



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**MISC APPLICATION NO. 434 OF 2013**

**IN THE MATTER OF THE ADVOCATES ACT CAP 16**

**AND**

**IN THE MATTER OF COSTS BETWEEN ADVOCATE AND CLIENT**

**IN H.C.C.C NO. 45 OF 2013**

**MIDROCK WATER DRILLING CO. LTD.....PLAINTIFF**

**VERSUS**

**NATIONAL WATER CONSERVATION AND PIPELINE**

**CORPORATION.....DEFENDANT**

**BETWEEN**

**J.A GUSERWA & COMPANY ADVOCATES.....APPLICANT**

**AND**

**NATIONAL WATER CONSERVATION AND PIPELINE**

**CORPORATION.....RESPONDENT**

**RULING**

1. The Reference application before the Court has been brought vide the Notice of Motion dated **22<sup>nd</sup> August 2013** and filed in Court on even date. It is expressed to be brought under Paragraph 11 (2) of the Advocates (Remuneration) Amendment Order 2006, Cap 16 of the Laws of Kenya.
2. The Application seeks the following Orders:-
  - a. *That this Court be pleased to set aside the decision of the Taxing Master made on the 23<sup>rd</sup> day of July, 2013 with respect to items Nos. 1, 5, 7, 9, 18 and 20 of the Bill of Costs dated 19<sup>th</sup> April, 2013.*

- b. *That the Court to order that the Advocate's Bill of Cost dated the 19<sup>th</sup> day of April 2013 be referred back to the Taxing Officer with appropriate directions or the Court to make such orders as are just and fair in the circumstances.*
- c. *That costs of the reference be awarded to the Advocates/Applicant.*
3. The Application is based on the grounds stated therein and is supported by the affidavit of JUDITH A. GUSERWA, Advocate of the High Court of Kenya and sworn on 21<sup>st</sup> August 2013.
4. In a synopsis, on 25<sup>th</sup> April 2013, the Applicant filed an Advocate-Client Bill of Costs dated 19<sup>th</sup> April 2013. The said Bill of Costs was taxed and the Taxing Officer delivered a ruling on 23<sup>rd</sup> July 2013, which ruling is the subject of this reference.
5. It is averred for the Applicant that the value of the subject matter having been Kshs. 3.2 billion, the Taxing Officer erred in law in assessing instruction fees at **Kshs. 3,000,000/=** contrary to the provisions of the Advocates Remuneration Order that allows a minimum of **Kshs.48, 985,000/=** for Advocate/Client Bill of cost. The Applicant referred to **paragraph 22** of the **Advocates Remuneration Order**.
6. It is further averred for the Applicant that the Taxing Officer assessed item 20 on the basis of understated liquidated damages instead of the value of the subject property as pleaded in the plaint. It is also averred that the Taxing Officer taxed the Bill of Costs on the wrong figures even when the Respondent did not challenge the value of the subject matter as being Kshs. 3.2 billion with a counterclaim of Kshs. 75,000,000/=.
7. The Respondent herein who is the Client filed Grounds of Opposition dated **24<sup>th</sup> September 2013**. It is the Client's contention that the assessment of fees is premised on proper principles of law save for the discretion by the learned magistrate to raise instruction fees by **Kshs. 3,000,000/=** which the client considers excessive in the circumstances. According to the client, the taxing master applied the correct principle in law by assessing instruction fees based on the liquidated damages of Kshs. 20 million and the two injunction orders, and liquidated damages of Kshs. 75,000,000/=.

## **ANALYSIS**

8. I have considered the pleadings and submissions on record and now take the following view of the matter.
9. The Applicant has applied to this Court to set aside the decision of the Taxing Master made on the **23<sup>rd</sup> day of July, 2013** with respect to items Nos. 1, 5, 7, 9, 18 and 20 of the Bill of Costs dated 19<sup>th</sup> April, 2013.
10. The 1<sup>st</sup> Item is the instruction fees. It is the Applicant's contention that the Taxing Officer taxed the Bill of Costs on the wrong figures and that the value of the subject matter was Kshs. 3.2 billion with a counterclaim of Kshs. 75,000,000/=.
11. It is not in dispute that the value of the project which gave rise to the suit in HCCC 45 of 2013 was valued at Kshs. 3.2 billion or thereabouts. However, having read the Plaint therein, it is discernible that by and large what was in issue was with regard to the terms of contract between the parties and nothing to do with its value. The foregoing in my view is what should form or inform what is to be defined as the subject matter in the said suit. To this end I adopt the definition of subject matter as per the Black's Law Dictionary as follows:-

**“the issue that is directly litigated upon and which the Court needs to give a determination on.”**

12. The Plaint is also clear in its prayers as to what reliefs the Plaintiff is seeking among them

injunctive orders and a liquidated claim of Kshs. 20,000,000/=. Further, the applicant filed a Defence on behalf of the Respondent together with a counterclaim of Kshs. 73, 500,000/=.

13. In that case, it cannot be said that the value of the subject matter in HCCC 45 of 2013 is the said Kshs. 3.2 billion being the cost of the project therein. The Plaintiff has not raised any issue(s) with regard to the value of the contract neither has it claimed for such sums. In light of the foregoing, I agree with the taxing master that the value of the subject matter was at Kshs. 20 million being the liquidated damages prayed for among the other injunctive prayers in the Plaintiff as well as Kshs. 73,500,000/= prayed for in the counterclaim. Therefore the instruction fees as calculated by the taxing master were based on the proper values.
14. However, the Respondent takes issue with the exercise of discretion by the taxing master in increasing the instruction fees therein. According to the Respondent, the said increment was excessive in the circumstances. In exercising her discretion to increase the instruction fees, the taxing master in her ruling of 23<sup>rd</sup> July 2013 indicated that she had considered the importance of the matter to both parties on record and work done by the parties.
15. It is now well settled that a Court cannot interfere with a Taxing Officer's decision unless the decision is based on an error of principle or the fee awarded is so manifestly excessive as to justify an inference that it was based on an error of principle. See ***Steel Construction Petroleum Engineering (EA) Limited v Uganda Sugar Factory (1970) EA 141*** and ***Joreth Limited Vs Kigano and Associates [2002] 1 E.A 92***.
16. As already observed above, the taxing Officer applied the right formula in assessing the instruction fees. Further, the taxing officer gave reasons for increasing the instruction fees as she did, being that she had considered the importance of the matter to both parties on record and work done by the parties. There is no error of principle.
17. With regard to whether the said fees were excessive in the circumstances, I will refer to the case of ***Premchand Raichand Limited & another Vs Quarry Services of East Africa Limited and another [1972] E.A 162*** in which the Court addressed itself thus:-  
  
***“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 somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other”.***
18. It is clear from the above case that even if I were to differ with the taxing master on the instruction fees awarded that would not be a sufficient reason to interfere with the award therein. The only exception is where the Court *thinks that the award is so high or so low as to amount to an injustice to one party or the other which I am unable to find in this case.*
19. In relation to items 5, 7, 9 and 18, it is plain that items 5 and 7 were properly taxed off as per schedule VI 7 (d) of the Advocates remuneration order. However with regard to Item 9 which the Applicant charged at Kshs. 5,040/= and was taxed off at Kshs. 42 the only logical explanation could be that the same was an inadvertent error on the part of the taxing master. Having gone through the Bill of Costs it appears that the taxing master intended to refer to item 18 as taxed off at Kshs. 42 and not item 9.
20. That notwithstanding, according to schedule VI 7 (g) of the Advocates Remuneration Order the fee to be charged for such attendances as per item 9 is provided for per quarter hour at Kshs. 378. The Advocate attended to the Defendant's representatives for 3 hours and therefore the amount chargeable would be calculated as (378 x 12) at Kshs. 4,536/=.
21. The Applicant also has an issue with item 18 which they charged at Kshs. 105. It is not clear what the issue is but from the ruling of the taxing master it is apparent that the said item was not

mentioned and therefore it is not clear at how much it was taxed at.

22.As for item 20 which reads “half of the instruction fees in preparation for hearing”, it is submitted that the Applicant prepared for the hearing of the matter in HCCC 45 of 2013 which was scheduled for 19<sup>th</sup> April 2013 but then the matter was taken out of the hearing list by the Court. It is the Applicant’s case that they are entitled to preparation fees in the nature of getting up fees, being half of the instruction fees in accordance with Schedule VI of the Advocates.

23.In view of the above, it is unfortunate that the Court is not privy to the Parent file being HCCC 45 of 2013 and cannot ascertain whether the suit therein was indeed set for hearing and then taken out of the hearing list on 19<sup>th</sup> April 2013. The applicant did not attach any documentary evidence to substantiate this Claim. Further, the taxing master did not address item No. 20 whatsoever. In my view it would only be fair for the taxing master to give reasons as to why the said item was not allowed, and to reconsider the same if indeed as submitted by the applicant, they prepared for the hearing for 19<sup>th</sup> April 2013.

24.Under Schedule VI 2 (ii) of the Advocates remuneration Order, an Advocate is entitled to increase instruction fees by one-half when the case has been set and confirmed for hearing. It is therefore important that the Taxing Officer establishes the factual position in this matter and make appropriate considerations.

25.In view of the foregoing and the few apparent omissions, in particular Items 9, 18 and 20, it is my view that the Bill of Costs should be referred to the taxing master to address the same for clarity purposes.

26.The upshot is that the Applicant’s Notice of Motion dated 22<sup>nd</sup> August 2013 and filed in Court on even date is hereby referred back to the Taxing Master with the following directions:-

- a. **The taxing Master shall review and reconsider items 9, 18 and 20 of the Bill of Costs dated 19<sup>th</sup> day of April 2013.**
- b. **Each party to bear their own costs of this application.**

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 17<sup>TH</sup> DAY OF MARCH 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

No appearance for Applicant

No appearance for Respondent

Teresia – Court Clerk