



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

MISC.CIVIL APPLICATION NO. 365 OF 2014

IN THE MATTER OF: THE ADVOCATES ACT CAP. 16 LAWS OF KENYA

IN THE MATTER OF: TAXATION OF COSTS BETWEEN CLIENT AND ADVOCATE

BETWEEN

ODERA OBAR & CO. ADVOCATES.....APPLICANT

VERSUS

CHATERHOUSE BANK LIMITED.....RESPONDENT

RULING

1. The Applicant herein M/s ODERA OBAR & Co. Advocates through a chamber summons dated 7th September 2017 brought pursuant to Rule 11(2) of the Advocates (*Remuneration*) order and section 1A and 3A of the Civil Procedure Rules and all enabling provisions of the law seeks the following orders:-

- a) THAT this Honourable Court be pleased to set aside the entire decision of the taxing officer under order dated 31st day of August 2018.
- b) THAT this Honourable Court be pleased to remit the Bill of Costs dated 11th day of August 2014 to an alternative Deputy Registrar for fresh taxation, with directions on the conduct of the taxation.
- c) THAT the costs of this application be provided for.

2. The Application is based on the grounds Nos. 1 to 7 on the face of the application and on the supportive affidavit of Mr. Odera Obar Kennedy sworn on 7th September 2018 and annexures thereto.

3. The application is opposed. The Respondent filed grounds of opposition dated 21st September 2018 setting out grounds of opposition Nos. 1 to 6. At the hearing of the application Mr. Odera, learned Advocate appeared for the Applicant whereas Mr. Muchiri, learned Advocate, appeared for the Respondent. None of the Advocates filed any written submissions before me but both urged the application orally.

4. The application is based mainly on the grounds, that the Taxing master in assessing and arriving at the quantum of the fees allowed on instruction fees, failed to apply cogently and with specificity the relevant factors, such as the value of the subject matter, the substance of the claim, the importance of the matter, to the parties and their interest, the complexity of this matter, the novelty of the matter, the skill, labour and responsibility involved, the scope of work carried out by the Advocate, the number and importance of the documents perused and this lead to a failure to achieve a judicial exercise of discretion.

5. The Respondent in opposing the above grounds averred that the Applicant failed to establish any grave error of principle committed by the Taxing Officer.

6. In the instant case, the Deputy Registrar in her ruling on the value of the subject stated that the subject matter is not ascertainable from the pleadings and proceeded under schedule VI paragraph 1(j) (i) to tax the bill of costs under the provisions for constitutional petitions and prerogative orders and purportedly taking into consideration of the nature and importance of the petition or application, the complexity of the matter and the difficulty on novelty of the question raised, the amount or value of the subject matter, the time expended by the Advocate and

awarded Kshs.1,500,000/-.

7. The instructions as per the Advocate/Client Bill of costs were recovery instructions from plaintiff to claim the following relief from the defendant; a declaration that the purported appointment of the 3rd defendant as statutory manager of plaintiff is illegal, null and void; a permanent injunction to restrain the Defendant jointly and severally from now or in the future, interfering with management of the plaintiff's business without compliance with the provisions of Banking Act or Central Bank of Kenya Act; taking into account the value of subject matter of Kshs. 4 billion, the nature and the importance of the matter to the client.

8. Whereas the value of the subject matter might not have easily been ascertained, it is clear the subject matter had nothing to do with a constitutional petition or prerogative orders as found by the Deputy Registrar and used the same as the basis for taxation of the Applicant's Bill of costs. I find the taxing master in assessing and arriving at quantum of fees allowed on instruction fees, by applying the provisions for fees provided for constitutional petitions, and prerogative orders erred in principle and erred in the amount awarded in her ruling.

9. In view of the above, I find that the taxing officer misdirected herself by assessing the instruction fees in respect of a purely civil commercial dispute under the wrong schedule of the Advocates (*Remuneration*) Order, thus schedule VI paragraph 1(j) (i) which is a reserve for instruction fees for matters under constitutional and prerogative orders.

10. On the issue of disbursement incurred and costs, it is an obligation of the Applicant to ensure such claims are supported by relevant receipts and avail the same to the taxing master. The taxing master has discretion to seek production of the same or proceed with taxation depending on the circumstances of the matter.

11. In the case of **Nyangito & Co. Advocates Vs Doinyo Lessos Creameries Ltd (2014) eKLR** the court set out the principles on the circumstances under which a Judge of High Court can interfere with taxing officer's exercise of discretion in taxation. The principles are as follows:-

"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 manifested 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 importance of the cause or matter, the amount or value of the subject matter involved; the interests 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."

12. I have very carefully considered all the grounds of opposition as well as the Applicant's grounds in support of the Application and I have found, that the taxing master in assessing the Bill of costs is bound to be guided by the Advocates Remuneration order as regards the relevant schedule and on the items to be allowed or disallowed, and has no power at all to ignore or oust a legal right that has been granted by the law. That the taxing master though has discretion in Taxing Bill of costs, such discretion must be exercised fairly, judiciously in accordance with the law and in wider interest of justice for all litigants. I am alive to the fact, that it is not the duty of this court to demand that taxing master tax the Bill of costs in a given way but I have to emphasize that where a taxation is shown to have been based on an error of principle or the fee awarded is not supported by the relevant schedule of the Advocates (*Remuneration*) order, the court shall interfere with the taxing officer's decision. In the instant case there is a glaring error of principle applied in the taxation in applying the wrong schedule. The errors of principle noted leads me to no other conclusion other than to find and hold the orders sought in the application are deserved.

13. The upshot is that the application dated 7th September 2018 is allowed in the following terms:-

a) The decision of the Taxing master delivered on 31st August 2018 be and HEREBY set aside in its entirety.

b) The Advocate/Client Bill of Costs dated 11th August 2014 be and is HEREBY remitted back for taxation afresh before an alternative Deputy Registrar.

c) Each party to bear its own costs of the application.

Dated, signed and delivered at Nairobi this 13th day of December, 2018.

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J .A. MAKAU

JUDGE