



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. MIS.E 458 OF 2019

IN THE MATTER OF THE SECTION 79 AND 81 OF THE CO-OPERATIVE SOCIETIES ACT NO.12

OF 1997 LAWS OF KENYA

**IN THE MATTER OF SCHEDULE 11 OF THE ADVOCATE'S (REMUNERATION)(AMMENDMENT) ORDER 2014
ADVOCATES ACT CAP 18 LAWS OF KENYA**

**IN THE MATTER OF SCHEDULE II OF THE ADVOCATE'S (REMUNERATION (AMMENDMENT) ORDER 2014
ADVOCATES ACT CAP 18 LAWS OF KENYA**

DAVID NJUKU WAWERU.....1ST RESPONDENT/APPLICANT

GODFREY NGANGA.....2ND RESPONDENT/APPLICANT

PETER NJENGA MIRINGU.....3RD RESPONDENT/APPLICANT

SAMUEL KINGARA.....4TH RESPONDENT/APPLICANT

MICHAEL MUNGAI KAMAU.....5TH RESPONDENT/APPLICANT

VERSUS

BANANA HILL MATATU SAVINGS & CREDIT SOCIETY LTD...CLAIMANT/RESPONDENT

(Application to set aside the Ruling/Order of the Co-operative Tribunal at Nairobi

dated 22nd August 2019) P.Swanya Member AND R. Mwambura, Member) in Case 155 of 2016)

BETWEEN

BANANA HILL MATATU SAVING & CREDIT SOCIETY LTD.....CLAIMANT

AND

DAVID NJUKU WAWERU.....1ST RESPONDENT

GODFREY NGANGA.....2ND RESPONDENT

PETER NJENGA MIRINGU.....3RD RESPONDENT

SAMUEL KINGARA.....4TH RESPONDENT

MICHAEL MUNGAI KAMAU.....5TH RESPONDENT

RULING

(1) Before this Court is the Chamber summons Application dated **3rd October 2019** by which **DAVID NJUKU NGANGA** (1st Respondent), **GODFREY NGANGA** (2nd Respondent), **PETER NJENGA MIRINGU** (3rd Respondent), **SAMWEL KINGARA** (4th Respondent) and **MICHAEL MUNGAI KAMAU** (5th Respondent) all hereinafter jointly referred to as “**the Applicants**” sought for orders as follows:-

- 1. THAT this court be pleased to extend the period for filing the reference herein.**
- 2. THAT this Honourable Court be pleased to set aside the decision of the Co-operative tribunal dated 22nd August 2019 to tax and award Item No.1 in the Bill of Costs dated 22nd October 2018 as drawn.**
- 3. THAT this Honourable Court be pleased to re-examine the pleadings in the Co-operative Tribunal Case No.155 of 2016 and ascertain the value of the subject matter.**
- 4. THAT the Honourable Court be pleased to tax item 1 on the Bill of Costs dated 22nd October 2018 afresh and give an award.**
- 5. THAT costs of this application be in the cause.**

(2) The application was premised upon **Section 79 and 81 of the Co-operative Societies Act No.12 of 1997, Schedule II Paragraph 8(2) Advocates Remuneration (Amendment) Order 2014**. The **Advocates Act Cap 16, laws of Kenya** and all other enabling provisions of the law, and was supported by the Affidavit of even date sworn by **RUTH N. NYAMBURA** the Advocate on record for the Applicants.

(3) The Respondent **BANANA HILL MATATU SAVINGS & CREDIT SOCIETY LTD** filed Grounds of Opposition dated **13th November 2019**. The application was canvassed by way of written submissions. The Respondent filed its written submissions on **14th February 2020**. However, the Applicants despite having been accorded sufficient time failed to file any submissions in the matter.

BACKGROUND

(4) This application arises from a Ruling of the Co-operative Tribunal dated **22nd August 2019** in respect of a Bill of Costs dated **22nd October 2018**. The Applicants being dissatisfied with the said Ruling and particularly with Item No.1 being Instruction Fees sought to have the said Ruling set aside and for this court to re-examine the Pleadings in the **Co-operative Tribunal Case No.155 of 2016** and to ascertain the value of the subject matter of the claim.

(5) As stated earlier the Respondent opposed the application. They submitted that the taxation was both fair and proper and urged the court to uphold the same.

ANALYSIS AND DETERMINATION

(6) I have carefully considered the pleadings in this matter as well as the submissions filed by the Respondent and find that only two issues emerge for determination.

- (i) Should the Reference be admitted out of time?
- (ii) Is the Application to set aside the Ruling of the Co-operative Tribunal dated **22nd August 2019** merited.

(i) Should Reference be admitted out of time

(7) In support of their prayer to have the reference admitted out of time the Applicant averred that after delivery of the Ruling on **22nd August 2019**, they sought for certified copies of the proceedings which were not availed until **27th September 2019**.

(8) I have seen annexed to the Supporting Affidavit dated **3rd October 2019**, the letter dated **26th August 2019** (Annexure **RNK “3”**) by which the Applicants Advocate sought for certified copies of the Proceedings. I am satisfied that the Applicants moved swiftly in seeking for copies of the record. The fact that the said records were not availed by the Co-operative Tribunal until **27th September 2019** cannot be blamed on the Applicants. This must have been due to delays within the Tribunal itself. The present application was filed within 7 days of the release of certified copies of the proceedings. A lapse of one week cannot in any way be termed an inordinate delay. Undoubtedly the Applicants upon receipt of the proceedings had to peruse the same and instruct their advocate accordingly. I therefore find that the delay in filing this reference has been sufficiently explained. Accordingly, I allow prayer (1) of the Chamber Summons dated **3rd October 2019**.

(ii) Should the Ruling of the Co-operative Tribunal dated 22nd August 2019 be set aside?

(9) In its ruling on the Bill of Costs dated **22nd August 2018** (Annexure **RNK “2”** to the Supporting Affidavit dated **3rd October 2019**) the Tribunal taxed the entire Bill at **Kshs.124,500**. The Applicant took issue with Item No.1 which was taxed at **Kshs.60,000**.

(10) In its Ruling delivered on 22nd August 2019, the Tribunal stated as follows:-

“We have noted the statement of claim and orders prayed for being:-

- (a) A declaration that the buses belong to the Claimant.**
- (b) An injunction be refrain [sic] the Respondent from compelling, running and using the motor vehicles.**
- (c) Payment of the collected daily revenues.**

In this claim the value of the Prayer sought has not been ascertained therefore it will only be diligent to assess this item as per schedule II Paragraph 9 which charges not less than Kshs.35,280 if undefended or unopposed.”

(11) The Applicants position is that the Tribunal erred in its finding that the value of the subject matter was not ascertainable.

(12) **Schedule II paragraph 9** of the **Advocates Remuneration Order** allows the Taxing Master or Tribunal to exercise its discretion in determining Instruction Fees where the value of the subject matter is to ascertainable from the pleadings on record, **but** that the instruction fees should not be assessed below **Kshs.35,280**.

(13) In **REPUBLIC –VS- NYATHA UNIVERSITY & ANOTHER Ex Parte WELLINGTON KIHATE WAMBURU [2018] eKLR** it was stated thus:-

“Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount. Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low. Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties.” [own emphasis]

(14) Further in the case of **JORETH LTD –VS- KIGANO & ASSOCIATES** the Court of Appeal 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.”

(15) I have considered the statement of claim presented before the Co-operative Tribunal and the prayers made therein. The prayers being sought were declaratory as well as a prayer seeking injunctive orders. From that statement of claim, the value of the subject matter being the five (5) mini buses was not ascertainable. Therefore, the Tribunal was at liberty to use their discretion as well as the criteria set in **Schedule II Paragraph 9** in order to assess the Instruction Fee due.

(16) In my view it has not been shown that the Tribunal erred in principal or awarded an excessively high figure as Instruction Fees. I take succor in the decision of the Court of Appeal **KIPKORIRM TITOO & KIARI ADVOCATES DEPOSIT PROTECTION FUND BOARD [2005] eKLR**, where the Court of Appeal held as follows:-

“On a reference to a Judge from the taxation by the Taxing Officer, the Judge will not normally interfere with the excuse of discretion by the taxing officer unless the Taxing Officer erred in assessing the costs-an example for an error of principal is where the costs allowed are so manifestly excessive as to justify an inference that the Taxing Officer acted on erroneous principles.”

(17) Finally, I find no merit in this Reference. The same is hereby dismissed and costs are awarded to the Respondent.

Dated in Nairobi this.....2ndday of October, 2020

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Justice Maureen A. Odero