



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

REFERENCE APPLICATION NO. 559 OF 2019

AGNES M. MUTUNGA T/A MUTUNGA & CO. ADVOCATES.....APPLICANT

VERSUS

NICHOLAS KYALO MUTUKU.....RESPONDENT

RULING

1. Before me is a reference filed by way of chamber summons dated 4th December, 2019 arising from the decision of the taxing officer made on 22nd August, 2018 in which the Applicant's costs against the Respondent, her client were taxed in the sum of Kshs 446,364/=. The reference is based on the ground that the taxing officer did not consider the fact that the instructions fees had been agreed between the parties herein at 30% of the total decretal sum. It is therefore contended that the taxing officer erred in taxing the instructions fees in accordance with the provisions of the *Advocates (Remuneration) Order* as opposed to section 45 of the *Advocates Act*.

2. It was further contended that the taxing officer erred in taxing the costs based on *Advocates Remuneration Order, 2006* when the prevailing scale as at the time of filing of the suit was the *Advocates Remuneration Order, 2006* and failing to consider the submissions made before him.

3. The reference is only opposed on the ground that it was filed out of time. However, the Applicant has exhibited a copy of the order enlarging time within which the reference was to be filed.

4. Section 45 of the *Advocates Act* provides as hereunder;

(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—

(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;

(b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;

(c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.

(2) A client may apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors, who shall be advocates of not less than five years' standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the Court, whose decision shall be final, shall have power to order—

(a) that the agreement be upheld; or

(b) that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or

(c) that the agreement be set aside; or

(d) that the costs in question be taxed by the Registrar, and that the costs of the application be paid by such party as it thinks fit.

.....

(6) Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48.

5. In the ruling dated 22nd August, 2018, the Learned Taxing Officer did not make any reference to the said Agreement. It is not contended and there is no evidence that the same was ever set aside. The law as set out by the decision in **Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2) [2006] 1 EA 5** is that where there is an agreement as regards a particular item, that item cannot be the subject of taxation.

6. It follows that the decision by the Learned Taxing Officer subjecting item 1 to taxation under the ***Advocates (Remuneration) Order*** was erroneous. Having so found, it is no longer necessary for me to address the other issues raised in this reference.

7. Consequently, I hereby set aside the order made by the Learned Taxing Officer herein on 22nd August, 2018 and direct that the matter be remitted back to the Learned Taxing Officer for fresh taxation in accordance with the directions issued herein.

8. There will be no order as to costs.

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 23RD FEBRUARY, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kilonzo for Miss Mutunga for the Applicant

Mr Mutinda for Mr Mulei for the Respondent

CA Geoffrey