IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, J.A (IN CHAMBERS)

CIVIL APPEAL NO. 307 OF 2013

KEZIAH NJAMBI MAINGI ..... APPELLANT
AND
BARCLAYS BANK OF KENYA LIMITED ..... RESPONDENT

(*An appeal from the ruling and orders of the High Court of Kenya at Nairobi (**Kamau, J**.) delivered on 20th day of September, 2013*

in

Civil Suit No. 773 of 2012)

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RULING

The background information to the ruling is that the appellant Keziah Njambi Maingi t/a Arrivals Textiles shop filed an appeal No. 307/2013 against the Respondent Barclays Bank of Kenya Ltd arising from the ruling and orders of Kamau, J dated the 9th September, 2013 in H.C.C.C. No. 773 of 2012. The appeal was heard on its own merit and allowed on the 14th day of November, 2014. Following that success, the appellant lodged a bill of costs in the central registry of the court on the 14th day of January 2015. The bill was taxed *inter partes* resulting in the ruling of the taxing officer A. Nyoike Deputy Registrar dated the 19th day of July 2016 in which she allowed Kshs.647,052.00.

It is evident from the content of the ruling that in arriving at the said figure the taxing officer took into consideration the fact that in the exercise of her mandate as a taxing officer she was in essence exercising a judicial discretion by virtue of which she was obligated to bear in mind the provisions contained in paragraph 9 (1), that instructions fee shall be such sum as the taxing officer shall consider reasonable but shall not be less than on thousand shillings; paragraph 9 (2) that such figure allowed for instructions fees shall be such sum as the taxing officer shall consider reasonable having regard to the amount involved in the appeal, its nature, importance and difficulty, the interests of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or parties to bear the costs and all other relevant circumstances.

She also took into consideration the principles enunciated in the case law thus:

The above cited considerations are reinforced in the pronouncement made in the case of Premchand Raichand Limited & Another versus Quarry Services of East Africa Limited and Another [1972] E. A. 162 where the Court of Appeal sitting in Nairobi held that the court must give due consideration to the

following principles in taxing costs, i.e.

- ***That costs must not be allowed to rise to such a level as confine access to the court to the wealthy***
- ***That a successful litigant ought to be fairly reimbursed for the costs incurred.***
- ***That the general level of remuneration of advocates must be such as to attract recruits to the profession, and,***
- ***That so far as practicable there should be consistency in the wards made.***
- ***The 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 party.***

Applying the principles set out in the **Premchand Raichand Limited & Another** (supra) together with those set out in the Court of Appeal Rules third schedule the taxing officer made the following observations:

> ***Looking at the above stated considerations, it suffices to say that the matter was of grave importance as it involved an investment made by the Appellant towards the acquisition of a home, virtually any person's endeavor. Further afield, it is noteworthy that the matter involved around the issue of injunction, and particularly whether the Appellant had a prima facie case with probability of success. In my view, the issues raised were not complex, not to mean though that the considerable research was not carried out and precedent was not set by the judgment delivered in the matter. I have also considered the party from whom costs are due; without prejudice, the Respondent, Barclays Bank of Kenya is a financially endowed entity.***

She then rendered herself thus:-

> ***Hence, having duly considered the law applicable and the nature of the appeal, my view is that a sum of Kshs.600,000 is sufficient as instruction fees in respect of item 1 in line with the provisions of paragraph 9(2) as afore set out. This shall also cover the costs in items 1, 2, 5, 6, 7, 9, 10 and 15 which are hereby taxed off in accordance with paragraph 9(3).***

The Respondent was aggrieved and has lodged a reference in the court's central registry on the 27th day of July 2016. The grievances set out in paragraph 3 of the reference read as follows:-

> ***"1. The Taxing Officer failed to apply and comply to the cardinal principle of reasonableness under paragraph 9 (2) in the Third Schedule, Court of Appeal Rules and taxed an amount that is manifestly excessive.***
>
> ***2. The Taxing Officer erred in law and in principle by contradicting herself by stating that the issues raised were not complex yet taxed the instruction fees at Kshs.600,000/=.***
>
> ***3. The Taxing Officer erred in principle by proceeding to arbitrarily assess the taxed amount without taking into account the judgment of the court rendered on 14th November, 2014 and the ruling in Civil Application No. NAI. 278 of 2013 (UR 201/2013) on costs hence amounting to double taxation and in conflict with the decision of this Honourable Court."***

The reference was argued before me *inter partes*. Learned counsel Mwangi Kigotho appeared for the appellant, while learned counsel Karen Muthee holding brief for Mr. Munge appeared for the respondent.

In her oral representations before me, learned counsel Karen Muthee urged me to interfere with the taxing officer's exercises of discretion because he applied the wrong principle in landing the respondent a hefty bill of costs on instruction fees just because it is endowed. It is her view that no such principle is found in

the case law enunciating principles governing taxation. The issues involved were not also complex as it was an interlocutory appeal. In this regard it was her view that the bill was manifestly excessive and it should be interfered with.

In opposition to the reference Mr. Mwangi for the appellant has relied on grounds of opposition dated the 15th day of September, 2016 and lodged in the court's registry on 15th September, 2016. These read thus:-

> ***1. THAT no component reference lies in view of the clear provisions of Rule 112(3) of the Court of Appeal Rules, the same having been filed out of time without leave of the court, and it ought to be struck out with costs;***
>
> ***2. THAT the reference is solely premised on the issue of Quantum awarded by the honourable Deputy Registrar, in clear contravention of the Provisions Rule 112(2) of the Court of Appeal Rules;***
>
> ***3. THAT costs in Civil Application No. Nai 278 of 2013 were to abide the outcome of the appeal and following the determination of the appeal, the said costs were taxed on the 30th day of September, 2015 and a certificate of taxation issued on the 4th day of November, 2015 and no reference was filed before the honourable court in respect to the said costs, and hence the reference to the said proceedings in this matter is a design to mislead the Court and an introduction of irrelevant issues therein.***
>
> ***4. THAT purported reference herein is bad in law, and an abuse of the Court process, and the same ought to be struck out with costs thereof."***

In his oral representations before me, it was Mr. Mwangi's argument that the amount arrived at by the taxing officer should not be interfered with because the reference is against quantum contrary to the provisions of **Rule 112** of the **Rules of the Courts**; principles of law invoked by the taxing officer gave the said taxing officer a wide discretion in determining the costs awardable; from the reasoning the taxing officer arrived at the amount assessed following demonstration that the appellant invested heavily in the appeal in terms of time, costs and research in respect of which she is entitled to be reimbursed. Lastly that the award should not be interfered with as the respondent has not made any suggestions as to what amounts to an appropriate award in the circumstances of this appeal.

In reply to the appellant's submission M/s Karen Muthee reiterated her earlier stand and urged that the taxing officer committed an error of principle which I have jurisdiction to interfere with and that I should be guided by what they have quoted in their submissions as an appropriate figure.

My jurisdiction to intervene has been invoked under **Rule 112** of the **Rules of the Court**. It provides:-

> ***"112. (1) Any person who is dissatisfied with a decision of the Registrar in his capacity as taxing officer may require any matter of law or principle to be referred to a judge for his decision and the judge shall determine the matter as the justice of the case may require;***
>
> ***(2) Any person who contends that a bill of costs as taxed is, in all the circumstances, manifestly excessive or manifestly inadequate, may require the bill to be referred to a judge and the judge shall have power and except as in this sub-rule provided, there shall be no reference on a question of quantum only."***

It is also common ground that in making the award the taxing officer was exercising a judicial discretion which the respondent has invited me to interfere with while the appellant has invited me to affirm. In deciding either way I stand guided by the court's observations in the case of **Kipkorir, Too & Kiara Advocates versus Deposit Protection Fund Board (2005) eKLR** thus:

> "***On a reference to a judge from the taxing by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in***

principle in assessing the costs. In Arthur v Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this Court said at page 492 paragraph 1: 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 interfere only in exceptional cases."

An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see Arthur v Nyeri Electricity Undertaking (supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see Devshi Dhanji versus Kanji Naran Patel (No. 2), [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see – D'Souza versus Ferrao [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji versus Kanji Naran Patel (No. 2) (supra).

Applying the above principles to the rival arguments herein it is evidently clear that the Respondent will stand non-suited on its reference if there is demonstration that the complaint is against quantum only as such a complaint would offend the provisions of the enabling **Rule 112 (1) (2)** of the **Rules of the Court.** In my view, the respondent's complaint was not solely against quantum as there is clear demonstration that it is directed against item (4) in the bill of costs which related to instructions fees; and second also that the principle applied when arriving at the figure awarded namely that it was because the Respondent was endowed was wrong. I therefore find that I have jurisdiction to intervene.

It was correctly submitted that one of the reasons the taxing officer gave for arriving at the figure arrived at was because the Respondent was endowed. It is however my view that this is not the only reason given for the figure assessed. This remark should not be considered in isolation from the other considerations outlined in the taxing officer's observations already outlined above.

The provision of law applicable enjoined the taxing officer to consider the fund and the person or persons against whom the award was to be made. The taxing officer therefore took the correct approach. I find no error.

In the result and for the reasons given in the assessment the reference is dismissed with no order as to costs.

Delivered and dated at Nairobi this 7th day of October, 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR