**Asea Brown Boveri Ltd v Bawazir Glass Works Ltd and another**

**Division:** Milimani Commercial Courts of Kenya at Nairobi

**Date of ruling:** 7 April 2005

**Case Number:** 1619/00

**Before:** Emukule J

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Advocate – Remuneration – Attendance fees in the High Court – Higher and lower scale – Principle regarding the scale upon which costs shall be taxed.*

*[2] Advocate – Remuneration – Instructions and getting-up fees – Whether they could be chargeable more than once – Whether the time lapse between one hearing and another may justify an increase in instruction fee – Schedule VI – Advocate’s Remuneration Order.*

*[3] Advocate – Remuneration – Taxation reference – Principles governing taxation of costs and reference to the High Court from the taxing officer’s decision.*

*[4] Words and Phrases – “Hearing” – “Trial” – Though there may be several days of hearing there is but one trial commencing from the first date of hearing.*

**RULING**

**Emukule J:** This ruling relates to an application by way of a chamber summons brought under paragraph 11 of the Advocates (Remuneration) Order, and all enabling provisions of the law and procedure. The application seeks three orders: 1. That the decision of the taxing officer (the Honourable Meoli Deputy Registrar) taxing the Bill in this case in the sum of KShs521 860-20 be reviewed and/or set aside;

2. That the Court be pleased to substitute its own decision therefore taxing the Bill in the sum of

KShs747 080-70; 3. That costs of this application be provided for. The application is supported by the affidavit of Anthony Thiongo *Njoroge* and the grounds following:

1. That the taxing officer erred in law and in fact to consider substantially and apply the provisions of Schedule VI paragraph 2 of the Advocates (Remuneration) (Amendment) Order 1997 when taxing items 101 and 116 of the plaintiff’s Bill of Costs.

2. That the taxing officer erred in law and in fact in failing to find that the plaintiff’s advocates perhaps had prepared for trial on 14 January 2003 and 10 June 2003 and is therefore entitled to the instructions fees claimed in items 101 and 116 of the Bill of Costs.

3. That the taxing officer erred in law and in fact in taxing items 103 and 104 of the Bill of Costs in the lower scale yet this is suit where a denial of liability. All costs are charged on the higher scale where there is a denial of liability.

4. And on other grounds that may be raised at the hearing of the application.

In the event there were no other grounds raised during the hearing of the application, Mr *Njoroge* learned counsel for the applicant told the Court that there are four items in dispute in the decision of the taxing officer. He grouped them into two clusters. The first cluster concerned items 101 and 116 of the Bill of

Costs. These items related to the instruction fee and the fee for getting-up. The second cluster concerned items 103 and 104. These items related to charges for attendances before the judge.

On items 101 and 116, learned counsel for the applicant told the Court that there was a considerable lapse of time between the dates when the suit was first heard (item 90) and he had to get-up for trial, that is to say, the 30 May 2002 and the subsequent hearing dates on 14 January 2003 (item 101), and again on

10 June 2003 (item 116). Counsel accepted that getting-up fees were allowed as charged under item 90.

He however claimed that by virtue of the considerable lapse of time, he was entitled to further getting-up fees under items 101 and 116 on the respective dates to which the hearing of the case had been adjourned.

In support of this proposition counsel referred to the proviso set out in paragraph 2 of Schedule VI to the Advocates (Remuneration) (Amendment) Order of 1997 which provided for an increase in fees. The applicant did not seek such an increase. He sought an additional getting-up fee. In his understanding the proviso for increase of fee in the event of an adjournment clearly means that there is a separate getting-up fee each time a matter is adjourned. In disallowing these items (101 and 116) counsel submitted, the taxing officer erred in principle. In this counsel’s view, getting-up fees are chargeable each time the matter is adjourned and heard on another date. Counsel relied upon the case of *Kassim v Habre International Ltd* [2001] 1 EA 98. I shall refer to both this case, and the proviso to Schedule VI(2) of the Advocates (Remuneration) (Amendment) Order in due course.

The second cluster of the applicant’s reference concerned attendance fees on items 103 and 104 and charged for attendance before the Judge in the course of the hearing of the case. Counsel submitted that these costs be charged on the higher scale as provided under Schedule VI, rule 2(*d*) of the Remuneration

Order. In summary, counsel submitted, the Bill of Costs was taxed at KShs521 800-20 and asked the Court to review the Bill of Costs to KShs722 500-70 by awarding getting-up fees and attendance costs on those items. Counsel for the applicant accepted that the instruction fee was static and that for these matters under reference, the Court should not refer the matter back to the taxing officer, but should rather deal with the matter applying the case of *First American Bank of Kenya Ltd v Shah and others* [2002] 1 EA 64 at 66 and decide the matter conclusively. Mr *Shah*, learned counsel for the defendant/respondent opposed the application. Counsel submitted that there was a substantial difference between the expression “trial” and “hearing”. There is usually only one trial before the Court during which the parties’ respective claims are tested in evidence and cross-examination. The trial of a case may be adjourned, and heard from day to day. Each of the days to which a case is adjourned is just but a day in the trial of the suit. It does not constitute a new trial. Counsel cited the Goldenberg Inquiry, and posited that if the advocates were to charge for every session, the fees would be both astronomical and incalculable.

In his submission Schedule VI paragraph 2, provides for a single fee. It is clearly so from the proviso

(ii).There were three days of trial. There was no request for 15% increase over the final fee. There was no error of principle of law. The taxing officer was absolutely correct in allowing one instruction fee. The

Court could only interfere with the decisions of the taxing officer if there was an error of principle. So far as the instruction fee was concerned there was no error of principle. The applicant is in essence asking for doubling of the instruction fees and this is not allowable.

An advocate gets up for hearing only once. There is no authority for the proposition that getting-up fees are chargeable for each hearing. On items 103 and 104, regarding attendances at the hearing Mr *Shah*, learned counsel for the respondent, submitted that an advocate is entitled to a fee on the higher scale where a judge has certified that matter to be taxed on the higher scale on the ground of complexity of the issues involved. No such orders were made in the present case. The taxing officer took this point in her ruling, and there is no error on the face of the record as it relates to items 19-22 inclusive which both parties agreed to be taxed off.

In summary counsel reiterated his submissions that a suit proceeds to hearing only once, unless the Court orders a re-trial. In this case the suit proceeded to trial once, and hearing proceeded for several days. Submitting that there was pressure on the Courts, but to accept submissions by counsel for the applicant that there was trial for several days, and therefore entitling him to getting-up fees on each occasion, would not be in the interests of justice. There was no error in principle by the learned taxing officer. In the event however that the Court finds an error of principle on the face of the record in the decision of the learned taxing officer, it should substitute its own decision for that of the taxing officer.

In support of his submission Mr *Shah*, referred the Court to the cases of (1) *SRD Souza and others v CC Ferr and others* [1960] EA 602 and (2) *Thomas James Arthur v Nyeri Electricity Undertaking* [1961] EA 492. Having set out *in extenso* the rival parties’ submissions, I shall now proceed to render my opinion and decision on the matter.

The applicant’s contention is that the learned taxing officer erred in principle and in law by refusing:

(*a*) To allow the applicant getting-up fees on three separate occasions, and

(*b*) To allow the attendances costs on the higher scale.

The authorities are more or less settled that this Court will interfere with the discretion of the learned taxing officer on clear grounds, that the taxing officer has erred on principle. (*Steel Construction* *Petroleum Engineering (EA) Ltd v Uganda Sugar Factory* [1970] EA 141) or that the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. In the case of *Kassim v Habre International Limited* (*supra*) the Supreme Court of Uganda restated the matter as follows:

“(*a*) A reference on tax action would be entertained either on a point of law or principle or on the ground that the bill of costs as taxed was in all the circumstances manifestly excessive or manifestly inadequate.

(*b*) The principles governing the taxation of costs by a taxing officer were that:

(i) The instruction fee should cover the advocate’s work including taking instructions and preparing the case for trial and appeal.

(ii) The taxing master was expected to tax each bill on its merits.

(iii) The value of the subject matter had to be taken into account.

(iv)The taxing master’s discretion had to be exercised judicially and not whimsically or capriciously.

(v) Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public policy such that costs were not to be allowed to a level that would confine access to the Courts to the wealthy while at the same time, the general level of remuneration of advocates had to be such as to attract recruits to the profession as per *Raichand Limited v Quarry Services EA Limited* [1972] EA 162.

(vi) The taxing officer had to tax the Bill of Costs in accordance with the applicable Schedule.”

According to the matter at hand, the parties’ counsel are agreed that the instruction fee at item 90 was Properly allowed. Both counsel agreed and applied the case of *First American Bank of Kenya Ltd v Shah and another* (*supra*) that the instruction fee was static, that it is chargeable only once. Having agreed on or accepted this basic tenet, it is hard to find support for argument such as the one by the applicant’s counsel, that notwithstanding this basic and accepted principle on taxation of advocate costs, that the getting-up fee which is based upon the instruction fee is somewhat elastic and is chargeable on every day to which the case is adjourned more so, if the periods between one hearing date to another are long. There is neither such rule in law or principle. Schedule VI (2) is in these terms:

“2. Fees for getting-up or preparation for trial.

In any case in which a denial of liability is filed or in which issues for trial are joined by pleadings a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction and shall not be less than one third of the instruction fee allowed on taxation. Provided that:

(i) This fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee.”

This rule clearly states that the getting-up fee shall not be less than one third of the instruction fee allowed on the taxation. The taxing officer having allowed instruction fee (on item 90) of the Bill of Costs and a getting-up fee thereon (on item 101), no other fee is allowed, consequently the taxing officer arrived at the correct decision, and did nor err either in law or principle. A fee upon attendance before the judge either in Court or in chambers is governed by Schedule VI(1) paragraph 7(*d*). Unlike Schedule VIIA(1) Costs of proceedings in Subordinate Courts, which in a note thereto states that “Lower Scale” shall be applied in all cases where no defence or other denial of liability has been filed and “Higher Scale” shall be applied in all other cases, no such similar provision exists in Schedule VIA(7), explaining the application of the “Ordinary” and “Higher Scale.” The terminology in the two Schedules VI and VII is not only different but different rules apply to their use or application. Schedule VII applies to fees in the lower or subordinate Courts. Schedule VI applies to fees in the High Court. It is a mistaken belief that because, the Higher Scale applies automatically to all defended suits in the subordinate Courts that the same rule or concept applies to defended suits in the High Court.

The application of the costs on “Higher Scale” to proceedings in the High Court is governed by paragraphs 50 and 50A of the Advocates (Remuneration) Order which provides as follows:

“50. Subject to paragraphs 22 and 58 and to any order of the Court in the particular case, a bill of costs in proceedings in the High Court shall be taxable in accordance with Schedule VI and unless the Court has made an order under paragraph 50A, where Schedule VI provides a higher and lower scale the costs shall be taxed in accordance with the lower scale. 50A. The Court may make an order that costs are to be taxed on the higher scale in Schedule VI on special grounds arising out of the nature and importance or difficulty or urgency of the case; the higher scale may be allowed either generally in any cause, or matter or in respect of any particular application made or business done.” The effect of these paragraphs 50 and 50A of the Advocates (Remuneration) Order is that an advocate is entitled to tax his bill on a higher scale only in cases where a judge has certified that the matter be taxed on a higher scale because of the nature, importance, difficulty or urgency of the case or issues involved in the case. Where no such order is specifically made under paragraph 50A aforesaid, the costs shall be taxed in accordance with the lower scale. Once again, the learned taxing officer arrived at the correct decision in her decision on items 103 and 104 of the Bill of Costs and taxed the same on the lower scale as is required by paragraph 50 of the Advocates (Remuneration) Order.

In the result therefore, the application herein has absolutely no merit at all. However before concluding my remarks, I would like to concur with Mr *Shah* learned counsel for the defendant/respondent that unless there is an order for a retrial of a matter, there is but one trial of a suit and many hearing days to which such trial may be adjourned. To say otherwise is complete heresy to the rules of procedure – Order XVI, rule 1:

“That in any suit in which a hearing of evidence has once began, the hearing shall be continued from day to day until all the witnesses in attendance have been examined unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.” So therefore although there may be several days of hearing, there is but one trial of case commencing from the first date of hearing and continuing for two or more days until all the number of witnesses called and/or recalled have been heard, and their evidence recorded pending the consideration thereof by the Court in the case of rendering its opinion or judgment.

In the result therefore the taxing officer made the correct decisions in respect of all the items 101,

116, 103 and 104 in contention and did not err either in principle or in law. The applicant’s reference has therefore no merit at all, and the same is dismissed with costs on the higher scale.

For the applicant:

*Mr Njoroge Thing’o* instructed by *Nderitu & Partners*

For the defendant/respondent:

*Mr CR Shah* instructed by *AR Kapila*