REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

MISC E.L.C. APPLICATION NO. 2B OF 2018

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

AND

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER, 2014

BETWEEN

MANYONGE WANYAMA & ASSOCIATES......................APPLICANT

AND

THE COUNTY GOVERNMENT OF KIRINYAGA.......RESPONDENT

RULING

1. This ruling arises out of a reference against the decision of the taxing officer Hon. Juliana Ndeng'eri dated 17th January 2019 pursuant to **paragraph 11 of the Advocates Remuneration Order** (hereinafter the *Order*) **and section 44 of the Advocates Act.** By her said decision she taxed the Applicant's bill of costs at Kshs. 1,169,468.80. The amended bill of costs as drawn was for a sum of Ksh.284,030,906.80

2. By a chamber summons dated and filed on 30th January 2019, the Applicant objected to the decision of the taxing officer on item Nos. 1-4, 5-19, 20-45, 56-71 on the amended Advocate-Client bill of costs dated 24th May, 2018.

3. The Applicant wanted the court to set aside the taxation and to adjust the figures and reassess the fees. In the alternative, the Applicant wanted the court to refer the bill of costs for fresh taxation before a deputy registrar in Kerugoya, Meru or Nyeri.

4. The said reference was supported by an affidavit sworn by Mr. Peter Manyonge Wanyama of the firm of Manyonge Wanyama & Associates on 30.01.2019.

5. The Applicant faulted the taxing officer on the following grounds:

a. That she erred in law and in principle in failing to appreciate that the proceedings raised complex and novel issues.

b. That she failed to take into account all the relevant factors in the assessment of the instruction fee.

c. That the award was so manifestly so low in the circumstances as to lead to a conclusion that there was an error of principle.

d. That she erred in holding that VAT was only payable upon professional fees and did not extend to disbursements.

e. That she failed to tax item Nos. 3, 4, 19, 56-57, 58-71 and consequently denied the Applicant due fees.

f. That she erred in principle by allowing a sum of Ksh.30,000/- per service instead of Ksh.65,000/-.

g. That she erred in law in taxing items 5-18 as copies whereas those items included other particulars in addition to copying.

h. That she applied schedule VII instead of schedule VI of the Advocates Remuneration Order.

i. That she taxed the bill on the ordinary scale instead of the higher scale.

6. When the said reference was listed for hearing on 19th February 2019 Mr. Wanyama for the Applicant was ready to proceed but the Respondent sought an adjournment to enable it file a response to the reference. The matter was consequently adjourned at the instance of the Respondent. The Respondent was given 14 days to file a response. The parties were directed to file and exchange written submissions within 30 days thereafter.

7. The record shows that the Applicant filed written submissions on 22nd March 2019. The record further shows that the Applicant filed his list of authorities on 19th February 2019. By the time of preparation of this ruling, however, the Respondent had filed neither its response nor written submissions to the reference.

8. The court shall consider and determine the first three (3) grounds together since they are intertwined. They all relate to the factors to be considered in the taxation of costs and the circumstances in which a superior court may interfere with the assessment by the taxing officer.

9. The court has considered the authorities cited by the Applicant in this reference. The court has also referred to the decision of Hon. Justice G.V. Ondunga in **R V Commissioner of Domestic Taxes *ex-parte* Ukwala Supermarkets Ltd & 2 Others Nairobi Misc. Application No. 319 of 2015. [2018] eKLR.** In that case, Odunga J extensively reviewed existing authorities on the subject beginning from the earlier cases of **Premchand Raichand Ltd & Another V Quarry Services of East Africa Ltd & Another [1972] EA 162** and **OPA Pharmacy Ltd V House Mc George Ltd Kampala [1972] EA 233** to the more recent ones of **R V Minister for Agriculture & 2 Others *ex parte* Samuel Muchiri W. Njuguna & 6 Others [2006] eKLR** and **Butt & Another V Sifuna T/A Sifuna & Co. Advocates [2009] KLR 427.**

10. Hon. Odunga J summarized the principles of law applicable to references on taxation as follows:

> **"18. 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 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."**

11. While taxing costs under paragraph (j) of the Schedule VI of the **Order** with respect to constitutional petitions, the taxing officer is required to take into account factors such as the nature and importance of the petition, the complexity of the matter, difficulty, novelty of the issues, the value of the subject matter and the time expended among other factors.

12. It is apparent from the ruling that the taxing officer was not persuaded that there was any complexity or novelty of issues canvassed in the constitutional petition. She was also of the view that the value of the subject matter was not applicable in the circumstances.

13. The court is of the view that the taxing officer was entitled to hold that no complexity, difficulty or novelty was demonstrated before her. There was no certification by the trial judge that the petition raised complex, difficult or novel issues. It would also appear that the Applicant was unable to demonstrate what complexity or novelty was involved in the petition. The taxing officer cannot therefore be faulted for discounting those factors. However, there is no indication in her ruling that she considered the other factors such as the nature and importance of the subject matter to the parties, the time and responsibility involved, and the volume of documents involved in the petition. The court is of the opinion that such omission constituted an error of principle as enunciated in paragraph 10 hereof.

14. The court agrees that the value of the subject matter could not be ascertained from the pleadings or judgement. The figure of Ksh.8.1 billion which was contained in the Applicant's bill of costs and submissions was merely plucked from the air. It had no basis in either the pleadings or the resultant judgement. In **Joreth Ltd Vs Kigano & Associates [2002] eKLR,** the Court of Appeal held that evidence from the bar on the value of the suit property was not admissible in taxation of a bill of costs.

15. The court, therefore, finds at least two errors of principle in the taxation the subject of the reference. First, the taxing officer stated that only a "nominal" fee was applicable because the matter in issue was a constitutional petition. There was no consideration of the other relevant factors alluded to in paragraph 13 hereof. Second, the taxing officer did not identify the applicable minimum scale fee before either increasing it or reducing it on the basis of the applicable factors. It is, therefore, impossible to establish whether the taxing officer had in mind the correct figure as the minimum instruction fee before increasing or reducing it to Ksh. 150,000/- **[See first American Bank of Kenya V Shah & Others [2002] 1 EA 64].**

16. The court has noted a curious feature in the taxation the subject of the reference. Whereas the Respondent submitted a figure of Kshs.300,000/- as instruction fee and Kshs.100,000/- as getting up fee, the taxing officer ended up awarding Ksh.150,000/- as instruction fee and Kshs.50,000/- as getting up fee. Although not illegal, it is unusual for instruction fee to be awarded at a figure far below what the client has offered. That could be indicative of an error of principle since even the client appreciated that the advocates services were worth much more. The court shall not, however, base its decision on this unusual phenomenon. As the court has found that the learned taxing officer

committed an error of principle as set out in paragraph 15 hereof, this court is, therefore, entitled to intervene on the taxation on instruction fees. That disposes of the 1st, 2nd and 3rd grounds set out in paragraph 5 hereof.

17. The 4th ground is based upon the payment of VAT upon taxation. The taxing officer was faulted for holding that VAT is only chargeable upon professional fees and not on disbursements. The court is not satisfied that there was any error or misdirection on the issue of VAT. The court is of the view that VAT is only chargeable upon legal professional services rendered and not disbursements. The Applicant did not cite any legal authority to the contrary.

18. The 5th ground was that the taxing officer failed to tax item Nos. 3, 4, 19, 56-57, 58-71, at all. Item No. 3 is on drawing the petition for which the Applicant had sought Ksh.117,650/- on the basis that the petition had 777 folios. There is no indication on record that this item was taxed as drawn or taxed to nil. However, the court has noted that the indication of 777 folios is utterly misleading. The petition runs to 18 pages only whereas the affidavit runs to 10 pages. The bulk of the documents are merely *copies* of supporting documents which should have been charged as copies at 25 per folio. The court will give an appropriate direction for the taxing officer to convert those pages into folios.

19. The court finds that item No. 4 on service was taxed at Kshs.30,000/- whereas Kshs.35,000/- was taxed off. That is clear from paragraph 4 of the ruling. In fact, all other items on service. i.e. Nos. 17, 19, 33, 46, 52, 55, were all taxed at Kshs.30,000/- each. There can be no legitimate complaint on service since the sum of Kshs.30,000/- per service is way above the scale fee of Kshs.1,400/- for service within 3 km of the court Registry and Kshs.35/- per every extra kilometer. It was the duty of the Applicant to place relevant material on distances and location of persons served before the taxing officer.

20. The ruling of the taxing officer indicates that item Nos. 56 & 57 were taxed and drawn hence there is no legitimate grievance with respect thereto. The rest of the items being Nos. 58-71 are all attendance at the court registry and in court. The ruling indicates that all mentions were taxed at Kshs.1,100/- whereas the hearings were taxed at Kshs. 5,000/- That is evident from paragraph 11 of the ruling.

21. The 6th ground relates to service and this has been sufficiently covered in this ruling. Although the Applicant failed to furnish the necessary particulars on service to facilitate the assessment, the Applicant was nevertheless awarded Kshs.30,000/- per service. There is no legitimate complaint in respect thereof.

22. The 7th ground relates to taxation of item Nos. 5-18. The Applicant's complaint is that they were all taxed as copies whereas some of them were actually drawn. There is no material on record to demonstrate how those items were taxed. The single sentence in paragraph 5 of the ruling creates an impression that all those items were taxed at the cost of making copies. The court finds that the items should be taxed afresh per scale.

23. The 8th ground faulted the taxing officer for applying Schedule VII of the **Order** instead of Schedule VI. The court is aware that Schedule VII applies to assessment of costs in proceedings before the subordinate courts whereas Schedule VI is applicable to proceedings before the High Court. Although the ruling of the Taxing officer refers to Schedule VII in the paragraph 1 thereof, it is clear from the ruling as a whole that the reference to Schedule VII was merely a clerical or typographical error. That is so because schedule VII does not provide for taxation with respect to correspondence. It does not have a paragraph on taxation of costs in a constitutional petition. The taxing officer taxed court attendances at a flat rate of Kshs.5000/- for hearing which can only be found in Schedule VI.

24. The 9th ground faulted the taxing officer for applying the ordinary scale as opposed to the higher scale of the **Order.** The court has perused the relevant provisions on the **Order** in his this regard. **Paragraph 50** thereof stipulates that:

> **"Subject to paragraphs 22 and 58 and to any order of the court in the particular case, a bill of costs in proceedings in the High Court shall be taxable in accordance with Schedule 6 and, unless the court has made an order under paragraph 50A, where Schedule 6 provides a higher and lower scale, the costs shall be taxed in accordance with the lower scale."**

25. On the other hand, **paragraph 50A** of the said **Order** stipulates as follows:

> **"The court may make an order that costs are to be taxed on the higher scale in Schedule 6 on special grounds arising out of the nature or importance or the difficulty or urgency of the case. The higher scale may be allowed either generally in any cause or matter or in respect of any particular application or business done."**

26. The court is unable to find any order by the trial court certifying costs on the higher scale. The Applicant did not furnish either the taxing officer or this court with such other. The court, therefore, finds that the only option the taxing officer had was to tax the bill on the ordinary scale in the absence of an order under **paragraph 50A** of the **Order.** The court consequently finds no substance in the 9th ground.

27. The upshot of the foregoing is that the court finds that there was an error in principle by the taxing officer in the assessment of the instruction fee. The court also finds that there was an omission in taxing item No. 3. There was also an error in principle in the taxation of item Nos. 5-18 of the amended Advocate/client bill of costs dated 24th May 2018.

28. The court shall therefore set aside the taxation and certificate of costs the subject of the reference. But, then, what are the appropriate orders to be made on taxation of item Nos. 5-18 of the bill of costs? The court has noted from the file that there are no figures on record to show how those items were taxed. There is no indication which particular ones were taxed as copies and at how much. It shall, therefore, be impossible for a different taxing officer to undertake a piecemeal taxation. The only viable option appears to be a fresh taxation.

29. The court finds no justification for the request by the Applicant for the bill of costs to be referred to a taxing officer in Kerugoya, Meru or

Nyeri whereas Embu Law Courts has more than one serving taxing officer. The court shall not, therefore, refer the matter to a station outside Embu County.

30. The court is of the view that the following remedial orders are called for:

a. The certificate of taxation dated 28th January 2019 is hereby set aside.

b. The Applicant's amended bill of costs dated 24th May 2018 is hereby remitted to a different taxing officer at Embu Law Courts for fresh taxation in accordance with the contents of this ruling and Schedule 6 of the **Order.**

c. Costs of the Reference to the Applicant.

d. Costs of the Reference to the Applicant.

31. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 20TH day of JUNE, 2019.

In the presence of Mr. Manyange for the Applicant and Mr. Okwaro holding brief for Mrs. Beacco for the Respondent.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

20.06.19