



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISC. CIVIL APPLICATION NO. 14 OF 2018

CG WAITHIMA & CO. ADVOCATES.....APPLICANT

VERSUS

AFRICAN MERCHANT ASSURANCE CO. LTD.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Mr. Nakhone Advocate (C. G. Waithima Advocates) for the Applicant

African Merchant Assurance Co. Ltd

RULING

This chamber summons under Section 11 of the Advocate Act and regulations therein seeks: That the Taxing Masters' order dated 22.10.2019 on taxing costs dated 30.8.2018 be set aside and the bill be taxed afresh. The summons is supported by the affidavit of Charles Githitu sworn on 16.12.2019 stating specifically that the Taxing Master whilst taxing the bill in regard to item 1 and 26 applied the wrong principles and she ended up with a figure that was inordinately low.

Secondly, that the Taxing Master failed to appreciate that the subject matter was Kshs.82,253,214/=. The respondent was duly served with the summons as evidenced with an affidavit of service but defaulted in filing any appearance or replying affidavit. The hearing therefore proceeded as an undefended application.

At the hearing Learned counsel **Mr. Nakhone** submitted that it is not clear when the taxation was due and how the Taxing Master went about assessing item 1 and 26 of the Bill of Costs.

Determination

The Bill of Costs in question is taxable under Schedule VI of the Advocates Remuneration Order 2006 as amended in 2014. The dominant guiding principles are set out in **Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 others {2006} eklr Ojwang J (as he then was)** expressed himself inter alia as follows:

“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, particularly where he is an officer of great experience, merely because it thinks the award 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 The Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. It the Court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the Law, or a particularized justification of the mode of exercise of any discretion provided for..... The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, the nature of it must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a

conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs”

In the instant application is in respect of the Taxing Master not resolving amicably item 1 on instructions fees. The leading case of **Premchand and Raichmond Ltd & another v Quarry Services of East Africa Ltd & Another** {1972} E.A. 162 gives guidance in many respects with reference to taxation of costs.

It is important for each case instruction fees to be considered separately factoring in the advocates work, including taking instructions and preparing the case for trial or appeal. further, the value of the subject matter has to be taken into account.

“The Law envisages further what is permissible are those costs which an honest, experienced and capable practitioner would consider reasonable in relation to the particular claim or defence, bearing in mind the requirements of efficient practice and the exigencies of litigation.” (See **Van Rooyen v Commercial Union Assurance Co of SA Ltd** {1983} 2 SA) 465).

For the avoidance of doubt as stated in this comparative decisions from **Preller v Jordaan & Another**, {1957} (3) SA 201 (O) at 203 C to E, **General Leasing Corporation Ltd v Louw**, {1974} (4) SA 455 (C) at 461 to 462, **Noel Lancaster Sands (Pty) Ltd v Theron & Others**, {1975} (2) SA 280 (T) at 282 F:

“It should be borne in mind, however, that the review of the Taxing Master’s decision on taxation is one going beyond the rather narrow Common Law parameters of judicial review applicable to the acts or omissions of public bodies. It is by its nature a review denoting “a wider exercise of supervision and a greater scope of authority than those which the Court enjoyed” under either the review of the proceedings of lower courts or of public bodies acting irregularly, illegally or in disregard of important provisions of statute.”

As such the integral part of this application is the whole process of the taxation in respect of item 1 and 26 of the filed Bill of Costs. I therefore direct the Taxing Master to have a second look at these items with specific focus on the grounds of objection raised by the applicant.

In the premises, the Taxing Master’s decision is hereby set aside and substituted with an order to review items 1 and 26 of the applicant’s Bill of Costs. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH DAY OF JULY 2020

.....

R. NYAKUNDI

JUDGE

This ruling has been delivered in terms of Article 48 and 159 (D) of the Constitution and practice directions on the general risks associated with COVID – 19 pandemic and the specific consents signed by both counsels dated **8.7.2020** (See **Gazette Notice No. 3137 of 17.4.2020**)