REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. MISC. APPLICATION NO. 286 OF 2016

MASORE NYANGAU & CO. ADVOCATES & OTHERS.....ADVOCATE

VERSUS

SUPPLIES & SERVICES LIMITED.....CLIENT

RULING

1. On 21/8/2017, the taxing officer of this court, Hon. I. N. Barasa, taxed the advocate/client bill of costs herein dated 21/10/2016 at Kshs 580,191.46. On 28/8/2017, M/s Masore Nyangau & Company Advocates (the **Advocate)** filed a notice of objection to the decision of the taxing officer in respect of Items 1, 16, 49 and 56. Similarly, M/s Supplies & Services Limited (the **Client**) filed a notice of objection in relation to the taxing officer's decision on Item 1 of the bill of costs.

2. Subsequently, on 25/9/2017, the advocate brought a reference dated 25/9/2017 under rule 11(2) of the Advocates Remuneration Order, seeking the following orders.

> ***i. That the honourable court be pleased to set aside the decision on taxation of the Senior Deputy Registrar given on 21st August, 2017 on the applicant's bill of costs dated 21st October 2016.***
>
> ***ii. That the honourable court be pleased to remit the bill of costs dated 21st October 2016 for taxation before a different taxing officer.***
>
> ***iii. That in the alternative to prayer 2 hereof, the honourable court be pleased to remit the bill of costs dated 21st October 2016 to the same taxing officer with appropriate directions.***
>
> ***iv. That the costs of this application be provided for.***

3. The advocate raised seven grounds in the said reference, namely;

> ***a) The Learned Senior Deputy Registrar erred in law and in fact in failing to apply the correct principles in assessing instruction fees in respect of item 1.***
>
> ***b) That the Learned Senior Deputy Registrar failed to appreciate the value of the subject matter of the suit and failed to give importance to relevant considerations of the case;***
>
> ***c) The award of Kshs 250,000 as instruction fees is so manifestly low that it amounts to an injustice to the Applicant;***
>
> ***d) The Senior Deputy Registrar failed to exercise her discretion fairly and judiciously in arriving at the instruction fees;***
>
> ***e) The Learned Senior Deputy Registrar erred in law in fact when she held that the applicant cannot claim instruction fees on scale;***
>
> ***f) That the Learned Senior Deputy Registrar failed to exercised her discretion fairly and judiciously by taxing all court attendances on the lower scale; and***
>
> ***g) The Learned Senior Deputy Registrar failed to consider the applicant's submissions in regard to the bill.***

4. The client similarly brought a reference dated 2/11/2017 under rule 11(2) of the Advocates Remuneration Order challenging the taxing officer's decision on item 1 of the advocate/client bill of costs dated 21/10/2016. The client's case was that no defence was filed in the suit, and in the absence of a defence, the entire sum itemized as instruction fees should have been taxed off because instruction fees had not accrued and the advocate was not entitled to instruction fees.

5. The two references were canvassed through written submissions. I have considered the parties' respective grounds of objection to the taxing officer's decision on the impugned items. I have also considered the relevant legal framework and jurisprudence. Only four taxed items are challenged through the respective notices and references. Both parties object to the taxing officer's decision on item 1. The item relates to instruction fees. In addition, the advocate has challenged the taxing officer's decision on: (i) item 16 which relates to court attendance on a mention; (ii) item 49 which relates to court attendance on hearing of an application; and item 56 which similarly relates to court attendance on hearing of an application. There is common ground that up receipt of instructions, the advocate filed a notice of preliminary objection seeking to have the suit struck out. There is also common ground that instructions were subsequently withdrawn before summons to enter appearance were served and before a statement of defence was filed.

6. The first question which falls for determination in the parallel references is whether instruction fees is payable to an advocate who acts for a defendant in a contested litigation at the stage of interlocutory applications but ceases to have instruction before he files a statement of defence in the suit. The second question falling for determination is whether the taxing officer's decision on the impugned four items was based on an error of principle or the fee awarded on any of the four impugned items was excessively high or manifestly low as to justify an interference by this court. Before I make pronouncements on the above two issues. I will set out in summary the principles that govern taxation of bills of costs and the superior court's jurisdiction to interfere with the discretionary jurisdiction of the taxing officer.

7. Taxation of a bill of costs is a discretionary jurisdiction excisable by the taxing officer on well laid down rules and well settled principles. The rules are laid down in the Advocate (Remuneration) Order as amended from time to time. The taxing officer is expected to adhere to the guidelines set out in the rules. Secondly, when taxing a bill of costs, the taxing officer is expected to ensure that the costs assessed on any particular item are not excessively high or manifestly low as to amount to an injustice.

8. The circumstances under which a judge of a superior court interferes with the taxing officer's exercise of discretion are similarly well settled. First, a superior court will not interfere with the decision of the taxing officer unless it is shown that either the decision was based on an error of principle or the fee awarded was excessively high or manifestly low as to justify an inference that it was based on an error of principle. Secondly, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors, and 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. Third, 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 re-assessment unless the judge is satisfied that the error cannot materially have affected the assessment. Further, the court is not entitled to upset a taxation because in its opinion the amount awarded was high or low. Fifth, it is within the discretion of the taxing officer to increase or reduce the instruction fees. Sixth, the taxing officer ought to set out the basic fees before venturing to consider whether to increase or reduce it. Seventh, the full instruction fee to defend a suit is earned the moment a defence has been filed. (see **First American Bank of Kenya v Shah and others (2002) 1EA; Joreth Limited v Kigano & Associates (2002) 1 EA 92; R v Minister for Agriculture & 2 others Exparte Samuel Muchiri W'Njuguna & others (2006) Eklr;** and **B Mbai & Associates Advocates v Clerk, Kiambu County Assembly & Another (2017) eKLR.**

9. The first and common issue in the two references relates to the question as to whether the advocate was entitled to instruction fees in view of the fact that no defence was filed in the suit. This question is not new in Kenya's jurisprudence. The Court of Appeal, in **Joreth Limited v Kigano & Associates (supra)** made the following relevant pronouncement on instruction fees:

> "***Instruction fees is an independent and static item. It is charged once only and it is not affected or determined by the stage the suit has reached" (emphasis mine).***

10. Answering the same question in **Softa Bottling Company Limited & Others v Nairobi City Council (2006) eKLR,** Azangalala J stated as follows:

> ***"With respect to the submission that as no appearance or defence were filed by the respondent instructions fees were not earned, I am afraid that submission was misconceived. In my view, the respondent's preliminary objection was a form of denial and at the end of the day determined the applicant's entire suit. I detect no error of principle on the part of the taxing officer in finding that instruction fee had been earned. The respondent argued that it was served with the plaint as well as the interlocutory application. Its counsel were perfectly entitled to determine how best to handle the respondent's case. They chose to raise the preliminary objection. In my view, instruction fee was clearly earned when the respondent's Advocates acted on the instructions of the respondent by filing the Preliminary Objection. In my view, Ringera J as he then was in the First Bank of Kenya case (Supra) was not setting up an inflexible rule that instructions fees can only be earned the moment a defence is filed. "***

11. I entirely agree with the holdings in the above cases. I would add that it is to be noted that drawing and filing of a statement of defence is only one of the many tasks undertaken by a defence counsel instructed to defend a claim in a case where suit papers relating to the substantive suit are served together with an urgent interlocutory application as was the position in the matter under consideration. The advocate seized of instructions took instructions relating to the client's defence and translated those instructions into the client's response to the interlocutory applications. In addition, he responded to the suit through a preliminary objection, focusing on striking out of the entire suit. To contend that the advocate is not entitled to any instruction fees because instructions were subsequently withdrawn before he filed a formal statement of defence would be illogical. I reject the proposition that only a statement of defence constitutes a denial of liability within the meaning of the Advocate Remuneration Order. In my view, denial of liability can take the form of a statement of defence, notice of preliminary objection, grounds of opposition or replying affidavit where appropriate.

12. The second question is whether the taxing officer's decision on the four impugned items was based on an error of principle or the fee awarded on any of the four impugned items was excessively high or manifestly low as to justify interference by this court. The premise upon which the taxing officer assessed instruction fees is contained in paragraph 3 of her ruling in which she stated thus:

> ***"I have carefully perused the bill of costs, the court record as well as the submissions by both the applicant and the respondent. The applicant has asked for an instruction fee of Kshs 5,227,935.21 based on the value of the claim that was the subject of the suit which is Kshs 187,306,735.00. The Respondent through his advocate has opposed this instruction fee on the basis that the applicant never filed a defence to the suit in ELC 1 of 2011. I have carefully perused the court record in ELC 1 of 2011. Indeed, there was no defence that was filed in that suit, which fact the applicant and the respondent conceded. Does this disentitle the applicant from an instruction fee in the matter? Paragraph 1 (b) of Schedule 6 sets out the fee to be charged as an instruction fee in respect of a suit where a defence or other denial of liability is filed. The applicant has stated that although no defence was filed, the grounds of opposition and replying affidavits on the record, in response to the various applications amounted to a denial of liability of the suit. I have carefully perused these documents and noted that they specifically related to the applications that the plaintiff in that suit had filed and served on the defendants. Consequently, the applicant cannot claim instruction fees on scale, based on the valued of the subject matter of the suit. The applicant is entitled to instruction fees for the work done that is for defending the respondent in those applications that were filed on record. I have carefully perused the record in ELC 1 of 2011. I have noted the volumes of pleadings, the nature and importance of the matter to the parties and the interest of the parties. I am persuaded that in the present instance, a composite instruction fee of Kshs 250,000/- is reasonable. Item 1 is so taxed. Kshs 4,977,935.2/- is taxed off. Item 68 on getting up fees is taxed off. The applicant did not prepare for trial."***

13. It is clear that the taxing officer determined that the advocate was entitled to instruction fees and observed that the fee would not be the scale fees set out in Paragraph 1 of Schedule 6. She correctly observed that in the absence of a defence, the advocate was entitled to a fair proportion of the scale fees commensurate with the work done by the advocate. I therefore find no basis for faulting the taxing officer on her assessment of instruction fees.

14. Regarding the other three impugned items, the taxing officer laid down her basis as follows:

> ***"I proceed to tax the other items based on the following principles. All court attendances are taxed on the lower scale. There is no order from the court pursuant to rule 50A that the costs be taxed on the high scale. I have perused all the documents and correspondence in the record and noted their folios and therefore taxed them according to the number of folios I arrived at."***

15. Again I find no basis for faulting the taxing officer on her assessment of the three items. The totality of the foregoing is that I find no merit in the rival references. Consequently, they both fail.

Summary and Disposal

16. In summary, my finding on the first issue is that an advocate who is duly instructed to act for a defendant in a suit and does so act is entitled to a reasonably proportionate portion of instruction fees notwithstanding the fact that instructions are withdrawn before a formal statement of defence is filed in the suit. My finding on the second issue is that there is nothing disclosed to suggest that the taxing officer erred in principle or that the fees awarded on any of the four impugned items was excessively high or manifestly low as to justify this court's interference with the taxing officer's exercise of discretion.

17. In light of the above findings, both the advocate's reference dated 25/9/2017 and the client's reference dated 2/11/2017 are dismissed for lack of merit. Each party shall bear own costs in respect of the two references.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF NOVEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Ms Motabari for the Advocate

Ms Mureithi holding brief for Mr Masinde for the Client

June Nafula - Court Clerk