



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 204 (OS) OF 2008

NEW KENYA CO-OPERATIVE

CREAMERIES LIMITED.....APPLICANT

VERSUS

EDWARD MURIU KAMAU

NJOROGE NANI MUNGAI

PETER MUNGE MURAGE

ESTHER NJIRU OMULELE

(All trading as Muriu, Mungai & Co. Advocates).....RESPONDENTS

RULING

1. The application dated 15th February, 2017 seeks the following orders:

1. That the decision of the Taxing Officer delivered on 29th March, 2016 as far as the same relates to re-taxation of item 1 and 2 of the 5th and 6th Defendants Bill of Costs herein be and is hereby set aside.
2. That the Honourable Court be pleased to refer back the matter to the Taxing Officer for re-taxation of item 1 and 2 of the 5th and 6th Defendant's Bill of costs herein and with proper directions thereof.
3. That in the alternative to prayer 2 above, the Honourable Court be pleased to re-tax the said item 1 & 2 of the 5th and 6th Defendant's Bill of Costs herein.
4. That the costs of this application be borne by the Applicant.

2. The application is premised on the following grounds:

(a) That the instruction fees awarded under item 1 of the Bill of Costs at Ksh.2,000,000/= is manifestly excessive as to represent an error of principle on the part of the Taxing officer.

(b) That in taxing Item 1 of the Bill of Costs at the amount of Ksh.463,161/= the Taxing Officer erred in law and principle by failing to appreciate the fact that:-

- i. That the 5th and 6th Defendants had nothing to defend since they were not partners of Muriu Mungai & Company Advocates.
- ii. That the 5th and 6th Defendants misrepresented to the public as partners in the website for Muriu Mungai & Company Advocates.

iii. That the 5th and 6th Defendants were represented by the same law firm and it was unnecessary for the 5th and 6th Defendants to file 2 separate pleadings and therefore increasing costs unnecessarily and against Rule 62 of the Advocates Remuneration Order.

iv. That the Plaintiff withdrew the suit against the 5th and 6th Defendants in the first instance without any delay.

v. That the Plaintiffs were awarded the amount of Ksh.1,581,015/= as costs after a lengthy hearing of the consolidated MA 204 and 250 of 2008 hence it makes no logical sense for the 5th and 6th Defendants to be awarded more than the costs awarded to the Plaintiffs after the hearing of the main suit and therefore the Taxing Officer erred in law and principle.

vi. That Originating summons was non pecuniary and only sought for payments of 3 Bills of Costs in addition to the amount of Ksh.4,000,000/= hence instructions fees should have been based on the only identifiable amount of Ksh.4,000,000/= and which amount under paragraph VI (i)(a) should be a minimum of Ksh.122,000/= and therefore the Taxing Officer erred in law and principle.

3. The application is opposed. According to the replying affidavit sworn by counsel for the Respondent sworn on 17th July, 2017 and filed in court on 20th July, 2017, judgment was entered in favour of the 5 & 6 Respondents in the year 2008 and they have not been able to enjoy the fruits of the judgment due to endless litigation by the Applicant herein. That the Bill of Costs herein was taxed on 26th February, 2008 and following a reference filed by the Applicants herein, orders were made for the Bill to be re-taxed before a different Deputy Registrar. That the Bills were taxed afresh on 29th March, 2016 at Ksh.2,209,706/=.

4. It is contended that in the said ruling the Taxing Officer failed to appreciate the value of the subject matter and awarded a much lower amount than was expected by the Respondents but the Respondents opted to rest the matter there without further litigation. The Respondent accused counsel for the Applicant of bad faith in filing the instant application when the same firm of advocate, Mereka & Co. Advocate filed a Bill of Costs against the same party (New Kenya Co-operative Creamers Ltd) who were it's client and was awarded Ksh.250,000/= but filed a Reference and the Bill of Costs of Ksh.82,536,494/= was re-taxed at Ksh.30,000,000/=.

5. The application was canvassed by way of written submissions which I have considered.

6. The central issue raised by the Applicant is that the taxation of the Bill at Ksh.2,207,766/= is manifestly excessive and amounts to an error in principle. It is argued that in HCCC 280/18 the Plaintiff's costs were taxed at Ksh.1,581,015/= following two years of hearing whereas the suit against the 5th & 6th Defendants/Applicants was withdrawn after the filing of a replying affidavit. That in a similar matter another Taxing Officer taxed the costs at Ksh.559,766/= and no appeal was preferred. According to the Applicant, the instruction fees ought to have been based on an identifiable amount of Ksh.4,000,000/= in the parent suit. That the instruction fees under Schedule VI(1)(a) of the Advocates Remuneration Order 2006 would come to Ksh.122,000/=. It was further argued that the 5th and 6th Defendants were not partners in the firm of Muriu Mungai & Company Advocates but had misrepresented to the public in the firms website where they reflected themselves as partners and that in any event could not give instructions as they were not partners. The Taxing Officer was also faulted for exercising the courts discretion wrongly by increasing the instruction fee by more than 16 times.

7. On the other hand the submissions by the Respondents is that following the withdrawal of the suit they were awarded costs. That the Advocates (Remuneration) (Amendment) order 1997, Schedule VI is applicable in determining the instruction fee payable herein. That the value of the subject matter in the Originating Summons was Ksh.547,028,870/=. It is argued that the matter was complex, exceptional and of unprecedented nature and extensive research was undertaken before the filing of the separate responses. According to the Respondents, at the value of Ksh.547,028,870/= the minimum party and party costs ought to have come to Ksh.8,245,433,05.

8. I have perused the ruling by the Taxing Officer dated 29th March, 2016. The same reflects that the Taxing Officer was aware that the parent suit was an Originating Summons. The Taxing Officer adopted the value of the subject matter in the Originating Summons being Ksh.14,372,053/= and a further Ksh.12,372,052/= making a total of Ksh.26,744,106/=. The instruction fees came to Ksh.403,161/= and exercised discretion to increase the same to Ksh.2,000,000/= taking into account the importance of the matter and the interest of the parties.

9. The Court of Appeal set out the principles to be followed during the taxation of instruction fees in the case of **Joreth Ltd v Kigano [2002] eKLR** 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 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.”

10. On the exercise of discretion by the Taxing Officer, as stated in the case of **Republic v Ministry of Agriculture & 2 others Exparte Muchiri W'njuguna & 6 others [2006] eKLR**:

“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 a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so 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 an error of principle, or the fee awarded was manifestly excessive as to justify an

interference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) order itself some of the relevant factors to take into account include the nature and importance of the case 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.”

11. On item No. 1 the Taxing Officer in the ruling delivered on 29th March, 2016 appreciated that the Originating Summons herein dated 21st May, 2008 and filed on 22nd May, 2008 which is the subject of the Bill of Costs that is the subject of the application at hand sought the following orders:

“(a) That the Defendant/respondent do forthwith or within a reasonable time as the Honorable court may set, file their Bill of costs in respect of Misc. Appl. No. 693 of 2003, Misc. 722 of 2003 and Misc. Appl. No. 990 of 2003 all of Nairobi.

(b) That the Defendants/Respondents do forthwith or within reasonable time pay the Plaintiff/Applicant, the amount of Ksh.4,000,000/= being the agreed and recovered party and party costs after the withdrawal of HC Misc. Appl. 693,722 and 990 all of 2003 aforesaid; together with interest thereon.

(c) Costs of the suit and interest.

(d) Any other relief.

On the grounds of the said summons it was stated that there was a total of Ksh.14,372,053/= paid to the advocate out of their advocate-client relationship and which it was later discovered by the plaintiffs that it was an overpayment by an amount of Ksh.8,372,052/=. Further that the Defendant/ Respondent wrongfully retained costs of Ksh.4,000,000/= making a total of Ksh.12,372,052/=. ”

12. From the foregoing, the Taxing Officer the arrival at the value of Ksh.14,371,053/= a further Ksh.12,373,052/= making a total of Ksh.26,744,106/=. The Taxing Officer then calculated the instruction fees at Ksh.463,161/= then invoked discretion and increased the fees to Ksh.2,000,000/=. In this courts view, there is no error of principle demonstrated and neither is the fee manifestly excessive to warrant interference. The Taxing Officer took into the account relevant factors and did not omit any relevant factors nor look into accounts any irrelevant factors. The amount taxed is a fair value of the responsibility involved.

13. In the ruling herein delivered by Hon. Lady Justice K.H. Rawal, the Hon Judge observed on page 15 thereof that both learned counsel for both parties made detailed and spirited submissions raising serious, unprecedented and interesting issues. The Hon. Judge reflected the mostly undisputed background facts as a buy back by the Government of Kenya, in public interest, the business undertakings and all the assets whether moveable or immovable owned by KCC (2000) Ltd and KCC Holdings Ltd. That this decision was challenged by the aforesated companies vide H.C. Misc. Civil Appl. No.693,722 and 990 of 2003. That the Respondents in the instant application were retained to represent the Ministry of Co-operative Development and another. It is therefore apparent that the matters herein were complex, novel, time consuming and of importance to the parties.

14. On item No. 2, there was no dispute that a separate charge was payable to the Senior Counsel. The Taxing Officer exercised discretion and awarded Ksh.200,000/= thereof. The same is reasonable.

15. With the foregoing, I find no merits in the application and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 12th day of Nov., 2019

B. THURANIRA JADEN

JUDGE