



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC CASE NO. 217 OF 2017**

**RACHIER & AMOLLO ADVOCATES LLP.....ADVOCATE/APPLICANT**

**VERSUS**

**NATIONAL HOSPITAL INSURANCE FUND BOARD OF MANAGEMENT....CLIENT/ RESPONDENT**

**RULING**

**Background**

1. On 1/11/2017, M/s Rachier & Amollo Advocates (the advocates) brought an advocate/client bill of costs dated 30/10/2017 in which they itemized the advocate's costs at Kshs 77,183,703 plus disbursements of Kshs 77,22, together totaling Kshs 77,260,923. The bill was argued before the taxing officer of this court (Honourable I N Barasa) through written submissions. In a ruling rendered on 30/10/2017, the taxing officer taxed the bill at Kshs 35,329,467.80.
2. Subsequent to that, the advocate brought a notice of motion dated 8/6/2018 under Section 51(2) of the Advocates Act, seeking judgment for the taxed amount. No replying affidavit was filed in response to the said notice of motion. The said notice of motion is one of the two applications to which this ruling relates.
3. The second application is the chamber summons (the reference) by the National Hospital Insurance Fund Board of Management (the client) dated 26/6/2018 seeking an order setting aside the decision of the taxing officer and remitting the bill of costs for re-taxation by a different taxing officer. The said application was opposed through a replying affidavit sworn on 5/11/2018 by Mr Stephen Lignyua on behalf of the advocate.
4. It was subsequently agreed that the two applications would be simultaneously canvassed through written submissions. On 17/12/2018, the client filed written submissions dated 11/12/2018 in support of the client's reference. The advocate filed written submissions dated 23/1/2019. When the two applications came up for highlighting of the parties' respective submissions, the advocates confirmed that they had exchanged written submissions and did not wish to make oral submissions.
5. Because the client's application seeks an order setting aside the taxing officer's decision, it will be disposed first. I say so because if it succeeds, the advocate's application will stand disposed because the certificate of taxation will stand set aside.
6. The verbatim grounds upon which the reference was premised are that:

**1. The taxing master erred in law in failing to properly subject the advocate – client bill of costs dated 30.10.17 to Schedule V, particularly by using an unknown value to calculate item 1.**

**2. The taxing master erred in law and in fact in failing to take into account all the relevant factors in the taxation of the Bill of costs as contained in the Appellant's submissions dated 23.02.18 and filed on 27.02.18.**

**3. The taxing master erred in law and in fact in failing to take into consideration that:**

**a. The primary suit sought only declaratory and injunctive orders;**

**b. In any event, at the time of receipt of instructions in 2004, the value of the property was the one based on the purchase price.**

**c. Instruction fees accrued in 2004 and hence the same ought to be calculated based on the position of the property as**

at that time;

**d. Increasing the minimum fees by nearly 150 times with no legal or factual basis.**

7. The advocate opposed the reference on the grounds that it was time- barred under paragraph 11(2) of the Advocate (Remuneration) Order 1962 and that it was brought without the applicant seeking an order extending time for bringing it. Secondly, the advocate contended that the reference was devoid of merit as no justification was given to warrant disturbance of the discretionary decision of the taxing officer. Thirdly, it was contended that the reference was incurably and fatally defective.

**Client's Submissions**

8. In its submissions dated 11/12/2018, the client set out the following as the key issues falling for determination: (i) whether the reference is defective; (ii) whether the reference is time-barred; (iii) whether the taxing officer erred in law and principle while taxing the bill of costs and thereby reached a wrong assessment; and (v) whether the court should interfere with the taxing officer's decision.

9. Counsel for the client submitted that the court should not allow technical objection based on form and procedure to prevail. Secondly, it was submitted that the reasons for the taxing officer's decision was forwarded to the client on 12/6/2018 hence the reference was properly filed within the 14 days stipulated by the law. Thirdly, it was argued that the taxing officer did not give a rationale reason for arriving at the instructions fee of Kshs 15,000,000. Further, it was contended that the taxing officer disregarded the comparative authorities cited by the client. Lastly, it was argued that because the taxing officer had erred in principle, this court was entitled to set aside the award.

**Advocate's Submissions**

10. In their written summons dated 23/1/2019, the advocate flagged out the following as the key issues falling for determination: (i) whether the reference is incompetent and time barred; (ii) whether this court has jurisdiction to entertain a reference lodged out of time without leave of the court; and (iii) whether the client has met the threshold for disturbing the discretion of the taxing officer.

11. The advocate submitted that under paragraph 11(2) of the principal Advocates (Remuneration) Order 1962, a party aggrieved with the taxing officer's decision is obligated to bring a reference within 14 days from the date of receipt of the reasons for the ruling. It was argued that the client was fully in receipt of the reasons for the decision the day the reasoned ruling was rendered in open court in the presence of counsel. It was further submitted that subsequently, on 30/5/2018, the taxing officer made it clear to the client that the reasons for the decision were set out in the signed and availed ruling. It was the advocate's position that the present reference was filed outside the 14 days period stipulated by rule 11(2). It was further submitted that this court lacks jurisdiction to entertain a reference lodged out of time. Reliance was placed on the decision in **Ahmednasir Abdikadir & Co Advocates v National Bank of Kenya Limited (2) (2006) 1 EA 5 (CCK)**. Further reliance was placed on **Evans Thiga Gaturu, Advocate v KCB (2012) eKLR**. Lastly, it was submitted by the advocate that the client had not met the threshold for upsetting the discretion of the taxing officer and it was contended that the taxing officer had set out in great details the factors which she considered in arriving at the instruction fee of Kshs 15,000,000. Reliance was placed on the holding in **Joreth Limited v Kigano & Associates Civil Appeal No Nairobi 66 of 1999; (2002) eKLR**.

**Determination**

12. I have considered the grounds set out in the reference, the supporting affidavit and the client's submissions. I have similarly considered the advocate's replying affidavit and submissions. Further, I have considered the relevant legal framework and jurisprudence on the key issues falling for determination in the reference and in the advocate's application for judgment. I have similarly considered the parallel sets of issues framed by the client and the advocate respectively.

13. The notice of objection dated 23/5/2018 raised objection to the taxing officer's decision on items 1, 2 and 3 of the bill of costs. Item 1 related to instructions to institute suit on behalf of the client to protect the client's interest in Land Reference Number 24968/2 situated in Karen and measuring 9.25 hectares (22.847) acres. Item 2 related to instructions given to the advocate to lodge a defence in relation to a counterclaim brought against the client. Item 3 related to getting up fees.

14. In my view, three key issues fall for determination in the reference. The first issue is whether the reference is time-barred and incompetent by dint of the requirements of paragraph 11(2) of the Advocates (Remuneration) Order 1962. The second issue is whether the taxing officer applied wrong principles in assessing fees relating to items 1, 2 and 3. The third issue is whether the taxed amounts in respect of the impugned items were manifestly and grossly excessive as to amount to an injustice in the circumstances of the case. The single issue falling for determination in the advocate's application for judgment is whether the application satisfies the requirements of Section 51(2) of the Advocates Act. I will deal with the four issues sequentially in the above order.

15. The first issue is whether the instant reference is time-barred. From the materials presented by the client, it is clear that the client gave notice of objection to items 1, 2 and 3 and sought the taxing officer's reasons for her decision through a letter dated 23/5/2018. The letter was presented to the Court Registry on 24/5/2018. On 30/5/2018, the taxing officer forwarded a letter addressed to the client's advocate, advising the advocate that the reasons for her decision on the impugned items were as set out in the body of her ruling. The instant reference was subsequently filed on 26/6/2018, twenty five days after the taxing officer had forwarded the letter clarifying that the reasons for her decision were in the ruling and one day after the advocate had served on the client the application for judgment.

16. The client contends that the reference was not filed out of the stipulated time because it received the taxing officer's letter dated 30/5/2018 on 12/6/2018 and filed the reference on 26/6/2018. The client does not however disclose the mode through which the letter was received on 12/6/2018. What is clear on the court record is that the taxing officer signed the letter on 30/5/2018. There is therefore no conclusive evidence to disapprove the client on the contention that they received the taxing officer's letter on 12/6/2018. In the circumstances, it is my holding that there is no conclusive evidence to suggest that the instant reference was brought outside the time-frame

stipulated under paragraph 11(2) of the Advocates (Remuneration) Order 1962. My finding on the first issue, therefore, is that the reference herein is not time-barred.

17. The second and third issues are intertwined because they relate to the principles upon which a taxing officer exercises discretionary jurisdiction in taxation of a bill of costs and the principles upon which a judge of a superior court exercises jurisdiction to interfere with the taxing officer's exercise of the said discretionary jurisdiction.

18. The principle to be applied when assessing instruction fee in a suit are well settled. The Court of Appeal in the case of **Joreth Ltd v Kigano & Associates** [2002] eKLR outlined the principle as follows:

**We would at this stage point out that the value of the subject matter of a suit for the purpose 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 ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among 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**

19. Similarly, the principles upon which a judge of the superior court interferes with the taxing officer's exercise of discretion are well settled. **Ojwang J** (as he then was) outlined these principles in the case of **Republic v Ministry of Agriculture and 2 Others; Ex-parte Muchiri W'Njuguna & others** [2006] 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 is somewhat too high or too low; it will only interfere if it thinks the award is 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 inference 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 particularized 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....**

20. The criteria which the taxing officer employed in exercising her discretion in relation to item 1 is set out in paragraph 2 of page 4 of her ruling which reads as follows:

**“Guided by the principles set out in the case of Joreth Limited v Kigano & Associates(Supra) that instruction fee is assessed on the value of the subject matter as contained in the pleadings on record, the judgment or settlement of the matter, I reject the valuation report by Ark Consultants Limited as a basis of determining instruction fee. As correctly pointed out, there is no judgment or settlement in the matter. Consequently, this is a bill that calls for my discretion in assessing instruction fee. I have considered several factors in awarding instruction fee. There was a claim and a counterclaim. I have also considered, among others, the interest of the parties to the suit and the case and labour employed by counsel to the prosecution of the suit. From the court record, I note that the suit property comprises 9.250 hectares or thereabouts, and is situated in Karen Area of Nairobi County. This property exchanged hands in the year 20002 for a sum of Kshs 93,712,675. I am also alive to the fact that this cannot be the current value of the property. As has been stated above, the suit instruction fee can only be claimed once. I am of the considered opinion that an instruction fee of Kshs 15,000,000 for both the claim and counterclaim will be reasonable. I award this amount as instruction fee”**

21. It is clear from the above verbatim excerpt of the taxing officer's ruling that she outlined the basis of her decision on item 1. Her decision was not plucked from the air. She stated that she took into account the fact that the amount she was awarding covered instruction fee relating to both the claim and the counterclaim, among other factors. It is not therefore correct to say that the taxing officer failed to give any justification as prescribed under the law.

22. The client contended that the taxing officer erred in principle when she held that the subject matter of the present dispute was Kshs 1,100,000,000. I have examined the decision of the taxing officer. She did not hold that the value of the subject matter was Kshs 1,100,000,000. To the contrary, she rejected the valuation report presented by the advocate and stuck to the principle set out in **Joreth Limited v Kigano & Associates** (supra).

23. I have on my part considered the award of Kshs 15,000,000 in relation to the claim and counterclaim and in relation to the totality of the

professional labour expended by the advocate. I have similarly considered the key factors that require consideration under the rules. The subject matter was a piece of land measuring 9.2550 hectares (22.847 acres) situated in Karen, Nairobi. The instruction fee assessed covered both the claim by the client and the counterclaim against the client. I do not agree with the client's view that the fee is manifestly high as to amount to an injustice.

24. Items 1 and 2 of the bill of costs were collapsed into one and the above single award was made in respect of the two items. The above finding therefore disposes the contestation against items 1 and 2 of the bill of costs.

25. Item 3 related to getting up fees. The taxing officer explained in her ruling that she had established from the court record that the suit was set down for hearing severally. On my part, I have perused the record and noted that both the client's claim and the defendant's counterclaim were defended. Secondly, the suit was set down for hearing severally. It is therefore my finding that the taxing officer properly awarded a getting up fee which was one third of the assessed instruction fee. Consequently, my answers to the second and third issues in the reference are in the negative. The net result is that I find no merit in the client's reference as a whole.

26. I now turn to the single question in the advocate's notice of motion dated 8/6/2018. The question is whether the advocate has satisfied the criteria set out in Section 51 of the Advocates Act. The said Section provides as follows;

**General provisions as to Taxation**

**51(1) Every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.**

**(2) The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.**

27. No replying affidavit was filed against the advocate's application. The advocate exhibited a certificate of costs duly issued by the taxing officer. There is no evidence to suggest that the certificate of taxation has been set aside. Similarly, there is no dispute regarding retainer. Consequently, I am satisfied that the requirements of Section 51(2) of the Advocates Act have been met. Accordingly, the advocate's notice of motion dated 8/6/2018 is allowed as prayed.

**Disposal Orders**

28. In light of the above findings, I make the following disposal orders:

**a. The client's reference brought by way of chamber summons dated 26/6/2018 is declined. The advocate shall have costs of the reference.**

**b. The advocate's notice of motion dated 8/6/2018 is allowed in terms of prayers (a) of the motion. The taxed costs shall attract interest at court rate from the date of taxation. And the advocate shall have costs of the said application.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Ochieng holding brief for Mr Ligunya for the Advocate

June Nafula - Court Clerk