



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS CIVIL CAUSE NO. 110 OF 2019

L. G. MENEZES & COMPANY ADVOCATES.....ADVOCATE

VERSUS

B. N. KOTECHA & SONS LIMITED.....CLIENT

RULING

1. The Advocate's Chamber Summons application dated and filed on 13th October 2020 sought that the Ruling delivered on 30th September, 2020 by the Taxing Master, Hon Lina Akoth Deputy Registrar, Kisumu High Court, dismissing its Advocate-Client Bill of Costs dated 11th June 2019 be set aside and that the Honourable Court be pleased to re-tax or order to be remitted for re-taxation of Items Nos 1 and 2 of the Applicant's Bill of Costs dated 11th June 2019. The said application was supported by an affidavit that was sworn by Dancan Otieno Njoga on the 13th October, 2020.

2. It averred that Items Nos 1 and 2 of its Bill of Cost ought to have been assessed under Schedule 6 paragraph 1(b) of the Advocates Remuneration (Amendment) Order 2014 and not Schedule 6 paragraph 1(f) of the said Order, which the Deputy Registrar based her assessment on and that she had misdirected herself.

3. In response thereto, on the 6th November 2020, the Client's Director, Hemal Kotecha swore a Replying Affidavit. The same was filed on 12th November 2020.

4. The Client averred that Schedule 6 Paragraph 1 (f) of the Advocates Remuneration Order had not been repealed and/or amended by the Chief Justice in accordance with Section 44 of the Advocates Act Cap 16 (Laws of Kenya). It was its contention that although winding up proceedings were removed from the Companies Act and incorporated in the Insolvency Act, 2015, the applicable provision for taxation was to charge fees for opposing or presenting winding up proceedings.

5. It added that no getting up fees had been earned as the new firm of advocates, Professor Tom Ojienda & Co Advocates was filed before the Insolvency Petition was fixed for hearing. It therefore urged this court to dismiss the application with cost to it.

LEGAL ANALYSIS

6. The Advocate's Written Submissions were dated 23rd November 2020 and were filed on 24th November 2020. It placed reliance on the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR** in support of its case.

7. On the other hand, the Client filed its Written Submissions dated 17th February 2021 on 19th February 2021. It relied on the case of **First American Bank of Kenya vs Shah & Others [2002] 1 EA 65** to argue that the court could only interfere with the discretion of the taxing master in certain instances.

8. In her Ruling on 30th September 2020, the Taxing Master found that all items in the Advocate- Client's Bill of Costs had been drawn to scale save for Items Nos 1 and 2. She assessed the instruction fees and getting up fees at Kshs 25,200/= and Kshs 8,400/= respectively. She found the taxable amount to have been in the sum of Kshs 197,683.70 being Kshs 167,632.50 plus VAT in the sum of Kshs 26,821.20. She further ordered that the client had actually overpaid the Advocate Kshs. 304,316.30 and as a result thereof, she dismissed the said bill of costs.

9. Manner of assessing costs in proceedings filed in the High Court is provided by Schedule 6 of the Advocates Remuneration (Amendment) Order 2014.

10. Schedule 6 (1) (f) (i) provides how costs of Proceedings in the High Court in relation to companies specifically is calculated. It states that the costs to represent or oppose proceedings under Rule 5(1) of the Companies (Winding Up) Rules is Kshs 25,200/=.

11. As was pointed out by the Client, a judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the cost - See **Arthur v Nyeri Electricity Undertaking [1961] EA 497.**

12. Whereas the court noted the Advocate's contention that Schedule 6(1)(f) arose from Companies (winding up) Rules which had since ceased to exist and or are revoked by dint of Section 1023(4) of the Companies Act No 17 of 2015, this court agreed with the Client that that Schedule 6 Paragraph (1) (f) of the Advocates Remuneration Order 2014 Schedule 6 (1)(f) of the Advocates Remuneration Order had not been repealed and or amended by the Chief Justice in accordance with Section 44 of the Advocates Act, Cap 16 Laws of Kenya.

13. Section 44 of the Advocates Act Cap 16 (Laws of Kenya) provides that:-

“The Council of the Society may make recommendation to the Chief Justice on all matters relating to the remuneration of advocates, and the Chief Justice, having considered the same, may by order, prescribe and regulate in such manner as he thinks fit the remuneration of advocates in respect of all professional business, whether contentious or non-contentious”

14. Indeed, there was no express amendment made with regard to the provisions of Schedule 6 of the Advocates Remuneration (Amendment) Order 2014 to warrant the Taxing Master not to apply Paragraph 1(f) (i) in taxing the aforesaid Bill of costs.

15. It was the considered view of this court that unless an Act or regulation or rule or a provision in an Act of law had been expressly repealed and/or amended, the same was deemed to remain in force. No recommendation has been made to the Chief Justice so far, by the Council of the Society, to amend the Advocates Remuneration Order.

16. It was the view of this court that the Taxing Officer, herein, in exercising discretion, applied the settled principle in assessing instruction fees in the Advocate- Client Bill of costs. The court did not see any evidence of the matter having been listed for trial to warrant the award of the getting up fees. However, as the Client had not filed a reference to contest that figure, this court's hands remained tied.

DISPOSITION

17. For the foregoing reasons, the upshot of this court's decision was that the Advocate's Chamber Summons dated and filed on 13th October 2020 was not merited and the same be and is hereby dismissed with costs to the Client.

18. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF MARCH 2021

J. KAMAU

JUDGE