REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL APPLICATION NO. 129 OF 2020

ODHIAMBO OWITI & CO. ADVOCATES...APPLICANT/ADVOCATE

-VERSUS-

EQUATOR BOTTLERS LIMITED.....RESPONDENT/CLIENT

RULING

Before me is a reference from taxation dated 6th October 2020. The Advocate/Applicant has asked the Court to set aside the taxing officer's decision on the Items **1** and **2** of the Bill of Costs.

1. The Applicant further asked the Court to re-assess the said items **1** and **2**, so that the costs be awarded as drawn in the Bill of Costs.

2. Finally, the Applicant asked the Court to award them the costs of the reference.

3. The Ruling by the learned taxing officer is dated 16th September 2020.

4. Being dissatisfied with the said Ruling, the Advocate/Applicant wrote to the taxing officer on 21st September 2020, requesting for reasons for the decision.

5. The taxing officer replied by her letter dated 25th September 2020, indicating that the reasons for ruling were contained in the Ruling dated 16th September 2020.

6. Pursuant to Paragraph 11 (2) of the Advocates Remuneration Order;

> **"(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.**
>
> **(2) The taxing officer shall forthwith record and forward to the Objector the reasons for his decision on those items and the Objector may within fourteen days from the receipt of the reasons apply to a Judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection."**

7. It was the Respondent's contention that the Applicant ought to have filed the reference within 14 days from 16th September 2020. The basis for that contention was that the reasons for the Ruling made by the taxing officer were contained within the said Ruling.

8. By its calculations, the Respondent submitted that the reference ought to have been filed by 30th September, 2020.

9. Therefore, as the reference was filed on 7th October 2020, the Respondent submitted that it was incompetent.

10. The Applicant's understanding was that the reference was filed within the prescribed period.

11. In the case of **EVANS THIGA GATURU Vs KENYA COMMERCIAL BANK LTD [2012]eKLR** made the point that when a taxing officer had delivered a comprehensive ruling, there would be no need to ask him to furnish fresh reasons thereafter. The learned Judge said that;

"In such circumstances, it would be fool hardy to expect the taxing officer to redraft another "ruling" containing reasons."

12. I am in full agreement with my learned brother, that when the ruling delivered by the taxing officer, already contained reasons, there would be no need to seek further reasons.

13. However, I acknowledge and appreciate that the Court's opinion is varied on the interpretation of paragraph 11 of the Advocates Remuneration Order.

14. In **PAUL GICHERU T/A GICHERU & CO. ADVOCATES Vs KARGUA (K) CONSTRUCTION CO. LTD. HCMCA NO. 124 OF 2007** (at Eldoret), Mohamed Ibrahim J. (as he then was), expressed himself thus;

"Under rule 11 (2) of the Advocates Remuneration Order, the taxing officer was required to record and forward to the objector the reasons for his/her decision on items 1 and 2.

This is a mandatory requirement, as the word used is "shall". It is only after receipt of these reasons that an objector may within another fourteen (14) days of receipt of the reasons, that he can file the application raising his objections before a judge."

15. The learned Judge explained that that;

"……. if the ruling is detailed and answers the inquiry, it is arguable that it would be superfluous for the taxing officer to give other reasons or repeat himself."

16. Nonetheless, Ibrahim J. was the following firm legal position;

"In any event, the Court must apply the law as it is, as there is no room for any other interpretation or need to use any other method of interpretation than the 'Golden Rule' to meet the ends of justice."

17. In my understanding, the Judges who have held that there was no need to ask for reasons when reasons were contained in the ruling of the taxing officer, were fully aware of the literal wording of the statutory provision. The said Judges rationalized, as I also did, that a ritualistic observance of the express wording of the statute was un-necessary.

18. I still reiterate that position. With utmost respect, I find myself unable to subscribe to the school of thought that it was fatally premature to lodge a reference from taxation before asking the taxing officer to give his reasons, even when the ruling obviously contains the reasons for such ruling.

19. As L. Njuguna J. held, in the case of **NYAMOGO & NYAMOGO ADVOCATES Vs KENYA PIPELINE COMPANY LIMITED [2018] eKLR**;

"There is no magic in the act of requesting for reasons, and it would not serve a different purpose to ask for reasons when the same are contained in the ruling."

20. Nonetheless, after further reflection on my part, I have also come to the conclusion that it would be prejudicial to condemn a party who followed the letter of the law, by seeking for reasons from the taxing officer when the ruling in issue contained reasons. In other words, whilst the request might be un-necessary, it ought not to lead to the striking out of the reference.

21. Accordingly, I find that in this case, time begun running from 25th September 2020, when the learned taxing officer responded to the Applicant's request for reasons. In the result, the reference was filed within the stipulated time-span.

Pleadings or Application?

22. It is common ground that the proceedings before me arose after the Advocate/Applicant had represented the Client/ Respondent in a Miscellaneous Application **No. 148 of 2018**.

23. In that Misc. Application, the Law Firm of **BRUCE ODENY & CO. ADVOCATES** had filed its Bill of Costs against their erstwhile client, **EQUATOR BOTTLERS LIMITED**.

24. As the Advocate/Applicant herein has indicated, Messrs Bruce Odeny & Company Advocates had claimed costs amounting to Kshs 2,592,003.18. However, upon taxation, the said firm was awarded Kshs 300,000/=.

25. The Advocate/Applicant went ahead to submit as follows;

"Schedule 6 (1) (b) clearly provides that where the subject matter can be determined from the pleadings, judgement and/or settlement, then the taxing master ought to use that figure in the taxation."

26. According to the Applicant, the value of the subject matter was not the sum of Kshs 300,000/=, which was the taxed costs. The Applicant's position is that the Value of the subject matter was the sum which law firm of Bruce Odeny & Co. Advocates had claimed in their Bill of Costs.

27. In **GEORGE ARUNGA SINO T/A JONE BROOKS CONSULTANTS LTD. Vs PATRICK J.O. & GEOFREY D.O. YOGO & CO. ADVOCATES, CIVIL APPEAL NO. 35 OF 2007**, the Court of Appeal dealt with a situation wherein there was an argument the matter of taxation, which was before the Deputy Registrar had not been originated by suit.

28. The learned Judges of Appeal noted that pursuant to **Section 2** of the **Civil Procedure Act**;

> **"Suit means all Civil Proceedings commenced in any manner prescribed."**

29. They then proceeded thus;

> **"As to taxation, Schedule VI (1) (a) of the Advocates (Remuneration) (Amendment) Order, 1997, which was in place at the relevant time provides for 'costs of proceedings in the High Court' and states:-**
>
> > **'(a) To sue in any proceedings whether commenced by plaint, petition, originating summons or notice of motion in which ……..'**
> >
> > **……**
>
> **These provisions, both the definition of suit in Section 2 (supra) and parts of the remuneration order we have reproduced above, do persuade us and we are persuaded that matters commenced by way of a notice of motion, as the matter before us was, is a law suit. We thus cannot accept Mr. Mwamu's contention that what was before the taxing master of the High Court was not a suit."**

30. The learned Judges of Appeal were emphatic that;

> **"The matter before the court fitted the definition of a suit and cannot be relegated into any matter under Schedule VI (1) (l)."**

31. In this instance, the taxing officer had not explicitly held that the proceedings in respect to which the Advocate/ Client Bill of Costs was filed in **Misc. Application No. 141 of 2017**, was an application; as opposed to a suit.

32. Secondly, the Advocate/Applicant herein cited in the Item No. 1 that the Instruction Fee he was claiming was Kshs 151,840.06, which was described as follows;

> **"Taking instructions to defend an an application for taxation of an advocate/client bill of costs against the Respondent client wherein the Advocate claimed costs amounting to Kshs 2,592,003.18 and the same being the value of the subject matter which application which application went to trial but a consent was entered into and such instruction fees charged taking into account the strenuous defence put up by the Applicant/advocate and thus reducing the amount payable by the Respondent from the aforesaid Kshs 2,592,003.18 to Kshs 300,000.00."**

33. In my considered view, the conscious decision made by the Advocate/Applicant, to cite the figure of Kshs 2,592,003.18 must have been intended to provide a guide to the taxing officer, regarding the decision made in the matter in which the said Advocate/Applicant had represented the Client/ Respondent herein.

34. I am persuaded that the learned taxing officer erred when she did not take into account the value of the subject matter.

35. By my calculations, the amount of Kshs 151,840.06, which was claimed by the Advocate/Applicant herein, was justified in the circumstances.

36. When the taxing officer awarded Kshs 5,000/= as Instruction Fees, the same was so low that it must have been calculated on the basis of wrong principles.

37. I therefore set aside the sums awarded under Item **1**, and substitute it with Kshs 151,840.06.

38. The Applicant is also awarded the costs of the reference.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF MARCH, 2022

FRED A. OCHIENG

JUDGE