



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 253 OF 2015

KENYA UNION OF DOMESTIC, HOTELS,

EDUCATIONAL INSTITUTIONS & HOSPITAL WORKERS.....CLAIMANT

VERSUS

BRITISH ARMY TRAINING UNIT KENYA.....RESPONDENT

RULING

1. The Application before me is the Chamber Summons application filed on 23rd June 2020 expressed to be brought pursuant to Rule 11(1) and 11(4) of the Advocates Remuneration Order. The application sought the following orders:-

i. Spent

ii. The time within which the Applicant/Claimant should give notice to objection of the decision on the Respondent's bill of costs of the taxing officer be enlarged.

iii. The notice of objection filed by the Applicant/Claimant by their advocates through letter dated 19th June 2020 be deemed duly filed.

2. The matter had proceeded and been concluded following which a party and party bill of costs was prepared and subsequently taxed. The Claimant wished to object to the Ruling on taxation and the grounds advanced by the Claimant/Applicant was that based on the certificate of taxation dated 25th February 2020, the Applicant does not agree with the decision of the taxing officer on the Respondent's bill of costs. The objection was due to be lodged within 14 days. The Claimant/Applicant asserted that unfortunately the time elapsed due to the Government's directive on 15th March 2020 in relation to the Covid-19 pandemic that hit the country around the same time.

3. In the grounds of opposition filed, the Respondent asserted that the Claimant had failed to make out any basis for interfering with the taxing master's discretion to assess instruction fees and getting up fees. Further it was stated that the Claimant has not disclosed any error of principle on the part of the taxing master in his assessment of instruction fees and getting up fees warranting this Court to review the awarded costs.

4. The parties consented to having the application disposed of by way of written submissions. The Claimant/Applicant submitted that from the one-page Ruling dated 14th February 2020 the Taxing Officer awards a sum of Kshs. 500,000/- for instructions fees and Kshs. 170,000/- for getting up fees. The Claimant/Applicant submitted that the only reason given for such a figure is that the matter was complex, difficult or novel. It submitted that no attempt has been made by the Taxing Officer to explain or clarify why the matter was perceived as novel or even difficult. The Claimant submitted that the issue of novelty did not even arise in this matter as the issue of recognition is purely arithmetic and just requires clerical effort but not professional engagement. The Claimant submitted that it is noteworthy that the taxing officer did not settle for the basic figure on the instructions fees and getting up fees before moving on to increase the fees and giving reasons for such increase. It was submitted that at paragraph 6 of the Ruling, the taxing officer simply said that the rest of the items are drawn to scale. The Claimant submitted that in its submissions on the bill of costs, it had clearly demonstrated situations/items where fees were exaggerated by exaggerating the folio numbers and repeating items more than once. The Claimant submitted that this was conceded by the Respondent in their submissions but the taxing officer disregarded all that and ended up awarding duplicated items on the bill of costs. The Claimant submitted that considering that the Claimant's case was simply dismissed, the award of Kshs. 773,665/- was excessive in all the circumstances of the case as an award of costs is not intended to punish the losing party but simply to reimburse the reasonable expenses of the winning party. The Claimant relied on the decision of the Court of Appeal in **Peter Muthoka & Another v Ochieng & 3 Others [2019] eKLR** where it was held

i. that the discretion of a taxing officer is a judicial discretion to be exercised on settled principles.

ii. Where it is shown that there was a misdirection on some matter resulting in a wrong decision or it is manifest that the discretion was improperly exercised, resulting in injustice, the discretion may be interfered with.

iii. Where the subject matter is not discernible from the pleadings, judgment or settlement, the taxing officer is entitled to use his discretion to assess the instructions fees 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 and directions by the trial judge and all other relevant circumstances.

The Claimant urged the Court to intervene in the said taxation, vary, review or set it aside and remit the bill of costs for taxation by a different taxing officer.

5. On its part, the Respondent submitted that the Claimant has submitted generally on the taxing master's ruling of 14th February 2020 and had not identified the items on the Respondent's bill that it is disputing in the reference. It submitted that from the submissions dated 3rd July 2020, the Claimant's complaint is with respect to the following items: - Item 1 on instructions fees, and Item 59 on getting up fees, and Items 94 to 99. The Respondent submitted that the Claimant alleged that the taxing master improperly exercised her discretion to assess instruction fees and getting up fees by awarding a sum that is excessively high. The Respondent asserted that is not correct as the sum awarded as instruction fees and getting up fees by the taxing master in the ruling of 14th February 2020 is fair in the circumstances of this case. The Respondent relied on the case of **Sammy Some Kosgei v Grace Jelel Boit [2014] eKLR** where Munyao Sila J, at page 3 of the ruling, held:

"I held that the taxing master ought to take into account all relevant circumstances when taxing the bill. At the end of the day, it is upon the taxing master to decide what he/she thinks is a relevant circumstance and the discretion on this point is very wide The suit may have numerous witnesses, may cover a considerable length of time, or may be absolutely involving and absorbing. Thus solely taking into account the value of the subject matter in the pleadings, judgment or settlement, may at times not do justice to the parties when it comes to the taxation of the bill of costs. All relevant matters need to be taken into account so as to arrive at a figure that is fair in the peculiar circumstances of each case." [Emphasis added]

The Respondent submitted that in this case, it had claimed instruction fees of Kshs. 950,000/- and the justification for this increase was set out in paragraph 3 of the Respondent's submissions dated 28th January 2020. The Respondent submitted that the Claimant in its submissions dated 4th December 2019 objected to the amount claimed as instruction fees and submitted that these should be taxed at Kshs. 100,000/-. The Respondent submitted that the taxing master considered the submissions before it, the complexity of the matter, the difficulty or novelty of the question raised and the time expended by the advocate and assessed instruction fees at Kshs. 500,000/-. The Respondent submitted that this is a fair assessment based on the circumstances of this case and there is no evidence that the taxing master acted injudiciously by reaching this decision. The Respondent relied on the case of **KTK Advocates v Baringo County Government [2017] eKLR** where Mativo J, at paragraph 20 of the ruling, cited with approval the decision of the **Ugandan Supreme Court in Bank of Uganda vs. Banco Arabe Espanol SC Civil Application No. 23 of 1999** (Mulenga JSC) where it held:

"Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount."

The Respondent submitted that the Claimant in urging their reference only states that the taxed costs of Kshs. 773,665/- are excessive in the circumstances of the case but do not however particularise the reason why this sum is deemed excessive. The Respondent submitted that this cannot be the sole reason for interfering with the discretion of the taxing master.

6. I have considered the submissions of parties, the law and authorities cited and have formed the opinion I proceed to express. From the foregoing it is clear the grouse the Claimant/Applicant has is with the taxation and prays for a variation or setting aside. I agree with the submissions of the Claimant that interference should be on settled principles as held in the case of **Peter Muthoka & Another v Ochieng & 3 Others (supra)**. The circumstances under which a Court may interfere with the taxing officer's exercise of discretion are well settled. These principles are:-

(1) that the Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive or manifestly low as to justify an inference that it was based on an error of principle;

(2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Advocates (Remuneration) (Amendment) Order, itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial court;

(3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

(4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;

(5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;

(6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;

(7) the mere fact that the defendant does research before filing a defence and then puts a defence 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 basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.

The Courts have further held that the Court should only interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job; the court should intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants. See **First American Bank of Kenya v Shah and Others [2002] 1 EA 64**.

7. The case before the Court was an issue of recognition and the taxing master when confronted with the bill taxed off a portion of the bill leaving the sum of Kshs. 773,665/-. Other than the items that were seemingly repeated in the bill of costs, there was no evidence that the Taxing Officer took into account a factor that she was not entitled to take or failed to take into account any factor she was entitled to. In other words, there is no indication the decision was on an error of principle, or the fee awarded was manifestly excessive as a result of failing to do what is required under the Advocates Remuneration (Amendment) Order. As stated in the authorities cited, the matter of instruction fees or the basic fee are to be determined by the Taxing Officer and the discretion granted is not to be casually interfered with. The only saving grace in the reference is that the Claimant/Applicant has however shown that there were items that were included in the bill that ought not to have been included. As a consequence, I form the opinion that the matter be referred to taxation by a Taxation Officer other than Hon. Ruth Kefa. Application is partly successful however, each party is to bear their own costs for this reference.

It is so ordered.

Dated and delivered at Nyeri this 29th day of September 2020

Nzioki wa Makau

JUDGE