

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 23 OF 2018

ATAKA, KIMORI, OKOTH, ADVOCATES.....ADVOCATE

VERSUS

SURESTEP SYSTEMS AND

SOLUTIONS LIMITED.....CLIENT

RULING

Before court is a Reference by the Client filed as chamber summons dated 28 July 2020 under Rule 11(2) of the Advocates (Remuneration) Order; the particular Remuneration Order referred to is not clear but, for reasons which will become apparent in due course, I suppose it is the Advocates (Remuneration) Order, 2014.

The Reference is against the taxation by Deputy Registrar of this Honourable Court, of a bill of costs filed by the advocates for taxation of their fees for representing Surestep Systems and Solutions Limited, the Client herein, in the proceedings before the Public Procurement Administrative Review Board (hereinafter "the Board") in the Request for Review No. 7 of 2018.

According to the decision delivered by the Board on 25 January, 2018, the client was the successful party in the proceedings before the Board and was also awarded costs and filing fees. The particular order in respect of costs was framed as follows:

"d) The applicant is awarded the costs of this review which are assessed at Kshs. 150,000/= plus the filing fees. The procuring entity shall pay the said costs and filing fees to the Applicant on or before 2nd February, 2018 a fact which will be confirmed on that day."

The advocates initial bill of costs against their client was dated 21 March 2018; however, this bill of costs was struck out by the Deputy Registrar on 13 June 2019 for want of jurisdiction; according to the learned Deputy Registrar, there was a valid agreement on payment of legal fees for services rendered. In coming to this conclusion the Deputy Registrar was influenced by the advocates' fee note which they sent to their client after conclusion of the proceedings before the Board. The fee note dated 10 January 2019 read as follows:

"FEE NOTE

RE: PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD NO. 7 OF 2018

DATE	NO.	PARTICULARS	AMOUNT CHARGED
05.10.2018	1.	<p><i>On instructions to represent you in a Request for review in the Public Procurement Oversight Authority against Industrial & Commercial Development Corporation. To drafting and preparation of the Request for Review. To attendance to the matter at the Review Board. To general care and conduct and necessary service.</i></p> <p><i>To agreed legal fees for services rendered</i></p>	

determination of the Reference.

2. THAT the decision of the Taxing Master, the Honourable C.A Muchoki made on the 14th day of July 2020 taxing the Advocate-Client Bill of Costs dated 21st March 2018 at Kshs. 573,310/= be set aside.

3. THAT the costs of this application be borne by the Applicant.

4. THAT this Honourable Court be pleased to make such other orders as it may deem just and fit to grant. ”

The Reference is supported by the affidavit of Jasper Odhiambo Lubeto, an advocate of this Honourable Court, and who is now on record for the Client. It is also based on grounds that the learned taxing master erred in law in holding that the applicable scale for taxation is Schedule 6A(j)(ii) of the Advocates Remuneration (Amendment) Order 2014; that the learned taxing master erred in law and in fact by failing to consider that prior to filing and taxation of the Advocate-Client Bill of Costs, the advocates had acknowledged receipt of Kshs. 214,000/= from the client as legal fees; and, that the learned taxing master erred in law and in fact in failing to consider and tax off the costs of Kshs. 150,000 which were awarded to the client in Public Procurement Administrative Review Board Application No. 7 of 2018 and subsequently obtained and appropriated by the Advocates in settlement of their legal fees.

The other substantive ground was that the client has an arguable case with a high probability of success and if stay of execution is not granted pending the hearing and determination of this Reference, the Reference will be rendered nugatory. Considering the stage at which this application has reached, the prayer for stay has been spent and therefore the ground in its support is as good as moot.

In submissions filed in support of the application, it was reiterated that the bill of costs was with respect to the advocates' representation of the client in the Public Procurement Administrative Review Board, which is a tribunal established under section 27 of the Public Procurement and Asset Disposal Act, No. 33 of 2015. That the advocates had received from the client the sum of Kshs. 214,000/= as their legal fees and that client had been awarded Kshs. 150,000/= which sum of money ought to have been recovered by the advocates.

It was submitted that the three issues that presented themselves for determination were whether the learned Deputy Registrar applied the correct schedule; whether the Deputy Registrar ought to have taxed off Kshs. 150,000/= from the advocates' bill and; finally, whether the deputy registrar should have taxed off the sum of Kshs. 214,000/= from the bill of costs.

On the first question, it was submitted on behalf of the client that Schedule 6 which the taxing master applied was not applicable since it only applies in taxation of bills of costs in judicial review applications in this Honourable Court.

The taxation in issue was in respect of a matter before a tribunal and not the High Court and therefore Schedule 6 of the Remuneration Order could not apply. For this position counsel for the applicant relied on the decision in **Republic v Kenya Medical Supplies Authority & another; Medox Pharmaceuticals Limited (Interested Party); ex parte Nairobi Enterprises Limited (2019) eKLR.**

The appropriate and applicable Schedule, according to the learned counsel for the Client, was Schedule 11 of the Advocates Remuneration Order 2014, which expressly provides for taxation of costs of proceedings before tribunals other than those under Schedules 8 and 9 of the Remuneration Order.

Under Schedule 11 (B) the scale of advocate-client costs is such that if the costs are ordered by the tribunal, they are to be increased by 50%. The tribunal in this case awarded costs at Kshs. 150,000; 50% of that would be Kshs. 75,000/= meaning that the Advocate and Client costs should be Kshs. 225,000/=.

The Client urged further that the parent Act, the Public Procurement and Asset Disposal Act, No. 33 of 2015, does not prescribe the applicable schedule but says in section 173 (d) that upon completing a review the Review Board “*may order the payment of costs as between parties to the review in accordance with the scale as prescribed.*” Thus section 173(3) of the Act as read together with Schedule 11 of the Advocates Remuneration Order, 2014 leaves no doubt that the applicable is Schedule 11 of the Remuneration Order.

On whether the taxing master should have set-off the Kshs. 150,000/= awarded to the Client by the Public Procurement Review Board, it was urged that it is settled that costs awarded belong to the Client and not the Advocate. In support of this position, counsel for the client relied on Justice Kuloba's book, *Judicial Hints on Civil Procedure*, 27th Edition, published by Law Africa, 2011, at page 94 where it is stated that costs are awarded at the discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise. That the object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. They are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action. The advocates, according to the Client, have never accounted for the costs awarded to the client. It is the client's case that the advocates should either account for the costs or those costs should have been set off from the advocate's bill of costs.

Apart from the costs, the client also urged that amount of Kshs. 214, 000/= which the advocates acknowledged as having received should also have been set off against the amount due to them.

In response to the Client's submissions, it was submitted on behalf of the Advocate that the Client's application is fatally defective and ought to be struck out for failure by the Client to comply with Rule 11(1) of the Advocates Remuneration Order and file a Notice of Objection. Rule 11 of the Advocates Remuneration Order sets out the mandatory steps that a party seeking to challenge the decision made on taxation should follow. It specifically requires the objecting party to, within fourteen days after the decision of the taxing master, to give Notice in writing to the taxing master of the items of taxation to which he objects.

It is the filing of the Notice of Objection that initiates the Reference by notifying the intended respondents of the case to be brought against them. The Advocates relied on the decision of this Honourable Court in **Nyiha, Mukoma & Company Advocates v Reynolds Mwangi Kinyanjui & Another [2019] eKLR** where the issue of notice was raised; the court held that failure to file the notice was fatal to a Reference. According to the court, it is through the notice of objection that both the court and the respondent get to know the items in the bill of costs which are the subject of the intended reference and without it the court held the application to be ‘at large’.

The Advocates urged that the Reference ought to have been directed only at those items in the bill of costs that were in dispute and not the entire bill.

On whether Article 159 (2) (d) could come to the aid of the client’s Application, the Advocates relied on **Ufundi Co-operative Savings and Credit Society v Njeri Onyango & Company Advocates [2015] eKLR and Kenya Airports Authority v Queens Insurance Agency, Nairobi HCC No. 1430 of 2000**, where it was held that the filing of a notice of objection to taxation is a fundamental step for a party seeking to file a reference and failure to do so is not a technical issue which can be overlooked under Article 159 (2) (d) of the Constitution for the sake of substantive justice.

Again, in **Karume Investments Limited v Kenya Shell Limited & another [2015] eKLR**, the Court stated that Rule 11(1) is a statutory provision which cannot be ignored or wished away.

Further, it was urged on behalf of the Advocates that the question of payments made to the Advocates by the Client was raised before the Deputy Registrar and it was determined that the Client had not proved any payment having been made.

Having considered the Reference, the response thereto and the submissions filed for and against it, I have come to the conclusion that the fundamental question is whether the taxing master applied the correct schedule in taxation of the advocate/client bill of costs dated 21 March, 2018.

There is no dispute that the costs for which the bill was filed arose out of proceedings before a tribunal and not this court, or any other court for that matter. To be precise, they arose out of the proceedings before the Public Procurement Administrative Review Board.

But in the taxation of the Advocates’ Bill of Costs the learned Deputy Registrar proceeded as if the proceedings out of which the costs arose were before this Honourable Court and applied Schedule 6 of the Advocates Remuneration (Amendment) Order, 2014 in particular Part A (j) (ii) which provides as follows:

“(j) Constitutional petitions and prerogative orders

To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate-

(i) ...

(ii) ...

(iii) ...”

(Emphasis added).

The proceedings before the Review Board were neither a constitutional petition nor an application for prerogative orders. The learned Deputy Registrar clearly misdirected herself on the forum before which the proceedings and been conducted and erred in law in treating the proceedings out of which the costs in issue arose as if they were proceedings in the nature of a constitutional petition or judicial review application for prerogative orders before this Honourable Court.

For all intents and purposes, the Public Procurement Administrative Board is a tribunal and it would be treated as such in taxation of bills of costs awarded by the Board.

It follows that the applicable schedule in taxation of the bill of costs would be Schedule 11 of the Advocates Remuneration Order 2014 which specifically provides for taxation of costs before Tribunals other than those under Schedules 8 and 9 of the Remuneration Order except where otherwise prescribed by the Act setting up the tribunal in question.

Schedules 8 and 9 would not be applicable because they respectively deal with costs of proceedings in tribunal under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and Tribunal under the Rent Restriction Act or any legislation amending or replacing it.

The Act creating the Board does not specifically prescribe any scale for assessment of costs; according to section 173 (d) the Review Board “may order the payment of costs as between parties to the review in accordance with the *scale as prescribed*.”

I agree with counsel for the Client that the only prescribed scale would be the Advocates Remuneration Order, 2014 and, in particular, Schedule 11 thereof.

Had the learned magistrate applied the correct schedule, she ought to have set off the amount of Kshs. 214,000/= against the sum that may have been found to be due to the Advocates; this is because the latter acknowledged having been paid this sum. In their submissions dated 16 June 2020, the advocates submitted in respect of this payment as follows:

“The Applicant confirms receipt of Kshs. 214,000/= and submits that the amount should be taken into account during taxation. The amount was received on or around 25th June 2018 and the Applicant did acknowledge receipt pf the same through a letter dated 25th June, 2018 in which it informed the Applicant (sic) that it will adjust the paid amounts against the amounts that will be taxed by the Court.”

The ‘Applicant’ in this excerpt refers to the Advocates. They admitted unequivocally, that they had been paid the sun of Kshs. 214, 000/= and even undertook to have this amount set off against the taxed amount.

It has turned out that this amount was never taken into account in the taxation of the advocates bill of costs and neither has it been set off against the taxed amount.

Failure to apply the correct schedule to the Advocates Remuneration Order would have been enough to allow this reference and remit it back for taxation afresh. But the advocates have raised at least two other issues which they have sought this to consider. They have urged that no notice was served to the Deputy Registrar before the Reference was filed.

I agree with the decision in **Ahmednasir Abdikadir & Co Advocates Vs National Bank of Kenya Ltd (2) (2006) 1 EA 5** that the notice is not for ritualistic purposes and that where the reasons for taxation are apparent in a considered ruling by the Deputy Registrar, there is no need to seek for further reasons. Thus, if the purpose for which the notice was intended has been served satisfactorily, there would be no need to go through the motions for the sake of it.

On the question whether the client ought to have singled out the specific items which it has disputed, the answer, as I understand the Client’s case, would be that it is not the items that are of concern to the client; it is the Schedule to the Advocates Remuneration Order, 2014 which the taxing master applied that is the overarching question. If the wrong schedule was applied, it would be foolhardy to insist on any particular items as having been improperly taxed.

For reasons I have given, I am satisfied that this Reference is merited; it is hereby allowed and the filed remitted to the Deputy Registrar for taxation of Advocates Bill of Costs afresh. The Client will have the costs of the Reference. It is so ordered.

Signed, dated and delivered on 28th May 2021

Ngaah Jairus

JUDGE