



**And Beyond Kenya Limited & another v Gulf African Bank (Civil Case 158 of 2009)  
[2024] KEHC 4518 (KLR) (Commercial and Tax) (18 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 4518 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 158 OF 2009  
DO CHEPKWONY, J  
MARCH 18, 2024**

**BETWEEN**

**AND BEYOND KENYA LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**CONSERVATION CORPORATION EAST AFRICA HOLDING  
LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**GULF AFRICAN BANK ..... DEFENDANT**

**RULING**

1. Before this Court for determination is the Chamber Summons application dated 21<sup>st</sup> December, 2021 filed by the Plaintiffs seeking the following orders: -
  - a. That the decision of Hon. S.A. Opande, Deputy Registrar delivered on 9<sup>th</sup> March, 2020 in the attached copy of the ruling, taxing the Applicant's Party and Party Bill of Costs dated 15<sup>th</sup> May, 2019 at a total sum of Kshs.562,729.40 be set aside and/or vacated.
  - b. That this Honourable Court be pleased to assess and quantify and or direct the re-taxation of the Plaintiff's party and party Bill of Costs in accordance with the law and on the basis of written submissions placed before the taxing officer by the parties.
  - c. That the costs of this reference be awarded to the Applicants.
2. In support of their case, the Plaintiffs averred that while taxing the Plaintiff's Bill of Costs. The Taxing Master exceeded and or abused his discretion by failing to appreciate the nature of the dispute and suit culminating to the taxation before him. That in assessing the instructions and getting up fees, the Taxing Master ought to have appreciated other factors such as the importance and complexity of the suit, the labour expended as well as the responsibility undertaken by the Plaintiff's counsel for a



period of more than a decade, interests of the parties, and conduct of proceedings and by ignoring those factors, the Taxing Master arrived at a manifestly low award on costs.

3. According to the Plaintiffs, the Taxing Master failed to apply Schedule VI of the *Advocates (Remuneration) Order*, 2009 and Schedule 6 of the *Advocates (Remuneration) Order*, 2014 appropriately as was necessary in the circumstances. For instance, the Taxing Master applied the *Advocates (Remuneration) Order*, 2006 and 2009 on Items 66 and 87 on attendances which happened while the *Advocates (Remuneration) Order* 2014 was applicable as at the time of those attendances. Further, that the Taxing Master erred by awarding an erroneous rate for attendances on Items 54, 66 and 87 which the miscalculations have jeopardized the Plaintiffs. The Plaintiffs further faulted the Taxing Master for not supplying the reasons for the award on each item despite requests by the Plaintiff.
4. The Application is opposed by the Defendant vide the Grounds of Opposition dated the 23<sup>rd</sup> February, 2022. On its part, the Defendant submitted that the instruction and getting up fees were properly assessed based on the decretal sum awarded to the Plaintiff in this suit. That there was nothing tabled before the Taxing Officer as basis for increasing the instruction fees and therefore the Taxing Master properly applied his mind to the applicable law and facts presented while disregarding the unjustified and manifestly exaggerated costs. As such, the Defendant craved for the instant application to be dismissed with costs.
5. The Application was canvassed by way of written submissions as directed by court and as the record reflects, the Plaintiffs filed written submissions dated the 13<sup>th</sup> June, 2022 whilst those of the Defendant are dated the 18<sup>th</sup> July, 2022.

#### **Plaintiffs' Submissions**

6. In their submissions, the Plaintiff pointed out that this suit was filed on 9<sup>th</sup> March, 2009 vide a Plaint dated 3<sup>rd</sup> March, 2009 claiming the sum of USD48,556.38 and additional USD13,547.63 being the value of cheques wrongfully converted by a third party with the assistance of the Defendant herein. According to the Plaintiffs, the Defendant had been negligent in discharging its mandate to the extent that it allowed the opening of accounts which were used to siphon its monies. That the case was prosecuted for a period of about ten years where upon the delivery of the Judgment on 14<sup>th</sup> March, 2019, the Defendant was found negligent for failing to verify the true identities of the directors and the documents utilized in opening the fraudulent accounts thus aiding the conversion of the Plaintiff's funds. The Honourable Court then awarded the Plaintiff USD48,556.38 with interest at court's rate from the date of filing the suit as well as costs together with interest thereon at court rate from the date of the Judgment.
7. Thereafter, the Plaintiffs proceeded to file a Bill of Costs which was taxed at Kshs.562,729.40 vide a ruling delivered by the court on 9<sup>th</sup> March, 2020.

Aggrieved by the award on costs, the Plaintiff preferred the instant reference challenging taxation on Items No. 1 and 2 of the Bill of Costs being the instruction and the getting up fees. The Plaintiff submitted that while assessing the instruction fees, the Taxing Master failed to take into account principles enunciated under law including the case of *Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & 7 Others* EALR (1972) EA 162 wherein the court held thus:-

“That the instruction fee should cover the advocates work including the taking of instructions and preparation of the case for trial or appeal”.

8. Therefore, the Taxing Master ought not to restrict himself to the value of the subject matter only but should have taken into account the ten years expended in preparation and prosecution of the case to



its conclusion, the complexity of the matter and documentations in the case in order to arrive at a reasonable award on instruction fees.

9. The Plaintiffs further submitted that the Taxing Master wrongly calculated the value of the subject matter when he adopted an interest rate of 12% whereas the applicable court rate interest is 14%. Be that as it may, the Plaintiffs proposed that it would be reasonable for the court to award instructions fees of Kshs.4,000,000/=.

### **Defendants Submissions**

10. On its part, the Defendant emphasized that the value of subject matter should only be determined from the parties' pleading and Judgment where the amount is ascertainable. That, since the amount is ascertainable from the award made for the decretal sum, the Taxing Offer correctly exercised its discretion in determining the decretal sum and calculation of the instruction fees thereof. The Defendant added that the applicable interest rate as per Practice Note No. 1 of 1982 is 12% hence the Taxing Master was correct in adopting the same rate.
11. Finally, the Defendant submitted that the case was equally important to all the parties but not just the Plaintiff, and that ought not to be a factor to warrant interference on the taxation. Further, that the case did not take a period of more than ten (10) years to be concluded due to its complexity but it was due to the unfortunate events which happened while the case subsistent. For example, the Plaintiffs amended their Plaint after a period of seven years and the unfortunate demise of the judge who was then handling the case. With all the above factors considered, the Defendant sought the court to disregard the reference for lack of merit and further direct the parties to bear their own costs.

### **Analysis and Determination**

12. From the above summary, the main issue that this court is to determine is whether the Plaintiffs/Applicants' Chamber Summons aforesaid is merited. In other words, should this Court interfere with the Taxing Officer's decision?
13. However, this court is alive to the fact that this should not interfere with the exercise of discretion by the Taxing Officer unless it is shown that wrong principles were followed or that the award was manifestly too low in the circumstances so as to justify an interference that it was based on an error of principle. In this particular case, the bone of contention is on instruction fees and whether the Taxing Master captured the value of the subject matter properly. On the latter issue, the Plaintiffs have submitted that the Taxing Master applied an interest rate of 12% p.a instead of 14% which the Plaintiff's believe was the prevailing rate pursuant to the pronouncement made by the Supreme Court in the case of *Highway Furniture Mart Limited v Permanent Secretary Office of The President & Another* [2006] eKLR.
14. Having read through *Highway Furniture Mart Limited case (supra)* and in this Court's view, the decision therein was limited to establishing the interest rate applicable to that particular case but not to serve as a Practice Note by the Chief Justice to guide on the interest applicable from time to time as is allowed under Section 26(1) of the *Civil Procedure Act*. Section 26(2) of the *Civil Procedure Act* is at all material times the relevant reference point on the interest rate applicable on decretal sum where the Judgment is silent on the rate and it provides for interest at the rate of 6% P.a.
15. In this Court's humble view, the decision in *Highway Furniture Mart Limited case (supra)* was not meant to amend the provisions of Section 26(2) of the *Civil Procedure Act* and or serve as a Practice Note dictating a ceiling and or guidance on the applicable court interest rates. Consequently, this Court is contended with the interest rate adopted by the Taxing Officer to ascertain the value of the subject matter in this suit.



16. As for whether the Taxing Officer misdirected herself on calculation of instruction fees, this Court wishes to begin by associating itself with the decision in the case of *Paul Ssemogerere & Another v Attorney General* SCCA No.5 of 2001 where the Court stated thus:-

“.... In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which, sometimes, are against one another, in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that the advocates' remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for the intricate balancing exercise that the taxing officer's opinion on what is reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference”.

17. Further, in the case of *Thomas James Arthur v Nyeri Electricity Undertaking* [1969] EA 492 Gould, J.A. rendered himself in the following terms:-

“Where there has been an error in principle, the court will interfere, but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the court will intervene only in exceptional circumstances.”

18. Similarly, the Court in the celebrated case of *Premchand Raichand Limited & Another v Quarry Services of East Africa Limited & Another* (1972) EA 162 went further and noted that:-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award is somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.”

19. Taking cue from the above cited authorities, there is a general caveat against the interference of an award on quantum of taxation unless it is shown that there is a clear error of principle, or the sums awarded are either manifestly high or low as to lead to an injustice. In inviting the court to interfere with the present taxation, the Plaintiffs argued that the Taxing Officer failed to appreciate the importance and complexity of the case, as well as the time expended in prosecuting the case thereby arriving at a manifestly low award on costs. To establish the same, I have perused the record and established that in the underlying case, the claim is pegged on the tort of conversion with no novelty in it.
20. The Plaintiff called a total of two witnesses whereas the Defendant called one witness. In this Court's humble opinion, it cannot be said that the case took so long to prosecute due to its complexity. Had the parties been more vigilant, this Court believes it would not have taken ten (10) years for only three witnesses to testify, hence, in the circumstances, the time spent to complete the case cannot be a measure of the complexity of the instant dispute.
21. Certainly, upon considering the Submissions by the parties, and the rival pleadings, this Court finds the Plaintiffs/Applicants have not demonstrated the existence of or proved any error of principle on the part of the Taxing Master, and as such the court is unable to fault the award by the Taxing Master



on instruction fees as manifestly low. This Court is persuaded that the same was premised on the applicable law and thus, it is reluctant to interfere with the Taxing Officer's decision on both the instruction fees and the getting up fees.

22. In the upshot, the inevitable conclusion is that this court finds no merit on the Plaintiffs' Chamber Summons dated 21<sup>st</sup> December, 2019 and the same is accordingly dismissed with no orders as to costs. Each party shall bear its own costs.

It is so ordered.

**RULING DATED AND SIGNED AT KIAMBU THIS 12<sup>TH</sup> DAY OF MARCH, 2024.**

**D. O. CHEPKWONY**

**JUDGE**

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH, 2024.**

**ALFRED MABEYA**

**JUDGE**

