



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI (NAIROBI)

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO.306 OF 2015

**IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16 LAWS OF KENYA AND THE ADVOCATES
(REMUNERATION) (AMENDMENT) ORDER, 1997**

LEGAL NOTICE NO.550 OF 11/12/1997, LEGAL NOTICE NO.159 OF 17/11/2006 AND NO.35 OF 11/4/2014

MWANGI KENGARA & CO.ADVOCATES.....ADVOCATE/APPLICANT

-VERSUS-

INVESCO ASSURANCE COMPANY LIMITED.....CLIENT/RESPONDENT

RULING

1. This reference arise from Ruling by **Hon. Elizabeth Tanui** on **27th July 2018** in respect to **Advocate /Client bill of costs** dated **12th August 2016**.
2. The reference is in respect to disputed items numbers 4, 6,22,23,25,34,45,52,76,79,84,14,17,26,30,31,38,39,43,49,56,60,62, 63, 66, 72, 73, 75, 83, 86, 89, 91, 96 and 100.
3. Grounds on the face of the application are that, the Trial Magistrate erred in principle and law in taxing off charges for journeys from home despite being proved with documentary evidence in support thereof contrary to provisions of **paragraph 7 of schedule 5 of the Advocates Remuneration Order, 1997 and Legal Notice Number 159 of 17/11/2006**, which the applicant had billed as items number 6,22,34,45,52,76,79 and 84 in the bill of costs dated 30th June 2015.
4. That the Honorable Taxing Officer erred in principle and law in taxing off items numbers 14,17,26,30,30,31,38,39,43,49,56, 60, 63, 66, 69, 75 and 83 which the Advocate had billed under **paragraph 3 of schedule v part II of the Advocates Remuneration Order** despite being furnished with documentary proof of the tasks that were undertaken on behalf of the client/respondent.
5. That the Taxing Officer erred in principle and law in taxing instruction fee at kshs 18,000 which is lower than the scale fees that is provided under **schedule 7 part B**.
6. That the Taxing Officer erred in principle and law by failing to award costs for each folio on grounds that **schedule 5** does not provide for charges per folio and thereby unlawfully disregarded the number of folios produced by Advocate/Applicant and proceeded to tax items numbers 4,25,62 and 73 at a flat rate of kshs 24 and items 80 and 90 at kshs 50 contrary to **rule 17(1) of the Advocates Remuneration Order**.
7. That the Taxing Officer erred in principle and law in failing to award charges for preparation of the documents on the basis of “**per item of work done**” in accordance with **paragraph 5 of the Advocates Remuneration Amendment Order** and instead misdirected herself in assessment of the costs for item no.72 under paragraph 2 which is meant for drawing.
8. That the Taxing Officer erred in principle and law by taxing items for drawing at a flat rate and not per folio contrary to **paragraph 17(1) of the Advocates Remuneration Amendment Order** and thereby erred in the assessment of costs for item numbers 89,91,96 and 100.
9. That the Taxing Master totally disregarded the documents adduced before the court in support of the bill of costs and thereby arrived at wholly unjust decision.

10. The application is supported by affidavit sworn by **Mercy Nduta Mwangi** the proprietor of the law firm **Mwangi Kengara & Co. Advocates**. She averred that she included in the bill a charge of travel from Advocate's offices at City Centre to Milimani Law Courts, which required the Advocate to expend one hour in travelling to and from and charged Kshs 1,200,000 according to scale in schedule 5. She listed the documents she availed in support of her claim for journeys from home.

11. She also attached documents in support of ordinary attendances on the matter and restated grounds on the face of the application.

12. Parties herein agreed to proceed by way of written submissions.

APPLICANT'S SUBMISSIONS

13. Applicant submitted that she made election to charge her legal fees under **Rule 22 (1) of the Advocates Remuneration (Amendment) Order schedule 5**. She submitted that the election form the heading of the Advocate/Client Bill of Costs and a separate note dated 30th June 2015 which was filed with the bill of costs; that an affidavit of service was filed to confirm both the bill and notice were served on the respondent.

14. That **Rule 22** was fully complied with and the court was therefore bound to apply the provisions of **schedule 5 in taxation of the bill dated 30th June 2015**; that the taxation was in relation to services rendered to Client/Respondent in defending **Milimani Commercial Court PMCC No.11562 of 2004, Frida Nyiva Makau Versus Obadia Mwaura Jack Kathurima**.

15. She urged the court to be guided by principles laid down in the case of **Thomas James Arthur Vs Nyeri Electricity Undertaking[1961] E.A 492** where the Court of Appeal held as follows:-

"The principles which were applied by the judges upon review of taxing officers certificates are known ... where there has been an error in principle, the court will interfere but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will only intervene in exceptional cases"

16. She submitted that the Taxing Master erred in principle, she misinterpreted and misapplied the law and prayed that the decision be set aside.

17. She restated ground on the face of the application as captured above.

RESPONDENT'S SUBMISSIONS

18. Respondent submitted that the reference herein is time barred for being filed after one year contrary to **paragraph 11 (1)** which provide that objection to taxation should be filed within 14 days by giving notice to Taxing Master of which items are being objected to. Respondent cited the case of **Governors Balloon Safaris Ltd Vs Skyship Company Limited & Another [2015] eKLR** where delay for 48 hours of delivery of taxation ruling rendered reference fatally incompetent.

19. And in **Ahmednasir Abdikadir & Company Advocates Vs National Bank of Kenya Ltd(2) [2006]1 EA** the Court held as follows:-

"...although Rule 11 (1) of the Advocate Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where reasons for taxation on disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reason simply because of unfortunate wording of sub rule (2) of rule 11 of Advocates Remuneration Order demands so."

20. The Respondent submitted that after the delay, the Applicant never sought leave of the court to file this reference and in **W. Amolo t/a Amolo Kibaya & Co. Advocates Vs Samson Keengu Nyamweya[2016] Judge Aburili** held that courts are divested with the jurisdiction to determine merits of reference filed outside stipulated time period

ANALYSIS AND DETERMINATION

21. From the ruling delivered by the Taxing Master on 27th July 2018, I note that she taxed the Bill of Costs under **Schedule 5 of Advocates Remuneration Order**. She applied the 1997 and 2014 **Remuneration Orders** where applicable.

22. I have considered submissions by parties and perused the record and find the following as issues for determination:-

- i. Whether the reference was filed outside the stipulated time.**
- ii. Whether items described as journeys from home are provided for and whether they were proved.**
- iii. Whether attendances should be limited to court and not other out of court attendances.**
- iv. Whether the taxing master erred by applying flat rate instead of awarding fees per folio.**

v. Whether the Taxing Master erred in applying flat rate for drawing.

vi. Whether the Taxing Master erred in reducing instruction fee from 27,000 to 18,000.

23. As to whether the reference herein was filed out of stipulated time, **Paragraph 11 (1)** is clear on time within which objection should be lodged and reference filed. Applicant herein filed reply to Respondent's submissions and stated that the allegation that the reference was filed out of time is unfounded as the actual position of the matter is misrepresented.

24. With respect to charges for journeys made paragraph 7 schedule 5 makes provision for journeys made and where time engaged is less than 7 hours per hour Kshs 1200 provided the Taxing Master may increase or diminish. Paragraph 3 does not limit journeys to travels to court. It indicated time engaged in travelling; journeys made in respect of the case.

25. The Applicant has indicated that the said journeys were proved by documentary evidence. Items proved by documentary evidence should not have been taxed off but allowed as provided by the above provision. The Taxing Master therefore erred in taxing off items related to journeys (items 6,22,34,45,52,76,79 and 84).

26. Whether Taxing Master was right in taxing off other attendances other than court attendance charged under items 14, 17, 26, 30, 31, 32, 38, 39, 43, 49, 56, 57, 60, 63, 66, 69, 75 & 83. In her ruling she provided for court attendances and taxed of other attendances which included attendances to post mail, deliver letters. In my view, the Taxing Master was right in limited attendances to court attendance. For such attendances, I believe they are done by the advocate's clerks who are paid to do the work.

27. In the case of **London Scott:-**

"solicitor can employ another solicitor to do work for him...if the work is done by a clerk then it is a loss of money & not simply loss of time because it is work done by a person who is paid to do that work"

28. In respect to engrossing, the Applicant argued that the Taxing Master disregarded the actual number of folios and applied a flat rate. On perusal of the ruling, I note that she did not apply a flat rate of Kshs 24. On the contrary she applied Kshs 24 for items 4, 25, 62 and 73 as per **1997 Advocates Remuneration Order** and for 88 and 90, she applied Kshs 50 as per **2014 Advocates Remuneration Order**. As to whether she should have counted folios, the provision does not provide for counting of folios.

29. As concern items No. 89, 91, 96 and 100, which relate to drawing, the applicant argued that, the taxing master did not apply flat rate instead counted folios. I note that the taxing master made provisions per item irrespective of folios; for 72 she taxed at 120 under **1997 Advocates Remuneration Order** and 89, 91, 96 & 100 at 250 each under **2014 Advocates Remuneration Order**. Paragraph 2 under schedule 5 does not provide for counting of folios; it just provide for drawing. That is what the taxing master allowed for the items. She therefore never erred as far as the items are concerned.

30. On instruction fee, I have perused the plaint and note that prayers are for General damages and special damages. The value of subject matter is not indicated in the pleadings. In **Kisumu, Court of Appeal No.35 of 2007 George Arunga Sino t/a Jones Brooks consultants Ltd Vs Patrick J.O & Geoffrey D.O. Otieno t/a Otieno Yogo & Co Advocates** the Court of Appeal held that instruction fees can be ascertained from pleadings where no judgment has been delivered.

31. I have not seen a decree to establish the amount awarded by court. Assessment of costs cannot be based on amount a claimant is asking in submissions because the court is not bound to grant amount sought but makes an independent determination based on evidence adduced. The Taxing Master did not however state the how he arrived at kshs 18,000/=.

32. FINAL ORDERS

- 1. Decision by Taxing Master under attendances is upheld.**
- 2. Decision by Taxing Master under engrossing & drawing upheld.**
- 3. Items under journeys listed in the Bill of Costs is remitted back to another Taxing Master to consider items where prove has been provided.**
- 4. Item on instruction fee is remitted back to Deputy Registrar to re-assess or state its basis.**
- 5. No orders as to costs.**

Judgment dated, signed and delivered at Nairobi this 21st day of February, 2020.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Langat: Court Assistant

Minu for Respondent

Odungo h/b for Ms. Mwangi for Applicant