



**1. Applicable principles in taxation**

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**MISC. CIVIL APP. NO. 59 OF 2011**

**IN THE MATTER OF:      ADVOCATES ACT**

**AND**

**IN THE MATTER OF:      ADVOCATE-CLIENT BILL OF COSTS ARISING FROM HCCC  
NO. 118 OF 2009 INVOLVING ACCREDO AG (PLAINTIFF) AND SALAMA BEACH HOTEL  
LIMITED (AS 1<sup>ST</sup> DEFENDANT), HANS JURGEN LANGER (2<sup>ND</sup> DEFENDANT), ZAHRA  
LANGER (3<sup>RD</sup> DEFENDANT), STEFANO UCCELLI (4<sup>TH</sup> DEFENDANT), ISSAC RODROT  
(5<sup>TH</sup> DEFENDANT)**

**BETWEEN**

**LEONARD KATUNGA MBUVI T/A KATUNGA MBUVI & COMPANY  
ADVOCATES.....APPLICANT**

**AND**

**ACRREDO**

**AG.....1<sup>ST</sup>  
RESPONDENT**

**HANS JURGEN**

**LANGER.....2<sup>ND</sup>  
RESPONDENT**

**ZAHRA**

**LANGER.....3<sup>RD</sup>  
RESPONDENT**

**SALAMA BEACH HOTEL**

**LIMITED.....4<sup>TH</sup> RESPONDENT**

## R U L I N G

1. What is before me is the Respondents Chamber Summons dated 31<sup>st</sup> July 2012. The Application has been filed pursuant to Rule 11(2) of the Advocates (Remuneration) Order.
2. The Application is seeking for the following orders:
  - a. **That the decision by the learned Deputy Registrar dated 23<sup>rd</sup> July 2012 be set aside and the Respondent's Bill of Costs dated 13<sup>th</sup> December 2011 be taxed a fresh.**
  - b. **THAT the costs of the application be provided.**
3. The Application, which is actually a reference in respect of the Ruling of the learned Deputy Registrar is premised on the grounds that by a Ruling on taxation read and delivered on the 23<sup>rd</sup> July 2012, the Bill of Costs was taxed and allowed in the sum of Kshs.17,900,720; that the learned Deputy Registrar erred in the application of the principles to be relied on in taxation of the Bill of costs.
4. The Applicants have further stated in their grounds that the learned Deputy Registrar erred in law and fact in determining instruction fees at Kshs.20,000,000; that the learned Deputy Registrar erred in law and fact when he awarded the said instruction fees yet the advocates were not in conduct of the transaction from its commencement to its ultimate conclusion and that the learned Deputy Registrar failed to take into consideration the fact that the Advocates did not handle the suit to its conclusion.
5. The Applicants finally stated in their grounds that the learned Deputy Registrar failed to take into account that the Advocates Remuneration Order stipulates the scale fees on the value of the subject matter and that the advocate ought to be in conduct of any given suit to its ultimate conclusion to be entitled to the said fees; that the learned Deputy Registrar erred in allowing the items from 1-107 whereas the same did not constitute services rendered by the Respondent and the Deputy Registrar failed to take into account the interest of the parties in the matter and the general conduct of the proceedings.
6. The Respondent filed his Grounds of Opposition on 18<sup>th</sup> February 2013. The Respondent averred in his Grounds of Opposition that the Application is totally unfounded and an abuse of the court process and that the remedy sought does not lie.
7. The parties agreed to dispose of the Reference by way of written submissions. The Respondent filed his submissions on 2<sup>nd</sup> July 2013. The Applicants did not file their submissions.
8. The Respondents' advocate submitted that the Respondent in the current Application prosecuted Malindi HCCC NO. 118 of 2009 jointly with Mr. Kenyariri Advocate; that the suit had complex issues and that the instructions were for the protection of the interests of Accredo Ag at the Salama Beach Hotel; that HCCC No. 118 of 2009 was determined and that the Respondent's Bill of Costs dated 13<sup>th</sup> December 2011 was drawn to scale.
9. The Respondent in the current Application further submitted that HCCC No.118 of 2009 was involving, extensive and quite complex and the decision by the Deputy Registrar in determining instruction fees at Kshs.20,000,000 was proper. Counsel relied on the cases of **ADXCCESS LTD VS CCK (2005) e KLR and FIRST AMERICAN BANK OF KENYA VS SHAH AND 2 OTHERS (2002) I EA P 64.**
10. I have considered the Respondent's counsel's submissions and authorities.
11. I have perused the Ruling of the Taxing Master of 23<sup>rd</sup> February 2012 in which he awarded the Respondent (the Applicant in the Bill of Costs) an all-inclusive sum of Kshs.20,979,255 less Kshs.3,078,535 that the Respondent had been paid by the Applicant.
12. The Respondent (Katunga Mbuvi & Co. Advocates) filed his Client-Advocate Bill of Costs in respect to Malindi HCCC NO. 118 of 2009.
13. The Respondent claimed for Kshs.45,000,000 as instruction fees for perusing application dated 17<sup>th</sup> August 2010; perusing the entire court file of HCCC No.118 of 2009 amongst other pleadings and to the protection of his clients' interests in HCCC No.118 of 2009 valued in excess of Kshs.1 billion.

14. On this item, the Applicant's advocate in the present Application averred that the instruction fees payable to the Respondent herein should have been Kshs.3,000 because his instructions was to make an application for a temporary injunction and to set aside the earlier orders of the court.
15. The learned Deputy Registrar awarded the Respondent herein Kshs.20,000,000 and gave the following reasons:

**“The advocate received instructions to set aside earlier orders and the value of the subject matter as exhibited by the Respondents is Kshs.250,000,000. Under schedule VI (0) (VIII) the minimum figure is pegged at Kshs.3,500 but the court can award an amount that is reasonable. I have considered the nature and importance of the cause and the amount involved. In my considered view, an amount of Kshs.20,000,000 would be reasonable. I therefore tax item 1 at Kshs.20,000,000.**

16. The learned Deputy Registrar found that the minimum figure payable to the advocate for setting aside earlier orders was Kshs.3,500. However the learned Deputy Registrar awarded the Plaintiff's Advocate instruction fees of Kshs.20,000,000 based on the nature and importance of the cause.
17. I have perused HCCC NO.118 of 2009 which is still pending in this court.
18. The Plaintiff in HCCC NO. 118 of 2009 was filed by the firm of Gunga Mwinga & Co. Advocates on 3<sup>rd</sup> September 2010. The parties initially were Accredo AG as the Plaintiff and Salama Beach Hotel Limited as the Defendant.
19. The firm of Katunga Mbuvi and Co. Advocates (the Respondent) took over the matter from the firm of Gunga Mwinga & Co. Advocates on 3<sup>rd</sup> September 2010. The Respondent in this reference simultaneously filed an Application for injunctive orders against some other parties who had not been joined in the suit. The Respondent also filed a Preliminary Objection dated 9<sup>th</sup> November 2010 in respect to an Application for joinder of parties dated 6<sup>th</sup> September 2010 and another Application dated 1<sup>st</sup> December 2010 for setting aside the orders of J. B. Ojwang J, as he was then.
20. The Respondent (Katunga Mbuvi & Co. Advocates) is entitled to instruction fees on the Applications I have enumerated above. It is the firm of Gunga Mwinga & Co. Advocates that is entitled to the full instruction fees having filed the Plaintiff's Application in HCCC No. 118 of 2009.
21. In view of the fact that the value of the subject matter of the suit was not stated in the pleadings, the taxing master was entitled, as he did in this particular case, to use his discretion in assessing the instruction fees payable to the advocate for filing and arguing the two Applications that I have enumerated above.
22. In assessing such instruction fees, it has been held by the High Court and the Court of Appeal that the taxing master should take into account the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances.
23. I have stated above that HCCC NO. 118 of 2009 is still pending in this court. In deed, numerous applications have been drawn and filed by the Applicants, through other counsels, since the firm of Katunga Mbuvi & Co. Advocates ceased acting for the Applicants.
24. As was held in the case of **Mayers and Another Vs Hamilton & others (1975) EA 13**, an advocate is entitled to claim the minimum instruction fees but he cannot properly claim fees in respect of work he had not done. The entitlement under the instruction fees grows as the matter proceeds. The taxing master should therefore have taken into consideration the work that the Respondent herein had done after filing the two Applications.
25. If the work that the advocate had done had been considered by the taxing officer, that is filing and arguing the two Applications, he would have realised that the minimum instruction fees of Kshs.3,500 as he had found could not have shot to Kshs.20,000,000.
26. As was held in **Premchand Raichard Limited & Another Vs Quarry Services of East Africa Limited & Others NO. 3 (1972) EA 163**, a court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one part and in my view, an award of instruction fees of Kshs.20,000,000 for filing and arguing two Applications is too high and it amounts to an injustice to the Applicants. The taxing master ought to take the interests of all parties in the matter and the general conduct of the proceedings.
27. The taxing master should have taken into account the fact that the Plaintiff will still have to pay instruction fees to the advocate who drew and filed the suit and the fact that the Respondent herein

- had ceased acting for the Applicants after filing and arguing the Applications dated 3<sup>rd</sup> December 2010 and 1<sup>st</sup> December 2010.
- 28.Indeed, as was held in the case of **First American Bank of Kenya Vs Shan & Others, Nairobi HCCC No. 2255 of 2000 (2002), 1 EA**, the mere fact that the advocate does research before filing a pleading and then puts a pleading 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 the basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. I entirely agree with that pronouncement by Ringera J.
- 29.Consequently, I find that the instruction fees of Kshs.20,000,000 that the taxing master awarded to the Respondent, having set the basic fee at Kshs.3,500, was manifestly excessive to justify my inference that it was based on an error of principle.
- 30.The taxing officer should have had regard to the fact that the full instructions fees will be paid to the advocate who filed the suit and to the fact that no reasonable progress was made in the suit by the Respondent and to the amount of work that was done by the Respondent in respect to the two Applications that were filed.
- 31.For the reasons I have given above, I allow the Applicant's Application dated 31<sup>st</sup> July 2012 and direct that the Respondent's Bill of Costs dated 13<sup>th</sup> December 2011 be remitted to another taxing master for re-assessment of item number 1.

**Dated and Delivered in Malindi this 27<sup>th</sup> day of September, 2013**

**O. A. Angote**

**Judge**