



REPUBLIC OF KENYA



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P. I. Samba & Company Advocates v Bundotich & another (Commercial Miscellaneous Application E444 of 2022) [2024] KEHC 4715 (KLR) (Commercial and Tax) (3 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E444 OF 2022**

MN MWANGI, J

MAY 3, 2024

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER, 2014 (SCHEDULE 6)

-AND-

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE & CLIENT

BETWEEN

P. I. SAMBA & COMPANY ADVOCATES ADVOCATE

AND

KIPROP BUNDOTICH 1ST RESPONDENT

DIANA JEPCHUMBA BUNDOTICH 2ND RESPONDENT

RULING

1. The Advocate/applicant filed a Chamber Summons application dated 10th November, 2022 under the provisions of Advocates (Principle) Remuneration Order, Rules 2, 11 (1) & (2) of the *Advocates Act*, Section 3A of the *Civil Procedure Act*, Article 159 of *the Constitution* of Kenya, 2010 and all enabling provisions of the law. The applicant seeks the following orders -
 - i. That the decision of the Taxing Master delivered on the 28th October, 2022 in so far as the same relates to the reasoning and determination of the instructions fees and getting up fees in terms of items 1 and 2 and the item of interest at the foot of the bill of costs dated 13th June, 2022 be set aside;
 - ii. That the Honourable Court be pleased to tax afresh the instructions fees and getting up fees and interest in terms of items 1 and 2 and the item of interest at the foot of the bill of costs dated 13th June, 2022 or issue appropriate orders for the re-taxation thereof; and



- iii. That costs of the application be awarded.
2. The application is anchored on the grounds on the face of the Summons and is supported by an affidavit sworn by Pennynah Samba, learned Counsel for the applicant on 10th November, 2022. From the record, it is evident that no responses to the instant application were filed by the respondents despite service of the application.
3. The instant application was canvassed by way of written submissions. The applicant's submissions were filed on 4th October, 2023 by the law firm of P. I. Samba & Company Advocates. The respondents neither filed any written submissions nor made oral submissions before this Court in opposition to the application herein. As a result, the application herein proceeded unopposed. This Court however has to satisfy itself as to the merits of the said application.
4. Ms. Samba, learned Counsel for the applicant relied on the case of *First American Bank of Kenya v Shah and Others* [2002] 1 EA 64, where the Court set out the circumstances under which a Judge of the High Court can interfere with a Taxing Officer's exercise of discretion, and submitted that in this instance, the Taxing Officer failed to appreciate the value of the subject matter, the complexity of the defence drawn and filed for the 1st & 2nd Third Party, the industry employed, time taken on the matter and work done by the applicant, and arrived at a manifestly low, unfair and unreasonable award on instruction and getting up fees. She further submitted that the sum of Kshs.500,000/= for instruction fees on a matter in which a demand was for Kshs.1,564,377,600.18 had been made in pleadings, is manifestly inadequate, as to render the Taxing Officer's decision patently unfair and manifestly unjust.
5. Counsel cited the Court of Appeal decision in *Joreth Limited v Kigano & Associates* [2002] 1 EA 92 at 99 in contending that the Taxing Officer in her ruling in this instance misdirected herself in finding that the value of the suit as against the respondents could not be ascertained from the pleadings. Counsel asserted that the subject bill of costs as drawn and filed invoked Schedule 6 of the Advocates Remuneration Order, therefore by placing reliance on Schedule 5 of the said Advocates Remuneration Order after directing herself that the value of the subject claim could not be ascertained, the Taxing Officer fell into grave error on principle. Ms. Samba stated that getting up fees is due on account of pre-trial preparations with drawing and filing of the pre-trial documents.
6. In submitting that the applicant is entitled to interest as pleaded at the foot of the bill of costs, Counsel relied on the case of *Otieno, Ragot & Company Advocates v Kenya Airports Authority* [2021] eKLR.

Analysis And Determination.

7. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. The issue that arises for determination is whether the application herein is merited.
8. The applicant in its affidavit in support of the instant application deposed that the plaintiff in HCCOMM NO. E134 of 2018 in its plaint dated 31st October, 2018 sought for a liquidated sum of USD.3,432,596.57 with interest at commercial rates from 20th September, 2017 until payment in full.
9. The applicant averred that the defendant in the aforementioned suit by an ex-parte Chamber Summons application dated 3rd June, 2019, sought and obtained orders to join the respondents herein to the suit as 1st & 2nd Third Parties, to offset the plaintiff's claim by Kshs.1,564,377,600.18. The applicant stated that as such, the value of the suit against the respondents herein is ascertainable from the pleadings.



Whether the application herein is merited.

10. The Court of Appeal in the case of Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR, held as hereunder in regard to the High Court’s jurisdiction with respect to a Reference -

“On 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.”

11. It is trite that the High Court can only interfere with the Taxing Officer’s decision where there has been an error in principle and not solely on questions of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job. The applicant’s contention is that the Taxing Officer erred in law and fact in finding that the value of the subject matter in HCCOMM NO. E134 of 2018 was ascertainable from the pleadings, thus arriving at a manifestly low, unfair and unreasonable award on the instruction and getting up fees. The Court of Appeal in the case of Joreth Ltd vs Kigano & Associates (supra) held as follows-

“We would at this stage point out that the value of the subject matter of a suit for the purposes 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 so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

12. On perusal of the plaint dated 31st October, 2018 in HCCOMM NO. E134 of 2018, I note that from the plaint, it is evident that the plaintiff is seeking special damages of USD.3,432,596.57 plus interest thereon at commercial rates from 20th September, 2017 until payment in full. On the other hand, the defendant in its Chamber Summons application dated 3rd June, 2019 sought to join the respondents herein to the said suit as Third Parties, to indemnify it for any monies that may be found to be due from it to the plaintiff, to the tune of Kshs.1,564,377,600.18.

13. From the foregoing, it is evident that the value of the subject matter in HCCOMM NO. E134 of 2018 could easily be ascertained from the pleadings in view of the fact that the parties therein were seeking special damages. As a result, I find that the Taxing Officer erred in fact and law in finding that the amounts set out in HCCOMM NO. E134 of 2018 were part of a wish list, thus they could not form the basis for determining the value of the subject matter.

14. In the premise, this Court it is my finding that the value of the subject matter in this case was Kshs.1,564,377,600.18 being the amount the defendants in HCCOMM NO. E134 of 2018 sought to be indemnified by the respondents herein in the event the said suit was determined against them.

15. Further, the applicant is entitled to full instruction fees despite the fact that it ceased acting for the respondents before HCCOMM NO. E134 of 2018 proceeded to trial. To this end, I am bound by the Court of Appeal holding in the case of Joreth Ltd vs Kigano & Associates (supra), where the Court stated that-

“In principle the instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached.”



16. On whether the applicant was entitled to getting up fees, the Taxing Officer taxed off the said item from the bill of costs on the ground that HCCOMM NO. E134 of 2018 was neither prepared for trial nor certified ready for hearing at the time the applicant was on record. Getting up fees is provided for under Schedule 6 Part 2 of the Advocates Remuneration Order, which states that-

“In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:

Provided that —

- i. this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;
- ii. no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;
- iii. in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.”

17. From the above provisions, it is clear that getting up fees is only charged in instances where a suit has been certified ready for hearing. It is not disputed that by the time the Court allowed and/or granted the applicant an order to cease from acting for the respondents, HCCOMM NO. E134 of 2018 had not yet been certified ready for hearing. The applicant contended that it is entitled to getting up fees from the respondents on account of pre-trial preparations with drawing and filing of the pre-trial documents.

18. Pursuant to the provisions of Schedule 6 paragraph 2(ii) of the Advocates (Remuneration) Order, I find that the applicant is not entitled to getting up fees, thus the Taxing Officer did not err in law and fact in taxing off item No. 2 on getting up fees.

19. On the issue of interest, it is provided for under Regulation 7 of the Advocates (Remuneration) Order, which states that –

“An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.”

20. A perusal of the Taxing Officer’s ruling delivered on 28th October 2022, reveals that the issue of interest was not addressed despite the fact that it had been raised by the applicant in its bill of costs. From the record, the respondents were served with the bill of costs herein on 22nd July, 2022, but by the time the Taxing Officer delivered her ruling on taxation of the said bill of costs which was approximately three months after service of the bill costs on the respondents was effected, the applicant was yet to be paid the amount claimed either in part or wholly. For the said reason, this Court finds that the claim of interest at fourteen percent (14%) per annum is payable.

21. In the end, this Court finds that the Chamber Summons application dated 20th November 2022 is partly merited, and it is allowed in the following terms –



- i. The Taxing Officer's ruling delivered on 28th October 2022 in respect to instruction fees is hereby set aside;
- ii. The applicant's bill of costs dated 13th July 2022 is hereby referred to another Taxing Officer for fresh taxation of Item No. 1 on instruction fees and interest due to the applicant; and
- iii . Costs are awarded to the applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF MAY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Samba for the applicant

No appearance for the respondents

Ms B. Wokabi – Court Assistant.

