



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC CAUSE NO. 24 OF 2016**

**(Formerly Misc. 367 of 2013)**

**IN THE MATTER OF THE ADVOCATES ACT**

**AND**

**IN THE ADVOCATES REMUNERATION ORDER**

**AND**

**IN THE MATTER OF THE ADVOCATES CLIENT BILL OF COSTS**

**SINGH GITAU ADVOCATES.....APPLICANT/ADVOCATE**

**VERSUS**

**CITY FINANCE BANK LIMITED.....RESPONDENT/CLIENT**

**RULING**

1. This is the chamber summons dated 31<sup>st</sup> January 2017 brought under Rule 11 of the Advocates Remuneration Order, Advocates Act, Section 3A of the Civil Procedure Act and all enabling provisions of the law.

2. It seeks orders:-

- (a) That the ruling and the order on taxation delivered herein on 12<sup>th</sup> January 2017 be varied and/or set aside.*
- (b) That this honourable court be pleased to tax the bill of costs dated 25<sup>th</sup> March 2013 afresh and/or make directions as to fresh taxation before a different taxing master.*
- (c) That costs of this reference be provided for.*

3. The grounds are on the face of the applicant and are:-

- (a) That the learned taxing master erred in principle in allowing instruction fees as against the defendant without taking into account the subject matter contained in the pleadings before court.*
- (b) That the learned taxing master erred in principle in allowing item 2 of getting up fees when the matter had not been confirmed for hearing neither were list of documents and list of agreed issues filed.*
- (c) That the learned taxing master erred in law and in fact in not assigning reasons for the taxation.*
- (d) That the learned taxing master erred in principle on the whole of the taxation, the award made by the taxing master is so manifestly excessive as to attract a finding that it was erroneous.*

4. The application is supported by the affidavit of James Murage, Head of Legal of Jamii Bora Bank Limited, previously City Finance Bank Ltd, client/applicant herein sworn on the 31<sup>st</sup> January 2017.

5. The application is opposed. There is a replying affidavit sworn by James Gitau Singh Advocate, sworn on the 8<sup>th</sup> March 2017.

6. There is also the notice of motion dated 2<sup>nd</sup> March 2017 brought under Section 51(2) of the Advocates Act and Order 50 rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.

7. It seeks:-

*1. That judgment be entered for the sum of Kshs.4,909,091.22 as taxed and certified by the Deputy Registrar as due to the applicant together with interest thereon from 12<sup>th</sup> January 2017.*

*2. That the applicants be at liberty to execute against the respondent.*

*3. That the costs of this application be borne by the respondent.*

8. The grounds are on the face of the application and are:-

*1. That the applicant received instructions from the client/respondent to represent them and their directors in proceedings in Nairobi ELC No. 894 of 2007, Mt Kulal Limited vs City Finance Bank Limited.*

*2. That HCC No. 894 of 2001 was dismissed in favour of the client and the party and party costs taxed at Kshs.2,710,055.08 on 26<sup>th</sup> October 2012.*

*3. That an advocate client bill of costs in respect of the applicant's cost was thereafter taxed in the sum of Kshs.4,909,091.22 only by the taxing master on 12<sup>th</sup> January 2017.*

*4. That the certificate of taxation has been issued in respect of the applicant/advocate's costs in the sum of Kshs.4,909,091.22.*

*5. That the respondents refusal to pay the advocates costs is based on malice and spite pursuant to a breakdown in the advocate client relationship between the parties.*

9. The application is supported by the affidavit of James Gitau Singh Applicant/advocate sworn on the 2<sup>nd</sup> March 2017.

10. On the 23<sup>rd</sup> March 2017, the court directed that the two applications be heard and determined together. It also directed that the two applications be disposed of by way of written submissions.

#### **The advocate's submissions**

11. At all material times, the advocate was the Banks lawyer and had represented the Bank on several matters including HCCC No. 1830 of 2002, which later became ELC 894 of 2007, Mt Kulal Limited vs City Finance Bank & another. This suit was eventually dismissed with costs being awarded to the Bank. The Bank proceeded to tax its bill of costs on a party to party basis against Mt Kulal, the plaintiff in ELC 894 of 2007. The bill of costs was taxed at Kshs.2,710,055.50. a certificate of taxation was issued on 25<sup>th</sup> March 2013. The advocate was instructed to proceed with execution against the judgment debtor. Soon afterwards there was a change in ownership of the bank and the advocate was instructed to cease acting in all matters and tax his bill of costs in the various matters he was handling on behalf of the bank. The taxing master delivered her ruling on 12<sup>th</sup> January 2017 and taxed the bill as drawn at Kshs.4,909,091.22.

12. The client has on numerous occasions objected to payment due to the advocate without valid grounds. The taxing master based her calculations on the amount of Kshs.150,000,000 as had been settled between the parties. The client did not object to this figure when the party and party costs were taxed. The court had already taxed the party and party costs at Kshs.2,710,055.80. the advocate therefore had to increase that amount by 50% and also add VAT at 15% as is required.

13. The client also challenges the taxing master's ruling by claiming that getting up fees should not have been charged since the matter never proceeded for hearing and was settled before it could proceed to hearing. The advocate did file a list of documents and framed issues on behalf of the client and on several occasions invited parties to fix the matter for hearing. Even though the matter did not proceed to hearing, the advocate did prepare for the trial. He has put forward the case of **Oyatta & Associates vs Nilam Doshi [2013] eKLR; Kamunyori & Co. Advocates vs James Gatheru Mathenge Misc App No. 241 of 2008**. The advocate is entitled to getting up fees as provided for in Schedule V1 parte A2. The taxing master did not err in awarding getting up fees in this matter. There is no error in principle and neither is the award excessive.

14. The taxing master did not err while granting the taxation award to the advocate. He is entitled to the orders sought for judgment to be entered for the sum of Kshs.4,909,091.22. He prays that his application dated 2<sup>nd</sup> March 2017 be allowed and that of the client dated 31<sup>st</sup> January 2017 be dismissed with costs.

#### **The client's submissions**

15. The principles upon which a court can exercise its own discretion to set aside a ruling of a taxing master are well set out in the case of **John Maina Mburu t/a John Maira Mburu & Co. Advocates vs George Gitau Munene (sued as Administrator of the Estate of Samuel Gitau Munene) & 3 Others [2015] eKLR**. They have also put forward the case of **Joreth Ltd vs Kigano & Associates [2002] 1EA 92; Kagwimi Kang'ethe & Co. Advocates vs O-lerai Nurseries Limited [2009] Eklr**.

16. The taxing master erred in principle. Kshs.150,000,000 was not the proper subject matter for consideration. The subject matter is easily discernible from the pleadings which stated that the subject matter is Kshs.52,279,974.55. The applicable scale should have been schedule VI (i) (iii).

17. If indeed the matter was settled before hearing as submitted by the advocate then item no. 2 of getting up fees should have been taxed off. There is no evidence that the matter proceeded for hearing. The existence of a consent as reflected by the decree dated 13<sup>th</sup> May 2010 is a confirmation that this matter did not proceed for hearing. It has put forward the case of **Metro Petroleum Ltd vs Onyango Oloo & Co. Advocates [2016] eKLR; Desai Sarvia & Pallan Advocates vs Jambo Biscuits (Kenya) Limited**. The taxing master erred in awarding getting up fees in this matter when settlement had been reached before the matter was confirmed for hearing. This court ought to exercise its discretion and remit the bill of costs dated 25<sup>th</sup> March 2013 before another taxing master other than Hon. Mwayuli.

18. The existence of a reference renders the notice of motion dated 2<sup>nd</sup> March 2017 premature. They have put forward the case of **Owino Okeyo & Co. Advocates vs Fuelex Kenya Ltd [2005] eKLR**. It prays that the court finds merit in the Chamber Summons dated 31<sup>st</sup> January 2017 and remit the bill of costs dated 25<sup>th</sup> March 2013 to another taxing master.

19. I have considered the two applications dated 31<sup>st</sup> January 2017 and 2<sup>nd</sup> March 2017, the affidavits in support, the replying affidavits, the written submissions of counsel and the authorities cited. The issue for determination is whether the taxing master erred and if so whether the bill of costs should be assessed a fresh.

20. The Decree in ELC 894 of 2007 **Mount Kulal Ltd vs City Finance Bank Ltd & Another** reads as follows:-

***“It is hereby ordered by consent;***

***That this suit be marked as settled as between the plaintiff and the 2<sup>nd</sup> defendant in the following terms:-***

***1. That the 2<sup>nd</sup> defendant shall forthwith upon the signing of this consent execute a transfer of all that parcel of land known as LR No. 14705 comprised in a grant registered in the land title registry in Nairobi as I.R 46612/1 (the suit property) in favour of Azmaveth Investments Ltd, the plaintiff financier for the consideration of 150,000,000.***

***2. ....”***

21. Schedule VI part A of the Advocates Remuneration Order provides that:-

***“To defend in any other proceedings an instruction fee calculated under sub-paragraph 1(b)”***

***1(b) provides that:-***

***“To sue in any proceedings whether commenced by plaint, petition, originating summons, or notice of motion in which no defence or other denial of liability is filed where the value of the subject matter can be determined from the pleadings, judgment or settlement between parties.”***

22. There is no doubt that this matter was settled between the parties in favour of the 2<sup>nd</sup> defendant at Kshs.150,000,000 plus agreed costs of Kshs.6,000,000. I agree with the advocate that the value of the subject matter is set out in the consent judgment was kshs.150,000,000.

23. The principles to be looked at by the court in determining instruction fees are set out in the case of **Joreth Limited vs Kigano & Associates [2002] 1EA 92** where the court held thus.

***“We would at this stage point out that the value of the subject matter of a suit for purposes of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but the same is not ascertainable that 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 given by the trial judge and all other relevant circumstances”.***

24. In ELC 894 of 2007 a settlement was reached by the parties at Kshs.150,000,000. I find that the taxing master did not err in assessing instruction fees based on this figure. In the case of **John Maina Mburu t/a John Maina Mburu & Co. Advocates vs George Gitau Munene (sued as administrator of the Estate of Samuel Gitau Munene & 3 Others [2015] eKLR** the court held that:-

***“.....in the First American Bank vs Shah & Others [2002] EA64 at page 69 the court held that:-***

***“First, I find that on the authorities this court cannot interfere with the taxing officers decision on taxation unless it is shown***

*that either the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle (see Steel Construction Petroleum Engineering (EA) Ltd vs Uganda Sugar Factory [1970] EA 141”.*

25. I find that the taxing master did not err in principle in assessing the instruction fees based as Kshs.150,000,000/-.

26. Getting up fees is chargeable once the matter is confirmed for hearing. ELC 894 of 2007 was not confirmed for hearing. The advocate has annexed copies of letters which the plaintiff’s advocates inviting him to fix a hearing date. He has however failed to demonstrate that the matter was confirmed for hearing. In the case of **Metro Petroleum Limited vs Onyango Oloo & Co. Advocates [2016] eKLR**, the court held:-

*“It cannot be said that either the respondent or the applicant had attended court for the hearing of the suit. Further, there is no evidence on record that either of the parties had made concerted efforts to have this matter set down for hearing, or that the hearing of the application precluded the parties from setting down the matter for hearing. As was in the case of Oyatta & Associates vs Nilam Doshi, presentation of evidence that the matter had been set down for hearing was vital in making claim for getting up fees. None has been presented by the respondent in the instance.”*

I therefore agree with the client that the amount of Kshs.763,333.33 ought to be taxed off.

27. The upshot of the matter is that the advocate succeeds partly and the client succeeds partly.

28. I therefore tax off Kshs.763,333.33 from Kshs.4,909,091.22. I hereby enter judgment for the advocate for the sum of Kshs.4,145,747.89 as taxed and certified by the Deputy Registrar together with interest thereon from 12<sup>th</sup> January 2017. Each party do bear his /its own costs.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 18<sup>TH</sup> day of JULY 2019.**

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Applicant

.....Advocate for the Client

.....Court Assistant