IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, G.B.M. KARIUKI & J. MOHAMMED, JJ.A.)

CIVIL APPLEAL NO. 268 OF 2010

BETWEEN

KAGWIMI KANG'ETHE & COMPANY ADVOCATES.......... APPELLANT

AND

O-KERAI NURSERIES LIMITED .... 1ST RESPONDENT

AGNES KASYOKA .... 2ND RESPONDENT

SHEDRACK MUNYALO NZENGE .... 3RD RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya, Nairobi (Kimaru, J) dated and delivered on 15th day of July 2009

in

H.C. Misc Cause No.393 of 2008)

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JUDGMENT OF THE COURT

1. Kagwimi Kangethe & Company, the appellant in this appeal, is a firm of advocates. In the years 2005 to 2008, it acted for O-lerai Nurseries Limited in Nbi H.C.C.C. 565 of 2005 (O-lerai Nurseries Ltd v. National Bank of Kenya Limited), the 1st respondent in this appeal.

2. For services rendered by the appellant qua advocates for the respondent in the said suit, the appellant claimed Shs.4,795,524.16 in an advocate/client Bill of Costs filed in the High Court in Milimani Commercial Courts in Miscellaneous Cause No.393 of 2008 which the Deputy Registrar (K. L. Kandet) taxed in the sum of Shs.1,364,623/= after taxing off some amount on various items and deducting the sum paid amounting to Shs.1,500,000/=. The upshot of the taxation was as follows –

(a) Professional fee Shs.2,460.925.00

(b) Add V.A.T. Shs. 393,748.03

(c) Add disbursements

Total **Shs.2,864,623.03**

Less paid Shs.1,500,000.00

Balance Shs.1,364,623.00

3. The appellant was dissatisfied with the decision of the Deputy Registrar and accordingly, in pursuance with Rule 11 (1) of **The Advocates (Remuneration) Order**, made a request for reasons to be furnished by the Deputy Registrar for the decision. The appellant also applied for a certified copy the ruling.

4. The record of appeal filed in this Court shows that it was the respondent, O-lerai Nurseries Limited, that filed a reference before a judge in the High Court seeking a review of the Taxing Master's award of 29th February 2009, particularly of items 1(9), 1(b) and (3). It was submitted on behalf of the client/respondent that the amount in which the Bill was taxed should be reviewed as it was four times more than the amount allowed under **The Advocates Remuneration Order**. It was contended on the respondent's behalf before the learned judge that the appellant based his fees on an amount of Shs.68 million being the value of the property and lost opportunity and that the figure of Shs.68 million was a conjecture. Moreover, the respondent contended that no substantive action had been taken in the suit by the appellant as the advocate for the respondent. It was further urged on the appellant's behalf that legal services were rendered by the appellant to the respondent in the said suit and that the issues for trial in the suit were crystallised, and documents were filed, and the suit was prepared for trial.

5. On the respondent's behalf, it was contended before the learned judge that in a reference such as was before the judge, the court should not interfere with taxation on the basis of quantum as that role is left to the Taxing Officer, the role of the judge being on issues of mistake of principle.

6. In his impugned ruling delivered on 15th July 2009, the learned judge adjusted taxation in items 1(a) and 1(b) of Schedule VIA (1) of The Advocates Remuneration Order and assessed instructions fees (under 1(a) at Shs 487,000/= and under item (b) of Schedule VIB of the Advocates Remuneration Order the learned judge awarded one half of the amount, that is to say Shs.243,750/= on the basis that the subject matter of the suit was Shs.35 million. As the suit had not been confirmed for hearing, he declined to allow get up fees of Shs.599,799.54 claimed by the appellant and instead taxed it off, thus allowing the respondent's objection in this regard as merited. All the other items in the appellant's Advocate client Bill of Costs were left intact as they were not disputed and were, in the judge's view, taxed in accordance with the Advocate Remuneration Order. VAT was adjusted to the new figure. The learned judge also disallowed the respondent's objection as regards the cumulative legal fees paid to the appellant because, in the judge's view, the appellant was handling other legal work for the respondent on instructions of the latter and the cumulative fees could not be attributed to the suit alone. In effect, the learned judge gave credit to the respondent for the sum of Shs.1.5 million only.

7. The appellant was aggrieved by the learned judge's decision, and consequently gave notice of appeal on 30th July, 2009 manifesting his intention to appeal against it and on 7th October, 2010 lodged the record of appeal.

8. In the Memorandum of Appeal dated 7th October, 2010, the appellant proffered 10 grounds of appeal. These can be summarized as follows; that the learned judge erred because he failed to strike out the Reference before him on the ground that the ruling of the Taxing Officer was not attached; in reducing the amounts awarded in items 1(a) and 1(b) of the Bill of Costs and substituting the same with Shs.487,500/= and 243,750/= respectively; in taxing off get-up fees; in not appreciating that there was no error of principle on the part of the Taxing Officer, and hence interference was not justified; in failing to appreciate that he was not entitled to interfere with the taxation merely because in his view the amounts awarded were high; and he erred in his decision on the value of the subject matter of the suit and made a

decision that was wrong in law.

9. In accordance with the Practice Directions of this Court, the parties filed written submissions and Lists of Authorities prior to the hearing.

The appellant's written submissions and List of Authorities were filed on 8th and 9th August, 2016 respectively and the respondent's written submissions were filed on 7th October, 2016. The latter did not file a list of authorities.

10. When the appeal came up for hearing on 11th October 2016 Mr. G. K. Kangethe appeared for the appellant and Mr. Jared Mituga appeared for the respondent. Neither counsel found need to highlight the written submissions. They left the matter to Court for determination whereupon we set 16th December 2016 for delivery of judgment. However, the court file of the judge preparing the draft judgment went missing hence frustrating the timely delivery of the decision. It was later found in play 2017. The delay attendant to the determination and delivery of this judgment is greatly regretted.

11. We have carefully perused the record of appeal. We have also perused the written submissions filed by the parties through their counsel and the authorities cited. It is necessary in this appeal to examine the relevant principles in review of decisions on taxation by the taxing officers.

12. The principles that govern review of decision on taxation were reiterated in the case of **First American Bank of Kenya versus Shah & Others** [2002] 1 EA 64. In that case, the decision of the taxing officer was referred to a judge in the High Court whose determination in turn was challenged on appeal in this court. This Court held that a Taxing Officer's decision would not be interfered with unless it was based on an error of principle or the fee awarded was so manifestly excessive as to justify interference as being based on an error of principle. The predecessor of this court also in the case of **Steel Construction & Petroleum Engineering (EA) Ltd versus Uganda Sugar Factory Ltd** [1970] EA 141 (per Spyr JA) at pg 143 agreed with the general statement that although a judge undoubtedly has jurisdiction to re-tax a bill of costs himself, he should as a matter of practice do so only to make corrections which follow from his decision, and that the general rule is that where a fee has to be re-assessed on different principles, the proper course is to remit to the same or to another taxing officer.

13. In **Joreth Limited versus Kigano & Associates** [Nairobi Civil appeal No.66 of 1999] this court held that for the purpose of instructions fee –

> ***"the value of the subject matter of a suit for the purposes of taxation of costs ought to be determined from the pleadings, judgment 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 importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances..."***

14. As long ago as 1961, the predecessor of this court in the case of **Thomas James Arthur v. Nyeri Electricity Undertaking** [1961] EA 492 (where the taxation by the Taxing Officer was reduced by half by the Superior Court judge upon reference to him by the aggrieved party on the ground that the fee allowed which was quadruple the scale fee was so manifestly excessive as to be of itself indicative of the exercise of a wrong principle on appeal to the Court of Appeal), the predecessor of this court held that –

> ***"where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the court will intervene only in exceptional cases."***

15. In allowing the appeal in **Thomas James Arthur's case** (supra), the court opined that the fee allowed was higher than seemed appropriate, but in a matter which must remain essentially one of opinion, it was not so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle.

16. What is salient in the decisions of this Court and of the predecessor of this court in appeals on taxation is that only where there is exercise of wrong principle, or where the decision on taxation is wholly wrong, will the court interfere.

17. In the appeal before us, the first issue was whether the value of the subject matter of the suit on which the instructions fee was based was correct. The Taxing Officer erroneously regarded USD 977,311.92 (Kshs. 68,441,834.40 as the damages prayed for. He however, appreciated that the plaint in suit No.HCCC No.565 of 2005 had not sought by way of reliefs a specified sum. There was a defence and a counterclaim for a sum of Shs.37 million. The taxing officer appreciated that the plaintiff in the suit was seeking damages for lost business capital and declaratory orders which had not been quantified and there being no settlement, the taxing officer was unable to attach any figure to the claimed damages. After noting the nature of the matter in the suit, and its complexity he came to the conclusion that Shs.600,000/= would be reasonable as instructions fees under item 1(a). He proceeded to increase that figure by one-half, that is to say, by Shs.300,000/= under item 1(b). That brought the figure of instructions fee to Shs.900,000/=.

18. There was also instructions fees for defending the counter-claim of Shs.37,306,605.80 in HCCC No. 565 of 2005, and the taxing officer in item 2(a) awarded Shs.599,599.05 (on the basis of schedule VI 1(b) of the Advocates Remuneration Order. Under item 2(b), the taxing officer increased the instructions fees for defending the counterclaim by half i.e. half of Shs.599,599.05 resulting in Shs.299,799.54. The total sum therefore came to Shs.1,799,398,162, one third of which came to Shs.599,799.54.

19. The learned judge of the superior court (Kimaru J) interfered with the decision of the taxing master on the ground that the latter erred in principle by basing the instructions fees on USD 977,000 which was not the sum claimed in the plaint. He reviewed the taxing officer’s decision, set it aside, and substituted his assessment with it. The learned judge found the value of the subject matter of the suit to be US$500,000 on the basis that although the claim in the plaint was for damages for lost business opportunities, the client had pleaded that it had applied for a short term loan of US$ 500,000 from the defendant Bank and therefore, in the learned judge’s considered view, that figure (of US$500,000) ought to have been applied by the taxing officer as the value of the subject matter of the suit instead of US$977,000 that the learned judge said was adopted by the taxing officer.

20. A careful reading of the rulings of the taxing officer and the learned judge of the Superior Court shows that the taxing officer referred in his ruling to US$977,311.92 (i.e. shs 68,411,834.40) as damages prayed for in respect of lost capital resources and business opportunities. No such claim is discernible in the plaint. However, the taxing officer went on in his ruling to correctly make it clear that there was no specific amount claimed on which instructions fee could be based when he stated that –

> ***“I am unable to attach any figures to the claimed damages from the pleadings. In my view, the plaintiff did not pray for any specific amount in the plaint. I have however noted the nature of the subject matter of the suit, its complexity which is clear from the pleadings, the length of the papers handled as demonstrated in the bundle of documents produced by the applicant and the skill required to prepare the suit. Under schedule VI (I) of the Advocates Remuneration Order 1997, I award the applicant a sum of Shs 600,000/= which I consider reasonable under the circumstances as instructions fees.***

21. It is clear from the record that the learned judge was in error when he stated that the taxing officer had taken the sum of US $977,000 as the value of the subject matter of the suit and based the instructions fee on it. The learned judge interfered with the taxation on the ground that there was an error of principle in that the instructions fee was based on an incorrect value of the subject matter of the suit namely US$977,000. This was not the case. The learned judge stated in his ruling that the correct figure in relation to the value of the subject matter of the suit was US$500,000. But nowhere in the pleadings was US$500,000 pleaded as a claim. In his assertion that –

> ***“...the client pleaded that it had applied for a short term loan of US$500,000 from the defendant Bank. In my considered view, this was the figure that ought to have been applied by the taxing***

officer as the subject matter of the suit instead of US$977,000 that was adopted by the taxing officer”

The learned judge was clearly wrong. The taxing officer did not base the instruction fee on US$977,000 and the plaint did not reflect a claim of US$500,000 anywhere which the learned judge took us the value of the subject matter. In effect, there was no error of principle on the part of taxing officer which needed to be corrected as the determination of the instructions fee was not on the basis of US$977,000. The learned judge also erred when he held that –

> ***“...the client has a case when it argues that the taxing officer erred in principle when he applied the wrong figures as the subject matter of the suit. To that extent therefore, I hold that in so far as the basis of the assessment of the instructions fees was US$977,000, the taxing officer committed an error in principle. I will therefore review and set aside the assessment in respect of item 1(a) and 1(b) of the Advocates Bill of costs and substitute it with a lawful assessment by this court based on the value of the suit being US$500,000.”***

22. Clearly the learned judge erred in his decision that the taxing officer based the taxation on the figure of US$977,000. The judge sought to correct an error that was non-existent. Consequently, he fell into error in doing so himself and further erred in basing his taxation of instructions fee on the figure of US$500,000 which he converted into Kenya Shillings by multiplying it with shs.70 that was the exchange rate, to get a figure of Shs.35 million.

23. In absence of any error of principle on the part of the taxing officer, and in absence of evidence that the amount in respect of which the bill was taxed was excessive, it seems clear to us that there was no justification to interfere with the taxation by the taxing officer. We do not doubt however, that the learned judge was acting in good faith.

24. In the result, we find merit in the appeal which we hereby allow. We set aside the ruling of the leaned judge dated 15th July, 2009 and restore the ruling of the taxing officer dated 29th January 2009 which we hereby uphold.

25. We award the costs of the reference in the Superior Court and in this appeal to the appellant. It is so ordered.

Dated and delivered at Nairobi this *6th day of October, 2017*.

W. KARANJA

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

J. MOHAMMED

..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR