focus on the Advocates (Practice) Rules. I have on my part tried to locate "rule 11A" of the Advocates (Practice) Rules and its relevance to the present application. I have not been able to identify the quoted rule.

14. The second ground of opposition was that the chamber summons was an abuse of the court process because the applicant had proposed to reference the ruling on taxation. The application under consideration was anchored on paragraph 11(2) of the **Advocates (Remuneration) Order** which provides as follows:

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reason apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection."

15. It is clear from a plain reading of the application and the above framework that the application under consideration was brought as a reference to a judge of this court under paragraph 11(2) of the Advocates (Remuneration) Order. It is not a review application made to the same taxing officer. Indeed, the applicant exhibited a copy of his notice of objection dated 28/11/2019 together with the Registrar's response to his request for reasons for the decision. There is nothing on the face of the application or before this court to suggest that the application was made to the taxing officer. My answer to the first issue therefore is that the chamber summons dated 17/12/2019 is properly before a judge of this court as a reference within the framework of paragraph 11(2) of the **Advocates (Remuneration) Order**.

16. The second issue is whether the taxing officer erred in principle in declining to reckon instruction fees relating to the cross-petition. Item 7 in the bill of costs related to instruction fees on the respondent's cross-petition. Declining to award instruction fees on the cross-petition, the taxing officer rendered herself thus:

"Item 7 is disallowed as instruction fees is earned once (see the case of Joreth Limited v Kigano Associate eKLR)"

17. The bill of costs under taxation related to both the primary suit which was a petition by **Tom Rading Kuyoh** and the subsequent cross-petition by **Joshua Nyiera**. It is apparent that the taxing officer treated the petition and the cross-petition as one suit. That, in my view, was wrong. A cross-petition is similar to a counter-claim. Although a petition and a cross-petition would ordinarily share the same cause number, they are distinct and separate suits. Instructions to defend a petition cannot for purposes of taxation be construed to be the same as instructions to lodge and prosecute a cross-petition. An advocate instructed to defend a petition and simultaneously lodge and prosecute a cross-petition receive two sets of instructions relating to two separate suits; the petition and the cross-petition. The same applies to an advocate instructed to defend a suit and simultaneously lodge and prosecute a counter-claim. Indeed, often times, original suits are terminated for one reason or the other and the cross-petition or counter-claim proceeds to hearing and full determination. It was therefore wrong for the taxing officer to completely disallow the item relating to instruction fees on the cross-petition on the ground that instruction fees is charged once. My finding on the second issue therefore is that the taxing officer erred in principle in declining to separately reckon and assess instruction fees on the counter-claim.

18. The last issue is whether the taxing officer erred in principle in failing to reckon and award getting up fees on the ground that the petition and the cross-petition were canvassed through affidavit evidence and written submissions. Item 18 related to fees for getting up or preparing for trial. It is provided for under paragraph 2 of Schedule 6. It is awardable in a case where: (i) denial of liability is filed or in which issues for trial are joined by pleadings; and (ii) the case has been confirmed as ready for hearing.

19. The record before the taxing officer indicated that the following directions were given in this petition on 15/11/2017 after presentations by the parties:

1) By consent the Nairobi City County Government is joined as an Interested Party.

2) The Petitioner has 10 days within which to file a Supporting Affidavit

3) The Petition herein shall be canvassed through written submissions.

4) Hearing of the Petition shall be on 14/12/2017

20. The following further directions were given on 17/1/2018 after presentations by the parties:

1) Petition herein shall be heard on 13/3/2018

2) The Interested Party has three days within which to file and serve its written statement

3) The Petitioner has leave to file brief rebuttal submissions in response within ten days

21. It is therefore apparent from the record that parties to this petition elected to prosecute the petition and the cross petition through affidavit evidence, written submissions and oral highlighting of the written submission at the plenary, if necessary. That in my view was proper trial within Kenya's legal system. That constitutes a proper hearing within Kenya's legal system. It was therefore a misapprehension of the tenor and meaning of "trial" on the part of the taxing officer when she concluded that there was no getting up or preparation for trial because trial did not take the form of *viva voce* evidence. In my view, there was proper trial. The trial took the format of affidavit evidence and written submissions. Satisfied with the adequacy of affidavit evidence and written submissions, parties opted not to highlight their written submissions in the plenary. I am therefore persuaded that, indeed, the taxing officer erred in principle in declining to award getting up fees under item 18. That is my finding on the third issue.

22. In summary, my finding on the first issue is that the notice of objection dated 28/11/2019 and the chamber summons dated 17/12/2019 constitute a reference to a judge of this court on the decision of the taxing officer under paragraph 11(2) of the Advocates (Remuneration) Order seeking a review of the decision of the taxing officer. It is not a reference to the same taxing officer. It is therefore properly before a judge of this court. My finding on the second issue is that a cross-petition or a counter-claim is a separate and distinct suit. Consequently, instructions to prosecute or defend a petition or a counter-claim attract separate instruction fees. The taxing officer therefore erred in principle in holding that the respondent's advocate was not entitled to instruction fees on the counter-claim. Lastly, my finding on the third issue is that getting up for trial entails preparation of a litigant's case by the advocate, in readiness for trial. Presentation of evidence can be either oral or by affidavit. Similarly, submissions after evidence can be either oral or written. Regardless of the form which the trial takes, it is still a trial. The advocate getting up for trial is therefore entitled to getting up fees regardless of the mode of presenting evidence and submissions. The taxing officer therefore erred in holding that because the petition and the cross petition herein were disposed through affidavit evidence and written submissions, the advocate of the successful party was not entitled to getting up fees.

Disposal Orders

23. In light of the above findings, I allow the reference herein and set aside the taxing officer's decision on item 7 and item 18 only. The bill of costs is remitted back to the taxing officer to assess fees on the two items. The other items will remain as taxed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JUNE 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Charles Ayugi for the Petitioner

Mr Wamai for the Respondent

Court Assistant: June Nafula