



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 189 OF 2008 (O.S.)

IN THE MATTER OF AN ADVOCATE/CLIENT RELATIONSHIP

AND

**IN THE MATTER OF AN APPLICATION FOR DELIVERY UP OF CLIENT DOCUMENTS
BETWEEN**

NEW KENYA CO-OPERATIVE CREAMERIES LIMITEDAPPLICANT

VERSUS

1. **EDWARD MURIU KAMAU**
2. **NJOROGE NANI MINGAI**
3. **PETER MUNGE MURAGE**
4. **ESTHER NJIRU OMULELE**
5. **JOHN SYKEI NYANDIEKA**
6. **ISIAH MUNGAI KAMAU (ALL TRADING AS)**

MURIU, MUNGAI & CO. ADVOCATES.....RESPONDENTS

RULING

1. Before this Court are a reference and cross-reference by way of Chamber Summons dated 26th November, 2012 and 20th December, 2012. For purposes of this ruling, the parties herein shall be referred to as Applicant and Respondents as they appear on this ruling's title. The Chamber Summons dated 26th November, 2012 is brought by the Applicant seeking:-
 - a. That the decision of the Taxing Officer delivered on 8th December, 2011 for the 5th and 6th Respondents in as far as the same relates to taxation of item 1 of the bill of costs, the quantum of the award and the reasoning with respect to the said award be set aside.
 - b. That this court be pleased to refer back the matter to the Taxing Officer for re-taxation of item 1 of the Bill of costs herein and with proper directions thereof.
 - c. That in the alternative to prayer (b) above, this court be pleased to re-tax the said item 1 of the bill of costs.
 - d. That the costs of this application be borne by Applicant.
2. The application is premised on the grounds that; the Taxing Officer having properly relied on schedule VI paragraph 1(1) of the Advocates Remuneration Order, 2006, which allows for a minimum of KShs. 8,400/=, the instruction fees allowed under item 1, of KShs. 5,000,000/= is manifestly excessive as to represent an error of principle on the Taxing Officer and being an

increase of nearly 600 times. That in taxing item 1 of the bill of costs herein, the Taxing Officer erred in principle in failing to appreciate the provisions of paragraph 1 (1) in determining the instruction fees thereof; that in taxing item 1, the Taxing Officer erred in principle in failing to appreciate the fact that the prayers sought in the Originating Summons dated 14th May, 2008, were non-pecuniary hence item 1 could be taxed and allowed at KShs. 8,400/= which is the minimum fees provided for; that the Taxing Officer erred in principle in exercising her discretion to increase the minimum figure provided for under paragraph 1(1) of the Advocates Remuneration Order, 2006 given that the Applicant had been misled by the Respondent into believing that the latter were partners in the firm of Muriu, Mungai & Co. Advocates and failed to appreciate that the Respondents had withdrawn the case against the 5th and 6th Defendants at the earliest moment, that the 5th and 6th Respondents could not have participated in defending a suit which they were not parties to or aware of and that the Taxing Officer having committed errors of principle, the decision is devoid of any basis in law and this court has jurisdiction to grant the orders sought.

3. The Chamber Summons dated 20th December, 2012 is by the 5th and 6th Respondents seeking orders that:-
 - a. The decision and orders of the Taxing Officer of 8th December, 2011 on item 1 of the 5th and 6th Respondents' bill of costs dated 27th November, 2008 be set aside and/or varied.
 - b. In the alternative to prayer (b) above, the 5th and 6th Respondents' bill of costs dated 27th November, 2008 be referred to the Taxing Officer with directions for taxation on item 1 thereto afresh.
 - c. The costs of this reference be provided for.
4. The application is premised on the grounds appearing on the body of the application and the supporting affidavit of Isaiah Mungai Kamau sworn on 20th December, 2012. He deponed that on 30th May, 2008 the firm of Muriu, Mungai & Co. Advocates filed its notice of appointment of advocates on behalf of the 1st and 4th Respondents whereas the law firm of Muthaura, Mugambi, Ayugi & Njonjo Advocates filed the notice of appointment on behalf of the 5th and 6th Respondents together with their respective replying affidavit in opposition to the originating summons; that his advocates on record undertook substantial research and preparation on all the issues pleaded in this suit prior to filing the replying affidavit in opposition to the originating summons; on 29th July, 2008 the 5th and 6th Respondent's advocates filed an application seeking to strike out the suit as filed against the 5th and 6th Respondents; on 16th October, 2008 the Applicant through its advocates, Mereka & Co. Advocates filed a notice to withdraw/discontinue the claims filed against the 5th and 6th Respondents; on 17th October, 2008 judgment on costs was entered in favour of the 5th and 6th Respondents against the Applicant after an unopposed oral application that was made before this court; that he is aware that at the material time the Respondents had instructed a senior advocate, Fred Ngatia, to lead their advocates on record and this caused substantial costs in terms of legal fees; that the 5th and 6th Respondents filed their respective bills which were taxed on 8th December, 2011 for the sum of KShs. 5,019,044/= for each bill after an aggressive opposition by the Applicant and that the main suit as regards the 1st and 4th Respondents was heard in full and a decree was issued wherein the court ordered that Applicant to deposit the sum of KShs. 14,000,000/= with the law firm of Muriu, Mungai & Co. Advocates, as a condition for release of the documents held by the said law firm. He stated being dissatisfied by the decision of the taxing officer of 8th December, 2011, he instructed their advocates to file a reference against the taxation on item 1 of the bill of costs for reasons that:-
 - i. The taxing officer failed to appreciate that the originating summons is a suit and the party and party costs are determined by the subject matter;
 - ii. The taxing officer failed to appreciate that the originating summons, its supporting affidavit and the annexures thereto had expressly admitted the value of the subject matter in the suit which should have guided the court in determining item 1 in the bill of costs;
 - iii. The taxing officer failed to appreciate that the plaintiff had in grounds (2), (3) and (6) of the

- originating summons expressly pleaded the value for the subject matter at KShs. 4.6 Billion.
- iv. The taxing officer failed to appreciate that the plaintiff expressly admitted the subject matter as in 11 (iii) above through its submissions filed in court on 12th February, 2010 and other affidavits.
 - v. The taxing officer failed to appreciate that the court's final ruling delivered on 7th April, 2011 with regard to the subject matter.
 - vi. The taxing officer erred in holding that the matter was a moderate complexity but the amount of work done and research undertaken was moderate hence her decision to reduce the party and party costs allowable and/or payable in law.
5. He stated that the reference filed by the Applicant lacks merit as it fails to demonstrate sufficient and/or valid grounds in law for allowing the same as drawn.
 6. It was the Applicant's submission that the award of KShs. 5 million was much since no evidence was tendered to prove the alleged work and research done by the 5th and 6th Respondent's advocates. It relied on the case of **Joreth Limited v. Kigano & Co. Advocates C.A. No. 66 of 1999** where the Court of Appeal reversed the High Court's decision and reinstated the gross amount awarded by the taxing officer. Citing **Adxess Limited v. Communications Commission of Kenya M.A. No. 360 of 2001** where Justice Ibrahim observed that it was mandatory for the taxing master to apply the rate provided for in the Advocates Remuneration Order, the Applicant submitted that the taxing officer was to outline the facts she considered in increasing the basic instruction fees. The same position was held in **Members of Kenya Transport Association v. Kenya Revenue Authority M.A. No. 10 of 2010**.
 7. The Respondents on the other hand argue that the taxing officer failed to exercise the discretion donated to her judicially in awarding instruction fees. That he did not give justifications for the award. That she erred in holding that the matter was of moderate complexity that she had no discretion to reduce the minimum sum allowed by law or statute for the subject matter in a suit. The case of **Republic v. Minister for Agriculture & 2 Others Exparte Samuel Muchiri W'Njuguna & 6 Others (2006) eKLR** was cited arguing that it was necessary for the taxing officer to ascertain how the instruction fees was arrived at. It was further argued that the taxing officer failed to give any specific complex elements considered in the decision; pick out what he considered novel element in the matter that guided him in exercising his discretion; how much research was undertaken and how much time was expended in the matter. The Respondents cited **Green Hill Investment Ltd v. China National Compete Plant Export Corporation** and Misc. Cause No. 264 of 2005 Okoth & Kiplagat Advocates v. The Board of Trustees NSSF where it was stated that instruction fees is a static item chargeable once and is not affected or determined by the stage of the suit has reached.
 8. It is my considered view that the outcome of the suit would not affect the entitlement to instructions fee as was been held in many leading cases including the case of **Joreth** (supra). The taxing officer acknowledged that the 5th and 6th respondents were entitled to instruction fees however, she stated that the value of the subject matter could not be ascertained from the originating summons and that the amounts used on the body of the originating summons could only be used to show the nature and importance of the matter and interest of the parties. She then proceeded to awarded KShs. 5,000,000/= under her discretion having considered the nature and complexity of the matter. He continued to state that even if the discretion of the Judge was that the Originating summons raised weighty issues, the 5th and 6th respondents were already out of the issues by virtue of withdrawal. From the foregoing it is not clear what factors the taxing officers considered in determining how weighty or otherwise the case was, and how she arrived at the figure KShs. 5,000,000/=. For that reason I find and hold that the taxing master erred in principle and I make orders that the ruling and certificate of costs be set aside. The bills of costs be referred to another other than taxing officer P. Gichohi for retaxation.

Costs shall await the outcome of retaxation.

Dated, Signed and Delivered in open court this 6th day of February, 2015.

J. K. SERGON

JUDGE

In the presence of:

Matoke h/b Nyaribo for the 5th & 6th Respondent

Mukami h/b Mureka for the Applicant