



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**MILIMANI LAW COURTS**

**MISC. CIVIL SUIT NO. 172 OF 2016**

**PROF. TOM OJIENDA & ASSOCIATES.....ADVOCATE/APPLICANT**

**-VERSUS-**

**KSC INTERNATIONAL LIMITED.....CLIENT/RESPONDENT**

**RULING**

This ruling relates to a Chamber Summons application dated 21<sup>st</sup> March 2017, brought under **Order 11 (2) of the Advocates Remuneration Order**. The Applicant sought orders;

a) That part of the Hon. Deputy Registrar's Ruling and order on Taxation dated and delivered on 16<sup>th</sup> February 2017 which relates to the instruction fees which were taxed and allowed at Ksh 15,000,000/- the 50% Advocate/Client increase which was taxed and allowed at Ksh 7,516,250/- and the 16% VAT which was taxed and allowed at Ksh 3,607,800/- as set out in the Client/Respondent's Notice of Objection to Taxation herein dated 22<sup>nd</sup> February 2017 be reviewed and set aside, and the Advocate/Applicant's Bill of Costs dated 4<sup>th</sup> April 2016 be remitted to the Taxing Officer for re-taxation of those items with appropriate directions;

b) The costs of the objection application be awarded to the Client/Respondent.

The application was based on grounds that;

a) The Hon. Deputy Registrar erred in taxing and allowing the instruction fees at Ksh 15,000,000/-, the 50% Advocate/Client increase at Ksh 7,516,250/- and the 16% VAT at Ksh 3,607,800/- which amounts are all so manifestly excessive as to amount to errors of principle in the circumstances of this case.

b) The Deputy Registrar failed to exercise her discretion judiciously and reasonably in her taxation of the three disputed items.

c) The Hon. Deputy Registrar erred in awarding the Applicant Ksh 15,000,000/- in instruction fees which is 200 times the minimum instruction fees set out and chargeable under the applicable paragraph 1(k) of Part A of **Schedule 6** of the **Advocates Remuneration(Amendment) Order 2014**.

d) The Client/Respondent on 23<sup>rd</sup> February 2017 filed its Notice of Objection herein dated 22<sup>nd</sup> February 2017 requesting the learned Deputy Registrar to record and forward to it; the reasons for her taxation decision given on 16<sup>th</sup> February 2017, and the learned Deputy Registrar vide her letter dated 10<sup>th</sup> March 2017 which was received by the Client/Respondent's Advocates on 20<sup>th</sup> March 2017 confirmed that these reasons were contained in the Ruling delivered on 16<sup>th</sup> February 2017. Accordingly, no further reasons were contained in the Ruling delivered on 16<sup>th</sup> February 2017 were offered despite being applied for in the Respondent's Notice of Objection dated 22<sup>nd</sup> February 2017.

**REPLYING AFFIDAVIT**

The application is opposed vide an affidavit dated 1<sup>st</sup> May 2017, sworn by Prof. Tom Ojienda, SC, the Managing Partner of the Advocate/Applicant Law Firm herein. He stated that the Client/Respondent came to the firm of the Advocate/Applicant for representation of their novel and important case. The Client/Respondent was disputing receivership that they had been put under which they believed to be illegal.

That the Advocate/Applicant diligently represented their case in court until they decided to appoint another firm of Advocates, the firm of Gichuki King'ara & Co. Advocates. Once they terminated the legal services; the Advocate/Applicant tried on several occasions to recover their fees but were never paid. The Advocate/Applicant thus resorted to tax and recover their fees.

That the Advocate/Applicant filed an Advocate/Client Bill of Cost dated 4<sup>th</sup> April 2016 for taxation requiring to be paid the sum of Ksh 127,249,600/-. The Client/Respondents entered appearance through their Advocates and each party made their submissions on how the Bill of Cost should be taxed.

That the Taxing Master after hearing both parties, delivered a ruling on 16<sup>th</sup> February 2017, having taxed the Bill of Costs at Ksh 26,206,550/- taxing off Ksh 100,883,050/-

That being dissatisfied with the Ruling, the Client/Respondents filed a Notice of Objection **Under Rule 11(1) of the Advocates Remuneration Order** requiring reasons as to why the Taxing master taxed the following items as she did;

- i) Instruction fees Ksh 15, 000,000/-
- ii) 50% increase (paragraph B) Ksh 7,516,250/-
- iii) 16% VAT Ksh 3,607,800/-

#### **ADVOCATE/APPLICANT'S WRITTEN SUBMISSION**

It's the Advocate/Applicant's submission that the Taxing Master agreed with Respondent/Client that the subject matter of the suit was not determined by the pleadings before the court. The Applicant/Advocate on the other hand disagreed and showed to the court the loss that the Respondent/Client was claiming to have incurred as a result of cancellation of contract;

- a) Bura irrigation Scheme - Kshs 7,189,575,121/-
- b) Lusaka -Chirinduu Road, Zambia - Ksh 2,642,839,780.35/-
- c) Construction of Naivasha town Settlements Roads - Kshs1,334,861,721.00/-
- d) Achwa Hydropower project, Uganda - Kshs 4,907,689,397/-
- e) Voi-Mwatate Road Project – Balance of works Ksh 4,907,689,397.10/-
- f) Songwe Airport, Mbeya Tanzania (payments to be collected) – Kshs1,152,380,952/-
- g) Gigiri Water Supply (payments to be collected) Ksh 160,000,000/-
- h) Kamkunywa -Kaptama Kapsokwony Road (Balance of works) Ksh 255,200,000/-
- i) Thogoto -Gikambura-Mutarakwa Road Kshs 156,000,000/-

#### **CLIENT/RESPONDENT'S SUBMISSION**

The Client/Respondent submitted that the Applicant/Advocate at paragraph 2 of its submissions contends that the parent suit was novel and in paragraph 18 of the said submissions insinuates that it put in a lot of work and effort in preparing the Client/Respondent's case. With due respect to the Applicant, there were no new or "novel points" of law involved in the parent suit and no such alleged novel points were detailed by the Applicant. Secondly, there was no direction given by any judge regarding the complexity of the case nor did the Applicant seek to prove the alleged complexity in any way. The Applicant ought to have detailed and particularized the alleged complexity.

It was their submission that although there might have been a fairly large volume of documents filed and perused in the parent suit, a large number of documents does not mean a matter is complex. In ***Trans National Bank Limited -vs- Elite Communication Limited & Another [2005]eKLR***; Justice Waweru stated as follows;

***“On the issue of complexity of the matter, I would observe that the length of the counsels’ submissions, or indeed the length of the judge’s decision, are not necessarily indicative of the complex nature of the matter.”***

By the same reasoning, the volume of the documentation is not indicative of the complexity of a matter as the Applicant purports in paragraph 20 of its submissions.

Further in ***First American Bank of Kenya -vs- Shan and Others 2000 E. A. L. R 64 at 69*** Ringera J. held that the Court cannot 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. It is clear that the instruction fees awarded by the Taxing Master was highly exaggerated, manifestly excessive and based on an error of principle.

## **DETERMINATION**

After considering the Reference pleadings and submissions by Counsel, the issue is whether the Taxing Officer properly exercised judicial discretion in awarding Instruction Fees of Ksh 15 million. Secondly, whether the amount in Instruction Fees was/is exorbitant, excessive and without merit.

The Applicant submitted that the Bill of Costs of 4<sup>th</sup> April 2016 claimed Instruction fees in HCCC 446 of 2015 at Ksh 76,560,000 based on an alleged loss of Ksh 17,000,000,000/- Relying on the case of Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund Board [2005] eKLR; the Court of Appeal allowed the Reference on 2 grounds; erred by using KSh 116,344,789.30 as value of the subject matter of the suit yet it was not a monetary claim but claim for declaration.

The Taxing Officer in the impugned Ruling of 16<sup>th</sup> February 2017 at Pg stated;

***“I therefore agree with the Respondent that the value of the subject matter, be it Ksh 17,000,000,000 or any other [figure] cannot be ascertained from the pleadings. Accordingly, sub paragraphs (b) (c) or (d) of Paragraph 1 Part A of Schedule 6 of the Advocates Remuneration Order 2014 cannot be applied to assess the applicant’s Instruction fees in the parent suit [HCCC 446 of 2015]The applicable provision is paragraph k headed other matter.”***

Clearly, the Taxing Master complied with the principle espoused in the Kipkorir Titoo & Kiara Advocates, supra

The taxing master considered the value of Plaintiff’s property under threat and disputed amounts underpinning the entire dispute between Respondent, Bank of Africa and Appointed Receivers.

The interest, importance of the cause to the parties entitled assessment of Instruction Fees at Ksh 15,000,000/-.

The Taxing Officer taxed off a whopping Ksh 61,560,000/- almost  $\frac{3}{4}$  of the original claim as Instruction fees.

This court has also gleaned at the parties, respective Counsel and Paperwork/Pleadings consisted of reading pleadings, correspondence and documents, obtaining instructions and preparing documentation within strict timelines. The involvement cannot be under estimated.

In the case of Joreth Ltd Vs Kigano & Associates Civil Appeal No 66 of 1999, the Court of Appeal stated of Instruction fees;

***“We would like at this stage [to] point out that the value of the subject matter of a suit for purposes of taxation of the Bill of Costs ought to be determined from the pleadings, judgment of 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, nature and importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any discretion by the Trial Judge and all other relevant circumstances.”***

In Republic Vs Ministry Of Agriculture & 2 Others Exparte Muchiri W’njuguna & 6 Others [2006] eKLR, OJUANG J (as he then was) stated;

***“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 Taxing Officer, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award is too high or too low as to amount to an injustice to one party or the other...The Court cannot interfere with the Taxing Officer’s decision on taxation unless it is shown that either the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle.”***

These 2 cases illustrate that the Court can only interfere with the Taxation of Bill of Costs where there is an error of principle and /or the award is too high or too low.

In the instant matter I am persuaded that the matter concerned a receivership of a Company that was contested and involved various parties, Counsel and included communication and negotiations on the instructions from clients which was not an easy task.

The Taxing Master considered the Bill of Costs of Ksh 127,089,600/- and reduced it drastically mainly on the instruction fees to Ksh 26,206,550/=

I find proper use of judicial discretion and application of the law. The amount of taxation is reasonable in the circumstances.

## **DISPOSITION**

**1. The Reference is dismissed with Costs**

**2. The certificate of taxation of 17<sup>th</sup> March 2017 is upheld for Ksh 26,206,550/-**

**3. During the ongoing corona virus pandemic lockdown period no execution shall take place until official announcement by Government on return to normalcy or within 90 days.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 22<sup>ND</sup> MAY 2020**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**N/A FOR DESAI SAVIA & PALLAN ADVOCATES FOR APPLICANT**

**N/A FOR PROF. OJIENDA & ASSOCIATES FOR RESPONDENT**