



**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO.279 OF 2013**

**JAMII BORA BANK LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**JAMES GITAU SINGH t/a**

**SINGH GITAU ADVOCATES.....DEFENDANT/RESPONDENT**

**RULING**

(1) Before this Court is the Chamber Summons dated **2<sup>nd</sup> April 2019** by which **JAMES GITAU SINGH T/A SINGH GITAU ADVOCATES** (the Applicant Advocate) seeks the following Orders:-

**“1. SPENT**

**2. SPENT**

**3. THAT the decision of the Taxing Master delivered on 6<sup>th</sup> March 2019 pertaining to the Bill of Costs dated 2<sup>nd</sup> July 2018 in so far as the same relates to the reasoning and determination of the instruction fees be set aside.**

**4. THAT the Honourable Court be pleased to refer the matter back for re-taxation of the Bill of Costs and with proper directions thereof.**

**5. THAT in the alternative to prayer 4, the Honourable Court exercises its inherent jurisdiction and be pleased to re-tax the Bill of Costs and/or make such other or further orders as regards the Bill of Costs in issue.**

**4. THAT the costs of this Application be borne by the Plaintiff/Respondent.**

(2) The summons which was brought under the Advocates Act and the **Advocates Remuneration Order, Rule 11**, and all relevant provisions of the law was supported by the Affidavit sworn by **DANIEL KIRAGU** an Advocate of the High Court of Kenya.

(3) **JAMII BORA BANK LIMITED**, the Client/Respondent opposed the Chamber Summons through the Replying Affidavit dated **14<sup>th</sup> June 2019** sworn by **CHRISTINE WAHOME** the Legal Manager with the Respondent Bank. The summons was canvassed by way of written submissions. The Advocate/Applicant filed his written submissions on **7<sup>th</sup> August 2019** whilst the Client/Respondent filed its submissions on **30<sup>th</sup> July 2019**.

**BACKGROUND**

(4) On **6<sup>th</sup> April 2018**, **Hon Lady Justice Olga Sewe** entered judgment in favour of the Defendant (Applicant herein) against the Plaintiff (Respondent herein) in the amount of **Kshs.5,233,150.94** together with interest thereon at **14% per annum** from **1<sup>st</sup> May 2015** until payment in full as well as costs be the suit.

(5) Thereafter the Plaintiff filed party and party costs dated **2<sup>nd</sup> July 2018**. The Taxing Master **Hon Claire Wanyama** vide her Ruling dated **6<sup>th</sup> March 2019** taxed the Bill at **Kshs.375,173**. The Applicant being aggrieved by this Ruling of the Taxing Master filed this reference which is based on the following grounds:-

- (a) That taking into account that the bill of costs in between Party and Party, the value of the subject matter should have been taken to be the principal sum claimed and should not have included any award of the accrued interest.
- (c) That if the amount is allowed to stand, the Applicant will suffer gross prejudice as the taxation of the Party & Party bill of costs is contrary to the set out principles and provisions of the law in determining instruction fees.
- (d) That the taxing master supplied reasons for the taxation on **29<sup>th</sup> March, 2019** and this reference is thus filed within the prescribed period of fourteen (14) days.
- (e) That the taxing master's award amounted to an error in principle.

### **ANALYSIS AND DETERMINATION**

(6) I have carefully considered the submissions filed by the parties in this matter. The Applicant submitted that the Taxing Master erred in law in taxing the Bill of Costs by including accrued interest when considering the value of the subject matter thereby failing to properly ascertain the appropriate Instruction Fees payable under Item No.1 of the Bill of Costs. This the Applicant contends amounted to an error in principle on the part of the taxing master.

(7) **Rule 11 of the Advocates Remuneration Order** provides as follows:-

**“(i) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items to which he objects.**

**(ii) 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 those reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”**

(8) In the case of **NYANGITO & CO. ADVOCATES –VS- DOINYO LESSOS CREAMERIES LTD [2014] eKLR**, the Court in discussing the guiding principles when considering a reference from taxation stated:-

**“(1) 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 manifested excessive as to justify an inference that it was based on an error of principle;**

**(2) It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration order itself. Some of the relevant factors to be taken into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved; the interests of the parties, the general conduct of the proceedings and any direction by the trial judge;**

**(3) if the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount was high.**

**(4) It is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”**

(9) In this case the Applicant contends that the Taxing Master erred in law and in principle by assessing the instruction fees using the wrong value for the subject matter of the suit. It is submitted that the taxing master ought not to have loaded the interest granted in the judgment in calculating the instruction fee. On the other hand the Respondent submits that the Taxing Master was correct in including the interest on the amount awarded in the judgment to come up with the instruction fees.

(10) In **JORETH LIMITED –VS- KIGANO & ASSOCIATES [2002] E.A** it was held that:-

**“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 importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”**

(11) In calculating the instruction fees the learned Taxing Master vide her ruling dated **6<sup>th</sup> March 2018** held as follows:-

**“Item 1 relates to the instruction fees which can be determined from the judgment....The instructions were issued in 2013 and the remuneration order to be used is the Advocates Remuneration Order 2006 and 2014 Schedule 6 the subject matter being Kshs.5,233,150.94 together with interest thereon at 14% per annum from 1<sup>st</sup> May 2013 until 6<sup>th</sup> April 2018. The instruction fees is calculated as follows:**

1<sup>st</sup> Million.....Kshs.77,000.00

Balance Kshs.4,233,150.94 at 15%...Kshs.63,497.00

Total.....Kshs.140,497

Interest from 1<sup>st</sup> May 2013 to 6<sup>th</sup> April 2018 at 14%

Kshs.5,233,150.94% \*1800 days.....Kshs.3,613,024

Kshs.3,613,024\*15%.....Kshs.54,195.00

The instruction fees is awarded at Kshs.194,692.00

(12) In arguing that the interest awarded in the judgment ought not to have been applied by the Taxing Master the Applicant submits that the import of said interest was to compensate the Plaintiff as per the evidence availed before the court which made a finding on the issue. In her judgment **Hon Lady Justice Olga Sewe** in finding for the Plaintiff stated:-

**“In the result judgment is hereby entered in the Plaintiff’s favour against the Defendant in the sum total of Kshs.5,233,150.94 together with interest thereon at 14% per annum from 1<sup>st</sup> May 2013 until full payment, as well as costs of the suit.”**

(13) In **DESAI SARVINA & ALLAN ADVOCATES –VS- GIRO COMMERCIAL BANK LIMITED MISC APPLICATION NO.1847 OF 2002** it was held thus:-

**“It is the Plaintiff to decide how it pleads or makes its claim. The important thing is that the interest is part of the Plaintiff’s claim as instructed to its advocates, and the value of interest is determinable. It is a factor to be taken into account in the assessment of the instruction fees.”** [own emphasis]

(14) Based on the above decision I do find and hold that the interest awarded formed a part of the Plaintiff’s claim and as such the Taxing Maser was right to consider such interest in calculating the instruction fees. Accordingly, I find there existed no error in law or principle on the part of the taxing master.

(15) Finally, this Reference fails and is hereby dismissed in its entirety. Costs are awarded to the Plaintiff/Respondent.

Dated in **Nairobi** this 5<sup>th</sup> day of **June 2020**.

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**Justice Maureen A. Odera**