



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 454 OF 2004**

**BELGO HOLDINGS LIMITED.....PLAINTIFF**

**VERSUS**

**ROBERT KOTCH OTACHI.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**WILSON BIRIR.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. This ruling relates to two chamber summons application dated 4<sup>th</sup> August and 18<sup>th</sup> September 2017, filed by the Plaintiff and Defendants, respectively. The applications are brought under Regulation 11(2) of the Advocates Remuneration Order and relate to the decision of the Learned Taxing master delivered on 3<sup>rd</sup> July, 2017, in relation to the bill of costs (herein "the bill"), dated 1<sup>st</sup> December 2016, and filed by the Plaintiff.
2. The Parties objection is in relation to items numbers 1 and 346 of the bill and both seek that the decision of the Learned Taxing Master on the said two items be set aside, and be re-taxed by the Honourable court. The Plaintiff further seek that the awarded amounts as claimed in its bill of costs, together with the costs of the Reference.
3. The Plaintiff's application is premised on the grounds, inter alia that, the Learned Taxing master erred in principle and failed to appreciate or pay any regard to the fact that the value of the subject matter in the suit, had already been decided upon, by Hon Mr. Justice E. Ogola, in the decisions delivered on 21<sup>st</sup> January and 3<sup>rd</sup> March 2016. Therefore, the Taxing master was bound by the said decisions which held that the value of the subject matter was Kshs. 6,000,000 and the Defendants were estopped from contending the value of that subject matter due to the doctrine of res judicata.
4. That in the alternative, the Learned Taxing master erred in holding that the value of the subject matter was to be exclusively determined from the prayers to the Plaintiff and also overlooked the fact that the Plaintiff had also made a claim for exemplary damages.
5. The Plaintiff argued that in assessing the instructions fees, the Learned Taxing master completely overlooked or failed to have any regard to the specific order of the learned trial Judge that, the costs were to be assessed for two Advocates and on a higher scale. Further, she failed to take into account the provisions of Advocates Remuneration Order, which the Plaintiff addressed in their written submissions.
6. That in assessing the getting up fees, the Learned Taxing master failed to appreciate that it was not just a mathematical exercise based upon the instructions fees assessed by her and that the getting up fees were not fixed at one third of the instructions fees but should not be less than one third (1/3) thereof.
7. The Plaintiff averred that, the amounts claimed in the bill for both instructions fees and getting up fees were fair and reasonable; it has been grossly inadequately compensation for the liability incurred in prosecuting the case for over a period of 12 years.
8. However the Defendants filed grounds of opposition to the application dated 4<sup>th</sup> August 2017, and argued that the application is incompetent and fundamentally defective, offends clear provisions of the law and procedure, is misconceived and amount to an outright abuse of the court process.
9. The Defendants application similarly seek for orders that, the Honourable court set aside the decision and/or ruling of the Taxing officer referred to above, in respect of items No. 1 and 346 of the subject bill and proceed to tax the bill and/or direct the same to be referred back to the Taxing officer for taxation of the said items and the costs of the application be provided for.

10. The application is supported by an affidavit sworn by the 1<sup>st</sup> Defendant; Robert Kotch Otachi, who avers that on 1<sup>st</sup> December 2016, the Plaintiff herein filed the subject bill arising from a judgment delivered on 4<sup>th</sup> December 201, although there is an appeal pending against the said judgment in the court of Appeal.

11. He deposed that the suit relates to a dispute in directorship and the Plaintiff was seeking for orders of declarations and an injunction. That, each party to the suit called a witness to testify, and no expert witnesses testified at all. Subsequently the Plaintiff filed the bill which was determined through filing of written submissions by both parties. On 3<sup>rd</sup> July 2017, the bill was taxed at Kshs. 7,456,803.

12. However, the Defendant being aggrieved by the said ruling and in particular the ruling on items No. 1 and 346 wrote a letter to the Taxing master requesting for reasons of the taxation's decision and a reminder was send on 23<sup>rd</sup> August 2017. The copy of the ruling was supplied on 5<sup>th</sup> September 2017.

13. The Defendants aver that the Taxing officer erred in law by failing to take into account that the suit was not complex at all and/or the nature of the case was simple and straight forward, as it was dealing with a dispute of directorship. That the number of witnesses who testified was not considered and that the length of time taken, did not imply the matter was complex at all.

14. However, the Plaintiff filed grounds of objection to the Defendant's application arguing that, the reference dated 18<sup>th</sup> October 2017, has not been filed within the time prescribed by Rule 11 of the Advocates Remuneration Order. That the ruling on taxation cannot be set aside on the grounds mentioned in the Reference.

15. The parties agreed to and disposed of the applications by fling submissions thereto. The Plaintiff submitted that it is trite law that a Taxing master's decision on taxation can only be set aside or reversed if; there is an error of principles, and/or the Taxing master has failed to take into consideration matters that ought to have been taken into account and/or has taken into account matters that ought not to have been taken into account.

16. That the plain and clear provisions of the Schedule 6(1)(b), of the Advocate's Remuneration Order, states that the value of the subject matter is to be ascertained from pleadings, judgment or settlement between the parties. As the words the words "pleadings and judgment" are not defined under these provisions, they should be given broader and liberal meaning. That the word "the pleadings" is defined under Section 2 of the Civil Procedure Act, to includes a petition or summons, and the statement of the claim or demand of any Plaintiff.

17. In that regard, the cases of; *Kotecha vs Mohammed (2002) IEA 112*, *American Express vs Atul (1990-1994) A 10*, and *Commissioner of VAT vs Shah (1999) 2 EA 58*, have held that a chamber summons; notice of motion plus the affidavit in support thereof is a pleadings as defined under Section 2 of the Civil Procedure Act.

18. The Plaintiff submitted that the most important issue in a taxation is that, the costs assessed are fair and reasonable in all circumstances of the case. The test being subjective and that the case of; *Ellingsen vs Det Skandinnaviske Company (1919) 2 K.B. 567*, held that, the principle of allowance of costs is that, successful party is to be recompensed for the liability he has reasonably incurred in defending himself.

19. The Plaintiff reiterated that the Learned Taxing master misdirected herself when she held that, the value of the subject matter was to be ascertained from the prayers to the Plaintiff.

20. Yet the Defendants filed a notice of motion on 18<sup>th</sup> January 2016, and claimed, inter alia, that unless an immediate stay was granted, the Plaintiff; "would deal with various business transactions of the Plaintiff including disposal of its assets including the only two pieces of land.....valued at Kshs. 6,000,000,000.00 to the exclusive of the Defendants, who will have no control at all to their detriment and substantial loss hence the urgency of this application." The same allegations were repeated in ground 7 of the notice of motion and in paragraph 8 of the supporting affidavit sworn on 18<sup>th</sup> January 2016 by the 2<sup>nd</sup> Defendant.

21. Similarly, at the hearing of the notice of motion on 21<sup>st</sup> January 2016 the Defendant's Advocate submitted that the Defendants were seeking for a stay of execution so that, the suit property of 44 acres of land worth Kshs. 6,000,000,000.00 be preserved.

22. However the Defendants filed their submissions and argued that, in the case of; *First American Bank of Kenya vs Shah & Others (2002) 1 EA 64*, quoted with approval in *Nyangito & Company Advocates vs Doinyo Lessos Creameries Ltd (2014) eKLR*, the court laid down the principles to consider while dealing with a Reference as follows:-

(a) *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 manifestly excessive as to justify an inference that it was based on an error of principle;*

(b) *It would be an error of principle to take into account irrelevant factors or 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 the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;*

(c) *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 awarded was high;*

(d) *It is within the discretion of the taxing officer to increase or reduce the instructions fees and the amount of the increase or*

reduction is discretionary;

(e) The taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it;

(f) The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;

(g) The mere fact that the Defendant does research is not necessarily indicative of the complexity of the matter as it may well be indicative of the Advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.

23. The Defendants submitted that it is settled law laid in the decision of; *Joreth Limited vs Kigano & Associates (2002) E.A. 92 (CAK)* that the value of the subject matter of a suit for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement. But if the same is not ascertainable, the Taxing master is entitled to use his/her discretion to assess such instructions fees as he/she considers just.

24. It was submitted that the value of the subject matter herein could not be ascertained as the issue in dispute was the directorship of the company, as observed by the court at paragraph 15 of the judgment, that "...it is evident that the dispute before the court is one of directorship." The Plaintiff were seeking for an orders of injunction, declaration, general damages and costs and was granted orders of injunction, a declaration and costs.

25. Therefore the Plaintiff in relying on the Defendants' application dated 18<sup>th</sup> January 2016, to claim that the value of the subject matter of the suit was Kshs. 6,000,000,000, is "erroneous, fallacious and meant to mislead the Honourable court". That the value of the property was brought to the fore, to demonstrate the irreparable harm the Defendants could have suffered if the directors, who were in control of the company, exercised their powers to deal with various business transactions thereof.

26. The Defendant supported their application by submitting that, Learned Taxing master's decision on instruction fees was inconsistent with the known principles of taxation, as she failed to set out the basic fees before venturing to consider whether to increase or reduce it and also failed to outline the formulae used in reaching the said figure especially where she clearly found as a matter of fact that the value of the subject matter was unascertainable.

27. That in particular the Learned Taxing officer abstracted her duty to clearly identify any elements of complexity in the issues before the court; describe accurately the nature of the responsibility which had fallen on counsel and/or the nature of any novel matter and to determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel to justify inflation of the instruction fees. In that case, the figure as taxed of Kshs. 5,000,000.00 is mystical. Reference was made to the cases of; *Republic vs Minister for Agriculture & 2 Others exparte Samuel Muchiri W'Njuguna & 6 Others (2006) eKLR* and *Republic vs Minister for Agriculture & 2 Others exparte Samuel Muchiri W'Njuguna & 6 Others (2006) eKLR*

28. The case of; *Opa Pharmacy Ltd vs Howse & McGeorge Ltd Kampala HCMA No. 13 of 1970 (HCU) EA 233*, was also cited where it was held, "the failure to give any reasons for the choice, surely, must therefore amount to an arbitrary determination of the figure and is not judicial exercise of one's discretion".

29. The Defendants refuted the allegation that their application was filed out of time. It was averred that, they wrote a letter dated 6<sup>th</sup> July 2017 barely 3 days after the ruling and a reminder on 23<sup>rd</sup> August 2017 requesting for the ruling/reasons and the ruling which was received on 5<sup>th</sup> September 2017. A simple arithmetic shows that the application was filed on the 13<sup>th</sup> day after receipt; therefore within the time of 14 days stipulated, under Rule 11(2) of the Advocates Remuneration Order.

30. Finally the Defendants submitted that, it is in the public interest that costs are kept to a reasonable level so that justice is not put beyond the reach of poor litigants. To ensure this, then the court is obliged to set aside the amount taxed. To allow the amount awarded will set an erroneous precedent and make justice a luxury for the poor yet it is their constitutional right.

31. I have considered the applications in the light of the arguments advanced and the submissions filed and in my considered opinion the issue to determine is whether the Learned Taxing officer properly directed herself in assessing the fees on the two items in dispute.

32. The legal principles that govern the assessment of instruction fees have been well laid down in the submissions herein basically; that the value of the subject matter. The value is then determined from pleadings, judgment or settlement by the parties.

33. The Learned Taxing officer found that the value of the subject matter could not be ascertained from the pleadings or judgment. There was no settlement However the Plaintiff does not agree with that finding. I have considered the arguments on the issue and I find that from the prayers in the plaint (as reproduced in the judgment and the Taxing officer's ruling) reveal that there was no claim in the plaint for a liquidated sum and neither did the court award any, the prayer for "damages" having been dismissed.

34. Similarly, from the substantive issues identified by the trial court at paragraph 28 of the judgment for determination, and which can be summarized as; appointment of the defendants as directors of the plaintiff; the resolution passed on 20<sup>th</sup> May 2004 in relation to the powers and/or directorship of one, A.A.K Esmail; the value of the subject matter was not an issue in dispute.

35. The Plaintiff has been referred the Court to various averments as quoted in the Plaintiff's submissions, made by the Defendants on the value of the subject matter being Kshs 6 billion and that the court also, ascertained the same.

36. Indeed the Defendant alluded to the value of two parcels of land described as the suit property as valued at Kshs 6,000,000,000. But the court did not rule that the value of the subject matter was Kshs 6,000,000,000, the court stated that the assets of the Plaintiff Company were “alleged to be worth over Kshs 6,000,000,000”. Therefore for the Plaintiff to submit that the issue is res judicata and the taxing officer could not deal with it is erroneous.

37. In my further considered opinion and with utmost respect to the submission by the Plaintiff although the word “pleading” should be interpreted broadly to include other pleading other than the averments in the Plaintiff, the primary document in the suit that bind and govern the Plaintiff in adducing evidence, is the Plaintiff. The plaintiff herein did not allude to the value of the subject matter and/or the suit as being Kshs 6 Billion. Thus the Taxing officer could only have relied on the figure of Kshs 6,000,000,000, if the same was ascertainable from the pleading and/or judgment or if it had been proved and ascertained. Even then, based on the fact that the assets of the Plaintiff were not in issue or dispute, I am in agreement with the finding of the Taxing officer that, the value of the subject matter could not be ascertained.

38. In deed where the value of the subject matter cannot be ascertained, the discretion in assessing the instruction and the getting up fees is left to the Taxing officer. In this regard the Learned Taxing acknowledged the same and went on to state that:-

*“ having considered the entire court record and the judgment of the Honourable Judge, the nature, interest, conduct and length of the proceedings and the importance of the cause to the parties, I assess the fees due to the Plaintiff’s counsel for work done on behalf of the plaintiff at Kshs 5,000,000/=*

*Item No. 1 is therefore taxed at Kshs 5, 000,000/=. An amount of Kshs 75,000,000/= is therefore taxed off.”*

39. The Plaintiff sought for Kshs 80,000,000 million and 40,000,000 million in respect to items number I and 346 respectively. The Learned Taxing officer awarded Kshs 5,000,000 million and 1,666,666 respectively. The Plaintiff argues that even, if the Learned Taxing officer was correct in assessing the instruction fees she erred by not doubling the same as she was obliged to do under proviso (ii) of clause 1(1) of schedule 6.

40. Further, as regards the getting up fees, the Plaintiff argue that paragraph 2 of schedule 6 of the 1997 of the Advocates Remuneration Order states that it shall not be less than one third of the instruction fees allowed on taxation and not one third as awarded therefore the Taxing officer failed to appreciate the same. In the same vein there were long stretch of trial informed by transfer and disqualification of judges and that added the burden to the Advocates to prepare for trial and time, which should have been considered.

41. Be that as it were the question remain as to how the Learned Taxing officer exercised her discretion. In the case of; Republic vs Minister for Agriculture & 2 others ex parte Samuel Muchiri W’Njuguna & 6 Others (supra) the court observed inter alia that:-

*“the taxing officer ought to describe accurately the nature and 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.....*

42. The court in the same case stated that :-

*“.....since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served without either a specific statement of the authorizing clause in the law or a particularized justification of the mode of exercise of any discretion provided for.....the complex elements in the proceedings which guide the exercise of the taxing officer’s discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated.....”*

43. It therefore follows that, although the Taxing master has the discretion in assessing the items in the bill and in particular the instruction fees, that discretion must be exercised judicially in the sense that, the Taxing master must act reasonably, justly and on the basis of sound principles, with due regard to the circumstances of the case; this is informed by the fact that, the taxation of the bill of cost is primarily the prerogative of the taxing officer and the scope of intervention by the courts is limited.

44. Be that as it were, it is a well-established principle of review that the exercise of the Taxing master's discretion will not be interfered with ‘unless it is found that he has not exercised his discretion properly, as for example, when he has been actuated by some improper motive, or has not applied his mind to the matter, or has disregarded factors or principles which were proper for him to consider, or considered others which it was improper for him to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given’. per SMIT AJP in Preller v Jordaan and Another 1957 (3) SA 201 (O) at 203C - E.”

45. In the instant case, although the taxing officer indicated that she had considered; the entire court record and the judgment of the Honourable Judge, the nature, interest, conduct and length of the proceedings and the importance of the cause to the parties, she did not describe with precision and in details how she related these factors to the facts of the case, for example, she did not explain what she established to be the length of the case and what she understood to be the importance of the “cause to the parties” and/or the complexity of the matter if any. Similarly it is not clear is; whether or not the fees on both items in dispute was awarded for both Plaintiff’s counsels and/or whether it was calculated on the higher scale.

46. As a consequent the parties are not able to appreciate how the Taxing officer arrived at the sums awarded on the disputed items and that

is why both parties are in dispute and/or argue that taxation is not a matter of mathematical exercise.

47. In the absence of these details, then it is proper to conclude that, the Taxing officer wrongly disregarded factors or principles which were proper for her to consider. An omission of the relevant factors amounts to an error of principle and material misdirection, which justifies interference by the Judge. Reference is made to the case of; Preller and others v Jordaan ( supra).

48. The law is also established that, 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.

49. In my considered opinion the taxing officer disregarded factors or principles which were proper for her to consider. I am therefore inclined reverse the decision of the Taxing officer and order that the subject bill be remitted to another different Taxing officer to be considered in the light of the findings herein.

50. The costs of the two applications will abide the outcome of the final orders on the re-taxed bill on the two disputed items.

51. It is so ordered

**Dated delivered and signed in an open court on this 20<sup>th</sup> day of May 2019**

**G.L.NZIOKA**

**JUDGE**

*In the presence of;*

.....for the Applicants

.....for the Respondent

Dennis .....Court Assistant