



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 332 OF 1999

SAID ABDALLA ZUBEDIPLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

RULING

1. This is a ruling on the Reference from a taxation of the applicants Bill of Costs dated 4th December 2014 and delivered on the 8th July 2015 by the taxing master Hon. M.A. Otindo. The Bill of Costs as drawn was in the sum of Kshs.8,427,994,44. The Honourable Taxing Master taxed and certified the Bill at Kshs.330,000/=. Being dissatisfied with the said certificate of costs, the applicant and pursuant to the procedural provisions under the **Advocates Remuneration Order 2009**, a notice of objection to the taxation was drawn on the 9th July 2015 and filed on the 15th July 2015 indicating that there was an objection to the entire decision on the bill of costs.

The taxing officer was requested to give reasons for her decision pursuant to **Rule 11(2) of the Order, 2009** but that was not done.

2. The court finds that the procedural requirements for the filing of a reference were observed. This is in response to the Respondents grounds of objection No. 1 filed on the 30th October 2015 that the plaintiffs application dated 22nd July 2015 is incompetent and misconceived for being in breach of **Rule 11** of the **Advocates Remuneration Order**. It is submitted that the notice of objection as filed by the applicant and directed to the Taxing master did not itemise the items that were being objected to, and therefore the taxing officer was unable to give reasons for the taxation, and that as a result there was no valid Reference filed.

3. I have looked at the applicant's notice of objection to the decision of the taxing officer dated 9th July 2015 and filed on the 15th July 2015.

It states

“ ----that the plaintiff objects to your decision delivered on 8th July 2015 on the entire bill of costs dated 13th March 2015.”

From the reading of the above notice the objection was to the entire bill, all the items as taxed. I am satisfied that a competent reference was filed. (emphasis mine)

4. The more substantive issues on the applicants Chamber Summons dated 22nd July 2015, and brought under the provisions of **Section 1A, 1B, 3, 3A** of the **Civil Procedure Act and Rule 11** of the **Advocates Remuneration Order 2009** are couched as follows:

1.

2. *That the Honourable Court be pleased to set aside the Taxing masters decision delivered on the 8th July 2015.*

3. *That the Honourable court be pleased to reassess the fees due to the items 1-103 in respect of the bill of Costs dated 13th March 2015 and make a finding of the same.*

4. *In the alternative and without prejudice to the foregoing, the Honourable court be pleased to remit items Number 1103 in respect of the Bill of Costs dated 13th March 2015 for review and reconsideration with direction on the taxation.*

5. *That costs of the application be provided for.*

5. The grounds upon which the orders are sought are to be found on the face of the application which is also supported by the affidavit of **Kisilah Daniel Gor, Advocate** for the applicant. It is stated that the taxing officer misdirected herself and acted contrary to the established principles of taxation of party to party Bills of Costs, that she did not take into account the work done, complexity of the subject, time expended and further failed to consider the Respondent's submissions dated 11th May 2015 that the applicant was entitled to Kshs.433,855/=, and that no reasons were given as to why instructions fees on the counterclaim and getting up fees were taxed at exceptionally low figures despite the amounts involved.

6. The application is opposed by a Notice of objection pursuant to **Rule 11(i) of Advocates Remuneration Order** dated 9th July 2015 and filed on the 15th July 2015.

7. Parties agreed to file written submissions. In his submissions, Mr. Kisila Gor Advocate for the applicant urged that the orders sought are merited. Relying on the *proviso* to **Schedule VI of the Order, 1997** that a taxing officer ought to consider the nature and importance of the matter, amount involved interest of parties and the general conduct of the proceedings, it was his submission that the taxing officer failed to apply those principles, and failed to give valid reasons as to why the bill was downscaled considerably. It was further submitted that since the respondents had proposed a sum of Kshs.433,855/= by its submissions, no reason was given as to why the bill was taxed below the offer by the respondent. Mr. Kisila the value could be determined from the pleadings. It was his submission that the taxing officer should have applied **Schedule VI Paragraph 1(b) and Paragraph 2 of the 1997 Advocates Remuneration Order**. He urged the court to grant the orders as sought.

8. The Respondent by its Advocate, Mr. Evans Gaturu filed submissions on the 20th January 2016. It was stated that the applicants Reference was bad in law for failure to follow procedural requirements as stated in **Rule 11 of the Advocates Remuneration Order**.

I have already made a finding on this issue, that the Reference is competently filed before the court. See Paragraph 1 and 2 above.

9. On the party to party bill of Costs, it is submitted by the respondent that the taxing officer applied her mind and the law as provided in the relevant schedules of the **Advocates Remuneration Orders**, and also considered the **proviso(i) to Schedule VI of the Remuneration Orders 1997 and 2006**, and awarded fair fees after considering the nature, importance, amount involved, interest of the parties and the general conduct of the proceedings and the award given at Kshs.330,000/= was fair, and ought not be disturbed.

10. It was further submitted that the case never went up to full hearing but settled out of court. It is further stated that the claim was not liquidated but merely to stop the defendant from realising the securities and give account for alleged high interest rates applied by the defendant over the overdraft; and therefore was not of a complex nature as to warrant submitted that there is no reason for doubling or tripling the sum of Kshs.55,000/= to Kshs.2,500,000/=, while on the counterclaim of

Kshs.14,211,700/= a maximum fees should be Kshs.198,165/= and no where can it be close to Kshs.2,500,000/=.

Though admitted that the case took over 16 years to be settled, it is stated that it was not complex, nor do the number of court appearances and the bulk correspondence exchanged make it complex.

On the offer of Kshs.433,855/= it is submitted that the taxing officer was not bound by the said offer but by her discretion to award what she deemed fair and reasonable.

12. The court has considered the application, the party to party bill of Costs as filed and submissions before the taxing master together with all the pleading. I have not seen any reasons given by the taxing officer through a requirement under the Advocates Remuneration Orders.

Notwithstanding the failure, I have evaluated all the reasons for and against the taxing officer's decision. Ordinarily, a Judge will not interfere with the discretion of the taxing masters decision. In the assessment of the costs.

In the case **Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board (2005)** I KLR, matters and circumstances when a Judge may interfere with the discretion of a taxing officer's decision were discussed.

The taxing officer is obligated to consider matters in **proviso (i)** of other relevant factors.

If taxing officer fails to apply the formula for assessing instructions fees or costs in **Schedule VI** or fails to give due consideration to all relevant circumstances particularly in matters specified in **proviso (i)** of the schedule that would be an error in principle. That in my view could have been evidenced by reasons for the taxing officer, but then, this the officer failed to give.

It further goes on to state that if a judge finds that an error of principle has been committed, the general practice is to remit the question of *quantum* for the decision of the taxing officer. The Judge has however a discretion to deal with the matter if the Justice of the case so requires. The court in the **Kiptoo case** further held that if the taxing officer totally fails to record any reasons and to forward them to the objector, as by law required, that would be a good ground for a reference and absence of such reasons would not itself preclude the objector from filing a competent reference.

For reasons above, the court makes a finding that the taxing officer made an error in principle by her failure to give due consideration of all the relevant circumstances in **Schedule VI of the Order**, and particularly matters specified in the **Proviso (I) of the Schedule VI** and the failure to give reasons for the decision.

13. I shall therefore set aside the taxing officer's decision dated the 8th July 2015 and emit the party to party bill of costs dated the 4th December 2014

In doing so, the taxing officer is to apply the formula provided for in the assessment of instructions fees on the applicants claim, and the counterclaim as well as getting up fees (if applicable) and consider the numerous court attendances as stated in **Schedule VI of the Advocates Remuneration Order**.

While doing so, the taxing officer shall give due consideration to all relevant circumstances of the case including court proceedings and any other factor that falls under the **proviso(i) of Schedule VI A(I)**.

14. For those reasons, the applicant's application dated 22nd July 2015 is allowed in terms of Prayer 4 due regard to directions given on *quantum* as stated in paragraph 13 above.

There shall be no order as to costs in the application.

Dated, signed and delivered in open court this 14th day of July 2016

JANET MULWA JUDGE