



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

MISC.CIVIL NO.68 OF 2019

LAXMANBHAI CONST. LTD.....APPELLANT/DEFENDANT

- V E R S U S -

JOSEPH GITONGA WARUTUMO.....RESPONDENT/PLAINTIFF

R U L I N G

The applicant herein, Laxmanbhai Construction Co. Ltd brought this application by way of Chamber Summons seeking the following orders:

- (a) That there be stay of the certificate of taxed costs dated 28/5/2019 in Nyahururu High Court Civil Appeal No.10/2017 pending hearing and determination of this reference;*
- (b) That the applicant's bill of costs dated 2/10/2018 in Nyahururu C.A.10/2017 be re-taxed with regard to the instruction fee;*
- (c) In the alternative, the applicant's bill of costs dated 2/10/2018 be taxed a fresh.*

The grounds upon which the application is brought are that the taxing officer misapplied the law and principles of taxation in the nature of the suit giving rise to the taxation and failed to apply the formula in Schedule 6 of the Advocates (Remuneration) Amendment Order, 2014 for assessing instruction fees; that the taxing officer erred by making an award that was excessively low in the circumstances, particularly with regard to the instruction fees; that paragraph 1(b) of Schedule 6 of the Advocates Remuneration Order 2014, provides for instructions fees chargeable when presenting or opposing an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties; that the value in the present case was an award of Kshs.1,029,600/= for loss of earnings; that the applicants advocates registered their objection to the taxation and requested for reasons from the taxing officer under the notice dated 6/6/2019. The applicant claims that they will suffer substantial loss if the stay order is not granted and unless the bill is re-taxed or taxed afresh.

The application is also supported by the affidavit of Njeri Kimunyo of Muthoga Gaturu Advocates who contends that Kshs.72,330/= being the taxed costs is manifestly low and a specifically on instruction fees. She contends that after the ruling on taxation, the filed an objection and the taxing offer gave his reasons in a ruling dated 1/7/2019 (NK.3); that item 1 was taxed at Kshs.25,200/= which is the minimum basic fees for an appeal where the subject matter is ascertainable; that in the appeal the award was Kshs.1,029,000/= for loss of earnings and that is the sum that should have been taxed under paragraph 1(b) of Schedule 6 of the Advocates (Remuneration) Amendment order, 2014.

The respondent opposed the application. Wahito Tumuti Advocate swore a replying affidavit dated 21/10/2019 in which he contended that the bill of costs emanates from this court's judgment of 10/7/2018 where the sum awarded to the respondent on loss earnings was reduced from Kshs.1,029,000/= to Kshs.215,000/=; that the value indicated on the memorandum of appeal would only have been used for the purpose of taxation if it was not determined. He further urged that there was nothing complex or unique about an appeal arising from an action arising from a road accident. Counsel further urged that the applicant had not shown any that would warrant the court to interfere in the taxing officer's award and the application is therefore incompetent and defective and should be dismissed.

The respondent's counsel did not attend court but having filed a replying affidavit this court is duty bound to consider it anyway.

I have considered the application, the affidavit in support, submissions by counsel and the replying affidavit in opposition. The principles upon which a court will interfere with the taxing officer's exercise of discretion are settled. They are:

- "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 manifestly 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 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;

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 awarded 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;

5) The Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;

6) 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;

7) The mere fact that the defendant does research before filing a defence and then puts a defence informed of such 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.

8) The court may also interfere where there has been an error in principle;

9) The court will only interfere in exceptional cases.”

See also *First American Bank of Kenya v Shah & others (2012) 1 EA 64*. In *First American Bank*, J. Ringera said:

“First, I find that on the authorities, this 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 so manifestly, excessive as to justify an inference that it was based on an error of principle.”

In *Jonathan Ltd v Kigano & Associates C.A.66/1999 (2002) IEA 92*, the Court of Appeal held that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement but if its not ascertainable, the taxing officer should use his discretion to assess the instruction fees as he considers just. The judge should not be called upon to re-tax the bill because the taxing officer's function is to tax bills and that is his speciality.

In *Republic v Ministry of Agriculture and 2 others, ex-parte Muchiri W. Njuguna & 6 others*, where Ojwang J stated as follows:

“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. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. 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... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised 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 a 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 – apart, of course, from the need to show if such works have not already been provided for under a different head of costs.....”

In this case, the applicant does not have any issue with the other taxed items except instruction fees. Although the applicant wants to peg the taxation on Kshs.1,029,000/= that had been awarded by the trial court, guided by the decisions that I have considered, the figure to base taxation upon is the sum in the pleadings or judgment. In this case, since there is a judgment, the figure to be used is the judgment. The figure of Kshs.1,029,000/= was reduced on appeal to Kshs.215,000/=. The taxing officer was therefore properly guided when he used the judgment sum as the basis for taxation.

I have seen the judgment on appeal. The appeal was only against one item, that is, loss of earnings for which the lower court had awarded Kshs.1,029,000/=.

The appeal was not complex but was simple and straight forward and did not involve much of research.

I have no doubt that the taxing officer properly exercised his discretion in awarding the minimum amount. The applicant has merely alleged that the sum is too low but has not demonstrated that the taxing officer erred in principle and I have no reason to fault the decision of the taxing officer on the instruction fees. I decline to grant the prayers sought. The application is therefore dismissed with costs to the respondent.

Dated, Signed and Delivered at NYAHURURU this 3rd day of December, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Waichungo holding brief for Ms. Kihungu for the applicant

Soi – Court Assistant