



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 506 OF 2016

STEPHEN ODDIAGA T/A STEPHEN ODDIAGA & CO. ADVOCATES.....APPLICANT

VERSUS

CHRISTOPHE HAPPE.....RESPONDENT

RULING

1. By a Chamber Summons of 5/7/2016 the Applicant/Advocate on a reference under the provisions of Rule 11(1) & 2 of the Advocate (Remuneration) Order, seeks to upset the decision and finding of the Taxing Officer made on the 19/5/2016 by which it taxed the Advocates costs and reduced instruction fees from the claimed Kshs.16,000,000 to Kshs.2,627,000/=.
2. The Advocate/Applicant faults the taxing officer for failure to increase the basic instruction fees owing to the fact that the suit was against eight defendants and involved several assets for which the advocate was duty bound to exercise due and additional diligence.
3. To the advocate, the taxing master ought to have exercised her discretion and increase the basic instructions fees and that in failing to increased it, the taxing officer erred.
4. From the application, written submissions and even the oral highlights of those submissions, the advocate does not fault the formular and workings adopted and undertaken by the taxing officer and the figure thereby arrived at. The additional reason disclosed in the submissions is that there was another suit of almost the same value and fewer defendants but the court had the bill taxed at Kshs.3,178,501. No decision nor statutory provision was cited to support the reference and demonstrate error by the taxing officer.
5. The application was opposed by the Client/Respondent who filed grounds of opposition whose gist was that the sum taxed for instruction was so taxed and arrived at in a proper and objective manner and therefore there had not been shown sufficient and valid reason to interfere with the decision.
6. The Respondent also filed submissions and contended that for this court to interfere with the decision of the taxing officer, which is an exercise in discretion based mathematical computation, there must be demonstrated that the decision was grounded upon an error in principle or that the fee awarded was manifestly so high and exorbitant or was too low as to be a misery. Reliance was placed on three decisions for that proposition. The decisions were First American *Bank of Kenya Ltd vs Shah & Others [2002] EALR 64*, *Premichand Raichard Ltd vs Quarry Services of E.A. Ltd [1972] EA 162* and *Joreth Ltd vs Kigano & Associates [2002] 1 E.A 92*.

Analysis and determination

7. I have had the benefit of reading the Record of the file, the decision by the taxing master and the submissions by the parties and the only question that present itself from determination is whether the taxing master made any error incoming to the decision that she reached.

8. Although reference to this court is not an appeal, it is important to remember and note that the principles applicable are akin to those this court applies on a first appeal.

9. In as much as the duty to tax costs is a matter discretion based on experience of a judicial officer, that discretion like all judicial discretions, must be exercised upon same logical and sound reason and not on whim. The taxing officer looks at value of the subject matter, if disclosed, and applies the fees prescribed using the provided mathematical formula. In this matter the trial court, I have said, is not faulted on her working. No. The fault is on failure to increase the ascertained instructions fees on the assertion by the advocate that the work was complex.

10. When it come to increasing instructions fees, the law Advocates,

(Remuneration) order, Proviso (i) to schedule VI A1 grant to the taxing officer a discretion which I consider unfettered. That discretion belongs to the taxing master and does not freely and unguardedly present itself for disturbance by the court on reference unless it be disclosed that the taxing master misdirected herself on a matter of principle. The law is worded:

Proviso (i): “The taxing officer, in the exercise of this discretion, shall take into consideration the other fees and allowances to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial judge, and all other relevant circumstances”.

11. The court of appeal in *Joreth Ltd vs Kigano & Associates*

Advocates reiterated the principle guiding a court of law on a reference when it said:-

“What the judge did not appreciate is that sitting on a reference against the assessment of instructions fees by the taxing officer he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle”.

12. On my part, I have appreciated my jurisdiction on this reference fully and I shall observe the boundaries set by the law. I have looked and sought to lay my head on any error of principle and I have failed in that endeavor.

13. It is only worth noting that the value of the subject matter having not been in dispute and the working the taxing officer being not challenged, whether or not to increase was a matter of discretion only exercisable if:-

i. There was demonstrated to the satisfaction of the taxing officer that the matter was complex and was that important to the parties. To me a complex matter is not determined by the number of litigants sued or suing. Rather, the complexity must be on some novel or inticate issue of law or on some unchartered area of practice deserving extra industry and application.

ii. Where there exist a decision by the judge certifying the matter as complex.

14. In this matter the taxing officer found no reason to increase instruction. She undoubtedly considered all the relevant factors and exercised a discretion as it was entitled to and no basis has been laid to invite interference. I find no merit in the reference and dismiss the same with costs.

Dated and delivered at **Mombasa** this **13th** day of **June 2017**.

HON. P.J.O. OTIENO

JUDGE