



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Civ Appli 138 of 2003**

**NYAMOGO & NYAMOGO ADVOCATE.....**  
....**PLAINTIFF**

**VERSUS**

**KENYA BUS SERVICE.....**  
**1<sup>ST</sup>**  
**DEFENDANT**

**DAVID NDARI MATHENDU.....**  
**2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

This Ruling is delivered in the Chamber Summons dated 26<sup>th</sup> May 2005 in which the firm of Nyamogo and Nyamogo Advocates, previously acting for the Defendants herein have challenged the taxation of their Advocates – Clients Bill dated 14<sup>th</sup> February 2005 on the grounds that

1. The Honourable Taxing master erred by holding that there is no value of the subject matter of the suit
2. The Taxing Master's decision on instruction Fee is a clear error of principle
3. The Learned Taxing Master fell into error by interfering with item number 18 of the Bill of Costs.
4. The Learned Taxing Master erred by awarding 16% V.A.T. instead of 18% based on the date of the bill of costs

The Chamber Summons was heard in the absence of the advocates for the other parties to the suit despite the same and the hearing date having been served. It is clear from items 19 and 20 that the applicants brief was terminated by the filing of a Notice of Change of Advocates on or about 17<sup>th</sup> January 2003. It appears from item No. 13 that the suit was withdrawn sometime in or around July 2002 but it is not clear why and in what circumstances the Plaintiffs served a list of documents on the Defendant on or around 16<sup>th</sup> August 2002. What is quite clear is that other than filing a memorandum of Appearance and a Defence, the applicants did not defend the suit to conclusion and the outcome of the suit has not been disclosed to this court. This notwithstanding I share the view that outcome of the suit would not affect the entitlement to instructions fee which, as held in many leading authorities on taxation and as clearly set out in the Court of Appeal decision of **JORETH LTD VERSUS KIGANO & ASSOCIATES** Civil Appeal No. 66 of 1999:

“ is an independent and static item which is charged once and is not affected or determined by the stage the suit had reached.”

From my perusal of the Ruling of 10.3.05 by the learned M. Matheka, Senior Principal Deputy Registrar, the Taxing officer in this case, I note that she did acknowledge the fact that the applicants were indeed entitled to instruction fee. The learned Taxing officer relying of course on the submissions made before her even found and recorded that she was

**“satisfied that the Advocate did prepare for trial”**

and proceeded to award 1/3 of the instruction fee of shs 35,000/= which she awarded in respect of item 1 of the bill of Costs.

Regarding the instruction fee, the taxing officer is shown in her Ruling of 10<sup>th</sup> march 2005 to have recorded that:

“.... This matter has not been finalized and there is no value of subject matter of the suit.”

The Taxing Officer then proceeded to treat the Bill as one where there is no specific provisions under schedule VI(I) of the Advocates Remuneration order 1997, but awarded shs 35,000/= considering as stated in her Ruling **“the nature of the case, the work done and the time taken.”**

The Plaintiff exhibited in this application shows that the claim is for both special damages of shs 117,609/= and general damages which could only be ascertained on assessment, after the suit had been heard to conclusion and evidence tendered, and upon consideration being made by the trial Court of the submissions in that regard. That notwithstanding it is clear from the Ruling by the Taxing Officer that she did award an instruction fee of shs 35,000/= which is the applicable amount under schedule VI (b) where the value of the subject matter is below shs 500,000/=, instead of the shs 6000/= she had considered applicable under sub paragraph 1(I). This being the case I do not find the applicant’s objection to the taxation under item 1 justified and I therefore disallow ground 1 and 2 of the reference.

Regarding Counsel’s submission that the learned Taxing Officer ought to have considered the existence of two defendants and therefore allow an additional fee under Rule 1( c) I am guided by the provisions of Rule 62 2 of the Advocates Remuneration Rules which states as follows:

“Where the same advocate is employed by 2 or more Plaintiffs or Defendants and separate pleadings are delivered or other proceedings had by or for two or more such Plaintiffs or defendants separately, the taxing Officer shall consider in the taxation such advocate’s Bill of Costs either between party or party or between advocate/client whether such separate pleadings or other proceedings were necessary or proper and if he is of the opinion that any part of the costs occasioned thereby had been unnecessarily incurred the same shall be disallowed.”

That there were two defendants represented by the advocate herein as submitted before me is not enough to warrant a higher fee without there having been a duplication of pleadings or proceedings as is clearly required in the above cited rule. Counsel having not demonstrated that indeed that was the case I have no reason to interfere with the Taxing Officers’ discretion in regard to that point.

As is the case with numerical aspects of any bill of costs the Taxing Officer is better placed than a Judge to decide what rate of tax to apply upon a taxation based on the facts placed before him. Other than alleging in his submissions before me that the applicable rate of interest was 18% not 16% as applied by the Taxing Officer, counsel in this reference has not tendered any evidence to prove that that was indeed the case. Even that considered I do not consider that the imposition of a particular rate of tax rather than another can be said to be an error in principal to warrant this court’s interference with the Taxing Officers’ findings.

In view of the above considerations I am not persuaded that my discretion ought to be exercised in

avour of the aggrieved advocate and this reference fails. The same is hereby dismissed with no order as to costs.

Dated and Delivered at Nairobi this 31<sup>st</sup> day of July 2006

**M. G. MUGO**

JUDGE

Delivered in the presence of

Nyamogo for the Applicant

No appearance for the Respondent