



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 15 OF 2000

ROYAL MEDIA SERVICES LTD. PLAINTIFF

VERSUS

TELKOM KENYA LTD. 1ST RESPONDENT

COMMUNICATIONS COMM. KENYA 2ND RESPONDENT

KENYA BROADCASTING CORPORATION 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

NICHOLAS ETYNG 5TH RESPONDENT

DANIEL MUSAU 6TH RESPONDENT

FRANCIS WANGUSI 7TH RESPONDENT

DANIEL WATUTU 8TH RESPONDENT

J. N. KAMUNGE 9TH RESPONDENT

PHILIP M. KAMANGA 10TH RESPONDENT

GEORGE KHOJALA 11TH RESPONDENT

MUSA ETIKO 12TH RESPONDENT

HENRY WEST 13TH RESPONDENT

KAREN & LANGATA DISTRICT ASSO. 14TH RESPONDENT

RULING

1. The first and second Defendants filed a Chamber Summons dated 25th February 2013 under the provisions of **Rule 11 (2)** of the *Advocates (Remuneration) Order*. The same requested this Court

to set aside the taxing officer's decision and Ruling delivered on 13th February 2013 as it related to the taxation of the first and second Defendants' Bill of Costs. The Application further requested the Court to be pleased to reassess the fees due on their Bill of Costs dated 18th August 2005 in respect of all the items thereof. In the alternative, the first and second Defendants prayed that the Court would be pleased to remit the said to Bill of Costs for review and reconsideration by a different Tax Officer in respect of the disputed items. The said Chamber Summons was grounded as follows:

“1. THAT the Taxing Officer erred in incorporating the submissions of the 1st and 2nd Defendants in the determination of the Plaintiff's Reference despite the fact that the 1st and 2nd Defendants were not party to the Reference filed by the Plaintiff at all.

2. THAT the Taxing Officer erred in taxing Item No. 1 for both the 1st and 2nd Defendant's Bills and the 3rd Defendant's Reference in a single ruling despite there being no orders for consolidation of the Bills thus leading to miscarriage of justice.

3. THAT the Taxing Officer misdirected herself in making a fundamentally erroneous assumption that even the 1st and 2nd Defendants were enjoined in the Reference filed by the Plaintiff against the 3rd Defendant's Bill of Costs only.

4. THAT the Taxing Officer erred in that despite setting out to determine the Reference brought by the Plaintiff against the 3rd Defendant's Bills only, proceeded to incorporate and tax Item Number 1 of the 1st and 2nd Defendant's Bill of Costs without any basis.

5. THAT the Taxing Officer erred in that despite setting out what was indeed before her for consideration in Paragraph 1-10 of the Ruling thereof, digressed from Paragraphs 11-22 of the ruling in abandoning the Reference before her and proceeding to analyse the 1st and 2nd Defendant's Submissions on their Bills which were filed, presented and argued separately before the Taxing Officer.

6. THAT the Taxing Officer erred in that despite setting out what was indeed before her for consideration in Paragraph 1-10 of the Ruling (being the 3rd Defendant's Reference), digressed and gave a final ruling and award only on the 1st and 2nd Defendant's Bill of Costs as regards Item No. 1.

7. THAT the Taxing Officer erred in ruling and/or deliberately omitting to tax or consider Items No. 2-95 of the 1st Defendant's Bill of Costs dated 18th August 2005 at all.

8. THAT the Taxing Officer erred in refusing and/or deliberately omitting to tax or consider Items No. 2-95 of the 2nd Defendant's Bill of Costs dated 18th August 2005 at all.

9. THAT the Ruling of the Taxing Officer has no basis in law.

10. THAT without prejudice to the foregoing:

- i. The Taxing Officer erred in that even after the High Court on a reference on the 3rd Defendant Bill of Costs expressly ruled that it was determinable the basis upon which the subject matter was to be calculated, the Taxing Officer nevertheless ruled that the subject matter is not determinable and hence arriving at an erroneous decision.**

- ii. **The Taxing Officer erred in that even after the High Court on a reference on the 3rd Defendant's Bill of Costs directing the taxing Officer to only establish a reasonable upper limit of period of mitigation of losses, the Taxing Officer omitted to consider the said crucial determination hence arriving at an erroneous decision.**
- iii. **The Taxing Officer acted contrary to well established principles of law and guidelines set out by the High Court.**
- iv. **The Taxing Officer misdirected herself on the discretion bestowed upon her by law and omitted to take into account relevant factors thus leading her to make an award extremely low in the circumstances to constitute a misdirection of law so as to justify interference”.**

The Supporting Affidavit to the said Chamber Summons was sworn by **George Ogembo** on 25th February 2013. The deponent, who is an Advocate of this Court practising as such in the firm of Okoth & Kiplagat, is on record for the first and second Defendants. The deponent outlined in his said Affidavit the Grounds in support of the said Chamber Summons as outlined above.

2. Prior to the filing of the first and second Defendants' Chamber Summons, the 3rd Defendant filed a reference dated 22nd February 2013 which sought the setting aside of the Taxing Officer's Ruling delivered on 13th February 2013 in relation to Item No. 1 in the third Defendant's Bill of Costs dated 6th October 2005. The Grounds upon which that Application are based are as follows:

“1. That the taxation of item 1 – instructions fees – of the 3rd defendant's bill of costs dated 6th October 2005 was excessively low as to amount to an error in principal.

2. The Taxing Officer erred in fact in that she ruled that the subject matter of the suit was not determinable while in fact it was determinable from the pleadings and thus arrived at wrong conclusions.

3. That in re-assessing item 1, the Taxing Officer failed to follow the guide lines laid out by the High Court in Justice Koome's Ruling delivered on 17th December 2010 and contradicted it in material particulars when she knew or ought to have known that the High Court made a finding that the subject matter was determinable from the pleadings and no appeal had been preferred against the said findings.

4. That the Taxing Officer erred in law and in fact in that she made an incoherent and contradictory ruling that did not accord with Justice Koome's ruling or the submissions made before her and thus arrived at wrong conclusions.

5. That the Taxing Officer failed to consider the 3rd defendant's submissions and the authorities cited before her and exhibited biases without any reason or cause at all.

6. That the Taxing Officer mixed the 3rd defendant's arguments and submissions in respect to its taxation of its bill of costs with that of the 1st and 2nd defendants when she knew or ought to have known that the three bills were distinct and separate and were dealt with separately by different counsels.

7. That the Taxing Officer in unprecedented confusion started taxing item 1 of the 3rd defendant's bill of costs and ended up by taxing the 2nd and 3rd defendant's bill of costs dated 18th August 2005 which consequently amounted to no taxation at all”.

The Application was supported by the Affidavit of **Mwangi Chege** sworn on 22nd February 2013 in which the deponent, an advocate of this Court on record for the third Defendant basically set out and

reiterated in the grounds as detailed above.

3. On 19th June 2013, the Plaintiffs filed a Notice of Preliminary Objection dated the same day. They maintained that the Defendants had not complied with the law as regards the filing of references as per paragraph 11 of the Advocates Remuneration Order. They had not detailed the reasons for the taxation of the contested items which had been sought from the Taxing Officer. Further the Taxing Officer had not given her reasons for taxation which would form the basis of a reference under paragraph 11 as aforesaid. As a result, the Plaintiffs maintained that the reference is incompetent, premature and they requested of the Court to strike out the same.
4. The Plaintiffs also filed a Replying Affidavit sworn by one **Gacheru Ng'ang'a** dated 19th of June 2013. The deponent is an advocate of this Court practising as such in the firm of **Kamau Kuria & Kiraitu** the advocates on record for the Plaintiffs herein. He noted that the Ruling giving rise to the Bills of Costs which had been taxed, was now subject to an appeal pending in the Court of Appeal. In the deponent's view this Court might be engaged in an academic exercise should the said appeal be successful. He went on to comment as regards the Ruling of the Taxing Officer who have followed the guidelines recommended by Koome J. (as she then was) when the learned The judge had referred the matter back before taxation before another Taxing Officer. The first and second Defendants had not demonstrated how the Taxing Officer had erred in principle or that the taxation amount awarded was excessively low so as to warrant interference by this Court. Further, the deponent submitted that the reference was a gross abuse of the Court's process since it was quite clear from the Taxing Officer's Ruling dated 13th February 2013 that the first and second Defendant's Bills of Costs were not taxed and they needed to set down their bills for taxation not file a reference.
5. The parties agreed that the first and second Defendant's Application before Court dated 25th February 2013, the third Defendant's Application dated 22nd February 2013, as well as the Plaintiffs' Preliminary Objection dated 19th June 2013 should be dealt with by way of written submissions. The first Defendant's submissions on the reference were dated 18th July 2013 and filed in Court, the next day. It immediately picked up on the point as made by the Plaintiffs that the Taxing Officer had not given reasons for her Ruling. It maintained that there were numerous authorities in support of the contention that if the reasons for the taxation on the disputed items were already canvassed and contained in the considered Ruling of the Taxing Officer, no further reasons ought to be sought or supplied. The first Defendant pointed to the Ruling of **Waweru J.** in the case of **Postal Corporation v Donald Kipkorir & 3 Ors HCCC No. 658 of 2004 (O.S.)** which reads as follows:

“If the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, why should further reasons be sought or supplied simply because the unfortunate wording of subrule (2) of Rule 11 of the Advocates (Remuneration) Order seems to demand so? What further purpose will be served by the further reasons not already served by the reasons contained in the considered ruling? To borrow the words of Ringera, J. did the Chief Justice, in formulating the said subrule, intend that there should be ritualistic observance thereof even when reasons for the disputed taxation are already contained in the formal and considered ruling? I think not”.

6. As regards the pending appeal, the first Defendant remarked that there was no order for stay of proceedings. The mere filing of an appeal does not automatically grant or amount to a stay at all. With respect to the hearing of the taxation, the first Defendant noted that it and the second Defendant had fixed in their Bills of Costs before the Taxing Officer at the time when the third Defendant had filed its reference on the same file. The third Defendant's Reference was heard first and exclusively as between the Plaintiff and itself. After the conclusion of that hearing, the Taxing Officer commenced and finalised the taxation of the first and second Defendants' Bills of Costs. The first Defendant maintained that it was clear from the Ruling of the Taxing Officer that the first and second Defendants were a party to the third Defendant's reference. The Taxing Officer analysed the first and second Defendants' submissions on their Bills of Costs but in setting out to determine the Reference brought by the Plaintiff as against the third Defendant's Bills of Costs, she proceeded to incorporate and tax Item No. 1 of the first and second Defendant's Bills of costs

- without any basis therefore. It was clear, according to the first Defendant, that only Item No. 1 of the first and second Defendants' Bills of Costs were taxed leaving Items Nos. 2 - 95 untaxed. The first Defendant noted that the Respondent had admitted under oath that the first and second Defendants' Bills of Costs were not taxed. In that regard, the first Defendant observed that although submissions thereon were extensively canvassed before the Taxing Officer, she had refused to tax the same and such refusal was subject to a reference. Secondly, in view of the fact that the first and second Defendants' Bills of Costs were not taxed, the first Defendant proposed both Bills should be submitted to a different Taxing Officer to be taxed afresh.
7. The third Defendant filed its submissions in relation to its reference on 18th July 2013. It is related the history of this matter as regards Item No. 1 of the third Defendant's Bill of Costs which had been allowed by the Deputy Registrar, Mr. Okato, by his Ruling dated the 30th April 2009 in the amount of Shs. 394,004,122/-. The High Court had set aside that Ruling as per **Koome J.** in her Ruling delivered on 17th September 2010 in which the learned Judge had ordered that the said Item No. 1 should be re-taxed by another Taxing Officer. The Judge had directed that the fresh taxation proceedings should be guided by the principles of litigation, reasonableness etc. as per the guidelines set out in **Premchand Raichand Ltd & Anor. v Quarry Services of East Africa Ltd & Anor. (1972) EA 162.** The fresh taxation proceedings became before Mrs. Njora, Deputy Registrar, and parties filed their submissions in connection therewith. The third Defendant maintained that in her Ruling delivered on 13th February 2013, the Taxing Officer had confused and mixed up all three Bills of Costs relating to the first, second and third Defendants. Paragraphs 1 to 11 of the Ruling clearly showed that the Taxing Officer was dealing with the Bill of Costs of the third Defendant bank but that she had gone astray in paragraph 12. The third Defendant maintained that it was clear that the Taxing Officer had ended up taxing Item No. 1 of the first and second Defendants' Bills of Costs instead of taxing Item No. 1 of the third Defendant's Bill of Costs.
 8. As regards the Preliminary Objection of the Plaintiffs, the third Defendant submitted that there was no sense in it seeking reasons as its Bill of Costs was not in actual fact, taxed. Secondly, the matter had been referred to Mrs. Njora by the Judge in respect of Item No. 1 only and such had resulted in a reasoned Ruling. The third Defendant went on to submit that if this Court considered that Item No. 1 of the third Defendant's said Bill of Costs had in fact been taxed, then it should consider that the Taxing Officer did not appreciate or follow the guidelines articulated by the Judge in the methodology and principles upon which the said Bill of Costs should be taxed. The third Defendant criticised the Taxing Officer in going against a finding of the learned Judge that the value of the subject matter of the suit could be determined from the Pleadings. The Taxing Officer had contradicted the learned Judge and erroneously found that the value of the subject matter of the suit could not be determined from the Judgement or Decree. Secondly, the Taxing Officer, having agreed that the computation period as regards the period that the damages were to be considered was an important ingredient of the issues before her, she totally failed to make a finding thereon. She had contented herself by saying that it was not for the Court to speculate on that period without appreciating that the specific period had been pleaded. Finally, the third Defendant submitted that in taxing Item No. 1 in the amount of Shs. 1 million, had the Taxing Officer arrived at such award for the two Bills of Costs of the first and second Defendant or was the third Defendant's Bill of Costs included? As regards the third Defendant's said Bill, the award was extremely unreasonable as being too low.
 9. The Plaintiffs' submissions as regards the taxation references of the first, second and third Defendants were filed herein on 24th July 2013. As regards their Preliminary Objection, the Plaintiffs set out paragraph 11 of the Advocates Remuneration Order and noted that in their Notice of Objection to taxation, the first and second Defendants had not specified in the Items of taxation to which they objected. Furthermore, they had not even asked for reasons for the taxation. As regards the Ruling of **Waweru J.** in the **Postal Corporation** case (supra), the Plaintiff's noted that such was a High Court decision and that there were conflicting decisions of that Court on the point. The Plaintiff referred to the case of **Osieko & Co. Advocates v Occidental Insurance Company Ltd HC MiscCauses Nos.149, 153, 156, 157, 158, 109, 160 and 161 of 2000 (Machakos)** where there had been a contrary finding to the extent that Rule 11 of the Advocates Remuneration Order must be complied with. Thereafter, the Plaintiffs in relation to the substance of the Preliminary Objection, reminded the Court that there was an application for stay of

execution of costs pending in the Court of Appeal. They felt that these proceedings before this Court should be stayed premised on the overriding objective of civil litigation and the comity that exists between the Court of Appeal and this Court. In any event, the taxation reference of the first and second Defendant was a gross abuse of the Court process in that the Taxing Officer's Ruling objected to, did not tax the first and second Defendants' Bills of Costs. In the opinion of the Plaintiffs, what the first and second Defendants needed to do was to set down their Bills for taxation not to file a reference. It was very clear that the Taxing Officer had not erred in any way as she did not touch upon those Bills.

10. As regards the third Defendant's reference, the Plaintiffs reiterated their submissions as concerns the first and second Defendants' reference also being applicable thereto. The Plaintiffs agreed that there had been typing errors in the said Ruling in the mixing up of the Counsel acting for the three Defendants. However, such did not go to the root of the Ruling and this Court should look at the overall picture and the substance rather than involving itself in the technicalities. In the opinion of the Plaintiffs, the Court's record spoke for itself and that the counsel for the first and second Defendants on the one hand and the third Defendant on the other had contributed to the confusion although they had agreed that the Taxing Officer should deal with Item No. 1 of the third Defendant's Bill of Costs which was before her after a reference, while the 2 Bills of the first and second Defendants were coming for taxation afresh. In the Plaintiffs' opinion it was quite clear from the Ruling that the Taxing Officer addressed Item No. 1 arising from the reference. Further, the Plaintiffs submitted that the third Defendant's reference did not demonstrate how the Taxing Officer had erred in allowing the sum of Shs. 1 million by way of instruction fees as regards Item No. 1. In their view, the Taxing Officer had indeed followed the guidelines set by **Koome J.** as well as applying general principles of taxation. The Judge, in her Ruling, had not categorically stated that the value of the subject matter of the suit was determinable from the pleadings as the suit was dismissed for want of prosecution. The Learned Judge had directed that some of the principles that the Taxing Officer should apply in taxing Item No. 1 but she had not limited the same.

11. I have read with interest paragraphs 1 to 22 of the learned Taxing Officer's Ruling dated 13th February 2013. To my mind, those paragraphs adequately summarise what had transpired as regards the reference of the third Defendant as before Lady Justice **Koome** resulting in her Ruling delivered on 17th September 2010. Those paragraphs also took into account the submissions of the various counsel who appeared before the Taxing Officer on numerous separate occasions being 20th July 2011, 19th September 2011, 6th October 2011, 18th October 2011, 19th October 2011, 8th November 2011, 14th November 2011 and 15th December 2011. In view of the large number of counsel who appeared as representing the different parties from time to time, it is hardly surprisingly that the Taxing Officer, in her said Ruling, had made typescript errors as to which counsel was acting for what party. In my opinion, it was the Taxing Officer's determination of the taxation before her that is salient to these proceedings. Indeed, she commenced her Ruling with the words:

“The matter before me concerns a Bill of Costs dated the 6th October, 2005, in which the 3rd defendant sought an award of Kshs 400,000,000 as the instruction fees for provision of services.”

To my mind those words are quite clear as to what the Taxing Officer considered was the subject before her for taxation. Indeed in paragraph 25 of the said Ruling, the Taxing Officer pointed out that her task as per the learned judge's direction was limited to reassessing the Item No. 1 of the Bill of Costs.

12. Coming to her determination, the Taxing Officer noted the key issues for her decision and the fact that she was duly guided by the principles enunciated by **Koome J.** as per the celebrated case of **Premchand Raichand** (supra). Thereafter, the Taxing Officer considered the point raised as to whether the dismissal of the suit affected the instruction fees. She concluded that the fact that the suit was dismissed for want of prosecution could not affect the quantum of instruction fees (see **Joreth Ltd v Kigano & Associates Civil Appeal No. 66 of 1999**). The Taxing Officer then noted that counsel for the first and second Defendants had referred the Court to the ruling in **First American Bank of Kenya Ltd v Shah & Ors (2002) 1 EA 64** as per **Ringera J.:**

“..... Under the Advocates (Remuneration) Order, some of the relevant factors to be considered were 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 direction by the trial Judge...”.

The learned Taxing Officer then went on to quote from the finding of my learned brother **Azangalala J.** in the case of **Vijay Kumar Mandal v Rajinder Kumar Mandal Civil Case No. 337 of 2002** which adopted the holding of the Court of Appeal in the **Joreth Ltd** case as above as follows:

“Where the value of the subject matter of a suit could not be determined from the pleadings, judgement 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.”

13.To my mind, it was paragraphs 31 and 32 of the Taxing Officer’s Ruling which were relevant to her findings and her assessment of the third Defendant’s instruction fees under Item No. 1 of the said Bill of costs dated 6th October 2005. The Taxing Officer noted that the Plaintiff did not succinctly show the value of the subject matter. She also noted that the record showed that the Plaintiff’s suit was dismissed (for want of prosecution) and thus the value of the subject matter of the suit could not be determined from any Judgement or Decree arising therefrom. As a result of her finding, the Taxing Officer detailed that the subject matter was not determinable and accordingly she would be guided by Schedule VI Para 1 (b) of the Advocates Remuneration Order, 1997. To this end, the Taxing Officer referred to the authorities of **Maboko Distributors Ltd & 2 Ors v Cooperative Bank of Kenya Ltd & Anor. HCCC No. 690 of 2002** as well as **Bunson Travel & Ors v Kenya Airways HCCC No. 304 of 2004.**

14.Regarding the computation period, the learned Taxing Officer found that such was the second vital issue for her to determine. Counsel for the first and second Defendants had argued that the suit had gone on for 5 years and submitted that a multiplier of 2.5 years would be reasonable. The Taxing Officer had no doubt, and said so, that the matter was a complex one involving intricate details and laborious work as evidenced by the pleadings, the number of applications and the length of period taken. The Taxing Officer was of the view that the period for computation of special damages was uncertain and it was during the time of the dispute that the channels were reconnected. Accordingly and, in my view, most practically, the Taxing Officer chose to be guided by the principle of reasonableness as set out in the cases of **Joreth Ltd** (supra) and **F.M. Mulwa Advocate v Patrick M. Ndeti HCCC No. 789 of 2005.** The learned Taxing Officer after careful evaluation of the parties’ written and oral arguments and bearing in mind the principles of taxation and guidelines detailed by **Koome J’s** said Ruling, found (using the principle of reasonableness), that the amount of Shs. 1 million was sufficient and reasonable under the circumstances as regards Item No. 1. At paragraph 38 of her said Ruling the Taxing Officer detailed:

“For the reasons given above, I hereby taxed item No. 1 of the defendants’ Bill of Costs dated 18th August, 2005 at a total of Kshs 1,000,000/=.”

To my mind and as she referred to defendants in the plural, it is quite clear that the Taxing Officer considered, by the end of her complex Ruling, that she was dealing with the first Defendant’s party and party Bill of Costs dated 18th August 2005 and not the third Defendant’s Bill of Costs dated 6th October, 2005. As such and in my opinion, the Ruling of the Taxing Officer was both confusing and in error.

15.As a result, I would more or less adopt the Ruling of **Koome J.** delivered on 17th September 2010. The third Defendant has asked this court to reassess reasonable fees for Item No. 1 of its Bill of Costs dated 6th October 2005. The first and second Defendants have also asked for the same thing in respect of their Bill of Costs dated 18th August 2005. However, as was held in the case of **Thomas James Arthur v Nyeri Electricity Undertaking (1961) EA 492** in which the

Supreme Court held:

“Where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will intervene only in exceptional cases.”

In my opinion, it is appropriate that this matter be referred to another Taxing Officer. As above, the Ruling of Mrs. Njora dated 13th February 2013 is set aside in its entirety. I direct that the Bills of Costs of the first and second Defendant dated 18th August 2005 are to be submitted to another Deputy Registrar who shall be guided by the principles laid down in the **Premchand Raichand** case to assess the fees payable. So far as the third Defendant’s Bill of Costs dated 6th October, 2005 is concerned, I direct that Item No. 1 thereof will be taxed afresh again before another Deputy Registrar who shall be guided by the same principles including that of reasonableness. The Preliminary Objection of the Plaintiffs dated 19th June 2013 stands dismissed with Costs to the first, second and third Defendants. The Chamber Summons of the first and second Defendants dated 25th February 2013, as well as the Chamber Summons of the third Defendant dated 22nd February 2013 are allowed with costs as against the Plaintiffs.

DATED and delivered at Nairobi this 13th day of February, 2014.

J. B. HAVELOCK

JUDGE