REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: TUNOI, GITHINJI & ONYANGO OTIENO, JJ.A.)

CIVIL APPEAL 220 OF 2004

BETWEEN

KIPKORIR, TITOO & KIARA ADVOCATES …….. APPELLANT

AND

DEPOSIT PROTECTION FUND BOARD …… RESPONDENT

JUDGMENT OF THE COURT

This is an appeal from the ruling and order of Azangalala, Ag.J. (now Judge) dated 21st July, 2004 allowing a reference under **Rule 11 (2)** of the Advocates (Remuration) Order (Order) from the taxation of Advocate/Client Bill of costs by the taxing officer delivered on 23rd February, 2004.

On 29th October, 2003 the appellant firm of Advocates filed an Advocate/Client bill of costs for taxation in which a total of Shs.10,527,836/07 was claimed as costs. That sum included Shs.6,000,515/50 claimed as instruction fees. The bill of costs arose from High Court Civil Suit No. 305 of 2002 in which three companies; Sports Cars Limited, (1st plaintiff); Kingsway Motor Kenya Limited, (2nd plaintiff); Hill View Holdings Limited, (3rd plaintiff) had sued two defendants, namely, The Deposit Protection Fund Board (DPFB) (1st defendant) and Trust Bank Limited (in liquidation), (2nd defendant). The 1st defendant DPFB was sued in its capacity as liquidator of the 2nd defendant appointed by the Central Bank of Kenya.

The appellant has not provided a summary of facts leading to the filing of the bill of costs. The following summary has been extracted from the bulky record of appeal. In the suit filed on 12th March, 2003, the plaintiff averred that Trust Bank Limited gave a letter of credit in the sum of Shs.60 million to Sports Cars Limited (1st plaintiff) which was secured by, inter alia, a charge on L.R. No. 209/4360/60 owned by Kingsway Motors Kenya Limited (2nd plaintiff) and a charge on L.R. No. 209/6873, owned by Hill View Holdings Limited (3rd plaintiff). The plaintiffs further averred that despite the payment of Shs.18,000,000/= in full and final settlement of the loan account in terms of the Memorandum of Understanding the defendant had unlawfully threatened to realize the securities. The main reliefs sought in the plaint were a permanent injunction to restrain the defendants from advertising and selling the two charged properties (L.R. No. 209/4360/80 and L.R. No. 209/6373 and an order that the defendants do discharge the charges and unconditionally release the two securities to the plaintiffs. The plaintiffs in the suit also filed a chamber summons dated 11th March, 2002 principally seeking an interlocutory injunction to restrain the defendants from advertising and selling the two charged properties. Upon receiving instructions from the 1st defendant to act for it in the suit the appellant filed a Notice of Motion dated 20th March, 2002 in which the 1st defendant sought leave to defend the suit and to appoint an advocate. After leave was obtained, the appellant filed a notice of appointment of advocates and proceeded to file grounds of opposition to the application for interlocutory injunction and a defence to the suit (one and

half pages). It is apparent from the record of appeal that the court temporarily stayed the suit pending the outcome of an application in a related suit. In the meantime, the appellant sent a "Deposit Request Note" dated 25th February, 2003 to the respondent. In that note the appellant demanded a deposit of interim costs totaling to Shs.1,488,941/94 including instruction fees under schedule VI part A (1) (b) of the Order of Shs.1,800,171/83 less discount of 30%, leaving a balance of Shs.1,260,120/29. The respondent did not respond despite several reminders until 9th April, 2003 when it informed the appellant that according to the guidelines applicable to the respondent a deposit of legal fees and legal fees is not payable until reasonable progress has been made. The appellant ultimately informed the respondent through a letter dated 10th July, 2003 that the appellant no longer wanted to act for the respondent. The appellant sent a fee note dated 10th July, 2003 to the respondent now demanding Shs.8,100,773/25 as instruction fees. On 1st September, 2003, the appellant filed a Chamber summons seeking leave to cease acting for the respondent on account of failure by the respondent to pay the legal fees in that suit and others.

Although the proceedings relating to the taxation of the bill of costs are not included in the record of appeal, it is a common ground that the bill of costs was fixed before D. K. Kaikai, a Deputy Registrar who heard submissions on it and reserved a ruling. The typed ruling wherein the bill of costs was taxed at Shs.6,081,372/97 including instruction fees of Shs.2,677,687/80 is shown to have been made and delivered by G. L. Nzioka, a Senior Resident Magistrate on 23rd February, 2004. It is conceded by both counsel that the bill of costs was not fixed before G. L. Nzioka for taxation and that she is not the one who heard the submissions on it.

By a letter dated 24th February, 2004 addressed to the Deputy Registrar, the respondent's advocates gave notice of objection to the taxation specifying the items of taxation to which the respondent objected and asked for reasons for the taxation in compliance with rule 11 (1) of the Order. By a letter dated 3rd June, 2004 the Deputy Registrar informed the respondent's advocates that:

> ***"The Deputy Registrar made remarks on your letter ….. dated 24th February, 2004 that, quote, "The reason are in the Ruling", end of quote".***

On 7th June, 2004, the respondent filed a Chamber Summons praying that the taxation of the bill of costs be quashed and the bill of costs be remitted to the Deputy Registrar for taxation afresh.

The learned judge allowed the reference and ordered that the taxation of the bill of costs be set aside and be remitted for taxation by a different taxing officer. This was a taxation of Advocates and Clients costs. The formula for taxation of those costs is provided by schedule VIA and VIB of the Order. According to the formula, the Advocates/Clients costs in this case would be the party and party costs prescribed in schedule VIA increased by one half. The main component of the bill of costs in dispute is the instructions fees. The appellant was defending the suit and so the instruction fees as provided in schedule VIA (1) (d) is the instructions fees calculated under sub-paragraph (1) (b) of schedule VI subject to the discretion of the taxing officer to increase or reduce the instructions fees. In exercising its discretion, the Taxing Officer is required to consider the matters specified in proviso (i) of schedule VIA (1) which states:

"Provided that:

> **(i) the taxing officer, in the exercise of his discretion shall take into consideration the other fees and allowances to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a discretion by the trial judge, and all other relevant circumstances".**

On a reference to a judge from the taxation 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 I:

"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 v 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 v 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 v Kanji Naran Patel (No. 2)*** (supra).

There are six grounds of appeal. In grounds 1, 3 and 6 the appellant challenges the competency of the reference which was before the learned judge. Mr. Kipkorir for the appellant submitted before us, as he did before the learned judge, that, the reference was fatally defective because the reasons of the taxing officer for the taxation were not filed before the judge and secondly because the reference was filed out time.

As regards the lateness in filing the reference, the ruling on taxing was delivered on 23rd February, 2004. By a letter dated 24th February, 2004 the respondent's advocates gave notice to the taxing officer of the items he was objecting to and asked the taxing officer to furnish him with reasons for taxation for the objected items. That was within the 14 days stipulated in ***Rule 11 (1)*** of the Order. By ***Rule 11 (2)*** of the Order the taxing officer was required on receipt of the notice to record the reasons forthwith and forward them to the respondent's advocates who were then required to file a reference to the judge within 14 days from the receipt of reasons. The taxing officer did not record the reasons but by a letter dated 3rd June, 2004 the Deputy Registrar informed the respondent's advocates that he (the Deputy Registrar) had endorsed on the respondent's letter of 24th February, 2004 that the *"Reasons are in the Ruling"*.

The Deputy Registrar's letter dated 3rd June, 2004 does not say when the endorsement was made. In particular, it does not say that the endorsement was made on 24th February, 2004 or any other date within the 14 days of the ruling. Further, there is no evidence that the respondent had been informed before 3rd June, 2004 that the taxing officer would be relying on the Ruling of 23rd February, 2004 for his reasons. In the circumstances, the appellants contention that time started running on 24th February, 2004 cannot be correct. We would agree with the learned judge that the reference was filed, within the prescribed time.

It is true that the taxing officer did not record the reasons for the decision on the items objected to after receipt of the respondent's notice. It seems that the taxing officer decided to rely on the reasons in the ruling on taxation dated 23rd February, 2004. That ruling at least indicated the formula that the taxing officer applied to assess the instructions fees. Although there was no strict compliance with ***Rule 11 (2)*** of the Order, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that if a taxing officer totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference. The rest of the grounds of appeal deal with the merits of the reference. In brief, the appellant contends that the objection to taxation was essentially on quantum and that there were no valid grounds for interference by the learned judge.

The learned judge allowed the reference on two main grounds. Firstly, he was satisfied that the taxing officer erred in principle in using the figure of Shs.116,344,789/30 given by the appellant as the value of the subject matter of the suit in computing the instructions fees. On this aspect, the learned judge observed thus:

"She (taxing officer) found as a fact that the claim was not a monetary claim but a claim for

declaratory orders. Notwithstanding these findings, the taxing officer seems to have applied the same figure in determining instructions fees payable. This determination affected the computation of the final figure of Kshs.6,081,312/97. On the face of the record therefore, the taxing officer does not seem to have exercised any discretion at all …".

Secondly, the learned judge found that the taxing officer did not have regard to the factors stipulated in the proviso (1) of schedule VIA (1) in taxing the bill of costs. Referring to that proviso, the learned judge again observed:

"The record does not show that the taxing officer had the above principles in mind. Indeed I find that an incorrect paragraph of the schedule was applied …".

The learned judge like the taxing officer was exercising judicial discretion when he allowed the reference. This Court cannot interfere with the exercise of that discretion unless it is shown that the learned judge acted on the wrong principles of law. The appeal to this Court from the decision of a judge on reference from a taxing officer is a kin to a second appeal and should be governed by ***Section 72 (1)*** of the Civil Procedure Act. In our view, such an appeal can only be allowed on any of the three grounds specified in section 72 (1) of the Civil Procedure Act, that is to say, if the decision is contrary to law or some usage having the force of law; or the decision has failed to determine some issue(s) of law or usage having the force of law or where there is a substantial error or defect in the procedure provided by law which may possibly have produced error or defect in the decision on the case upon merits.

It is apparent from the grounds on which the learned judge allowed the reference that the learned judge was satisfied that the taxing officer had committed grave errors of principle in assessing the costs. The appellant had pegged the instruction fees on the sum of Shs.116,344,781/30 which as the ruling dated 23rd February, 2004 correctly stated, was not the value of the subject matter of the suit. If anything the value of the subject matter of the suit would only have been the value of the two properties that the three plaintiffs wanted to save. However, the value of the two properties was not stated. The learned judge found that the taxing officer erroneously still used the value of the subject matter of the suit supplied by the appellant's counsel in assessing the instruction fee. Further, it does not appear that the taxing officer gave due consideration to all relevant circumstances preceeding the filing of the bill of costs. For instance, the taxing officer does not seem to have considered, the instructions fees previously claimed by the appellant; the fact that no reasonable progress had been made in the suit; the fact that DPFB was merely sued as a liquidator and was a party in the loan transaction; the amount of work done by the appellant in the suit and the conduct of the appellant.

It is not true as contended by the appellant's counsel, that the objection was essentially on quantum. Rather, it is the principles applicable in arriving at the quantum which were in issue. It has not been shown that the grounds on which the reference was allowed are not valid. We are satisfied that the learned judge exercised his discretion on sound findings which were amply supported by the contents of the ruling of the taxing officer.

Lastly, it is common ground that the bill of costs was fixed before D. K. Kaikai for taxation and that he is the one who heard the submissions of the counsel. Yet the ruling dated 23rd February, 2004 is shown to have been made and delivered by G. L. Nzioka, a Senior Resident Magistrate. It is conceded that G. L. Nzioka did not deal with the taxation of the bill of costs. The learned judge observed that the discrepancy would be a valid ground for a reference.

In our view, that is a grave and substantial irregularity which in itself would have justified an order for re-trial, which the learned judge in effect made. For the reasons we have given above, we do not find any merit in this appeal. It is ordered dismissed with costs to the respondent.

Dated and delivered at Nairobi this 29th day of April, 2005.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

…….

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR