REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 19 OF 2017

STEPHEN MWANGI & 2 OTHERS.....CLAIMANTS

VERSUS

TUSKEER MATTRESSES LIMITED.....RESPONDENT

RULING

1. The Claimants/Applicants application by chamber summons expressed to be brought under Sections 1A, 1B, 3A of the Civil Procedure Act, Rule 11(1) & (2) of the Advocates (Remuneration) Order 2014 and all enabling provisions of the law, seeks to set aside the taxing officer's determination on items 1, 2 and 3 of the Claimants amended bill of costs dated 23rd August 2017. The application also sought that the court be pleased to award items 1, 2 and 3 of the Claimants amended bill of costs as drawn or as it may deem it fit to tax. The grounds upon which the application is premised were set out on the face of the application and to summarize was to the effect that the taxing master misdirected herself in the taxation of the amended bill of costs and ended up not taxing the amended bill of costs as filed, erred in principle and law by completely ignoring item 2 of the bill of costs being getting up fees yet the suit was heard and judgment on merits delivered and failed to award instruction fees to each of the Claimants as drawn given the authorities binding on the taxing master and the fact that each Claimant had a distinct claim independent of each other resulting in an inordinately low sum by taxing huge chunks of the items 1, 2 and 3. The Respondent was opposed to the application and filed grounds of opposition under Order 51 Rule 14(1)(c) to the effect that the Claimants had not laid down any plausible ground to warrant court's interference with the decision of the Deputy Registrar.

2. The objection was heard on 5th February 2018 and Mr. Nguring'a urged the Claimants/Applicants chamber summons dated and filed on 23rd November 2017. He submitted that in compliance with the Advocates Remuneration Order Rule 11, a notice of objection was filed and served on 15th November 2017 and courtesy of that, concise reasons given by the taxing officer. He stated that the Ruling confirmed that the taxing officer had erred in principle and also on record. It was stated that the Claimant had amended the bill of costs on 23rd August 2017 and filed it the same day but according to the Ruling the taxing officer ignored the bill and taxed a bill that was not before her which demonstrated that the bill taxed was alien to the parties. He submitted that the opening statement refers to a figure of Kshs. 192,910/- and that the Claimants had never floated such a figure and that this was a confession to the error as the initial bill was 371,530/- and the amended bill was Kshs. 691,530/-. In his view, this case was a clear candidate for reference and the Claimants sought the taxation of items under item 1, 2 and 3 of the Amended Bill of Costs be taxed as the court will deem fit. He stated that the instruction fees are due for the 3 Claimants separately and cited the case of **Nguruman Ltd *v* Kenya Civil Aviation Authority & 3 Others [2014] eKLR** where Lenaola J. (as he then was) held that when costs are awarded and parties are numerous Rule 62 of the Advocates Remuneration Order can only consider other costs like pleadings as irrelevant, as duplicated but not instructions. He stated that instructions are given by clients in a distinct manner and separately. He found in his research that the advocate-client relationship is not considered wholesale but that the professional duty is owed to each client individually and personal contact is maintained between counsel and each litigant at a personal level. He submitted that on the strength of the **Nguruman** case above getting up fees are awardable even where there is no hearing and stated that the fee for getting up and preparing for trial is founded as where there is a defence a fee for getting up is founded. He thus urged the court to award the fees for getting up as well as the instruction fees for the Claimants.

3. In opposition to the application, Mr. Biamugisha for the Respondent submitted that the Court was being asked in this taxation reference to interfere with the taxing master's decision dated 9th November 2017 and delivered on 10th November 2017. He stated that the legal parameters upon which a taxing officers decision can be interfered with are well settled. He submitted that the court can only interfere if there is an error of principle or where the fee is so manifestly excessive or so low as to lead to injustice which was stated in the case of **First American Bank *v* Shah & Others [2002] EA 69** per Ringera J. (as he then was). The same words were reiterated in **LÓreal *v* Inter Consumer Products Ltd [2014] eKLR** where Kimondo J. presided. Mr. Biamugisha was categorical that no injustice was caused by the taxing officer who was guided by Rule 62 by arriving at the sums awarded in items 1, 2 and 3 of the amended bill of costs. He submitted that the case of **Nguruman *v* Kenya Civil Aviation** (supra) confirmed that instructions were given by the clients separately which was to be distinguished from this case where the instructions in this case were similar and the Claimants sought the same prayers. He argued that the reason the taxing master taxed off the items in 1 was that the Claimants had tried to sever the instruction fees despite issuing similar instructions to the advocate who prosecuted their matter jointly in a cause of action that was similar. He cited the case of **Guiseppe Bozzolasco *v* Anneliesse S. Feller & 3 Others [2014] eKLR** where Angote J. upheld the taxing masters decision stating that where the cause of action was the same we cannot separate the fees as they are similar. The learned Judge was of the view that the taxing officer should have consolidated the fees. Mr. Biamugisha stated that this was similar to what the Respondent was arguing before the court and that the taxing master used the correct method to arrive at the sum of Kshs. 192,910/- as instruction fees under item 1. He submitted that the court should uphold the award. He stated that on item 2, the taxing master had taxed off the entire amount because the Claimants advocate did not demonstrate to her how or what would entitle him to getting up fees. He was of the view that because the matter did not proceed on *viva voce* evidence there was no need for an award of the getting up fees that was sought. He relied on the case of **Jayesh M. Sutaria *v* Jambo Biscuits (K) Ltd [2016] eKLR** where the court categorically stated that if the taxing master finds costs to be excess they should be taxed off entirely and the sum on the schedule be allowed per scale. He supported the taxing master's decision on items 1, 2 and 3 of the Claimant's bill of costs and stated that the application actually lacks merit and by extension was a waste of court's time and as a consequence should be dismissed with costs to the Respondent.

4. In his reply, Mr. Nguring'a wished to disqualify the authorities cited by his counterpart from bearing influence on the matter. He submitted that the first authority cited involved a taxed figure that was inordinately low and did not have numerous parties while the second authority involved a commercial contract where all the numerous parties were privy and could not camouflage the present case. He stated that authority no. 3 was where the taxing master had taxed a figure as drawn and exercised imaginary discretions. He submitted that when the provisions of Rule 62, Schedule VI on instruction fees as well as definitions of costs and fees by the Oxford Dictionary are considered, the inevitable conclusion would be that the Claimants were entitled to more than was allowed. He urged that the court should consider the reference which was merited.

5. The taxation giving rise to the reference was by the Taxation Officer Hon. Nelly Kariuki given on 9th November 2017 but delivered on her behalf on 10th November 2017 by Hon. N. K. Micheni. The taxation was attacked because the taxing officer taxed the bill filed on 6th July 2017 as opposed to the amended bill of costs filed on 23rd August 2017. A court dealing with a reference such as this one must be cognizant of the principle that it cannot flippantly interfere with the taxation officer's decision. It is a discretionary power which can only be interfered with if there is an error on principle or where the taxing officer awarded a sum so inordinately high or low as to warrant interference. Having so warned myself, I proceed to determine the reference.

6. In the matter before me, this issue of instruction fees was focal. The amended bill of costs is in a skeleton file that was opened on 23rd August 2017 and accompanies the main file. It is on the amended bill of costs that I saw the Deputy Registrar's marks on the said bill which she taxed. She refers to a sum of Kshs. 192,910 in the opening paragraph of the Ruling and this figure is erroneous as it does not appear anywhere on the taxed bill of costs or the initial bill of costs by the Claimants. Though the sum appears in her Ruling, this was not what she based her taxation on. The objection to her taxation of a non-existent bill of costs therefore is misplaced as nothing turns on this figure of Kshs. 192,910/-. She mentions the item of instruction fees under paragraph 3 of the ruling where she clearly points out that the decretal amount in the judgment was Kshs. 2,436,786/- and her taxation of item 1 was on that basis. This was not erroneous as a taxing officer is within her the law to base the costs on the sum awarded by Court as the claim was not a monetary one. The Claimants assert that the instruction fees were inordinately low as the Taxing Officer only allowed a part of the fee due as there were 3 Claimants. Under Rule 62 of the Advocates (Remuneration) Order, the law provides as follows:-

> *Where the same advocate is employed for two or more plaintiffs or defendants, and separate pleadings are delivered or other pleadings had by or for two or more such plaintiffs or defendants separately, the taxing officer shall consider in the taxation of such advocate's bill of costs, either between party and party or between advocate and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby have been unnecessarily or improperly incurred, the same shall be disallowed.*

7. It is clear that the rule refers to the situation where an advocate is engaged or instructed by two or more clients and files separate pleadings for each client. It may seem to be of some dubious provenance where singular pleadings are filed. It may assist a court taxing the bill to enhance the fee by $^1/_3$ for complexity or other such consideration. In my view, it does not contemplate that if 100 claimants filed a single suit it would mean that the instruction fees due would be multiplied by 100. I am in agreement with Angote J. in the case of **Guiseppe Bozzolasco *v* Anneliesse S. Feller *&* 3 Others** (*supra*). Additionally the case of **Desai, Sarvia *&* Pallan *v* Tausi Assurance Co. Ltd [2017] eKLR** clarifies the position of instruction fees where the clients are many. In this case, the decretal sum was some 2 million plus and the taxing officer carefully calculated the instruction fees due for the claim on the basis of the sum awarded by Court. The Respondent is thus correct on the principles applied by the Taxing Officer in relation to the instruction fee.

8. The second issue was on item 2 which is getting up fees. There was a sum sought for getting up and the Taxing Officer did not allow it. The Respondent argues that the sum was not awardable as no hearing took place. The Claimants assert that the getting up fee is due and for this rely on the case of **Nguruman Ltd *v* Kenya Civil Aviation Authority *&* 3 Others** (*supra*)**,** a decision of my brother Lenaola J. (as he then was). In that case, the court upheld the reasoning of the taxing officer in regard to Schedule VI paragraph 2 of the Advocates Remuneration Order which states that the fees for getting up are in any case where a denial of liability is filed or in which issues for trial are joined by pleadings, a fee for getting up and preparing the case for trial shall be allowed. In my view, this getting up includes the mode of disposal of the suit which was by way of written submissions. I would therefore review the decision of the taxing master and allow a third of the instruction fee as getting up fees. The sum of Kshs. 49,578.70 would be awardable as getting up fees are a third of the instruction fees. In all other respects the Ruling of the Taxing Officer was not erroneous in principle and is upheld. In the final result, this reference only succeeds to the extent that getting up fees are payable to the Claimants being the sum of Kshs. 49,578.70 as well as costs of this reference which I set at Kshs. 10,000/- only so as to save time and expense taxing the matter afresh before the taxing officer.

9. The final item the Claimants had a problem with on the taxation was on item 3 which was drawing the claim herein and the Claimants had claimed Kshs. 3,250/-. The Taxing Officer allowed Kshs. 2,750/- and there is no basis laid for my interference with this sum. In the final result the Claimants are entitled to getting up fees of Kshs. 49,578.70 would be awardable as getting up fees being a third of the instruction fees and Kshs. 10,000/- for this reference.

It is so ordered.

Dated and delivered at Nyeri this 20th day of February 2018

NZIOKI WA MAKAU

JUDGE