



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 59 OF 2015

**IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16 LAWS OF KENYA AND THE ADVOCATES
(REMUNERATION) (AMENDMENT) ORDER NO. 35 OF 11/4/2014**

AND

IN THE MATTER OF TAXATION

BETWEEN

MWANGI KENG'ARA & CO. ADVOCATES.....ADVOCATE/APPLICANT

AND

INVESCO ASSURANCE COMPANY LIMITED.....CLIENT/RESPONDENT

RULING

1. This ruling relates to a Chamber Summons Application dated **28th February, 2021** brought under provisions of Rule 11 (2) of the Advocates (Remuneration) Order and the Advocates Act, Chapter 16, Laws of Kenya.
2. The Advocate/Applicant is seeking for orders : -
 - a) **THAT the decision of the Taxing Officer dated 9/12/2020 whereby item no. 2 in the Bill of costs dated 23/10/2019 was taxed at 10,000/= be set aside and the Bill of costs dated 23/10/2019 be remitted back for re-taxation of instruction fees.**
 - b) **THAT the costs of this reference be awarded to the Advocate/Applicant.**
3. The application is supported by an affidavit dated **28th February, 2021**, sworn by **Mercy Nduta Mwangi**, an Advocate working with the Advocate/Applicant herein. She deposed that, on the **9/12/2020**, the Taxing Officer rendered a decision on the taxation of the Bill of costs (herein "the bill"), dated, 23/10/2019, wherein he taxed the bill at; **Kshs. 45,757/=**.
4. However, the Advocate/Applicant is dissatisfied with the decision for the reason that; the learned Taxing Officer failed to elaborate on how he arrived at; **Kshs 10,000/=**, as the reasonable instruction fees. Further, the Taxing Officer failed take into consideration the value of the subject matter and overlooked the orders that the clients sought under **Section 45 (6)** of the Advocates Act.
5. She deposed that, the taxation of **item no. 2** on instruction fees at 10,000/= in the ruling dated **9/12/2020** is unjust, oppressive and contravenes the explicit provisions of the Advocates (Remuneration) Amendment Order. According to the applicant, the taxing officer should have taken into consideration that the Notice of Motion dated **10th November, 2015** sought inter alia a recognition of an agreement on fees between the Client/Applicant and the Advocate/Respondent/ under which a sum of **Kshs. 20,000,000/=** was paid and which sum the Client/Applicant was yet to account for, and hence the bill of costs dated 7/4/2015 sought for the same to be struck out.
6. The applicant further averred that by a letter dated **21st December, 2020** the applicant objected to the taxation of **item no. 2** on instructions fees whereby a sum of **Kshs. 732, 489/=** had been taxed off from the party and party Bill of costs dated **23/10/2019** and requested for the reasons of the decision.
7. The application is unopposed as the Client/Respondent has not filed a response.
8. Directions were issued that the application be canvassed by way of written submissions. It is only the Applicant who filed submissions dated 8/7/2021 and filed on 12/7/2021. It was submitted that the taxing officer misdirected himself when he held that the application in issue

was just an application for striking out a bill of costs yet the truth of the matter was that the said application dated 10/11/2015 was a substantive suit filed within a taxation and which is recognized as such by dint of the definition of a suit in section 2 of the Civil Procedure Act which describes suits as civil proceedings commenced in any manner prescribed and which tallies with what is provided for under Schedule V1(1) (a) of the Advocates Remuneration Order, 1997. Counsel placed reliance in the case of **First American Bank of Kenya Ltd Vs Gulab P, Shah [2003] eKLR** where the Court of Appeal held that instruction fee is an independent and static item chargeable only once and is not affected by the stage the suit has reached and it is earned the moment a defence is filed and the subsequent progress of the matter is irrelevant to that item of fees. According to counsel, the taxing officer ought to have allowed the proposed item No. 2 on instruction fees. Finally, counsel sought reliance in the case of **Kamunyori & Company Advocates Vs Development Bank of Kenya Ltd [2015] eKLR** where it was held that if instruction fee is arrived at on the wrong principles, it will be set aside. Learned counsel urged the court to set aside the taxing officer's order as he failed to appreciate the subject matter of the suit in its entirety thereby resulting in an unjust assessment of the instruction fees and thus the court should set aside the order and refer back the bill of costs with appropriate directions to the taxing officer.

9. I have had the liberty to read through the application on record as well as the submissions and find that, the question to determine is whether the Taxing Officer committed an error of principle so as to warrant the setting aside of his decision. I have gone through the ruling delivered by the learned taxing officer on 9TH December, 2020 regarding the item on instruction fees as herein:

“Item 1 instruction fees will not be pegged on the value of the subject matter as it was only an application for striking out the Bill of Costs for being time barred.”

10. The taxing officer considered the ruling delivered in **Joreth Limited vs. Kigano & Associates no. 66 of 1999 (2002) 1 EA 92** where the Court of Appeal held 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 (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, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings.”

11. He then states that *“item 1 instruction fees will not be pegged on the value of the subject matter as it was only an application for striking out the Bill of Costs for being time barred.”* The Taxing Officer then concluded that *“considering the fact that the subject matter of the application herein involves striking out of the Bill of Costs, the said application was not complex and having due regard to the general conduct of the proceedings, I exercise my discretion bearing in mind the need to ensure a) costs are not allowed to rise to a level as to confine justice as to the wealthy b) That a successful litigant ought to be fairly reimbursed for the costs he has to incur and c) the general level of remuneration of Advocates must be such as to attract recruits to the profession.”*

12. He awarded a sum of **Kshs. 10,000/=** as instruction fees and other items were found to have been drawn to scale and the resultant figure awarded came to **Kshs. 45,757/=**.

13. I note from the affidavit in support of the application that the applicant avers that the taxing officer was unjust, oppressive and contravened the explicit provisions of the Advocates Remuneration Amendment Order by arriving at the **Kshs. 10,000/=** at taxation of item no. 2.

14. Having considered the findings of the taxing officer, I note that, first and foremost, it is settled law that, a 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 so manifestly excessive as to justify an inference that, it was based on an error of principle, as held in; First American Bank of Kenya v. Shah & Others (2002) 1 E.A. 64.*

15. Similarly, it was held in the case of; **Haider bin Mohamed el Mandry & 4 Others v. Khadija Binti Ali Bin Salem alias Bimbubwa (1956) 23 EACA 313** that, *where the instruction fee was taxed at a level so grossly excessive as to betoken the application of wrong principles, it is an occasion for a Judge to intervene.*

16. Further **Spry, V-P.** held in the case of; **Premchand Raichand Ltd & Another v. Quarry Services of East Africa Ltd & Another (supra) at page 164** that: -

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.”

17. However, the rationale of the exercise of judicial discretion of the taxing officer was well considered by the court in the case of; **Republic vs Minister of Agriculture & 2 others ex parte Samuel Muchiri W Njuguna ^ 6 Others (2006) eKLR**, *as an aspect of judicial decision-making, to be conducted regularly, and guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs.*

The court in the same case further stated as follows; -

“Regularity in this respect cannot be achieved without upholding fairness as between the parties; the taxing officer is to provide only for reasonable compensation for work done; the taxing officer should avoid the possibility for unjust enrichment for any

party and ought to refuse any claim that, tends to be usurious; so far as possible, the taxing officer should apply the test of comparability; the taxing officer should endeavour to achieve objectivity when considering ill-defined criteria such as public policy, interests affected, importance of matter to parties, or importance of matter to the public; the taxing officer should clearly identify any elements of complexity in the issues before the court – and in this regard should revert to the perception and mode of analysis and determination adopted by the trial judge; the taxing officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer should determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel”.

In summation, while referring the bill for taxation afresh before a different taxing officer, the court laid down the following guiding principles: -

- a) the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private - business arrangements or earnings of the tea production sector;*
- b) the taxation of advocates’ instruction fees is to seek no more and no less than reasonable compensation for professional work done;*
- c) the taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;*
- d) so far as apposite, comparability should be applied in the assessment of advocate’s instruction fees;*
- e) objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;*
- f) where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be identified and stated; and secondly, complexity is to be judged on the basis of the express or implied recognition and mode of treatment by the trial Judge;*
- g) where responsibility borne by advocates is taken into account, its nature is to be specified;*
- h) where novelty is taken into account, its nature is to be clarified;*
- i) where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarized form.*

18. To revert to the matter herein, I note that the taxing officer in his ruling makes references to several authorities that guides inter alia; the factors that will be taken into account in taxing a bill. However, I note that, when it came to assessing the instructions fees, he simply made reference to the **Miscellaneous Application no. 214 of 2015** that involved the striking out of Bill of Costs for being time barred and observed that it was not complex.

19. The amount herein is by all means quite appropriate. If the same has to be upheld, then it must be demonstrated that the taxing officer indicated with clarity how the Advocate/Applicant imparted its skill and expended its labour in the Miscellaneous Application no. 214 of 2015, and how he eventually arrived at the conclusion that the matter was not complex.

20. I have personally read through the proceedings in **Miscellaneous Application no. 214 of 2015** and note inter alia that, the matter commenced with a Notice of Motion dated 27th April, 2016. The Respondent filed a replying affidavit thereto and the parties appeared before the Deputy Registrar who was the taxing officer under the Advocates Act for hearing of the Notice of Motion, and the Deputy Registrar ruled that the orders sought in the application were outside the jurisdiction of a taxing officer and referred the matter to the court for hearing. The directions of the Judge were rendered on 16th November 2016, and a final ruling on the matter was delivered on 21st December 2016 which is contained in the 15 pages. I have given a brief historical background in this matter to show inter alia, that the Respondent has been seized of this matter to show that this is the kind of analysis that the taxing officer should be able to clearly indicate in their decision to justify any sum of money that is awarded and to enable the parties appreciate how the same is arrived at. That does not seem to have been done herein.

21. As stated in the case of; **Premchand Raichand Limited (supra)** basic principles of taxation are; -

- (a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy;*
- (b) That a successful litigant ought to be fairly reimbursed for the costs he has had to incur;*
- (c) That the general level of remuneration of Advocates must be such as to attract recruits to the profession and*
- (d) So far as practicable there should be consistency in the award made and*
- (e) The court will only interfere when the award of the Taxing officer is so high or so low as to amount to an injustice to one party.*

22. In my considered opinion, taking into account the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings as stated herein and the duration the matter has taken, it is evident that the Advocate/Applicant did not expend

considerable amount of time and work into this particular matter. The Advocate/Applicant is entitled to payment of the legal services rendered and since it was just an application, the amount awarded is within the limits provided for under the Advocates Remuneration Order. In any event, the value of the subject matter in the subject application was not discernible and as such the taxing officer was only to gauge the amount of work and industry expended in the matter in arriving at the eventual instruction fee.

23. The next question is whether the court should re-tax the bill or send it to another taxing officer. It was held in the case of; **Steel Construction Petroleum Engineering (EA) Limited vs Uganda Sugar Factory**, the High Court can re-assess a bill but the normal practice is to remit it to the taxing officer for re-taxation unless the court is satisfied that the error did not materially affect the assessment. (See also; **Nanyuki Esso Services Vs Touring and Sports Caps Limited (1972)** and **Thomas James Urther vs Nyeri Electricity Undertaking (1961) EA 492**, where it was held that the questions solely of quantum are regarded as matters which the taxing officer are particularly fitted to deal. As already found that the amounts awarded was not manifestly low, I find that the applicant's request for a re-taxation of item No. 2 on instruction fees lacks any basis as the taxing master did not err in principle. The amount awarded was reasonable and within the range provided by the relevant Advocates Remuneration Order whereby an application whether presented or opposed would attract a fee of not less than Kshs 5000/. The sum awarded of Kshs 10,000/ was reasonable in the circumstances.

24. In the result, it is my finding that the application dated 28th February, 2021 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 19TH DAY OF JULY, 2021.

D. K. KEMEI

JUDGE