



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CAUSE 843 OF 2013**

**IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16 LAWS OF KENYA.**

**AND**

**IN THE MATTER OF ADVOCATE-CLIENT BILL OF COSTS ARISING FROM LEGAL SERVICES IN JR NO. 529 OF 2007**

**BETWEEN**

**NYANGITO & CO. ADVOCATES.....APPLICANT/ADVOCATE**

**VERSUS**

**DOINYO LESSOS CREAMERIES LTD.....RESPONDENT/CLIENT**

**(Being a reference for the decision of the Taxing Officer, A N Ongeri (Mrs) DR on 3<sup>rd</sup> December, 2013)**

**RULING**

1. By a Chamber Summons dated 16<sup>th</sup> December 2013 expressed to be brought principally under the provisions of Paragraph 11(2) of the *Advocates (Remuneration) Order* the applicant herein, **Nyangito & Co. Advocates**, seek an order that the decision of the earned Registrar dated 3<sup>rd</sup> December, 2013 be set aside and/or varied and the appellant's (sic) bill of costs dated 30<sup>th</sup> August, 2013 be taxed a fresh and for an order for provision of costs.

**Applicant's Case**

2. According the applicant this reference arising from the decision made by the learned taxing master on 3<sup>rd</sup> December 2013 in respect of the advocate-client bill costs dated 30<sup>th</sup> August, 2013 which was taxed in the sum of Kshs 424,774.00
3. Being aggrieved by the said decision the applicant orally notified the Registrar of the objection thereto and on 3<sup>rd</sup> December, 2013 the Registrar supplied the reasons and the ruling thereof.
4. In the applicant's view the learned Registrar erred in law and fact by failing to consider the subject matter of a colossal amount of Kshs 431,059,479/= demanded by the respondent (Kenya Revenue Authority) to be paid by the applicant, the client herein and being the main issue as pleaded and disclosed in JD case No. 529 of 2007 filed in court by the appellant and pursued to its logical conclusion on behalf of the respondent-client.
5. It was further contended that the learned Deputy Registrar failed to apply and comply to (sic) the cardinal principles which id essentials (sic) in guiding the taxing officer costs while taxing

- advocates-client bill of costs. It was further contended that the said Deputy Registrar failed to tax the other items in the said bill and failed to determine the adequate and appropriate instructions fees to be paid to the appellant-advocate pegged on the subject matter.
6. It was the applicant's case that the learned Deputy Registrar erred in law and fact by contradiction herself by stating that the appellant had not proved the complexity of the matter and yet the matter itself was complex in nature from the face of the documents filed in court by the appellant and time spent in negotiations to settle the matter and finally record a settlement in court. According to the applicant the said Deputy Registrar further erred in failing to consider the submissions filed by the appellant to enable her arrive at a fair and just conclusion in the spirit of dispensation of justice.
  7. While the learned Deputy Registrar stated that the said bill was exorbitant and exaggerated, it was contended that she erred in failing to accurately discharge her mandate bestowed upon her by diligently taxing the same and awarding the appellant a reasonable amount based on the legal services rendered by the appellant-advocate instead of concentrating on mere technicalities. To the applicant there was a further error in awarding the mandatory  $\frac{1}{2}$  or  $\frac{1}{3}$  pegged on instructions fees and failed to apply the appropriate principles in determining the said bill and instead proceeded to erroneously tax the same based on a non-existent imagine figure hence failed to adequately compensate the advocates and thereby deprived the advocates of the fees already earned.
  8. In his oral submissions, **Mr. Nyangito** apart from relying on the submissions filed herein highlighted the fact that the matter arose from a notice issued by KRA in which it was demanding Kshs 431,059,479/- from the client. Apart from the said notices, KRA also issue agency notices whose effects were the freezing of the client's accounts. The advocate herein acting alongside **Mr Nyairo** who was the leading counsel subsequently entered into negotiations but along the way **Mr Nyairo** withdraw from the matter leaving the advocate herein to fully engage therein. Pursuant to the said negotiations, the agency notices were withdrawn and the freezing orders lifted.
  9. In **Mr Nyangito's** view, the learned taxing master did not consider relevant considerations such as the fact that the amount involved and complexity of the matter. She further failed to consider the fact that meeting s were held and that the client's business had been paralysed hence the importance of the matter to the client. Based on the amount involved, the advocate/applicant sought the sum of Kshs 7,000,000.00. To learned counsel the work was involving and the learned taxing master ought to have exercise d her discretion and increased the fees.
  10. The Court was therefore urged to vary the decision of the taxing master and award such reasonable sum depending on the circumstances and in the alternative that a fresh taxation be directed.
  11. With respect to the replying affidavit, it was submitted that the issues raised therein were never raised before the taxing master. In support of the submissions, the applicant/advocate relied on **Joreth Limited vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] 1 EA 92.**

### **Respondent's Case**

12. On behalf the client/respondent it was contended that the applicant has not laid sufficient basis on which the court can interfere with the decision of the taxing master's decision. In the Respondent's view, the said decision was true and legally sound and that the learned taxing master properly directed herself in assessing item 1 of the applicant's bill of costs at the same of Kshs 300,000/- while the minimum provided for is Kshs 28,000/= hence the increase of more than 100% was more than reasonable. According to the respondent's the taxing master used correct principles.
13. According to the respondent no evidence has been shown that the matter was complex and the mere fact that time was spent in negotiations on behalf of the respondent cannot be a yardstick for determining the complexity of the matter. To the respondent the assertion that the application was not a prerogative in nature is a complete miscomprehension of the basics on the law on judicial review by the applicant. It was submitted that it is incomprehensible for the applicant for applicant to purport that the taxing master did not increase the instruction fees by either  $\frac{1}{2}$  or  $\frac{1}{3}$  when in the first place the applicant's bill of costs did not provide for this item.
14. According to the respondent the learned taxing master was right in disregarding all the authorities

- filed by the applicant as they were irrelevant since they did not relate to assessment under Scheduled VI(1)j of the **Advocates (Remuneration) Order**.
15. Even assuming that the costs ought to have been pegged on the value of the subject matter the respondent contended that the same could only be pegged on Kshs 25,000,000.00 which was the settlement sum and not Kshs 431,059,479/= which was the sum demanded. Apart from that the costs of the firm of **Nyairo & Co. Advocates** which was acted alongside the applicant was assessed in the sum of Kshs 627,333.65. That the instructions fees in both instances were Kshs 357,251/- and Kshs 300,000/- respectively is a manifestation that the two taxations were guided by correct principles in assessing instructions fees. In the Respondent's view to settle the matter in the sum of Kshs 25,000,000.00 and pay the advocate Kshs 17,241,660/- would amount to settling precedence towards reserving access to justice for only the rich.
  16. According to **Mr Akech**, learned counsel for the Respondent, while relying on the submissions on record, the principles guiding the taxing master are well settled and reliance was placed on **Republic vs Minister for Agriculture & 2 others ex parte Samuel Muchiri W'njuguna & 6 others (2006) eKLR**.
  17. What was in issue, it was submitted was not the amount but whether the agency notices were procedural. In his view, the taxing master was right in finding that the amount involved was not the basis for determining the amount. With respect to complexity, he submitted that it was not shown what was complex about the matter. According to him, the range of instructions fees is between Kshs 200,000/= and Kshs 300,000/=. A look at the bill shows that there was no request for increase. In any case, the matter according to him did not proceed to the trial and the decision whether or not to increase the fees being discretionary, the failure to do so cannot be faulted hence no basis has been laid for attacking the other items such as item 22. Since the decision of the taxing master was reasoned the same cannot be impeached as the importance of the case was taken into account and that the court in assessing the applicant's fees did not take into account the sum paid to **Nyairo & Co. Advocates**.
  18. I have considered the foregoing and this is the view I form of the matter.
  19. The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are, (1) 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 manifestly excessive as to justify an inference that it was based on an error of principle; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, 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; (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise 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; (4) 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; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64**.
  20. Further it has been held 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 the Judge on appeal; the costs should not be allowed to rise to such level 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 cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

21. Further guidance if necessary may be obtained in the case of **Joreth Limited vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] 1 EA 92** where the Court of Appeal held that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement 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 the 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. It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. The Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle. In principle the instruction fees is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. The Taxing Officer whilst taxing his bill of costs is carrying out his functions as such only. He is an officer of the Superior court appointed to tax bills of costs.
22. In **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others** (supra), **Ojwang, J** (as he then was) expressed himself *inter alia* as follows:

**“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, 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.... 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 manifestly excessive as to justify an interference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case 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. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. 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... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for.... The complex elements in the proceedings which guide the exercise of the taxing officer’s discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings**

necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs.....”

23. While remitting the matter for fresh taxation the learned Judge in the above matter gave the following guidelines:
1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;
  2. the taxation of advocates’ instruction fees is to seek no more and no less than reasonable compensation for professional work done;
  3. the taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
  4. so far as apposite, comparability should be applied in the assessment of advocate’s instruction fees;
  5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
  6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;
  7. where responsibility borne by advocates is taken into account, its nature is to be specified;
  8. where novelty is taken into account, its nature is to be clarified;
  9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.
24. In my view the complexity of a case is not necessarily determined by the value of the subject matter in terms of the amount of money involved. It may well be that the amount of money involved may be high but the issue may be a very simple legal issue. However, it cannot be gainsaid that where the amount is high the issue is likely to be very important for the parties. In this case, the amounts demanded was Kshs 431,059,479/= which in my view is by any standard not a small amount. Having considered the submissions of counsel I have no doubt that the matter was very important for the parties.
25. In her ruling, the learned Taxing Master was the view which view I agree with that in judicial review application the subject matter is not the basis of determining the instructions fees though it is one of the factors to be considered. She found that the relevant paragraph of Schedule VI was paragraph (1)(j) where the minimum provided for is Kshs 28,000/=. While appreciating the factors which guide the increase of the instructions fees, she found that the complexity had not been demonstrated hence the amount of Kshs 300,000/= was reasonable.
26. In this case no serious arguments have been advanced with respect to the other items apart from the instructions fees to justify my interfering with the same. As was held by **Ojwang, J** (as he then was) in **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W’njuguna & 6 Others** (supra):

**“The taxing officer was wrong in law to incorporate profit levels of the tea production sector as an element in her taxation of costs in a judicial review matter.....Although the taxing officer referred to the complexity of issues in judicial review proceedings, the judgement has not shown anything in the application to have risen at all above the work a day chores of legal practitioners. It follows that the responsibility entrusted to counsel in the proceedings was quite ordinary and called for nothing but normal diligence such as must attend the work of a professional in any field.....There was nothing novel in the proceedings on such a level as would justify any special allowance in costs. There is nothing to indicate any time-consuming, research-involving or skill engaging activities as to justify an enhanced award of instruction fees. There is also no great volume of crucial documents which counsel for the judicial review applicants had to refer to, to prosecute their cause successfully. Further the matter was not urgent, for urgency would have mainly attached to prayers for orders of**

prohibition.....The taxing officer was not properly guided when she conducted the taxation. Her exercise of discretion was done perfunctorily and as a mere formality. It is necessary to specify clearly and candidly how she had exercised her discretion since discretion as an aspect of judicial decision-making is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs.....Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the taxing officer should avoid the possibility of unjust enrichment for any party and ought to refuse any claim that tends to be usurious; so far as possible the taxing officer should apply the test of comparability; the taxing officer should endeavour to achieve objectivity when considering ill-defined criteria such as public policy, interests affected, importance of the matter to the parties, or importance of the matter to the public; the taxing officer should clearly identify any elements of complexity in the issues before the court and in this regard should revert to the perception and mode of analysis and determination adopted by the trial judge; the taxing officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer should determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel.....Private law claims do not fall in the same class as public law claims such as those in judicial review, in constitutional application, in public electoral matters. Such matters are in a class of their own and the instruction fees allowable in respect of them should not, in principle be extrapolated from the practices obtaining in the private law domain which may involve business claims and profit calculations..” [Underlining mine]

27. Taking cue from the above decision, a decision which I associate myself with, it is my view and I hold that in judicial review, constitutional applications and in public electoral matters, the amount in dispute is not necessarily the determinant factor in deciding the quantum of costs payable though the same may be taken into account in considering the interest and importance of the matter to the parties. As was rightly submitted by the Respondent, the matter never went to trial and the amount of instructions fees awarded was much more than 100%. Therefore it was not possible to determine the exact time that was expended in the matter.
28. With respect to the increase under part B of Schedule VI my understanding is that such increase is only applicable where there has been a determination of the party and party fees under part A of the said schedule in which case instead of taxing the advocate/client bill the court may simply decide to increase the amount of party and party costs under Part A as provided under part B. In this case there is no evidence that there was a determination on party and party costs in order for part B to be invoked. With respect to fees for getting up and preparing for trial under Schedule VI paragraph 2, no fees is chargeable under the said paragraph until the case is confirmed for hearing and in case where the case is not heard, the taxing master must be satisfied that the case has been prepared for trial. It is obvious that the case which gave rise to these proceedings was not heard. There is no evidence that the case was prepared for trial. Accordingly this paragraph did not apply.
29. In this case the taxing master properly recognised that the basic instructions fees payable was Kshs 28,000.00. As was held in First American Bank of Kenya vs. Shah & Others Nairobi (Milimani) (supra), the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it. In this case the learned Taxing Master correctly set out the basic fee. She however did not indicate the reason why the said basic fee had to be increased from Kshs 28,000.00 to 300,000.00 which was more than 10 times the basic fees. In Opa Pharmacy Ltd vs. Howse & McGeorge Ltd Kampala HCMA No. 13 of 1970 (HCU) [1972] EA 233, it was held:

**“Whereas the taxing officer is given discretion of taking into account other fees and allowances to an advocate in respect of the work to which instructions fees apply, the nature and importance of the case, the amount involved, the interest of the parties, general conduct**

**of the proceedings and all other relevant circumstances and taking any of these into consideration, may therefore increase the instruction fees, the taxing officer, in this case gave no reason whatsoever for doubling the instruction fee. Had the taxing officer given his reasons at least there would be known the reason for the inflation. As it is he has denied the appellant a reason for his choice of the figure, with the result that it is impossible to say what was in the taxing officer's mind. The failure to give any reason for the choice, surely, must, therefore, amount to an arbitrary determination of the figure and is not a judicial exercise of one's discretion."**

30. In Danson Mutuku Muema vs. Julius Muthoka Muema & Others Machakos High Court Civil Appeal No. 6 of 1991 which was cited in Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others (supra) Mwera, J (as he then was) held that whereas the Court was entirely right to give the costs within its discretion, the amount allowed being ten times the sum provided for, the Court did not think the said sum was reasonable and found that it was definitely excessive as opposed to three or four times. The Court further found that since the Taxing Officer was bound to give reasons for exercising his discretion and as none were given in his ruling save to say that he simply exercised his discretion, it was just and fair to set aside the sum he allowed.

31. in this case i have found that the amount of money involved clearly showed what was at stake and was evidence of the interest the parties had in the matter and the importance of the case to them. i am therefore not prepared to hold that in the circumstances of this case the increase of the basic instructions by more than 10 times was so high as to justify interference. in butt & another vs. sifuna t/a sifuna & company advocates civil appeal no. 45 of 2005 [2009] klr 427, the court of appeal while appreciating that the basic instructions fees was kshs 9,000.00 in a winding up petition nevertheless awarded kshs 150,000.00 in respect of instructions fees which was 17 times the basic instructions fees. however the mere fact that this court or any other court being in the position would have awarded a slightly higher or lower figure does not necessarily justify interference with the taxing master's undoubted exercise of discretion. in this case there is no evidence that the taxing master took into account the fees paid to ms nyairo & co. advocates. a reading of the decision of the taxing master shows that the issue was not in fact taken into account since the taxing master held and rightly in my view that a party is entitled to instruct as many advocates as he wishes depending on whether he can afford. in other words the fees payable to individual advocate in an advocate/client bill as opposed to party and party bill is not to be reduced on the basis that the party retained several advocates to appear for him in the matter. 32.in the result this i am not satisfied that the decision was based on an error of principle, or the fee awarded was manifestly excessive or low as to justify interference. order 33.in the result i find no merit in this reference which i hereby dismiss with costs to the client/respondent.

**Dated at Nairobi this day 7<sup>th</sup> day of May 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Nyangito for the Applicant***

***Mr Akech for the Respondent***

**Cc Kevin**