



**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO.699 OF 2012**

**PATMOSE TECHNICAL SERVICES (K) LIMITED.....PLAINTIFF**

**VERSUS**

**RURAL ELECTRIFICATION AUTHORITY.....DEFENDANT**

**J U D G M E N T**

Before this Court is the Chamber Summons Application dated **4<sup>th</sup> May, 2018**, by which the Plaintiff/Objector sought for Orders that:-

**“(a) The decision of the Taxing officer (Claire N. Wanyama) taxing the Plaintiff’s Party and Party Bill of costs in this matter in the sum of Kshs.265,916/= be reviewed to Kshs.670,488.30 and/or set aside.**

**(b) This Honourable Court be pleased to substitute its own decision therefore; or**

**(c) The matter be remitted back to the Taxing officer for re-assessment.**

**(d) The costs of this application be provided for.”**

The application was premised upon Paragraph 11 of the **Advocates (Remuneration) (Amendment) Order, 2009, Section 3A of the Civil Procedure Act, Chapter 21**, Laws of Kenya, and all other enabling provisions of the law, and was supported by the Affidavit of **SAMEET PATEL**, the Sales and Marketing Director of the Plaintiff/Objector sworn on **4<sup>th</sup> May 2012**.

In opposition to this reference the Respondents filed their Grounds of Opposition dated **13<sup>th</sup> June 2018**. The matter was disposed of by way of written submissions. The Plaintiff/Objector filed their written submissions on **4<sup>th</sup> May 2018** while the Respondents filed their submissions on **16<sup>th</sup> February 2018**.

The reference arises from the Ruling dated **23<sup>rd</sup> April 2018** delivered by the Taxing Master **Hon. Claire N. Wanyama**, in which she taxed the Plaintiffs Party and Party Bill of costs in the sum of **Kshs.265,916/=** all inclusive. The items which the Plaintiff/Objector specifically challenges are items No.9 **Instruction Fees** which was taxed at **Kshs.97,160/=** and item No.63 **Getting –up Fees** which was taxed at **Kshs.32,386/=**.

It was submitted for the Plaintiff/Objector that the Taxing Master erred in fact, law and principle in taxing Item No.9 being the Instruction fees at **Kshs.97,160/=**. This was because the Taxing Master failed to appreciate that the subject matter of the suit for purposes of taxation in computing the instruction fees which was clearly ascertainable from the pleadings, was **Kshs.14,640,012** being the sum paid out to the Defendant on **18<sup>th</sup> March 2014** in full and final settlement of the suit vide the consent dated **24<sup>th</sup> July 2014**. It was further contended for the Plaintiff/Objector that the Taxing officer erred in law and in fact by assessing the instruction fees on the basis of accrued interest and coming up with a figure of **Kshs.2, 344, 004.38** as opposed to assessing the instruction fees based on the pleadings. The Plaintiff/Objector urged the court to review the Bill of costs from **Kshs.256, 916/=** as taxed by the Taxing Master to **Kshs.670, 488.30**. In the alternative the Plaintiff/Objector urged the court to come up with its own judgment (taxation) or remit the matter back to the Taxing officer for re-assessment.

On Item No.63 which is the Getting-up fees, the Plaintiff/Objector submits that having made an error in ascertaining the subject matter of the suit for purposes of taxation, it therefore follows as a consequence that the Taxing

Master equally fell into error in computing the getting up fee. The Court is urged to review and/or set aside the decision of the Taxing Master in respect of the two items. The Respondent opposed the application on the basis that the same had no legal substratum and was

therefore fatally defective.

The Respondent in opposing this reference submitted that the amount being sought by the Plaintiff was a liquidated sum of **Kshs.14,640,012/=** as per the Plaint dated **29<sup>th</sup> October 2012**. It follows therefore that the instruction fees could only be based on this sum of **Kshs.14, 640,012/=**. The Respondent placed reliance of **Schedule VI A Paragraph 1(iii)** of the **Advocates (Remuneration Order) 2009**, which deal with situation where a suit is settled prior to the confirmation of the first hearing date and urges the Court to disallow the sum of **Kshs.400,588.70** as billed for instruction fees. With respect to the getting up fees it is submitted for the Respondent that the getting up fee ought to have been taxed at **Kshs.101,603.38**. The court is urged to disallow the sum of **Kshs.133,529.60** as billed.

#### **ANALYSIS AND DETERMINATION**

Arising from the submission of the Objector in this matter

The two main issues in contention which require the determination of this court are:-

- 1. Instruction Fees**
- 2. Getting – Up fees**

Paragraph 11 of the **Advocates (Remuneration) Order 2009** provides that the procedure for objecting to a decision of the Taxing officer is by way of a reference to the High Court. With respect to the taxation of Instruction Fees, it is provided

#### **“I Instruction Fees**

**Subject as herein provided the fees for instructions shall be a follows:-**

**(b) to sue in any proceedings described in paragraph (a) where a defence or other denial of liability is filed or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined.....**

In her judgment the Hon Taxing Officer taxed Item No.9 being the Instruction Fees at **Kshs.97,160/=**. The learned trial magistrate used as a basis for her taxation of the instruction fees the sum of **Kshs.2,344,000.30** being the interest accrued on the principal sum of **Kshs.14, 640,000/=**. In **JORETH LIMITED –VS – K KIANO AND ASSOCIATES [2002] IEA 92** 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 importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any directions by the trial judge and all other relevant circumstances....”**

Based on this authority the first determinant of the Instruction fees would be the pleadings. In this case the Plaint dated **29<sup>th</sup> October 2012** and filed in Court on **5<sup>th</sup> November 2012** was for a liquidated claim in **Kshs.23,087,098.38** which was the aggregate of the total value of goods supplied being **Kshs.14,640,012/=** together with interest thereon at the rate of 18% per annum from the date of the last invoice (being 06/06/2009 to 19/09/2012).

Both parties are in agreement that the matter did not go to trial. When the matter came up for hearing on **24<sup>th</sup> July 2012**, counsel for the Plaintiff informed the court that the Defendant had on **18<sup>th</sup> March 2014** paid to the Plaintiff the principal sum of **Kshs.14,640,012/=**. The parties were however unable to agree upon the interest payable on this principal sum. This issue of interest was argued before my sister **Hon Justice Olga Sewe** who in her Ruling delivered on **16<sup>th</sup> December 2014** entered judgment in favour of the Plaintiff against the Defendant for interest that accrued on the sum of **Kshs.14,640,000/=** at court rates (being 12%) from the date of filing suit until **17<sup>th</sup> March 2014**. The question of applicable interest is therefore **“res judicata”** before this Court.

Arising from the judgment of **Justice Sewe** it is manifestly clear that the claim (being the value of the goods supplied) in the suit was **Kshs.14,640,000/=** and it is this figure which ought to have guided the taxation of instruction fees. Indeed the Plaintiffs have admitted as much vide Paragraphs (4) and (8) their Plaint dated **29<sup>th</sup> October 2012**. The Objector cannot claim interest on the sum claimed at 18% p.a which was not awarded to it. The Plaintiffs claim of **Kshs.23,087,098.38** as stated in their Plaint was a computation of the Principal sum of **Kshs.14,640,012/=** plus interest at 18%. The additional **Kshs.8, 446, 996.26** being claimed by the Plaintiff was rejected by the High Court. It is pertinent to note that the matter did not proceed to trial as parties settled the matter before the hearing date. This was not a particularly complex case.

In the circumstances I find that the learned trial magistrate erred in using as the basis for her taxation of instruction fees the figure of **Kshs.2,**

344, 000.38 which represented the accrued interest on the principal sum. The trial court ought to have computed the instruction fees based on the principal sum of **Kshs.14, 640.012** as evidenced by the pleadings.

Having established that the correct sum of the claim which formed the basis upon which instruction fees was to be charged was **Kshs.14, 640,012**. I turn to Paragraph 1(iii) of the **Advocates (Remuneration Order) 2009** which provides

**(1) "The fees shall be 85% of the fees chargeable under item(1)(b) of this schedule"**

**VI Paragraph 1(b)** the fees chargeable where the sum claimed is **Kshs.14, 640,012** is to be calculated as follows:-

- Fees for the first 1,000,000/= **Kshs.77,000/=**.
- Fees for Kshs.1,000,000/= to Kshs.20,000,000/=
- $Kshs.77,000 + (1.5 \times Kshs.13,640,012) = \underline{\mathbf{Kshs.204,500.18}}$

$204,600.18 + 77,000/=$

$=\underline{\mathbf{Kshs.281,600.18}}$

- Total

$Kshs.77,000/= + 281,600.18$

$=\underline{\mathbf{Kshs.358,600.18}}$

- Fees as per schedule VI A 1(iii) which is 85% of the total  $Kshs.358,600.18 \times 85/100 = \underline{\mathbf{Kshs.304,810.15}}$

I therefore find that the instruction fees for this matter ought to have been taxed at **Kshs.304,810.15**.

#### **GETTING UP FEES**

Schedule VI Paragraph 2 of the **Advocates (Remuneration Order) 2009**, provides:-

**"In any case in which a denial of liability is filed or in which issues for trial are found by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall not be less than one third of the instruction fee allowed on taxation."**

Given that the instruction fee has been taxed at **Kshs.304, 810.15** the Getting up fee is to be computed as follows:-

- $304,810.15 \times 1/3 = \mathbf{Kshs.101,603.38}$

I therefore tax the Getting up fee at **Kshs.101,603.38**

The other items in the bill of costs will remain as taxed by the Taxing Master. Finally regarding the Bill of Costs dated **22<sup>nd</sup> July 2016** the amount taxed off is **Kshs.155, 279.77**.

Therefore in conclusion the Plaintiff Party and Party Bill of costs dated **22<sup>nd</sup> July 2015** is taxed at **Kshs.527, 695.53** plus interest at 12% from the date of filing of the suit until **17<sup>th</sup> March 2014**. It is so ordered.

**Dated in Nairobi this 9<sup>th</sup> day of November 2018.**

.....

**Justice Maureen A. Odera**