



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. APPL. NO. E768 OF 2020

MUTHAURA MUGAMBI AYUGI &

NJONJO ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

QUALITY CENTRE LIMITED.....CLIENT/RESPONDENT

RULING

1. By Chamber Summons application dated 16th October 2020, filed together with a supporting affidavit, brought under the provisions of **Section 3A of the Civil Procedure Act, Rule 11(2) of the Advocate (Remuneration) Order** and all other enabling provisions of the law, the Advocate/Applicant herein sought orders that;

- a. The decision of the Taxing Officer delivered on 17th September 2020 be recalled, reviewed and set-aside or quashed with respect to item Number 1 on Instruction fees.
- b. The Court assesses and allows Item 1 as drawn in the Applicant's Bill of Costs dated 12th March 2020 or refers the said items for taxation before a different Taxing Officer.
- c. The costs be borne by the Respondent in any event.

2. The Application was based on ground that, the Taxing Officer erred in law and in fact in taxing Instruction fees under **Schedule 6** ("other matters") which would only be applicable in instances where a case is not provided for in previous paragraphs of **Schedule 6**. In this particular case, the applicable paragraph was 1(b) of **Schedule 6** as the proceedings were originated by way of Motion and were defended and the subject matter value (of **USD 1,497,426.00**) was easily determined from the pleadings and subsequent decree issued by the court.

APPLICANT'S CASE

3. The Applicants filed Misc. Appl. on instructions of and on behalf of the Respondent through Nairobi High Court Commercial Division ***Misc. Application No. 454 of 2016 (O.S) – Quality Centre Limited vs Uchumi Supermarkets Limited & Another***, which Application was opposed and after conducting a hearing, judgment was delivered by the Hon. Mr. Justice Tuiyott on the 5th October 2017 and a decree was subsequently issued.

4. The Applicant/Advocate then filed its advocate/Client Bill of Costs dated 12th March 2020 and a Ruling delivered by the Taxing Master on 17th September 2020. A copy of the Ruling was delivered to the Applicant via email on 2nd October 2020.

5. By a letter dated 15th October 2020, the Applicant sought the reasons from the Taxing Master.

6. The Taxing Master erred in law and in fact in taxing the instruction fees at Ksh 75,000/-. The assessment of the court on instruction fees was so low as to amount to an injustice to the Applicant.

7. The Taxing Officer erred in law and in fact in Taxing Instruction fees under **Schedule 6** ("other matters") which would only be applicable in instances where a case is not provided for in previous paragraphs of Schedule 6. In this particular case, the applicable paragraph was **1 (b) of Schedule 6** as the proceedings were originated by way of Motion and were defended and the subject matter value (of USD. 1,497,426.00) was easily determinable from the pleadings and subsequent decree issued by the court.

8. The court failed to consider and apply the principles set out in the celebrated case of **Premchand Raichand Limited vs Quarry Services of East Africa Limited (No.3)[1972]E.A 162** being the well cited principles of taxation. In particular, that a successful litigant ought to be adequately reimbursed for the costs incurred and that the general remuneration of advocates must be such that it is to attract recruits to the profession.

9. The Taxing Master failed to consider and apply the decision of **Joreth Limited vs Kigano & Associates [2002] E.A. 92** which set out the principles the court ought to consider in assessing instruction fees and in particular, the importance of the matter, general conduct of the case, the (commercial) nature of the case, time taken for its dispatch and the impact of the case on the parties.

10. It was the Applicant's view that the Taxing Master erred in law and in fact in not taking into account the written submissions of the Applicant together with binding decisions of the High Court cited by the Applicant to assist in taxing the Bill of Costs.

RESPONDENT'S CASE

11. The Applicant, vide an Affidavit of Service dated 25th November 2020, confirmed to have served the Respondent with the following; the Chamber Chamber application dated the 16th October 2020 and Hearing Notice dated 26th November 2020. The documents were forwarded to the following e-mail addresses of the Respondent on 11th November 2020, info@qualitygroup.com; a.thirumal@qualitygruop.com; dp.sharma@qualitygruop.com; nt2017dar@gmail.com; rnvm2017@gmail.com.

12. The Respondents did not respond or file any document to the Reference.

DETERMINATION

13. The matter relates to a Miscellaneous Application of the Applicant seeking to enforce the foreign judgment High Court of Tanzania at Dar es Salaam being **Land Case No 8 of 2015 Quality Centre Ltd vs USL (T) Ltd [formerly Uchumi Supermarkets (TZ & Uchumi Supermarkets)]** delivered on 8th July 2016 by Hon Justice I. Arufani in favour of the Applicant.

14. By Ruling of Hon F. Tuiyott of 5th October 2017, the Applicant's application was upheld against the Judgment Debtor.

15. The Advocate for the Judgment Creditor raised Advocate-Client Bill of Costs which culminated to the impugned Ruling by Taxing Officer of 17th September 2020 on the basis that the amount awarded was/is too low as Instruction fees.

16. The **Advocates Remuneration Order Schedule 6** provides at Clause d) To defend any other proceedings; an instruction fee calculated under **sub- paragraph 1(b)** which provides as follows;

17. b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and— [where]

18. That value exceeds Kshs. 0 but does not exceed Kshs. 500,000/- Fees are Ksh 75000/-; Ksh 500,000/- - 750,000/- Fees are Ksh 90,000/-, Ksh 750,000/- Ksh 1,000,000/- Fees are Ksh 120,000/- and so forth.

19. Although it was/is an application to enforce foreign judgment in light of Schedule 6 Rule 1(b) the amount is too low considering the subject matter involved as is disclosed in the said Judgment and pleadings includes an order to pay USD 997,426 as specific damages among other orders.

20. The Applicant sought from the Bill of Costs Instruction Fees of USD 50,000 considering a decretal amount of USD 1,497,426.00/- which this Court could not confirm as the figure of the subject matter from the pleadings.

21. Instruction Fees of USD 50,000 as Instruction Fees whereas the substantive suit was heard and determined in Tanzania High Court and it proceeded *ex parte* is excessive. The Originating Summons, Supporting Affidavit & the copy of the Judgment were filed for recognition and enforcement of Foreign judgment in this Court. It was defended by Judgment debtor who sought stay as it sought to set aside the said foreign judgment in Tanzania High Court. The proceedings were not that intricate, complex and convoluted. Therefore, the Instruction Fees claimed are/is of USD 50,000 over the top compared to the Rates in the Advocates Remuneration Order Schedule 6 that prescribe any other proceeding, which the instant case is a Miscellaneous Application to enforce foreign judgment and not a protracted matter.

22. This Court considered the following cases;

a. Premchand Raichand vs Quarry Services [1992] E.A. 162 which held that a Court will not interfere with the award of Taxing Officer merely because it thinks the award was somewhat too high or too low. It will only interfere if it thinks the award was too high or so low as to amount to an injustice to one party or the other.

b. In First American Bank of Kenya vs Shah & Others [2002]E.A. L.R.

23. Where the Court held that the Applicant has to show that the award of the Taxing Officer was based on an error of principle or the award was made was so manifestly excessive as to justify an influence that it was based on the error of principle.

24. In *Joreth Ltd vs. Kigano & Associates [2002] 1 EA 92*; Court of Appeal stated that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement 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:-

- a. The nature and the importance of the cause;
- b. The interest of the parties;
- c. The general conduct of the proceedings;
- d. Any direction by the trial judge; and
- e. All other relevant circumstances

25. The Taxing Officer found correctly that the Miscellaneous Application would rightfully be considered under **Schedule 6 Rule 1 (d)**. However, on assessment of Instruction Fees with regard to the subject-matter, the Taxing Officer took the view that Ksh 0- Ksh 500,000/- whose Fees was Ksh 75,000/- was reasonable in the circumstances. Although it was not a suit for hearing and determination but a miscellaneous Application to enforce a foreign Judgment the value of the subject-matter ought to be taken into account as the Fees so low as to amount to an injustice to one party the Applicant.

26. For these reasons, the reference succeeds only to the extent of assessment of value of the subject-matter.

27. The Bill of Costs shall be taxed before any other Taxing Officer

with regard to Instruction Fees.

DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH JUNE 2021

(VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MS CHERONO FOR THE APPLICANT

ADVOCATES FOR THE RESPONDENT – N/A

COURT ASSISTANT- TUPET