



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL AND TAX DIVISION

MISC. CIVIL APPLICATION. NO. 119 OF 2017

MWANGI KENG'ARA & CO. ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

INVESCO ASSURANCE COMPANY LIMITEDCLIENT/RESPONDENT

RULING

1. By her Summons in Chambers dated 27/5/19, brought under **paragraph 11 (2) of the Advocates Remuneration Order**, the applicant challenged the ruling of the taxing officer made on 18/9/2018 in respect of his advocate/client bill of costs dated 6/3/17. She sought that the same be remitted back for re-taxation by another taxing officer.

2. The grounds for the application were contained in the body of the Summons as well as the supporting affidavit of **Mercy Nduta Mwangi** sworn on 27/5/19. These were that; the taxing officer erred in principle in taxing off item nos. 7, 12, 16, 20, 24, 25, 32, 33, 38, 45, 46, 59, 60 and 66 which had been charged under **paragraph 3 of Schedule V part II of the Advocates Remuneration Order**; that the taxing officer erred in principle in failing to establish the value of the subject matter of the taxation before taxing off Ksh 15,000/= on instruction fees; that the taxing officer erred in principle in failing to award costs for each folio and by awarding a flat rate contrary to **Rule 17(1) of the Advocates Remuneration Order**; and that there had been proper objection to the taxation vide a letter dated 29/4/2019.

3. It would seem that the respondent did file the grounds of opposition dated 29/8/19 but the same are missing from the record. The court was able to discern this from the submissions of the applicant dated 13/11/19. In the grounds, the respondent objected to the application on the ground that the applicant should have obtained leave to file the current reference and the application was therefore a non starter.

4. Although directions were given that the parties do file written submissions, as at the time of writing this ruling, only the applicant had filed her submissions. I have carefully, considered the deposition and the submissions on record.

5. The 1st issue is whether the application is non suited for want of leave. The starting point is **Rule 11(1) and (2) of the Advocates Remuneration Order**. The same provides:

11(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".

11(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 for his objection."

6. The ruling against which the reference was made was delivered on 18/9/18. The applicant was required to object thereto within 14 days after delivery in terms of **Rule 11(1)** above. I have seen the letter dated 29/9/18 by the applicant addressed to the Deputy Registrar of this court objecting to the taxation. That letter also requested that the applicant be furnished with copies of the ruling and the reasons. In my view, the objection was within the prescribed time under **Rule 11 of the Advocates Remuneration Order**.

7. The reasons sought were not provided immediately. However, by a letter dated 13/5/19, the Deputy Registrar advised the applicant that the reasons for the ruling were contained in the ruling itself. However, the present application was filed on the 20/5/19 which was 7 days after the letter by the Deputy Registrar that gave reasons for the decision.

8. The applicant has referred the court to the decisions in **Moses Mwigigi & 14 Others Vs IEBC & 5 Others 2016 eKLR, Muriu Mungai & Co. Advocates vs China Civil Engineering construction corporation (K) LTD 2019 eKLR** amongst others in support of her contentions that the reference was filed within time.

9. In Makecha & Co. Advocates vs Central Bank of Kenya [2013] eKLR, the court held:

“Although the Applicant/Advocate filed no affidavit as to when the reasons for the Deputy Registrar’s Ruling were delivered to it, it seems quite apparent to me that the certified copy of the same was dated 26th October, 2012. In my opinion the 14 days which the applicant/advocate had in which to file the appeal application would have run from, that date. The application was filed for 5/11/12, 4 days within the stipulated time limit. Accordingly, I do not think the respondent /client has any point to make in that regard.”

10. In this regard, it is my view that the material time for filing a reference against a taxation as set out in **Rule 11 (2)** above is within 14 days after receipt from the taxing officer of the reasons for the decision. This is so because, an applicant cannot mount any challenge on a decision whose reasons he /she is not aware of. No doubt the giving of reasons is an important right that is vested on a litigant at all stages of a litigation.

11. Since the reasons were given on 13/5/19 and the present Motion was filed 7 days thereafter, I hold that no leave was required before lodging the present reference. This now paves way for me to consider the grounds for this reference.

12. The 1st ground was that the taxing officer erred in principle in taxing off item nos. 7, 12, 16, 20, 24, 25, 32, 38, 45, 46, 59, 60 and 66 which had been billed under **paragraph 3 of Schedule 5**. That the advocate had produced documents in support of the services provided thereunder.

13. It should be noted that **Schedule 5 of the Advocates Remuneration Order** applies where a party has made an election under **Rule 22 (1) of the Advocates Remuneration Order**. The applicant duly made this election as can be seen from the bill of costs dated 6/3/17.

14. The taxation therefore was to be undertaken under the said schedule. The items set out above, were in respect of attendancies. These attendancies were for meetings, service of pleadings, deliveries amongst others. The taxing officer held in the impugned ruling that the attendancies envisaged under **paragraph 3 of Schedule 5** were for court attendancies and not otherwise. The applicant contests this finding.

15. **Paragraph 3** aforesaid, provides:

“In ordinary cases, per 15 minutes or part thereof Ksh.1000/=; on routine telephone calls within Kenya 15 minutes or part thereof. In other cases, the taxing officer may increase or diminish the above charges for any special reasons.”

16. Nowhere in the **Advocates Remuneration Order or schedule 5** is the term attendance defined. According to the **Concise Oxford Dictionary 9th Edition, Clarendon Press 1995**, attendance means; *“the act of attending or being present...the number of people present.”*

17. In view of the foregoing, the term attendance under this paragraph may mean attendance in court, attending meetings, attending to service or any other similar act on the part of an advocate that facilitates the execution of the client’s instructions. It does not restrict the attendancies to court only.

18. In view of the foregoing, I agree with the applicant that the interpretation given by the taxing officer of the term attendancies in **Paragraph 3** was erroneous. To that extent, the decision of the taxing officer on those items cannot stand.

19. The next challenge was that the taxing officer erred in principle by failing to award fees per folio and for applying a flat fee. This was in respect of item nos. 4, 9, 18, 23, 30, 44, 48, 58, 63, 73 and 75 of the bill of costs. The taxing officer in her decision held that the **Remuneration Order** did not provide for a charge per folio but rather the amount was fixed. The applicant complained that in so holding, the taxing officer disregarded the number of folios that were prepared by the advocates.

20. In **Schedule 5 part 2 paragraph 2**, the charges for drawing and perusing documents are set out. These documents are either pleadings or any other document that is prepared by the advocate. That Paragraph does not provide for charging per folios. Having elected to charge under Schedule 5 the advocate is bound by the provisions thereof. If it was the intention of the Legislature that those documents be charged per folio, nothing would have been easier than to provide as such. This is so because charging per folio is expressly provided for in the other Paragraphs under the same Schedule or the other Schedules. For example Paragraph 5 of Schedule 5, Schedule 6 Paragraphs 4 and 5 on drawing up documents.

21. This is not so however for correspondences under Paragraph 5. Under that paragraph, drawing of letters and perusals thereof charging per folio is provided for. In this regard, the court should have allowed the items touching on correspondences where charges per folio was raised. This is expressly provided for therein unlike in Paragraph 3 of that Schedule.

22. Accordingly, the taxing officer did not err in her finding that item nos 4,9, 48,63, 73 and 75 were not chargeable per folio. However, she erred in so far as she declined the charges per folio in item nos. 18, 23, 30, 44 and 58.

23. The other challenge to the decision of the taxing officer was that she erred in principal in failing to establish the value of the subject matter before taxing off Ksh 15,000/= on instruction fees. The starting point in respect of this complaint is the holding in Joreth Ltd vs Kigano & Associates EALR (2002) 1 EAK in that case the court of appeal held:

“the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not so ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the

importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. The Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle. In principle the instruction fees is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. The Taxing Officer whilst taxing his bill of costs is carrying out his functions as such only. He is an officer of the Superior court appointed to tax bills of costs.”

24. It is clear from the foregoing that a taxing officer should be guided by the value of the subject matter when assessing instruction fees. In the present case, the value of the subject matter was neither disclosed in the pleadings nor the judgment of the court. The appellant has not disclosed whether the court ever determined the value of the subject matter or not. She has only relied on a letter by the plaintiffs dated 1/8/2005 which had quantified the claim at Ksh 350,000/=.

25. With due respect, I do not understand the Court of Appeal in Joreths case (*supra*) to be that the value of the subject matter is to ascertained from anything other than a valuation report or the pleadings before court.

26. In the present case, it is not clear how the quantum of Ksh 350,000/= relied on by the advocate was arrived at. That is only a figure that was raised by that advocate probably for purposes of negotiation. To my mind, that per se cannot be evidence of the value of the subject matter. The applicant should have either pointed at the pleadings or the decision of the court as to the value of the subject matter.

27. In this regard, I am not satisfied that the taxing officer was in error in taxing off Ksh 15,000/= in item 71. In the absence of any concrete evidence as to what the value of the subject matter was, the taxing officer cannot be faulted. She exercised her discretion correctly.

28. In view of the foregoing, the application dated 27/5/19 succeeds to the extent stated above. The bill of costs dated 6/3/2017 is hereby remitted back for taxation by a different taxing officer only on those items set out above.

It is so ordered.

DATED and DELIVERED at Nairobi this 21st day of January, 2021.

A. MABEYA, FCI Arb

JUDGE