



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 29 OF 2012**

**IN**

**LENNA CATHERINE KOINANGE.....APPLICANT**

**VERSUS**

**MAJANJA LUSENO & CO. ADVOCATE.....RESPONDENT**

**RULING**

1. The application before court for determination is a Chamber Summons dated 22<sup>nd</sup> January, 2013 and taken out under paragraphs 11 and 62A of the Advocates Remuneration Order, Section 3A of the Civil Procedure Act and Order 40 Rule 1(a) of the Civil Procedure Rules and all other enabling Provisions of the Law. The Applicant thereby seeks orders that the Bill of Costs dated 9<sup>th</sup> March 2012 and taxed on 17<sup>th</sup> October 2012 at a sum of Kshs. 23,181, 877.00 be set aside and that the same be taxed afresh before another taxing officer. There is also a prayer for orders to restrain and stay execution proceedings founded on the said taxation pending the hearing and determination of the reference.
2. The application is premised on the grounds that the taxing officer erred in principle in assessing the taxed costs in respect of the bill at exorbitant costs without outlining the clear formulae she applied in assessing the same. It is argued that the taxing officer was wholly wrong, that the Respondent/Applicant has valid reasons for objecting as aforesaid since the same flies in the face of valid principles advanced by the courts, that the matter was not complex as to require extensive research on the part of the Applicant/Respondent herein as novel issues of law were not raised and determined, that by granting the Applicant/Respondent a sum of Kshs. 23,181, 877.00 is far in excess of the actual agreed amount as per the Advocates Act Section 45 where Kshs. 4,600,000.00 was agreed as fees payable and the said sum has been fully paid, that the amount allowed in all the items is manifestly excessive as to justify an inference in the circumstances of the case and there is no justification for the same. It is in the public interest that costs are kept to a reasonable level so that justice is not beyond the reach of poor litigants, that the decision was based on an error of principle and amounted to wrongful exercise of discretion and that this court is entitled to interfere with wrongful exercise of taxing powers.
3. The application is further supported by the annexed affidavit of J. Lily Munene an Advocate of the High Court of Kenya sworn on 22<sup>nd</sup> January 2013 and there is a further affidavit filed in court on 18<sup>th</sup> June 2013 and sworn on the same date by Lenna Catherine Koinange the Applicant.

4. Opposing the application, the Applicant/Respondent filed Grounds of Opposition on 1<sup>st</sup> March 2013. Their opposition is based on the grounds that the Respondent did not at the taxation of the Applicant's bill of costs indicate any specific items to which she was objecting to and instead filed a Replying Affidavit asking for the dismissal of the Bill of Costs. It is further argued that the taxing officer did not err in principle in the taxation. It is also urged that there is no jurisdiction for interference with the taxing officer's decision in taxation in regard to quantum and also that there is no jurisdiction in law to stay taxed costs. The Respondent is also said to have not shown any prejudice that she would suffer if she pays the taxed costs.
5. It was directed by court that the matter be disposed of by way of written submissions. Parties duly filed their submissions in court. The Applicant's submissions dated 17<sup>th</sup> June 2013 were filed on 18<sup>th</sup> June 2013, while the Respondent's submissions dated 24<sup>th</sup> June 2013 were filed on 25<sup>th</sup> June 2013.
6. I have considered the grounds set out on the face of the application and the facts deposed in the affidavits filed in support and the grounds of opposition by the Respondent against the application. I have further considered the written submissions filed herein. I am of the view that the circumstances under which this court can interfere with the Taxing Officer's exercise of discretion are well settled. The principles as set out in the case of *First American Bank of Kenya vs. Shah & Others* [2002] 1 EA 64, were that the Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle and that it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. According to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or 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. Thirdly, if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high. Fourthly, it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.
7. It has also been pointed out that the Court should interfere with the decision of the taxing officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the taxing officer is more experienced and therefore more apt to the job. The court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the taxing officer or even by the Judge on appeal; the costs should not be allowed to rise to such levels as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case. The general level of remuneration of Advocates must be such as to attract recruits to the profession. So far as practicable there should be consistency in the awards made. Every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions. One must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief. Clearly it is important that advocates should be well motivated but it is also in the public interest that costs be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.
8. The above stated principles were re-affirmed by the Court of Appeal in *Joreth Limited vs. Kigano and Associates* [2002] 1 EA 92 where the Court stated thus:

*“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances. That is what C K Njai Esq. did when he said: ‘As we do not know the capital value of the property in dispute; one I believe is left to determine the matter on the general discretion donated to the taxing officer to tax a bill, based on the importance of the matter to the parties, complexity and the responsibility placed on shoulders of Counsel.’”*

9. There is thus a general caveat on judicial review of quantum of taxation unless there is a clear error of principle or the sums awarded are either so manifestly high or low as to lead to an injustice. In *James vs. Nyeri Electricity* [1961] 492, it was stated that:-

*“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. An example of such an exceptional case is that of *Haiders Bin Mohamed Elmandry and Others vs. Khadija Binti Ali Bin Salim (4)* (1956) 23 EACA. 313, in which an instructions fees of the 9,000/= was considered so excessive as to indicate that it must have been arrived at unjudicially or on erroneous principles.”*

10. The Applicant submits that the taxing officer by estimating the gross value of the estate to be in excess of Kshs. 4 billion, did not consider any valuation report or at all establish the extent of the estate. The Applicant contended that there is no legal basis on how the figure of Kshs. 4 billion was arrived at and that there ought to have been a valuation so as to establish the instruction fees. The Applicant further contended that the alleged Kshs. 4 billion worth of asset belongs to the estate, and that she is one of the beneficiaries, whose interest is yet to be established and thus the figure of Kshs. 23,181,877.00 has no legal basis on how it was arrived at. Also, the Applicant has submitted that the taxing officer taxed the bill herein as if Majanja Luseno & Co. Advocates were the only lawyers representing the beneficiary. There were other lawyers before and others who took over from him, and submitted the a sum to be taxed should be a bill in respect of all the lawyers representing the beneficiary/Applicant herein.

11. The Respondent on their part, submitted that the Applicant engaged the Respondent to act for her in Succession Cause No. 527 of 1981 and that the Respondent duly executed its duties. The Respondent then proposed a payment plan in terms of its letter dated 30<sup>th</sup> August, 2010 and the Applicant refused to agree with the terms as proposed and did not respond to the letter. When the Respondent filed a bill of costs upon failure by the Applicant to pay legal fees due and owing, the Applicant did not at the taxation of the bill of costs indicate any item that she objected to.

12. I agree with the applicant when she contends that the respondent’s claim that under paragraph 62(A) (1) of the Advocates (Remuneration) Order should await for the final Advocate on record to file a bill of costs is erroneous. There is no dispute that the Respondent rendered services to the Applicant and therefore, it is obvious that the Respondent is entitled to payment for the said services offered. In *Machira & Co. Advocates vs. Arthur K. Magugu & Another* [2012] eKLR which the Respondent has relied, held at paragraph 17 thus:

*“We hold that paragraph 62A (1) does not apply to advocate/client bills of costs. An advocate whose instructions have been terminated is entitled to immediate payment of his fees for the services rendered. If upon demand the client refuses to pay, he is entitled to file his bill and have it taxed immediately. He does not have to wait until the matter is concluded. He also does not have to depend on the advocate on record to*

*recover his fees for him. The client might compromise with his current advocate on his fees and no bill is filed. “*

13. From the foregoing, it is clear that the Respondent is entitled to immediate payment of its fees for the services that they rendered. However, one of the main issues here is how much is the Respondent entitled to? The Applicant has submitted that there was an agreement as to the fees which fees were Kshs. 4,000,000.00 which have been paid in full. The Respondent has refuted this claim and submitted that it proposed a payment plan in terms of its letter dated 30<sup>th</sup> August, 2010 and the Applicant refused to agree with the terms as proposed and did not respond to the letter. I have had a look at the said letter whose content at paragraph 2 states thus: “In order to complete the matter of the estate on your behalf, we shall charge the sum of Kshs. 20,000,000.00. In addition to the said sum the partners of the firm shall be entitled to and you shall pledge 1 acre of your entitlement in Closeburn and/or Kentmere at the option of either partner”.
14. It must however, be noted that the matter of the estate has not been completed and the Respondent’s services were terminated and another firm of Advocates came on record. Having stated that, it cannot be emphasized enough that the Respondent is indeed entitled to the services rendered.
15. A look at the records, one would realize that it is not possible to ascertain the value of the estate, as no such valuation report had been provided, and there is serious doubt as to where the taxing officer might have gotten the estimate. Therefore, it is the considered view of this court that the taxing officer should have used her discretion to determine such instructions fees as she considered just, taking into account, amongst other matters, the interest of the parties, the general conduct of the proceedings, and all other relevant circumstances.
16. In view of the above mentioned, I find that the amount taxed by the taxing officer was excessive and that she did not properly exercise her discretion. This in my view forms the exceptional case envisaged in the above quoted case of *James vs. Nyeri Electricity* [1961] 492. Accordingly, this court holds that it in the interests of the parties and in the circumstances of this case the order of the taxing officer of 17<sup>th</sup> October 2012 which passed the Bill of Costs herein at the sum of Kshs. 23, 181, 877.00 be set aside.
17. The upshot of the above is that the application herein is merited and is hereby allowed. The order of the taxing officer of 17<sup>th</sup> October 2012 is hereby set aside; the Bill of Costs dated 9<sup>th</sup> March 2012 shall be remitted to a taxing officer other Mrs. Ngugi for fresh taxation.

**DATED, SIGNED and DELIVERED at NAIROBI this 9<sup>th</sup> DAY OF May, 2014.**

**W MUSYOKA**

**JUDGE**

**No appearance for the applicant.**

**No appearance for the respondent.**