



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT KISUMU
CAUSE NO. 4 OF 2013
(Original Nairobi Case No. 1100/2012)

GRACE ACHIENG OGOTCLAIMANT

VERSUS

SUKARI CO-OP. SAVING & CREDIT SOCIETY LTD.....RESPONDENT

R U L I N G

The applicant filed the present application by way of Chamber Summons under paragraph 11(2) of the Advocates Remuneration Order and Sections 3 and 3A of the Civil Procedure Act seeking the following orders:-

- (a) The Decision of the Taxing Officer/Deputy Registrar made on 26.08.2014 on taxation of the Claimant's bill of costs dated 07.05.2014 in respect of item numbers 3,4,7,8,10,11,12,13,14,18,19,21,26,28,30,31,34,35,36,38,39,41,44,46,53,55,58,59,60,61,67,68, and 74 be varied, reviewed and or set aside.
- (b) The Honourable Judge be pleased to tax the objected items in (a) above.
- (c) Costs of this application be provided for.

The application is supported by the grounds on the face thereof and the affidavit of ANNET MUMALASI ADVOCATE for the Applicant. The Respondent did not file any response to the application.

The application was fixed for hearing on 8th June, 2015. When the application came up for hearing on that day the parties agreed to canvass the same by way of written submissions. The parties thereafter filed and exchanged submissions.

In the Applicant's submissions filed on 29th June, 2015 the Applicant lists the grounds for review as follows:-

1. *That during taxation, the Taxing Officer did not make any decision on items, 3,4,8,10,13,14,19,28,31,34,36,38,39,41,44,49,71 and 74.*
2. *That the Taxing Officer did not exercise her discretion fairly and judiciously in taxing the bill.*
3. *That the Taxing Officer did not judiciously consider the Notice of Objection to the taxation*

dated 28/08/2014 and specifically the items raised therein and hence her decision was unsupportable.

4. That the Taxing Officer fell into an error of law by sitting on Appeal on her decision when she made an award of Kshs.79,000/= on item 3 and Kshs.100/= on items 7,12,18,30 and 35 at the stage of giving reasons when all she was required to do was to give reasons for her decision. Therefore the taxing officer attempted to amend her ruling in the reasons for the taxation thereby acting *ultra vires*.

5. That the taxation by the Taxing Officer on the disputed item was too low and unreasonable in the circumstances of this case.

6. The Taxing Officer taxed off items conceded by the Respondent thereby raising an issue where none existed as the Respondent had in his submissions indicated that the Claimant was entitled to instruction fees under item 3 on the counter-claim. What was in contention was the specific amount.

7. That the Taxing Officer failed to consider the Claimant's submissions in regard to the bill.

The Respondent on the other hand states in its brief submissions that the counter-claim only sought to recover from the Claimant such sum as is recoverable under the Co-operative Act Cap 490 of the Laws of Kenya and not the entire sum of Kshs.164,000,000 which was the extent of the entire sum alleged to have been lost by the Respondent.

I have considered the Claimant's application, the affidavit, the grounds and documents in support thereof and the submissions by both parties.

I will adopt the Applicant's grounds as set out in the Applicant's submissions.

Determination

On grounds 1 and 2 the Applicant submitted that the case involved several voluminous documents including report, minutes, letters and certificates. The Applicant further submitted that the case proceeded to full hearing by *viva voce* evidence and further that there was some complexity. The Applicant submitted that the subject matter of the counter claim was Shs.164,000,000 as particularised under paragraph 10A and the court rejected the whole counter-claim thus confirming the subject matter. It was further submitted by the Applicant that the court specifically awarded costs on the counter-claim and that Schedule 6 paragraph 1(n) as read together with paragraph 1(b) entitled the Claimant to a party and party fee on the counter-claim of Shs.2,050,000.

The Applicant submitted that the Taxing Officer misdirected herself when she held that instructions fees where the subject matter is over shillings 20 million is Shs.79,131.90 when the correct fee is Shs.377,000. She relied on the decision in *Wambugu, Motende & Co. Advocates v Attorney General of Kenya [2013] eKLR* in which Justice J.R.B. Havelock referred to the case of *Joreth Ltd v Kigano & Associates Civil appeal No. 66 of 1999 (unreported)*. The court of appeal in that case stated as follows:-

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 her discretion to assess such instruction fee as he considers just, taking in to 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 of the trial judge and all other relevant circumstances".

It was submitted that if the Taxing Officer found that the value of the subject matter is not ascertainable, she was not properly guided in arriving at a figure of Shs.79,131.90.

The Applicant further submitted that the Claimant was entitled to fees for getting up or preparing for trial for the counter-claim and that the wording used in the Remuneration Order is mandatory so the Taxing Officer ought to have allowed the same at the rate of one third of the instructions fee as Shs.809.000 as the minimum fee under item 4.

The Applicant further relied on the case of *Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & others (1972) EA 162* where the court set the principles for taxation as follows:-

1. (a) *That costs be not allowed to rise to such a level as to confine access to the courts to the wealthy.*
 - (b) *That a successful litigant ought to be fairly reimbursed for the costs that he has had to incur.*
 - (c) *The the general level of remuneration of advocates must be such as to attract recruits to the profession.*
 - (d) *That so far as practicable there should be consistency in the awards made..*
2. *The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party*
 3. *In considering bills taxed in comparable cases allowance may be made for the fall in the value of money...*

It was submitted that Shs.432,293.90 awarded by the Taxing Officer was too low and amounted to an injustice to the Claimant as it constitutes a mere 0.26% of the counter-claim when the lowest rate under Schedule 6 is 1.25%.

The Applicant also relied on the decision of Justice Koome in *Mutuli & Apopo Advocates v Jirongo [2010] eKLR* where she observed as follows:-

"However there are factors that the taxing master did not take in to account in arriving in his decision. For instance the holding that the advocate did not demonstrate the complexity of the matter, in my opinion this is an error of principle. It is discernible from the bill of costs and the submissions by the advocate that this was a complex matter which elucidated enormous public interest. Secondly, there were volumes of records to peruse. The proceedings went on for two and half months and the advocate attended to represent the client.'

The Respondent in its submissions urged the court to find that the Taxing Officer applied the correct interpretation to reach a finding.

I have perused the ruling of the Taxing Officer. On the subject matter of the counter-claim she stated as follow:-

Item 3- *I do agree with the Respondent that from the wording of the amended defence & counter-claim, paragraph 10A thereof the value of the counter-claim was not specifically ascertained. The same was dismissed, going by the judgement. In my view, provisions of paragraph 1(n) as read with paragraph 1(b) of Schedule VI applies. The same is taxed at Kshs.79,131, 9 on basis of the fee being over 20 million.*

On the getting up fee she made the following determination:-

Item 4 - *Getting up fees having been charged under item one, I am of the view that the issues in the claim and the counter-claim were enjoined and canvassed at the same hearing. As such I make no award under the title.*

I have also perused the Claimant's letter of termination, the Memorandum of Claim, the Amended Defence and counter-claim and the Amended Reply to Amended Defence and counter-claim in order to ascertain the subject matter of the Counter-claim and if the Applicant is entitled to getting up fees.

The Claimant's letter of termination refers to a forensic audit carried out following an order by Commissioner of Cooperative Development. It is the audit findings which resulted in the termination of the Claimant's employment.

Paragraph 10A of the counter-claim states as follows;

" As a result of the matter herein above, the Respondent lost Kshs.164,000.000 (Kenya shillings one hundred sixty four million only) of which the Respondent prays that the Claimant be surcharged to the extent of her blame as per the Co-operatives Act (Cap 490) Laws of Kenya." (emphasis added)

In the Amended Reply to Amended Defence and counter-claim the Claimant avers at paragraph 6A and 6B.

6A. The contents of paragraphs 10A of the Amended Defence and counter-claim are denied in toto and the Claimant specifically denies having lost Kshs.164,000,000/=(Kenya Shillings One Hundred and Sixty Four Million) or any part thereof. Denies that she should be surcharged and puts the Respondents to strict proof thereof.

6B. The Claimant denies that the Respondent is entitled to compensation by surcharge undisclosed amount the Respondent wishes the court to calculate and establish against her and puts the Respondent to strict poof thereof.

From the foregoing it is clear that the subject matter of the counter-claim is the same as the subject matter of the claim and the Claimant in the Amended Reply to Amended Defence and Counter-claim acknowledged that the subject matter of the counter-claim is an undisclosed surcharge to be established by the court.

As was stated in the case of *Joreth Ltd v Kigano & Associates (supra)* if the subject matter of the claim is not ascertainable the Taxing Officer is entitled to use discretion to assess such instruction fee. The extent of the Claimant's surcharge was to be assessed by the court as prayed in the counter-claim but no assessment was made as the entire counter-claim was dismissed.

The foregoing being the case, I find that the Taxing Officer properly directed herself in assessing the subject matter as she did and that she also properly directed herself in rejecting the getting up fees on grounds that getting up fee had been charged under item 1.

This also takes care of the applicant's ground No. 3 that the Taxing Officer did not judiciously consider the Notice of Objection to the taxation dated 28th August, 2014 and specifically the items raised therein and hence her decision was unsupportable and also ground 6 that the Taxing Officer failed to consider the Claimant's submissions in regard to the bill.

Ground 4 and 5 are not factually true as the decision of the Taxing Officer considered all the items in the Claimant's bill. This is reflected in the ruling of 26th August, 2014 which is attached to the affidavit in support of this application. In the same ruling the Taxing Officer also made a determination on all the items in the bill cited in Ground 4 and 5 of the Claimant's submissions as may be ascertained by a perusal of the same.

The allegation in Ground 5 that the Taxing Officer taxed off item 3 which had been conceded by the Respondent is also not factually correct as may be ascertained from Respondent's submissions and the ruling of the Taxing Officer. The Respondent objected to item 3 of the Bill and did not make any concession for any amount as alleged by the Applicant.

The upshot is that the Applicant has not proved any grounds in support of the Chamber Summons dated 17th September, 2014 and the same is dismissed with costs.

Dated signed and delivered this 12th day of October, 2015

MAUREEN ONYANGO

JUDGE