



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
MISC. CIVIL APPLICATION NO. 13 OF 2015
IN THE MATTER OF: THE ADVOCATES ACT
IN THE MATTER OF: THE ADVOCATES REMUNERATION ORDER
IN THE MATTER OF: THE ADVOCATES [REMUNERATION]
AMENDMENT ORDER 2006 AND 2014

AND

**IN THE MATTER OF: INDUSTRIAL CAUSE NO. 116 OF 2013 MAURICE MUNYAO AND
148 OTHERS SUING ON THEIR BEHALF AND ON BEHALF OF THE OHER
MEMBERS/BENEFICIARIES OF THE KENYA**

**PORTS AUTHORITY PENSION SCHEME AFFECTED BY THE AVERAGING OF THE
PENSIONABLE OF THE SALARY AND FREEZING OF THE PENSIONABLE ALLOWACE
[PERSUANT TO THE PRDER MADE BY THE HONOURABLE JUSTICE MAGAGA ON 28TH
NOVEMBER 2007]**

VS

**ALBERT CHAUREMBO AND 7 OTHERS [PREVIOUSLY FILED IN THE HIGH COURT OF
KENYA AT MOMBAS IN COMMERCIAL SUIT NO. 41 OF 2007]**

KINYUA MUYAA & CO. ADVOCATES.....APPLICANTS

AND

- 1. KENYA PORTS AUTHORITY OENSIN SCHEME**
- 2. ALBERT CHAUREMBO MUMBA**
- 3. ABDALLA H. MWARUWA**
- 4. M.K. MURE**
- 5. MARY WAIRIMU NG'ANG'A**

6. ALEX OLE-TEIPAN

7. MARY OTIENDE

8. MARGARET NYAGA

9. MAJENGO KATANA (sued on their own behalf

and on behalf f their predecessors and/or

successors in the title in their capacity as the

Registered Trustees of the Kenya Ports

Authority Pension Scheme.....RESPONDENTS

R U L I N G

INTRODUCTION

1. On 2/7/2015, the applicant herein after called ‘the Advocate’ filed his bill of costs against the respondent, herein after called the "client". After taxation the Deputy Registrar of this court acting as the Taxing officer rendered his ruling on 21/10/2016 whereby he awarded the Advocate ksh.15,909,341.22. Both the Advocate and the client were dissatisfied and they filed the references now before the court for determination.

2. The client's reference is dated 14/12/2016 and it was filed on 15/12/2016. It seeks for orders that:

- a) The costs allowed by the Deputy Registrar of this court, Mr. A.S. Lesootia on taxation of the Advocate's Bill of costs dated 2/7/2015 be set aside in its entirety.
- b) In the alternative, items 1,2, 3-17, 158-325, 326-471,472 and 473-481 of the bill be reviewed and taxed off or remitted with appropriate directions to a taxing officer as the court shall deem fit for reconsideration.

3. The gist of the client reference is that the impugned ruling is a nullity because the Deputy Registrar of this court lack jurisdiction to tax Advocates –client Bills of costs. In her view only the High Court has such jurisdiction. In the alternative to the foregoing objection on ground of jurisdiction, the client contends that the Taxing Officer made errors of principle while taxing the bill of costs as a result of which he awarded excessively higher amount of ksh.15,909,341.22 instead of ksh.8,524,478.

4. The second reference was filed by the Advocate on 10/4/2017 as it seeks for orders that:

- a) The ruling by Hon. A.S. Lesootia, Deputy Registrar of this court on the taxation of the Bill of costs dated 2/7/2015 be set aside as relates items 1 and 2 on instruction fees and getting up fees.
- b) This honourable court be pleased to tax the said item 1 and 2 of the applicants bill based on ksh. 6,982,340,602 as the value of the subject matter in the principal suit, Industrial Cause No. 116 of 2013 (Formerly HCCC No. 41 of 2007) as opposed to ksh.201,981,424.50 used by the Taxing officer.
- c) Based on the said value of the subject matter of the suit of ksh.6.982,340.602, the instruction fees be assessed in the sum of Ksh.88,166,257.50 and getting up fees be taxed at ksh.29,388,886 as drawn in the Bill of costs dated 2/7/2015.
- d) The 50% uplift of the Bill of costs be calculated on the basis of ksh.6,982,340,602 being the

value of the subject matter.

e) The court be pleased to order payment of interest on such sum as it shall find due at 14% per annum from 1/4/2014 until payment in full.

5. The gist of the Advocates reference is that the Taxing officer erred by basing his ruling on ksh.201,981,424.50 as the value of the subject matter instead of ksh.6,982,340.602. That the Taxing officer further failed to consider relevant and material facts including the affidavit by the Advocate and the annexures thereto. Finally it is the Advocate's case that the Taxing Officer had no discretion to disallow the claim for interest on fees and as such he fell into error by so disallowing the interest on fees.

6. All the two references are opposed and they were disposed of by written submissions which were highlighted on 14.6.2017.

CLIENT'S CASE

Submission on the client's Reference dated 14.12.2015

7. The client submitted that the Advocate filed his bill of costs on 2/7/2015 seeking a sum of ksh.227,922,220.73 as legal fees for professional services rendered in defending her in HCC 41 of 2007. That in opposing the bill, she submitted before the taxing officer that the Advocate was only entitled to a maximum of the party and party costs which were taxed in the principal suit being ksh.5,682,828 increased by one-half under part B of Schedule VI of the Advocates Remuneration Order (ARO), legal Notice No. 159 of 2006 which would total to ksh.8,524,242. However her said submissions were allegedly disregarded and the bill taxed at ksh.15,909,341.22 in favour of the Advocate inclusive of VAT, less kshs.11,257,720 earlier paid to the Advocate leaving as outstanding ksh.4,656,621.22.

8. The client has framed 4 issues for determination in respect of his reference and submitted on each of them.

a) Whether the Deputy Registrar exercised his discretion correctly when considering the Advocate-client bill of costs.

b) Whether the Deputy Registrar erred in principle by enhancing the instruction fees to ksh.10,000,000 without any reason.

c) Whether the Deputy Registrar erred in law by not appreciating the provisions of Schedule VI Part B of the ARO 2006.

d) Whether the Deputy Registrar exercised his discretion judiciously in assessing getting up fees at ksh.3,333,333,33 or at all.

Exercise of discretion in allowing the bill of costs by the Advocate

9. The Client contends that the Taxing Officer erred in principle in assessing the instruction fees in the sum of ksh.8,291,715.125 when the Party and Party Bill of Costs was taxed at ksh. 5,682,828. In her view, such enhancement of the instruction fees was unjustified, injudicious and based on erroneous principle and resulted to an excessive instruction fees. Further in her view, the suit was not complex, difficult and/or involving novel issues to warrant an increase in the instruction fees to the scale awarded.

Failure to appreciate Schedule VI Part b of the Advocates Remuneration Order (2006)

10. The Client further submitted that the Taxing officer erred both in law and principle by failing to appreciate that under Part B of the Schedule VI of the ARO 2006, the Advocate was only entitled to instruction fees increased by one-half. That getting up fees is not applicable to an Advocate-client bill of costs since the same is charged under Party and Party costs and that item 3-37, 158-245,246-325,326-

448,449-471 and 473-481 were no longer payable under Schedule Vi Part B of the ARO 2006 as they had all been charged under the Party and Party costs. That by assessing these items afresh, the taxing officer fell into error both in law and principle. Consequently, the Client urged that the maximum fees the Advocate is entitled to under Party B of Schedule VI of the ARO 2006 is the Party and party Costs taxed, plus one half which amounts to ksh. 8,524,242. He relied on *D. Njogu & company Advocates Vs. Kenya National Capital Corporation [2006] e KLR and J.M. Njenga & co. Advocates VS Kenya Tea Development Agency Ltd* to support the foregoing submissions.

Enhancing Instruction fees to Ksh.10,000,000

11. The client submitted that the taxing officer erred in principle by enhancing the instruction fees to ksh.10,000,000 without giving any reason. She relied on *Opa Pharmacy Ltd VS Mc George Ltd [1970] EA 1972 pg 233* in which the Appellate Court allowed the appeal on ground that the taxing officer had not exercised his discretion judiciously by inflating the instruction fees without giving any reasons.

Assessment of Getting Up Fees at ksh.3,333,333.33

12. The client submits that the Taxing Officer erred in principle by not only failing to appreciate that getting up fees are not applicable to an Advocate-client bill of costs as the same is charged under the Party and Party Costs, but also by his assessment of the getting up fees at ksh.3,333,333.33. Consequently, she submitted that the award of getting up fees by the taking Officer was entirely baseless and bad in law. She contended that awarding the Advocate more than Party and Party costs increased by one-half (ksh.8,524,242) was tantamount to unfair enrichment and urged the court to order the Advocate to reimburse to her the sum of ksh.2,733,478 which had been overpaid. In the upshot, the Client urged the court to set aside the costs taxed on the Advocate-client Bill dated 2/7/2015 and in its entirety. In the alternative, she prayed that items 1,2,3-37,158-325,326-471,472 and 473-481 of the bill of costs be reviewed and taxed off or remitted with appropriate directions to a Taxing officer as the court may deem fit for reconsideration.

Submissions on Advocate's Reference

13. In respect of the Advocates reference, the client submitted on the following issues:

- a) The effect of filing a reference out of time.
- b) The effect of filing a reference before receiving reasons from the Taxing officer
- c) Whether the Taxing Officer committed an error in principle as to entitle the court to interfere with his discretion.

Effect of filing reference out of time

14. The Client submitted that the Advocates reference herein was filed out of time contrary to paragraph 11 of the ARO which provides for filing within 14 days after receipt of the reason for the taxation. She therefore urged the court to find that the Advocate's reference is incompetent for being filed out of time without leave of the court. She relied on *Governors Balloon Safaris limited VS Skyship company Limited & Another [2015] e KLR* where the court held that a delay of 48 days after delivery of taxation ruling had rendered the reference fatally incompetent.

Effect of filing a reference before receiving reasons

15. The Client appreciated that under paragraph 11 of the ARO, an objector to taxation is required to file his reference within 14 days after receipt of the reasons for the taxation from the Taxing Officer. She however submitted that she filed her reference before receipt of the reasons for taxation from the taxing officer. She relied on *Evans Thiga Gaturu Advocate Vs Kenya Commercial Bank Limited [2012] eKLR* to urge that she was entitled to file her reference before receipt of the reasons from the Taxing officer

because the reasons were contained in the Ruling itself.

Error in Principle warranting interference with discretion

16. The client has echoed her submissions in support of her reference herein, whereby she urged that the Taxing officer made error in principle that warrants the interference with his ruling by this court. That the specific areas where the Taxing Officer misdirected himself and fell into error of principle included ignoring the taxed party to party costs and proceeding to assess the costs afresh at a higher sum of ksh.10,000,000; failing to appreciate the provision of Schedule VI part B of the ARO (2006); and in assessing getting up fees afresh and at ksh.3,333,333.33.

17. In summary, the client opposed the Advocate's reference and maintained that under Schedule VI Part B of the ARO, the Advocates is only entitled to ksh.8,524,242 which was paid in full even before filing the Bill of costs dated 2/7/2015 and he should be compelled to reimburse to her the ksh.2,733,478 which was overpaid.

ADVOCATE'S CASE.

Submissions on the Client's reference dated 14/12/2016

18. The Advocate submitted that the client's reference is incompetent for being prematurely filed contrary to paragraph 11(1) of the ARO. That the client requested the Taxing officer for his reasons for the taxation vide letter dated 25/10/2016, 4 days after the taxation ruling, but filed her reference to challenge the taxation ruling 54 days thereafter. According to the Advocate the Client is being dishonest by alleging that a party does not require reasons from the Taxing Officer so long as the assessment is contained in written ruling.

19. Relying on *Evans Thiga Gatumu Advocate Vs Kenya Commercial Bank Limited* the Advocate has urged that where a party requests for reasons under paragraph 11 (1) of the ARO, as the client did herein, he is bound to wait for the same and if 14 days required to file a reference expires after receiving the reasons, he should apply for extension of time under paragraph 11(4) of ARO.

20. According to the Advocate the facts of the clients reference herein are similar to those in the *Evans Thiga Gaturu Advocate case* where a reference was dismissed for being filed before the reasons were given by the taxing officer. Relying on *Kerani Manduku & Company VS Gathecha Holdings Ltd (2006) e KLR*, the Advocate submitted that a party wishing to challenge the reasons for the decision of a Taxing officer cannot file his reference until the Taxing Officer gives the reasons. The Advocate maintained that paragraph 11 of the ARO is the law in force in regulating the filing of references to challenge taxation of costs and it must be followed as it has been held by the courts in most of the decisions cited. He therefore prays for the clients reference to be struck out.

21. The Advocate has also faulted the client's reference for lack of supporting affidavit. He has also contended that the client has not prosecuted ground number 1 and 2 of her reference on the issues of jurisdiction of the Deputy Registrar of this court to tax advocate –client's bill of costs. That notwithstanding, the Advocate submitted that my ruling dated 18/11/2015 has settled that issue of jurisdiction because it has not been reversed by any competent court.

22. As regards the instructions fees, the advocate has denied that it must be the Party and party costs taxed increased by 50% as alleged by the client. In the advocates view, the correct position of the law is what justice Waweru stated in the *J.M. Njenga & Co. Advocates VS Kenya Tea Development Agency Ltd [2011] eKLR* when he held that fees prescribed in Part A of the Schedule VI of ARO increased by one half does not necessarily mean the fees as taxed in a Party to Party Bill. In agreeing with Judge Waweru's decision, the Advocate submitted that it would be unfair to tie the advocates fees to the Party to Party costs because the advocate is never a party and has no interest and is never heard in the Party and Party bill costs; that there are occasions when costs are not awarded to any of the parties to the suit; and that there are cases where the party drawing the party to party bill of costs understates the same for one

reason or another.

23. For the foregoing reasons the advocate submitted that party and party costs should not be binding to the Advocate when he sues for his rightful fees, and especially where the advocate has rendered more services or incurred more costs than what is covered in a Party to Party bill of costs or where the parties reach compromise on costs. The Advocate therefore submitted that the Taxing Officer adopted wrong principles in assessing the instructions fees and more so when he based it only on ksh.201,981,424.50 as the suit value instead of ksh.6,982,340,602. In that respect, the advocate has objected to the claim for refund of ksh 2,733,478 allegedly overpaid to him by the client. The Advocate therefore prays for the client's reference to be dismissed for being incompetent and for lack of merits.

Submissions on Advocates reference dated 10/4/2017.

24. The advocate submitted that the suit he acted for the client herein was a representative suit brought on behalf of 5000-10000 beneficiaries. That although the ensuing decree was for about ksh.201,981,424.50, the actual value of the case was ksh.6,982,340,602 which had fraudulently not been remitted to the client by the sponsor (Kenya Ports Authority). That the Taxing officer ignored the submissions by the Advocate and all the documents filed in support of Advocate-client Bill of costs as a result of which he under assessed the instructions fees. The advocate contended that although the decree was for ksh.201,981,424.50 the client made further payments in compliance with the decree including ksh.4,000,000 as accruals by way of arrears from February 2014 to September 2014 and there was a subsequent demand of ksh.143,657,344.50 by members of the scheme other than the 149 claimants in the principal suit. However the Advocate submitted that, cumulatively the benefit to all the members could aggregate at ksh. 15,154,264,097 as a result of the decree made in the principal representative suit.

25. The Advocate further contended that the ksh.201,981,424.50 was only part of order 2 of the decree and as such the Taxing Officer ignored rest of the decree which dealt with the accruals until payment in full. That due to the said accruals the client paid over ksh.267million to the 149 claimants.

26. As regards the party and party costs taxed at ksh.5,682,828, the Advocate submitted that he is not bound by the said certificate of costs because he were neither a party to the said taxation nor was he given a hearing. The advocates further submitted that the ARO bars counsel to agree or accept as his remuneration an amount that is below what is provided in the ARO. Consequently he contended that accepting legal fees based on ksh.201,981,424.50 instead of ksh.6,982,340,602 would amount to professional misconduct of undercutting.

27. Regarding the objection by the client that the Advocate's reference is incompetent for being filed out of time without leave, the advocate submitted that he received the reasons from the taxing officer on 5/4/2017 and filed his reference on 10/4/2017, 5 days thereafter. Relying on paragraph 11(2) of the ARO, the Advocate submitted that he filed the reference within the 14 days required by the law after receipt of the reasons and as such leave was not necessary before filing the same.

28. The Advocate urged me to consider the delay to get his fees from 2015 and determine his fees herein instead of remitting the file back to the taxing officer. He further urged that in determining the fees, I should base the instruction fees on ksh. 6,982,340.602 as the value of the suit. That using the said value I should award him ksh. 88,166,257.50 for instructions fees plus getting up fees of ksh.29,388,886 to total to ksh.117,555,143.50. That the said total must then be increased by 50% (ksh.58,777,751.75) to total ksh.176,332,715.25. He also prayed for interest at the rate of 14% per annum for February 2015 when the demand for the fees was served.

29. The Advocate supported his submissions by paragraph II of the ARO, Article 25(c) and 50(1) of the Constitution and several authorities including ***Kerandi Manduku & Company VS Gathecha Holdings limited [2006] eKLR***, ***AGAM investments Limited VS Voi Development & 2 others [2015] eKLR*** and ***Nyamogo & Nyamogo VS Kenya Bus Services***

ANAYSIS AND DETERMINATION

30. There is no dispute that the client herein objected to the taxation by the Taxing Officer of this court, citing lack of jurisdiction and moved the court to challenge the decision by the taxing officer to continue with the taxation. There is further no dispute that I pronounced myself on the matter by my ruling delivered on 18/11/2015 whereby I held that this court is endowed with the jurisdiction to determine both party and party and also advocate- client bill of costs just as the High Court. The basis of my said decision was Section 7 of Schedule six of the Constitution and it has never been reversed by any competent court. Consequently the client submitted herself to the taxation process before the Taxing officer of this court.

31. Although paragraph 10 of the ARO defines the taxing officer to mean Registrar, District Registrar or Deputy Registrar of the high Court or any other person appointed by the Chief Justice in writing and the court to mean the high Court or a Judge of the court, I still hold the view that such definition examined through the lenses of Section 7 of the Schedule six of the constitution read with schedule VI of the ARO includes the Registrar or Deputy Registrar of this court and the court itself or a Judge thereof. Any other interpretation would be wrong because up to now the ARO has not been amended to reflect this Court or Environment and Land Court as different from the High Court for a purpose of the procedure, the formula and the jurisdiction to determine both Party and Party costs and Advocate- Client costs.

32. The issues for determination in this ruling are:

- a) Whether the references by both client and the Advocate are incompetent for being filed contrary to paragraph 11 of the ARO.
- b) Whether the Taxing Officer erred in the law and principle while taxing the Advocate client bill dated 2/7/2015 and thereby reached a wrong assessment.
- c) Whether the court should interfere with award of costs as certified by the Taxing officer on 21/10/2016.

Whether the reference are incompetent

33. The Advocate contends that the client reference is incompetent for being filed prematurely before receipt of the reasons for taxation from the Taxing officer or in the alternative for being filed out of time without the leave of the court. He relied on the said High Court decisions to urge that a reference filed before receipt of the reasons from the taxing officer is premature and incompetent under paragraph 11 of ARO. In the alternative he seems to argue that if at all the court agrees with the client's contention that the reason for the taxation were apparent on the face of ruling delivered by the Taxing Officer, then her reference is time barred because it was filed 54 days after the date of delivery of the said ruling.

34. The client has on the other hand denied that her reference is incompetent and contended that after requesting for the reasons in good time, the reasons were only availed to him on 7/12/2016 and he filed her reference on 14/12/2016. She has however maintained that where the reasons are clear on the ruling by the Taxing Officer, its superfluous for an objecting party to demand for reasons from the taxing officer. He relied on High Court decisions in ***Governors Balloon Safari Limited VS skyship company Limited and Another [2015] eKLR*** and ***Evans Thiga Gatimu Advocate VS Kenya Commercial Bank Limited [2012] eKLR*** where the high Court held that if reasons for taxation are available in the ruling by the taxing officer, the reference must be filed within 14 days after the taxation ruling or else the reference would be incompetent, if filed 14 days after the delivery of the ruling.

35. The client has also faulted the reference by the Advocate dated 10/4/2017 for being filed out of time and without the leave of the court. She contends that since the ruling by the taxing officer delivered on 21/10/2016 was in writing and it contained the reason for the taxation, filing his reference outside the 14 days provided by paragraph II of the ARO without leave of the court rendered the reference incompetent. The Advocate has however submitted that he received the reasons for the taxation from the taxing officer on 5/4/2017 and filed the reference on 10/4/2017, only 5 days after receipt of the reasons. He therefore maintained that his reference was competent under paragraph 11 of ARO and leave was not necessary

before filing the reference on 10/4/2017.

36. After careful consideration of the submissions by both sides and the divergent decisions from the High Court on the obligation to provide reasons for taxation on the part of the taxing officer to an objecting party under paragraph 11 (2) of the ARO, I am of the view that the judge before whom the reference is brought must consider each case on its own circumstances. For example a the taxing Officer may not write a formal ruling but only calculated the costs on the bill of costs, then it is necessary for him to give the reasons for his decision in writing to the objecting party. Another is that the Taxing Officer may make a hand written ruling, as it is the case in most times and the parties are not availed a copy of ruling until such a time when a certified copy of the typed of the ruling is given to the parties. Lastly, there are few Taxing Officer who deliver an already typed ruling on the due dates and even supply copies to the parties on the spot.

37. In my view, and in consideration of different circumstances of each respective case, a judge should carefully apply paragraph 11 of the ARO considering the circumstances of each case but without taking away the objectors rights under the said paragraph. In that respect, where it can be shown that an objecting party has captured the reasons for taxation in the written ruling of the taxing officer, he can exercise the option of filing his reference, without waiting for reasons from the taxing officer as contemplated by paragraph 11(1) of the ARO, as soon as he serves his notice of objection on the taxing officer under paragraph 11(1) of ARO. That exercise of the option not to wait for the reasons from the Taxing Officer should not be punished on ground that the reference is prematurely filed.

38. On the other hand even where the reasons are apparent on the face of the ruling, the objecting party has the second option of not filing his reference until the Taxing Officer performs his mandatory obligation under paragraph 11(2) of the ARO, that is, to record and forward to the objector the reasons for his decisions on the objected items of the bill of costs. In my view it is not superfluous for the Taxing Officer to write to the objector stating that the reasons are contained in his written ruling and provide a certified copy of the ruling to enable the objector and eventually the judge to determine whether the taxation was grounded on sound legal reasoning. That was the view taken by Odunga J, in ***Evans Thiga Gaturu Advocate case***, when he held that:

“It is therefore clear that the interpretation by the court especially the High Court on this issue is far and varied. In y view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the judge to make an informed decisions as to whether or not the discretion of the taxing master was exercised on sound legal principles.

However, where there are reasons on the face of the decisions, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of a reference since that insufficiency may be the very reason for preferring a reference”.

39. From the foregoing analysis it is clear that both references before me are competent. In this case, the taxing officer rendered a written ruling on 21/10/2016. The client sought for reasons for the decision of the taxing officer in all the items in the bill of costs vide her notice of objection dated 25/10/2016 while the Advocate sought for the same under his notice dated 21/10/2016. The Taxing Officer delayed to forward the reasons to either party and after waiting until 14/12/2016, the client exercised her option of filing her reference after allegedly getting the reasons from the ruling by the taxing officer on 7.12.2017. The manner of correspondence between the client and the taxing officer was however not revealed to me and I can only guess that the client perused the court file to get the reasons from the handwritten ruling.

40. On the other hand, the advocate opted to wait for the reasons to be forwarded by the taxing officer as required under paragraph II(2) of the ARO and the record shows he kept on writing letters to the taxing officer until 29/3/2017 when the taxing Officer wrote to him telling him that the reasons were in the ruling delivered on 21/10/2015. The ruling was not enclosed with the letter and I can only guess that the advocate too perused the court record to get the reasons from the handwritten ruling.

41. The delay in availing the reasons for the taxation was not explained but suffice it to say that it took my effort in September 2017 to have the Taxing Officer provide a certified typed copy of the ruling to enable me review the reasons for the taxation of the impugned costs because the handwritten ruling in the court file was not legible. Consequently I do not blame either the client or the advocate for the alleged delay or premature filing of their respective references due to the circumstances discussed above.

42. However i would have punished the objectors if there was evidence that, they failed to file the references within 14 days after receipt of the reasons from the taxing officer because in such a case they would definitely require leave of the court before filing the reference as per paragraph 11(5) of the ARO.

Whether the Taxing Officer erred in law and principle while taxing the Advocate-client bill of costs

43. The client's contention is that the Taxing Officer erred in law and principle when he assessed the instruction fees in the Advocate-client bill at ksh.8,291,715.125 when the Party and Party costs had already been taxed at ksh.5,682,828. According to the client, the Advocate was only entitled to instruction fees under Schedule VI Part B of the ARO 2006 being the taxed party and party costs plus one half thereof and nothing more. Consequently she contended that the maximum fees to the Advocate herein is ksh.8,524,242 and he should not be awarded getting up fees or any enhancements to any higher amount as the taxing officer did.

44. The Advocates agrees with the client that the taxing officer erred in law and principle while taxing the bill of costs dated 2/7/2015 but on difference issues. He submitted that the fees prescribed by Part A of Schedule VI of ARO does not necessarily mean the fees taxed in a Party and Party Bill of costs. In his view the advocate is not a party to the party and party bill of costs and therefore he cannot be bound by the outcome of taxation of the party and party bill especially if it is understated like in this case. He contended that the rightful costs ought to have been over ksh.88,000,000 plus getting up fees of nearly ksh.30,000,000 and not the taxed party and party costs of ksh.5,682,828 considering the correct value of the primary suit.

45. In his view the value of the suit was ksh.6,982,340,602 and not the ksh.201,981,424.50 that was awarded to the claimant as part of the decree . He therefore urged that the taxing officer erred by assessing the instructions fees payable based on the ksh.201,981,424.50 as opposed to ksh.6,982,340,602 which was the sum upon which declaratory orders were sought. He further contended that, even under the decree of the court, the sum of ksh.201,981,424.50 was not final because under Order 2 of the decree the defendant was to pay other accruals to the 149 claimants plus other pensioners and their successors.

46. After perusing and considering the court record and the submissions by both parties, there is no dispute that the primary suit was a representative suit commenced by 28 claimants with leave given by the High Court on 28/11/2017. That after advertisement as ordered by the court the claimants increased to 149 and the damages sought rose from skh.15,783,221.65 to 202,199,424.50 as at July 2012 plus accruals till payment in full. The other order sought was declaration that the remedial pension plan and failure by the client herein to collect ksh.6,982,340,602 from the pension sponsor (Kenya ports Authority) was fraudulent, wrongful and unconstitutional.

47. After the trail I entered judgment as follows:

(a) Declared the 2002 remedial pension plan fraudulent, wrongful and unconstitutional.

(b) (i) awarded the claimants and/or their successors ksh.201,981,424.50 being arrears resulting from the said remedial plan as at July 2012 plus further accruals till payment in full.

(ii) lumpsum and monthly pension arrears to kiaru Kiarie, Apollo Agwambo, Michael N. Rai, Christine Mbuya Oloo and Jacob Kaburu Kiara occasioned by failure to use the salary after the increment on 1/7/2007

48. From the foregoing analysis, it is clear that the value of the suit was much higher than

ksh.201,981,424.50 but definitely not the ksh. 6,982,340.620 mentioned in the plaint as having been unremitted by the sponsor. It is obvious from the plaint that the claimants never sought to recover the said kshs 6,982,340,620 from the pension scheme but only cited the sum to pray for the said declaratory order. Had the taxing officer perused and considered all the material presented to him including affidavits, pleadings and other copies from the record of the primary suit, he would have ascertained the value of the suit for purposes of assessing the instructions fees. The correct value of the suit was therefore the sum of kshs.201,981,424.50 plus the accruals awarded under Order 2(a) and (b) of the judgment delivered on 14/2/2014. Consequently, I find and hold that the taxing officer erred in principle by assessing the advocates instructions fees based on ksh.201,981,424.50 as the value of the suit.

49. However, the Taxing Officer was right in assessing the instructions fees based on the value of the suit under Part A of Schedule VI instead of the costs taxed under the Party and Party Bill of costs in the primary suit.

Under Schedule VI part B of the ARO, the minimum fees between Advocate and Client is either:

- (a) The fees prescribed in part A increased by one-half; or
- (b) The fees ordered by the court increased by one-half or (c) the fees agreed by the parties under Paragraph 57 of the ARO increased by one-half; but in either case the 50% increment should include all proper attendances on the client and all necessary correspondences.

Consequently, I find that the contention by the client that the maximum instruction fees for the Advocate is the costs taxed under party and Party bill increased by 50% to be wrong by dint of the said Part B of Schedule VI of the AR

50. In view of the foregoing analysis, the correct position is that the instruction fees of an Advocate is depended on the choice of the advocate while drawing his bill either based on the value of the suit (the prescribed fees under part A of schedule vi of ARO), or party and party costs taxed (costs ordered by the court), or the agreement between the parties under paragraph 57 of the ARO. In either of the 3 options, the amount is increased by 50%. It follows therefore that if an advocate draws his bill based on the value of the suit under Part A of the VI Schedule, he is not bound by the proceedings under party and party bill of costs. The Taxing Officer must consider all the items charged under the Advocate-Client bill and determine it on merits including the item of getting up or preparing for trials, all proper attendances on the client and all necessary correspondences.

51. In this case, the Advocate filed his bill based on the value of the suit under Part A of the Schedule Vi of the ARO. He charged instruction fees of ksh.88,166,257.252 plus getting up fees of ksh.29,388.086. In addition he charged fees for drawing correspondences, copies, perusal, attendances, service, court fees, commissioning affidavits and disbursements. However the taxing officer bill he assessed the instruction fees at ksh.8,291.710.54 and enhanced it to ksh.10,000,000 after considering the complexity of the matter and the time devoted to the suit by the Advocate. In addition he awarded getting up fees at the rate of 1/3 of the said instruction fees equaling to ksh.3,333,333.33; allowed as drawn the costs charged for drawing being item 3-37; correspondences charged under item 38-81 ; perusal charged under item 158-325; service charged under item 326-471 and affidavit commissioning fees charged under item 473-481.

52. He however taxed off costs charged for copies under item 82-157; and disbursements under item 472 being return air ticket to Nairobi plus taxi charges to attend to his client. The item was taxed off, either for being double charged or lack of evidence in form of boarding pass or receipt. He also taxed off the charge for one-half of the instruction fees stating that the item is only charged on the instruction fees. He however allowed the charge of VAT at 16% of the sum taxed being ksh.13,714,949.33. In summary he taxed off ksh.212,012,879.508 out of a bill ksh.227, 922,220.73 and allowed ksh.15,909,341.22

53. From the foregoing analysis, it is obvious that the taxing officer erred in law and principle by assessing the instructions fees using the wrong suit value as result of which he arrived at the wrong instructions fees, wrong getting up fees and in the end, a wrong quantum of total fees. He further erred in

principle by enhancing the instructions fees without considering the relevant factors as outlined under schedule VI A of the ARO. Likewise the taxing officer erred in law and principle and misdirected himself by holding that 50% increase under schedule VI part B is only done on the instruction fees as opposed to the total fees assessed under part A, and thereby arrived at a wrong quantum of fees for the advocate. In addition, the taxing officer erred in law and principle by assessing the instruction fees at kshs. 10,000,000 without any legal or factual basis. Such discretion should be exercised judiciously based on sound legal and factual considerations.

54. In addition, the taxing officer erred in law and principle by failing to consider and determine on the merits each and every item on the Bill of costs and instead made generalized determination that the copies were from the drawings and correspondences in the same bill and thereby taxed the items off. On the other hand and through the said generalization, the taxing officer allowed all the other items on the basis that he did not doubt that the services were rendered as charged.

55. Finally the taxing officer erred in law and principle by failing to consider and make a finding on merit in respect of the item of interest. No reasons were given for taxing off the item of interest as a whole. The taxing officer therefore exercised his discretion on the matter injudiciously contrary to paragraph 7 of the ARO

Whether the quantum of advocates fees taxed should be interfered with.

56. Both the advocate and the client urged me to review and set aside the fees taxed by the taxing officer on 21.10.2016 and either tax the bill or refer it to a taxing officer with appropriate directions to tax the bill afresh in the proper manner. The errors made by the taxing officer while taxing the advocate client bill of costs have been outlined herein above. I trust that given another opportunity he or any other taxing officer can properly tax the bill. I therefore refer the bill back to a taxing officer for fresh consideration with the directions that he should strictly comply with the provisions of ARO and especially Schedule VI part A and B so as to give a fair compensation to the advocate for his professional services but also avoid giving him unfair enrichment. He will therefore:

- a) Assess instruction fees under part B (a) of schedule VI of the ARO 2006 based on the correct value of the suit which can be ascertained from the documents filed with the bill or primary suit file among other sources or upon making other considerations provided for under the ARO.
- b) Assess the correct getting up fee as prescribed under part A of schedule VI of the ARO.
- c) Consider and determine on merits each and every item in the bill of costs.
- d) Increase the total fees assessed under part A of schedule vi of the ARO by 50% .
- e) Order payment of interest on the sum taxed in accordance with paragraph 7 of the ARO.

DISPOSITION

57. For the reasons that both parties herein have succeeded in proving that the taxing officer erred both in law and principle while taxing the advocate-client bill of costs dated 2.7.2016, I set aside the costs taxed and refer the bill back for fresh taxation by a taxing officer guided by the directions given herein above. Each party shall bear his or her own costs because both references partially succeeded.

Signed, dated and delivered at Mombasa this 13th day of October, 2017.

O.N. MAKAU

JUDGE