



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 499 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

WILLIAM NEMBE OBORA AND 73 OTHERS.....CLAIMANT

-Versus-

RIFT VALLEY RAILWAYS (KENYA) LIMITED...RESPONDENT

RULING

The application before me for determination is the Chamber Summons dated 24th July 2017. It is filed under the provisions of Section 1A, 1B, 31 of the Civil Procedure Act, Order 50 Rule 6 of the Civil Procedure Rules and Rule 11(2) of the Advocates (Remuneration) order 2015 and all enabling provisions of the Act. The application seeks the following orders –

1. That the Honourable Court be pleased to vacate and set aside in its entirety the Ruling of the Honourable D. Mutai, Deputy Registrar, dated and delivered on the 22nd June 2017, taxing the Party to Party Bill of Costs dated 3rd February 2017, at Kenya Shillings Nine Hundred and Twenty Three Thousand, Three Hundred and Eighty and Fifty Six Cents (Kshs.923,380.56)/- and refer the matter for fresh taxation before a Taxing Master.
2. That the costs of this Application be provided for.

The grounds in support of the application as set out in the supporting affidavit and on the face of the application are that the Deputy Registrar misdirected herself in both law and fact in taxing the applicant's bill of costs based on a subject matter of Kshs.33,916,545 instead of Kshs.42,300,000 as she failed to take into account the counter-claim. That this led to an error in law and fact which the applicant should be granted an opportunity to ventilate, that the applicant would otherwise be prejudiced and it is in the interest of justice to grant the orders sought.

In the replying affidavit of EUNICE ARWA, the Company Secretary of the respondent, she deposes that the ruling of the Deputy Registrar on the party and party bill of costs is sound and prays that the same be maintained.

In the submissions the applicant submits that they had reservations relating to the manner in which instruction fees were calculated and also the manner in which the rest of the items were taxed. The taxing master proceeded on a wrong footing by:

- a. Relying on judgment award alone as the quantum for taxation purposes;
- b. Failing to consider the vast nature of instructions the advocates had to obtain from a huge number of applicants and failed to make a finding of adequate compensation for work done.
- c. Failing to consider the counterclaim and its value as part of the suit for purposes of computation of the taxable amount;
- d. Failing to give reasons for her ruling delivered on 22nd June 2017.

That the taxing master has made it clear that she relied solely on the judgement award for purpose of calculating instruction fees. The taxing master in effect disregards the counterclaim that was defended and subsequently dismissed. That the position taken by the taxing master is that the counterclaim did not form part of the suit.

That Schedule 6 (l)(b) of the Advocates Remuneration Order is to the effect that where proceedings have been commenced either by a plaintiff

of any of the stated ways and a defence or other denial of liability filed, then it is imperative that the value of the subject matter of the suit be gleaned from the pleadings, judgement or settlement where such value is ascertained, for purposes of taxation of party and party bill of costs.

The position of Schedule 6(1)(b) has been confirmed by the superior courts. In **JORETH LTD -V- KIGANO AND ASSOCIATES (2002) 1EA 92** the Court of Appeal stated that –

"We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgement 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 the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

That the value of the subject matter in present matter should have been ascertained from both the pleadings and the judgement.

That according to the judgement and having regard to the Court of Appeal decision award payable to the Claimants was Kshs.33,916,454/=. Further in the judgement the court dismissed the Respondents Counterclaim of Kshs.34,954,250.60. The taxing officer failed to take into consideration the value of Counterclaim hence erring in her decision.

The applicant relied on the case of **KENYARIRI & ASSOCIATES ADVOCATES -V- SALAMA BEACH HOTEL LIMITED AND 4 OTHERS** in which the court held –

"A Counterclaim contains assertions that a defendant could have made by starting a lawsuit if the Plaintiff had not already begun an action. It is governed by almost the same rules that regulate a claim made by a Plaintiff except that it is a part of the answer that the Defendant files in response to the Plaintiffs claim. A Counterclaim is therefore in all respects a suit by the Defendant."

The applicant further relied on the case of **NGURUMAN LIMITED -V- KENYA CIVIL AVIATION AUTHORITY & 3 OTHERS** in which the court –

"This does not mean that the advocate has one instruction. Receipt of instructions from a client is a separate exercise from drawing of pleading and preparation of documentation for filing. To me there is nothing wrong in receiving two sets of different instructions from different clients in the same matter and executing those instructions vide single pleading. That does not in any way make instructions one and does not disentitle the executing advocate from demanding payment for each of the separate instructions received. "

The applicant also relied on the case of **JEREMIAH MUKU -V- METHODIST CHURCH IN KENYA TRUSTEES REGISTERED & ANOTHER** in which the court held that –

"The Taxing Master in assessing the Bill of Cost only considered the pleadings and judgment of the court and the fact that according to her the matter was not complex but failed to consider other factors which were relevant. I am of the view that such failure to consider all factors required to be considered is an error in principle on taxing the bill of costs and the amount awarded of instruction fees was based on an error of principle and as such the same is manifestly low.

Having considered the submissions and authorities relied upon by both counsel, I am satisfied there is the question of principle in this case, namely, that discretion ought to be exercised with reason, fairly and judiciously. That the taxing officer ought to have taken into account care and labour or industry and time put in the matter."

On the power of the court to grant the order sought the applicant relied on the case of **MBOGO -V- SHAH** in which it was observed that the court should not interfere with the exercise of discretion of a Judge unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision.

The applicant further relied on the case of **NYAGITO & COMPANY ADVOCATES & DOINYO LESSO CREAMERIES LIMITED** in which the court held –

"It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. The Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle."

For the respondent it is submitted that the counterclaim was dismissed without any award of costs. The respondent relied on the following cases –

1. Minister for Agriculture & 2 Others ex-parte Samuel Muchiri W’Njuguna [2006] eKLR.

2. Raila Amollo Odinga & Another -v- Independent Electoral and Boundaries Commission & 2 Other [2017] eKLR.

3. M/S Nyaundi Tuiyott & Company Advocates -v- Tarita Development Limited [2016] eKLR.

4. **M/S Lubuleliah & Associates Advocates -v- N K Brothers Limited [2014] eKLR.**

5. **Joreth Limited -v- Kigano and Associates [2002] 1EA 92.**

6. **Muema Kitulu t/a Muema Kitulu & Company Advocates -v- County Government of Kitui [2015] eKLR.**

7. **Kipkorir, Titoo & Kiara Advocates -v- Deposit Protection Fund Board [2005] eKLR.**

8. **Gacau Kariuki & Company Advocates -v- Alan Mbugua Ng'ang'a [2012] eKLR.**

I find all the cases irrelevant to the issue at hand, which is whether award of costs on suit automatically includes costs on a counterclaim that has been dismissed.

Determination

I have considered the application by the applicant with the grounds and affidavit in support thereof, I have also considered the replying affidavit and the very elaborate submissions by both parties as well as the generous number of authorities cited by each of them.

The ruling of taxing master that is in contention is as follows –

“In the present case therefore the value of the subject matter is to be deciphered from the judgment delivered on the 18th June, 2014 which is Kshs.33,916,454/=. The claimants have stated that the value of the counterclaim ought also to be factored in which has been disputed by the Respondent. Given that the jurisdiction of the taxing master is based on the orders issued by the court, I find that Order (4) of the Judgment dated 18th June, 2014 was only limited to an award for costs of the suit. In the premise, instructions fees would be based on Kshs.33,916,454/ = and thereby attracting fees of Kshs.535,955.68/ =. Consequently, fees for getting up would be Ksh.178,651.89/= being a third of the instructions fees. Given the nature of the matter and the fact that every action has been taxed that is attendances, perusal and drafting; I do not find that circumstances warrant the increase of instructions fees.”

I have also considered the judgment of Mbaru J. delivered on 18th June 2014 in which she awarded as follows –

In this regard therefore, the counterclaim herein is dismissed and enter judgement for the claimants against the respondent in the following terms:

- 1) *A declaration that the summary dismissal of the claimants by the respondent was unfair and unlawful.*
- 2) *The summary dismissal of the claimants is herein quashed;*
 - a) *The claimants are awarded compensation equivalent to twelve (12) months gross salary; [find attached Schedule Marked “C”]*
 - b) *The claimants will be paid their full gross salaries from 4th July 2011 to 26th March 2012 amounting to Kshs.20,871,664.00.*
 - c) *Each claimant will be paid one month’s gross pay in lieu of notice; [find attached Schedule Marked “A”]*
- 3) *Amounts payable at (2)(b) above will be paid with interest from the date of dismissal until paid in full; and*
- 4) *Costs of the suit awarded to the claimants.*

In the case of **INTERNATIONAL CHILD CARE TRUST (K) –V- DAVID JAMES MBOGO 2015** Court stated –

“The defendants counterclaim is dismissed with costs to the plaintiff. The defendant shall also pay costs of the suit to the plaintiff.”

In the case of **PAMELA NALIONA LETTA -V- MUMIAS SUGAR COMPANY LIMITED** the counterclaim of the respondent is dismissed. The respondent shall pay costs for both claim and counterclaim.

In the case of **EPHANTUS NJOGU NDAMBURI -V- JUSTUS NGARI & ANOTHER**

(i) The plaintiffs claim against the defendants is dismissed with costs.

(ii) The counterclaim is allowed in the following terms –

(a)

(b)

(c) The defendants in the main suit (plaintiffs in the counterclaim) are also entitled to costs of their counterclaim

In the case of **ALBERT KANAKE KARIUKI T/A KIVANGUA INVESTMENT -V- COUNTY COUNCIL OF EMBU** the plaintiff is awarded costs of the suit and counterclaim together with interest...

These cases are a clear demonstration that a suit is not the same as counterclaim and unless the court specifically awards costs for a counterclaim, none is payable. I therefore find that the Deputy Registrar was right in basing the taxed amount on the subject matter of the suit and not the counterclaim as no costs were awarded on the counterclaim in the judgment.

For these reasons I find the application without merit and dismiss the same with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF AUGUST 2018

MAUREEN ONYANGO

JUDGE