



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, OKWENGU & GBM KARIUKI, JJ.A.)**

**CIVIL APPEAL NO.292 OF 2012**

**BETWEEN**

**LUCY WAITHIRA.....1<sup>ST</sup> APPELLANT**

**JOHN IRUNGU GITUGI.....2<sup>ND</sup> APPELLANT**

**JULIUS KARIUKI.....3<sup>RD</sup> APPELLANT**

**AND**

**EDWIN NJAGI T/A E. K**

**NJAGI & COMPANY ADVOCATES.....RESPONDENT**

***(Being an appeal against a ruling and order of the High Court of***

***Kenya at Nairobi (Odunga, J.), dated 27th February, 2012***

**in**

**MISC. Application No.516 of 2009)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

[1] This appeal arises from the ruling of the High Court (Odunga J.), in a reference lodged by **Lucy Waithira, John Irungu Githinji** and **Julius Kariuki** (appellant herein), against the decision of the taxing master in the taxation of the Bill of costs lodged by **Edwin K. Njagi T/A E. K. Njagi & Co Advocates** (now respondent). The latter represented the appellants in High Court Civil case No.454 of 2008.

[2] In his decision, the taxing officer taxed off Kshs.122,464,371/-from the Bill and allowed at Kshs.32,447,332/-. In regard to the specific items the taxing officer, amongst other things, taxed the instruction fees at Kshs.5,000,000/-, allowed Kshs.16,666,667/- as getting up fees, and allowed a further sum of Kshs.5,000,000/-, as instruction fees for appearing for the appellant in arbitration proceedings regarding the same matter.

[3] In the reference, the appellants faulted the taxing officer for exercising his discretion improperly: by making an erroneous finding on the value of the subject matter; improperly increasing the instruction fees to Kshs.5,000,000/-; allowing getting up fees when the same were not justified as the matter was referred to arbitration before the pleadings were closed; and allowing as drawn disputed items of disbursements in the bill without proper authentication.

[4] In his ruling, the learned Judge found that the subject matter of the suit could and was determined from the proceedings, and that the taxing officer did not err in adopting the value of the subject matter from the proceedings, nor was the increase in the basic fees manifestly excessive as to amount to an error of principle. With regard to the getting up fees, the learned Judge held that it was based on a finding of fact that the suit was set down for hearing, and there was therefore no justification for the court to interfere. On the instruction fees for conducting the arbitral proceedings, the learned Judge found that the taxing officer was wrong in principle in awarding separate instruction fees for the arbitration process. On disbursements, the learned Judge held that the taxing officer properly exercised his discretion under Paragraph 16 of the Remuneration Order. Finally the learned Judge found fault with the item allowed in respect of legal research, contending that it is not expressly provided for under Schedule VI of the Remuneration Order, nor did the court make an order allowing the same. The Learned Judge therefore allowed the reference to the extent of remitting the bill of costs back to any Deputy Registrar other than the one who had taxed the Bill previously, to re-tax the advocates' costs in regard to instruction fees for the arbitral process, and fees for legal research, in accordance with the directions of the learned Judge.

[5] The appellants have faulted the ruling of the learned Judge in regard to the instruction fees, get up fees and disbursements raising 8 grounds. In short the appellants contend that in determining the reference, the learned Judge: failed to appreciate the nature of the claim and the subject matter thereof; erred in holding that the subject matter was assets of Fig Tree Hotel Ltd and that the value of the subject matter could be determined from the proceedings; erred in failing to find that the increase in basic fees was not justified, nor manifestly excessive as to amount to an error of principle; failed to appreciate the appellant's objection to the disbursements; failed to apply the relevant principles of taxation.

[6] Hearing of the appeal proceeded by way of written submissions that were duly highlighted by counsel for the respective parties. In brief the appellant submitted that from the plaint filed in HCCC 454 of 2008 the dispute was the number of shares held by one **Benson Kimanga**, and that the main prayers in the plaint were:

- (i) An order of injunction preventing the defendants from interfering with the operation of Fig Tree Hotel, and
- (ii) An order for reconciliation of shareholding of Fig Tree Hotel by an agreeable arbitrator to determine each member's rightful share.

[7] It was contended that the value of the subject matter of the suit could not be determined from the pleadings, judgment, or the award. Nor could the value of the subject matter be determined from the assets or liabilities of the Fig Tree Hotel Limited as there was no claim over any assets of the company. It was argued that the taxing officer erred in relying on an affidavit to assess the value of the subject matter for the reasons that:

- (i) Value of the subject matter can only be determined from the pleadings, award or judgment.
- (ii) Affidavit is evidence not pleading.
- (iii) From the pleadings and award, it was clear that the subject matter was the number of shares held by one Benson Kimanga from whom the defendants were claiming shareholding, and this share was given a nominal value of 1,000 by the Arbitrator.
- (iv) That if value of the subject matter could not be ascertained, the taxing master ought to have assessed the same under Schedule VI (h).

[8] In support of the above propositions the following authorities were relied upon:

(i) ***Moronge & Co Advocates v Kenya Airports Authority [2014] eKLR.***

(ii) ***Kamunyori & Co Advocates v Development Bank of Kenya Limited [2015] eKLR.***

[9] It was reiterated that the taxing officer did not exercise his discretion properly as he made errors of principle both in the ascertainment of the subject matter of the suit and the value of the subject matter.

[10] On increase of the basic instruction fees, it was submitted that the taxing master did not indicate what was complex in the matter to justify the increment from the basic of Kshs.814,219/- to Kshs.5,000,000/-. The case of ***Devshi Dhanji & Others v Kanji Naran Patel and others 1978 KLR 243*** in which the Court of Appeal upheld interference on the grounds that the taxing officer had overemphasized the difficulties, importance and complexity of the suit, was relied upon it being contended that the matter in the High Court was neither complex nor novel to warrant the increase. It was maintained that the learned Judge ought to have interfered with the exercise of discretion by the taxing master

[11] Further, it was submitted that the taxing officer misdirected himself in allowing get up fees maintaining that the matter had been set down for hearing when no defence had been filed nor a hearing date fixed. It was argued that the learned Judge misdirected himself in holding that he could not interfere with a finding of fact made by the taxing officer. It was maintained that the learned Judge in a reference is entitled to interfere with a finding of fact if the evidence before the taxing master does not support it.

[12] Regarding the disbursements, it was stated that there was no proof proffered of the amount of Kshs.4,774,242/- that was allowed as arbitrators fees nor the payment for stenographer's fees, or the fees paid to Kago Mukunya & Associates Certified Public Accountant (K). Nor was there any proof that the advocate was authorised to make the payment or did indeed make the payment. It was argued that the learned Judge did not appreciate the appellant's objection in this regard.

[13] Finally it was submitted that the costs could not be allowed to reach an amount where the subject matter becomes irrelevant; that the fees charged ought to be in the range set out in the Remuneration Order; and that taxation of costs should not be allowed to rise to such a level as to limit access to courts to the wealthy only. The Court was therefore urged to allow the appeal, set aside the decision of the learned Judge in respect of instruction fees, getting up fees, and disbursements and remit the entire Bill of costs for taxation afresh.

[14] For the respondent, it was pointed out that the decision of the taxing officer could only be interfered with if there was an error in principle; or if the taxing officer failed to take into account relevant matters, or took into account irrelevant matters.

[15] Relying on ***Premchand Raichand Ltd & Anor v Quarry Services of East Africa Ltd & others (1972) EA 162***; it was submitted that the instruction fees should be based on the amount of work involved in the preparation for the hearing and the difficulty and importance of the case, and that the decision of the taxing master can only be interfered with if it is so high or so low as to amount to injustice to one party. It was maintained that Fig Tree Hotel Limited was the subject of the suit in the High Court, and that although the value of Fig Tree Hotel Limited could not be determined from the pleadings, the taxing officer was right in relying on the replying affidavit sworn by Edwin K Njagi that was on record, and upon which the value of the subject matter could be pegged.

[16] In regard to the getting up fees, it was pointed out that the advocate prepared for the conduct of the suit in the High Court as well as the hearings before the arbitrator and therefore the amount allowed was proper. Similarly it was argued that the instructions for the arbitration proceedings were independent of the High Court suit and therefore the taxing officer could not be faulted for allowing the instruction fees. It was maintained that the amounts allowed in respect of disbursements were all amounts properly expended on behalf of the appellants. The Court was therefore urged to dismiss the appeal.

[17] We have considered this appeal, the submissions made and the authorities cited. It is clear that the bone of contention in regard to the Bill of costs is the instruction fees, the getting up fees and the disbursements that were allowed by the taxing officer and upheld by the learned Judge. Paragraph 16 of the Remuneration Order states as follows:

**“16. Discretion of taxing officer**

***Notwithstanding anything contained in this Order, on every taxation the taxing officer may allow all such costs, charges and expenses as authorized in this Order as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through over-caution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses.”***

[18] It is evident from the aforestated paragraph that the taxing officer exercises a discretionary power in taxing the Bill of costs. Such power has to be exercised judiciously in that it must be done in accordance with the scale provided in the Remuneration Order, and where discretion is given for variation, justification must be given for such variations. Thus in a reference one of the reasons that can justify interference with the decision of the taxing officer is if the discretion has not been exercised judiciously. It is trite that the taxing officer’s decision is not exercised judiciously where relevant consideration has not been taken into account, or irrelevant considerations have been taken into account and this would amount to an error of principle.

[19] As was stated by this Court in ***Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board Civil Appeal No.220 of 2004*** (UR) in taxation failure to take into account relevant considerations may include failure to apply the instruction fees or costs as provided in the appropriate schedule of the Remuneration Order or where the taxing officer has committed an error of principle.

[20] In the case of ***Premchand Raichand Ltd & Anor v Quarry Services of East Africa Ltd & others*** (Supra); it was also held that a judge may be justified to interfere with the decision of a taxing officer if he finds the award so high or so low as to amount to injustice to one of the parties. Thus the issue in the appeal before us is whether the taxing officer properly exercised his discretion in regard to the instruction fees, the getting up fees and the disbursements, or whether there was an error of principle such as called for intervention of the learned Judge.

[21] Further, in regard to the instruction fees the following statement made by this Court in ***Kamunyori & Co Advocates v Development Bank of Kenya Limited*** (supra) is instructive:

***“There are principles which a taxing officer is enjoined to follow while Taxing Bills of Costs. It is axiomatic that an advocate is entitled to claim instructions fee. Where an advocate is instructed by a client to sue or defend a suit, providing the advocate does the work, he is entitled to charge for the work he has done. In determining the instructions fee in an advocate/client Bill of Costs, the relevant provision in the Advocates Remuneration Order is Schedule VI B. It shows that the instructions fee is calculated on the basis of the value of the subject matter in the suit where it can be determined from the pleadings or the judgment or where parties have entered into a settlement.”***

[22] A similar statement was made in ***Joreth Ltd v Kigano & Associates Civil Appeal No. 66 of 1999*** [2002] eKLR, in which this Court had this to say:

***“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not so ascertainable the 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 the importance of the cause or the matter, the interest of the parties,***

***general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”***

[23] The following extract from the judgment of the High Court reflects how the learned Judge addressed the issue:

***“In the original suit the plaintiff therein was praying for the following orders:***

***a) An order of permanent injunction restraining the defendants either by themselves, their officers, employees, servants and or agents or otherwise whomsoever, from requisitioning, convening illegal and or unlawful meetings and or interfering in any manner whatsoever with the smooth running and operation of Fig Tree Limited.***

***b) An order for reconciliation of shareholding of Fig Tree Hotel Limited by an agreeable arbitrator for purposes of determination of each member’s rightful share.***

***c) Costs and interest of the suit***

***It is therefore clear that the submission that Fig Tree Hotel Limited did not feature in those proceedings was incorrect. It was actually the shareholding therein that was the subject of the dispute. Whereas it is true that the pleadings did not disclose the value of and there was no judgment on the value of the subject matter, one of its properties was valued at Kshs.48,817,500. Whereas I would hesitate to endorse resort to other material on record as a basis of determining the subject matter of the dispute as being too vague and too wide, it is my considered view that the value of the subject matter herein could to a certain extent be determined and was determined from the proceedings and in my view that value was settled. I accordingly, do not agree that the taxing master erred in adopting that figure for the purposes of assessing the instruction fees”***

[24] In our view the approach by the learned Judge cannot be faulted. It is evident from the pleadings that the dispute related to determination of shares in the Fig Tree Hotel limited. In the absence of any pleadings or judgment on the value of the subject matter the taxing officer properly exercised his discretion by using the best evidence that he had. That is the undisputed evidence of the value of one of the properties of the company to determine the value of the subject matter.

[25] Indeed the approach adopted is consistent with the position in ***Kamunyori & Co Advocates v Development Bank of Kenya Limited*** (supra) in which the Court upheld the decision of the Judge setting aside the decision of the taxing officer holding that: the Taxing Officer was wrong in principle in determining the subject matter to be US Dollars 7.1 which was the value of all the property and assets of the plaintiff; that the suit by the plaintiff only challenged the appointment of Receiver and Manager and the validity of the charge and debenture instruments over its properties which the respondent created to secure the loan of Shs.95 million; and therefore the subject matter of the suit was Shs.95 million.

[26] In assessing the instruction fees the taxing officer increased the basic instruction fee of Kshs.814,219 by adding an additional Kshs.5 million. Under paragraph 5(1) of the Advocates Remuneration Order a special fee may be allowed where the instructions relate to matters of exceptional importance or unusual complexity.

[27] **Section 5(2)** of the Advocates Remuneration Order, states that in assessing such special fee regard may be had to—

***“(a) the place at or the circumstances in which the business or part thereof is transacted;***

***(b) the nature and extent of the pecuniary or other interest involved;***

***(c) the labour and responsibility entailed; and***

***(d) the number, complexity and importance of the documents prepared or examined.”***

[28] Although the taxing officer did not state the provision under which he had increased the instruction fees, he stated in his ruling that he had exercised his discretion having taken into account the nature and importance of the matter, the amount involved, the interest of the parties, and the general conduct of the proceedings including the volume of papers perused. Thus it is evident that he exercised his discretion under paragraph 5 of the Remuneration Order.

[29] The learned judge rightly addressed himself to the circumstances under which a judge can interfere with the taxing officer's exercise of discretion and found no justification for interference. We concur with the learned Judge that there was no error of principle committed in the award relating to the instruction fees. There is no evidence that the taxing officer took any irrelevant matters into account or failed to take relevant matters into account. Moreover, the taxing officer appreciated the exceptional importance and unusual complexity of the instructions, and it is clear that he was alive to these issues.

[30] On the Getting up fees, we have noted that there is an order given on 14th August 2008 that forms part of the record of appeal, which shows that the suit came up for the hearing of the application dated 11th August 2008, when a consent was recorded allowing temporary restraining orders and referring the matter to arbitration. Since the matter had been fixed for hearing, the assumption is that the advocate must have prepared for the hearing of the matter and therefore the getting up fees was justified.

[31] The last item that was also subject of this appeal is the amount allowed with regard to the disbursements. The amount complained of was in regard to the payment for the arbitrator's fees, the stenographer's fees and the fees for the firm of Kago Mukunya & Associates Certified Public Accountant (K). All these are disbursements arising from the consent order requiring the matter to be referred to arbitration. The matter was indeed referred to arbitration and the arbitral proceedings form part of the record of appeal. This lends credence to the fact that there were expenses that arose from the arbitral process.

[32] The question is whether the learned Judge had jurisdiction to inquire into the amounts allegedly paid to determine whether the same was paid and whether the amount was reasonable. Under Paragraph 16 of the Advocate Remuneration Order, the taxing officer had the discretion to allow:

***“all such costs charges and expenses as authorised in this order as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through over-caution, negligence or mistake, .....”*** (underlining added)

[33] We concur with the learned Judge that in considering the disbursements the taxing officer had very wide discretion. We see nothing to show that the circumstances did not entitle the taxing officer to make a finding that he was satisfied that the amounts were expended and should be reimbursed. The learned Judge could not interfere with the exercise of that discretion unless there was evidence that the discretion was not exercised judiciously. In this case there were mere murmurs of dissatisfaction, nothing really to show that the expenses ought not to have been incurred, or that they were increased through over caution or negligence or mistake such as to justify interference. We find that the taxing officer acted within his discretion in allowing the disbursements and the learned judge was right in upholding the same.

[34] In light of the above we come to the conclusion that the learned Judge properly dealt with the reference. We uphold the decision of the learned Judge and dismiss this appeal with costs.

Those shall be the orders of this Court.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of September, 2017**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**