



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISC. APPL. NO. 147 OF 2018

IN THE MATTER OF ADVOCATES/CLIENT TAXATION

BETWEEN

MUTU MBOYA & NZISSI ADVOCATES.....ADVOCATES/APPLICANTS

VERSUS

STEPHEN WAMBUA KIVINDYO.....CLIENT/RESPONDENT

RULING

1. The respondent Stephen Wambua Kivindyo was one of the administrators of the estate of Harun Kivindyo Isai in High Court **Succession Cause No. 1493 of 2003**. The deceased had died testate. The respondent instructed Vishnu Sharma Advocate to petition for the grant of probate, and thereafter King'oo – Wanjau Advocates were instructed to take over the matter. They are the ones who made the application for the confirmation of the grant. It was while that application was pending that the respondent instructed the applicants M/s. Mutua Mboya & Nzissi Advocates to take over the matter. The application was settled by the consent of the beneficiaries on the distribution of the estate.

2. The applicants filed an advocate/client bill of costs dated 19th October 2018 seeking Kshs.20,390,052/=. For instructions fees (items 1) they sought Kshs.20,112,750/=. This comprised Kshs.13,408,500/= which was increased by half (Kshs.6,704,250/=). The bill of costs was on the basis that the value of the estate was Kshs.893,900,000/=. The taxing officer Hon. Mukabi Kimani taxed the entire bill at Kshs.304,396/76. Instructions fees was taxed at Kshs.100,000/= which was increased by half which made it Kshs.150,000/= for item 1. The taxation was done pursuant to schedule 1xB of the **Advocates (Remuneration) Order 1997**.

3. The applicants filed this reference challenging the taxation in respect of instructions fees. They complained that the taxing officer had not taken into account the value of the subject matter and that they had settled the matter in less than one year. It was complained that the taxing officer had observed that the work done by the applicants was routine, straightforward and not mind-boggling; that a lot of work had been done but the work had been done by the previous advocates; and that the sought instructions fees was not deserved given that two other counsel had been on record previously. The applicants submitted that these observations were unmerited, went against the principles of taxation, were extraneous, and did not take into consideration that instructions fees cannot be determined on the basis of what stage the case had reached. Lastly, the applicants argued that the relevant **Remuneration Order** had not been considered.

4. The respondent opposed the reference, and supported the taxation done on the bill of costs. On the value of the subject matter, it was argued that no valuation had been done to show Kshs.893,900,000/=. It was argued that full instructions fees could not be paid since the role played by the applicants was not much, and was routine. It was the respondent's case that fees was supposed to compensate advocates for work done and not to enrich them. Lastly, that the cause did not have any weighty legal issues, there was no oral hearing and the matter had been settled by consent.

5. Mr. Mutua for the applicants and M/s King'oo for the respondent filed written submissions which I have considered.

6. During the action, the taxing officer exercises a wide discretion. His decision should not be interfered with unless it is demonstrated that a wrong approach was taken in the taxation. In **Steel and Petroleum (EA) –v- Uganda Sugar Factory Ltd [1970] E.A. 141** it was observed that the court should not interfere with the decision of the taxing officer 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 was based on an error of principle. Further, it would be an error of principle not to take into account relevant factors or to omit to consider relevant factors, and, or not to consider the **Remuneration Orders** itself. Some of the relevant factors to take 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 directions by

the judge.

7. In the Court of Appeal decision in **Premchand Raichand –v- Quarry Services (No. 3) [1992] E.A. 162** it was held that the court will only interfere with the award of taxing officer if it is so high or so low as to amount to an injustice to one party; if the bill taxed is not comparable with previous taxations, except that consideration be had of inflation. In reaching the figure, the court should consider the following principles:-

- (a) that costs should not be allowed to rise to such level as to confine access to the courts to the wealthy;
- (b) that a successful litigant ought to be fairly reimbursed for the costs he has to incur;
- (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession; and
- (d) that so far as practicable there should be consistency in the awards made.

8. The applicants were instructed in the middle of the petition, when the respondent had had two previous firms of advocates. It is now trite that a new advocate being instructed in an ongoing case in the High Court will be entitled to the full instructions fees, subject to the taxing officer's discretion to increase or (unless otherwise provided) reduce it. (**J.M. Njenga & Co. Advocates –v- Kenya Tea Development Agency Limited [2011] eKLR**).

9. I have read the taxing officer's reasons for taxing instructions fees at Kshs.150,000/=. He took into consideration that the applicants had handled the matter for five years. The officer enumerated the amount of work done by the applicants. He observed that the cause was not a complicated one, and what the applicants had done and the filings done were routine. The cause was straightforward. However, it was not considered that, despite coming into the matter in the middle of proceedings, the applicants were, nonetheless, entitled to full instruction fees.

10. The applicants brought the bill on the basis that the value of the subject matter was Kshs.893,900,000/=. The value was in the bill and in the submissions by the applicants. The taxing officer acknowledged the submissions by the applicants regarding the value. In the instant reference the respondent submitted that there was no valuation to establish the value of the subject matter. The taxing officer, I find, made no determination on what the value of the subject matter was. He did not find out whether the estate had been valued. I have looked at the petition in the parent file. When the petition was filed the petitioners indicated the value of the estate to be Kshs.67,000,000/=. No reference was made to the figure by the taxing officer. In short, the value of the subject is an important consideration during the taxation of an advocate/client bill. In the instant case the taxing officer failed to establish the value of the estate, and to take it into consideration while taxing the bill. On the face of the pleadings the estate was substantial.

11. Therefore, it is clear that the taxing officer, in the exercise of his discretion, did not take into account the important matter of the value of the estate. He also did not consider that instructions fees is an independent and static item which is charged by every advocate who is instructed and joins the proceedings at the instance of the client, irrespective of the stage the matter has reached (**Joreth Ltd. –v- Kigano & Associates, Civil Appeal No. 66 of 1999 [2002]I E.A. 92**). I consider the error on the part of the taxing officer materially affected the taxation.

12. Consequently, I allow the reference with costs. I remit the bill for fresh taxation by another officer.

DATED AND DELIVERED AT NAIROBI THIS 3RD OCTOBER, 2019.

A.O. MUCHELULE

JUDGE