



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: D. K. Kemei – J)

CIVIL MISC.REFERENCE NO. E047 OF 2020

IN THE MATTER OF ADVOCATES ACT CAP 16

AND

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER 2019

AND

IN THE MATTER OF THE ADVOCATES AMENDMENTS ORDER 2014

AND

IN THE MATTER OF ADVOCATES-CLIENT BILL OF COSTS

BETWEEN

JOSEPH TAMATA ADVOCATE.....APPLICANT

VERSUS

MARY NTHAMBI MBUVI.....RESPONDENT

RULING

1. By Reference dated 14.12.2020 supported by an affidavit of J.M Tamata Advocate, the Applicant is seeking to set aside and review upwards or tax afresh the applicant's bill of costs pursuant to the ruling of the taxing officer made on 11.12.2020.
2. According to the applicant, the taxing officer erroneously taxed the bill of costs dated 5.10.2020 at Kshs. 72,000/- when the bill of costs was for Kshs. 827,260/-. Copies of the bill of costs and the ruling of the taxing officer said to be annexed as 'JMT1' in the advocates supporting affidavit are not attached to the reference.
3. It is submitted by the Applicant that the taxing officer did not take into consideration the value of the properties in dispute. According to counsel, fees should be considered based on instructions received and acted upon. Counsel has urged the court to set aside the taxing officer's ruling as the Reference herein is unopposed.

Determination

4. I have considered the reference and submissions filed. In my view the reference is incompetent for the reasons I find hereunder.
5. It is now trite law that the High Court will only interfere with the decision of a taxing officer in cases where there has been shown to be an error of principle. In *Republic vs Ministry of Agriculture & 20 Others EX-PARTE MUCHIRI W' NJUGUNA [2006] eKLR, Ojwang J.* (Retired) stated as follows:-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not,

therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other...The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle."

6. The reference is premised on paragraphs 11 Rule (1) and (2) of the Advocates Remuneration Order in which it is provided:-

"(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 this objection.

7. The rule requires the Objector to give notice of the items of taxation within 14 days from the date of the taxing officer's decision. Sub-rule (2) requires the taxing officer to give his reasons forthwith and once that is done the Objector may then file a reference 14 days from the receipt of the reasons. A cursory perusal of the court record reveals that none of the requirement under paragraph 11 to have been undertaken by the Applicant.

8. However, it has been the courts' view that lack of the taxing officer's reasons will not make the reference incompetent. **Odunga J**, in **Evans Thiga Gaturu Advocate vs Kenya Commercial Bank Limited [2012] eKLR** , when he held that:

"It is therefore clear that the interpretation by the court especially the High Court on this issue is far and varied. In my view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles.

However, where there are reasons on the face of the decisions, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of a reference since that insufficiency may be the very reason for preferring a reference".

9. On the same note, **Makau J.** in **Kinyua Muyaa & Co. Advocates vs Kenya Ports Authority Oensin Scheme & 8 others [2017] eKLR** held that the exercise of the option not to wait for the reasons from the Taxing Officer should not be punished on grounds that the reference is prematurely filed.

10. In **Ahmednasir Abdikadir & Co. Advocates vs National Bank of Kenya Ltd (2) (2006) 1 EA 5** the court held that:-

"...where the reasons for the taxation on the disputed items in the Bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of sub rule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling."

11. However, I note that a copy of the taxing officer's ruling has not been attached to the reference or submissions filed despite attaching a copy of the judgement in the divorce cause No. 9 of 2019. The Applicant has not informed the court why a copy of the same has not been attached. The court is therefore not in a position to make a finding as to whether the taxing officer erred in principle or to determine any of the issues framed by the Applicant. Again, the applicant did not avail a copy of the bill of costs for perusal so that the court will have an opportunity of seeing the various items presented for taxation. In short, the court cannot be expected to act in vain when the applicant has not availed the impugned ruling or even the bill of costs dealt with by the taxing officer. The applicant seeks the court to interfere with the ruling by the taxing officer yet the said ruling has not been availed for perusal. In such a situation, the applicant cannot expect the court to make a decision based on nothing literally.

12. In the result, I am constrained to strike the applicant's reference dated 14/12/2020 with no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF JULY, 2021.

D. K. KEMEI

JUDGE