REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 873 OF 2005

FRANCIS KIGO NJENGA……..PLAINTIFF/APPLICANT

VERSUS

ROYAL MEDIA SERVICES……DEFENDANT/RESPONDENT

RULING

1. This was a suit for defamation. The plaintiff's suit was dismissed with costs to the defendant. The defendant then filed its party and party bill of costs dated 19th January, 2016 which was taxed on 13th June, 2016.

2. The plaintiff has now filed a notice of motion dated 5th August, 2016 contesting the taxation of item No. 1 of the bill of costs. The motion is brought under rule 11 (2) of the Advocates Practice Rules and is supported by the grounds on the body of the motion and the supporting affidavit of Maina Njuguna the advocate who is in conduct of this matter on behalf of the plaintiff. It is contended that the instruction fees of KShs. 200,000/= as taxed by the taxing officer is inordinately high and is not to scale as per the applicable remuneration order. That the taxing officer misdirected herself by relying on the wrong principles when making the award and that the reasons advanced for arriving at that figure are not satisfactory. The plaintiff prays that the said award be reviewed downwards.

3. In response thereto, the defendant filed grounds of opposition dated 3rd October, 2016. The grounds are as follows:

> i. The plaintiff has not disclosed any meritorious grounds in support of the application to disturb the taxing officer's decision on taxation.
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> ii. The application has been filed for the sole purpose of denying the defendant access to taxed costs.
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> iii. The learned taxing officer considered all the relevant factors in arriving at her decision hence she did not err in principle.
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> iv. The taxing officer's judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and is an abuse of the proper application of the correct principles of law which is not the case here.

4. From my reading of the parties disposition, what falls for this court's determination is whether or not, the taxing officer applied the formula for assessment provided for under the applicable remuneration order in awarding instruction fees of KShs. 200,000/= and whether or not the said award was inordinately

high.

5. The motion was dispensed with by way of written submissions. It was the plaintiff's submissions that the claim in this suit was for exemplary damages arising from defamation. That, considering that the matter was dismissed for want of prosecution before being certified ready for hearing, the award was inordinately high. It was submitted that a taxing officer is considered to have erred in principle when he fails to consider all factors of a case. In this regard the plaintiff cited the case of **Kipkorir Titoo & Kiara Advocates v. Deposit Protection Fund Board (2005) eKLR** where it was stated as follows:

> ***"An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles. We have no doubt that if the taxing officer fails to apply the formula for assessing instruction fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle."***

6. It was stated that upon writing to the taxing officer requesting for her reasons for the taxation, she indicated that her reasons were, as per her ruling which reason the plaintiff says was "*considering the importance of the suit*…". That the same was a straight forward matter that did not involve much task and was not complex in nature. It was argued that the suit had not been confirmed for hearing and therefore the award was too high. The plaintiff further relied on **Eastland Hotel Limited v. Wafula Simiyu & Co. Advocates [2014] eKLR** and **First American Bank of Kenya v. Shah and Others (2002) 1EA 69** where the court found that it was an error to take into account irrelevant factors or omit to consider relevant factors. The plaintiff urged for reassessment of the bill by this court and relied on **First American Bank** (supra) and **Premichand Raichand Ltd and Another v. Quarry Services of East Africa Ltd and others (1972) 3 EA 163** to illustrate that this court has the jurisdiction to so reassess and in the alternative prayed that it be referred to a different taxing officer for re taxation.

7. The defendant on the other hand was of the view that the amended plaint sought different reliefs some of which are not quantified. That the value of the claim could not be determined from the pleadings hence schedule VI paragraph 1 (1) which applies for reasonable sums. It was argued that the taxing officer was guided by the nature and importance of the matter, the amount involved, the interest of parties, the general conduct of the proceedings, a direction by the judge and all other relevant factors. It was further submitted that these factors were discussed by the Court of Appeal in **Joreth v. Kigano & associates [2002] 1 EA 92** which case involved the interpretation of Schedule VI Paragraph 1 (1) which provides for a minimum and leaving a reasonable amount at the discretion of the taxing officer. It was further stated that a headnote in I stated:

> ***"where the value of the subject matter of a suit could not be determined from the pleadings, judgment or settlement, a taxing master was entitled to use his discretion in assessing the instruction fee and in doing so the factors to be taken into account included the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings, any directions of the trial judge and all other relevant circumstances. In this instance, the taxing master had followed this course and had not erred in doing so."***

8. It was submitted that in determining what was reasonable, the taxing officer was guided by the principles laid down by the Court of Appeal in **Premichand** (supra) i.e. that a successful litigant ought to be fairly reimbursed for the costs that he had had to incur; the general level of remuneration of advocates must be such as to attract recruits to the profession; and that so far as practicable, there should be consistency in the awards made. The defendant cited the words of Spry, V-P at page 164 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, and particularly where he is an officer of great experience, merely because it thinks the award was somewhat too high or too low: it will only interfere if it thinks the award was so high or so low as to amount to an injustice to one party or the other."***

9. It was further submitted that from this taxation reference the plaintiff only challenges the taxing officer's decision on quantum. That the court of appeal has held that such a taxation reference which only challenges quantum cannot stand. On this point the defendant cited **Rogan-Kampar v. Grosvenor [1978] eKLR**.

10. The general principles to consider with regard to references in taxation are now well settled. A judge is only under duty to interfere with the taxation if it is demonstrated that the bill of costs as taxed is manifestly excessive or manifestly inadequate. The judge however has no jurisdiction to entertain a reference on a question of quantum only. See **Rogan – Kemper** and **First American Bank of Kenya (**supra**)**. Ringera J. in the latter case had this to say:-

> ***"...The high court was not entitled to upset a taxation merely because in its opinion the amount awarded was high and it would not interfere with a taxing officer's decision unless 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…Under the advocates remuneration order, some of the relevant factors to be considered are the nature and importance of the 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 trial judge...".***

11. From a reading of the reference before the court, it has not been shown that the amount taxed by the taxing officer was manifesting excessive in the circumstances of this case. I do not find any reason to interfere with the amount as taxed and therefore, the application dated 5th August, 2016 is hereby dismissed with costs to the respondent.

Dated, Delivered and Signed at Nairobi this 9th day of March, 2017.

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L. NJUGUNA

JUDGE

In the presence of

……...…*For the Plaintiff/Applicant.*

……...*For the Defendant/Respondent.*