



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC.CIVIL APP.NO. 83 OF 2019

BETWEEN

SOPHIE CHIRCHIR

T/A CHERONO CHIRCHIR & CO. ADVOCATES....APPLICANT

VERSUS

AFRICAN MERCHANT ASSURANCE CO.LTD.....RESPONDENT

RULING

1. The Chamber Summons is dated the 4th October, 2019 and is brought under the provisions of Paragraph II (2) of the Advocates Remuneration Order, and Section 3A of the Civil Procedure Act; the applicant seeks the following orders;

- i. That the ruling of the Taxing Officer dated the 6th September, 2019 be set aside as it was taxed under Schedule VII instead of Schedule V;
- ii. That this Honorable Court be pleased to adjust the figures and all the items taxed under Schedule VII be re-assessed on the basis of Schedule v;
- iii. That this Honorable Court be pleased to make such further orders in the interest of justice as it may deem just and fit;
- iv. The cost of the reference be awarded to the applicant.

2. The application is premised on the grounds on the face of the application and on the Supporting Affidavit made on the same date by **SOPHIE CHIRCHIR** who deponed that the firm filed a Bill of Costs against the respondent and made an election to have the Bill taxed under Schedule V; the election had been duly communicated to the respondent; and the notification to the respondent was filed in court;

3. The above notwithstanding the taxing master failed to appreciate the option and or ignored the said election and proceeded to tax the Bill under Schedule VII; that an election for Schedule V instead of Schedule VII is available at the option of the Advocate and this right cannot be taken away by the court; the applicant had sought for the reasons for the decision vide its objection contained in the letter dated 13/09/2019 and the taxing master's ruling is dated 26/09/2019;

4. The respondent was duly served with the Hearing Notice but was not in attendance at the taxation and it was therefore uncontested; at the hearing hereof despite having been duly served with the application and Hearing Notice the respondent was also not in attendance nor did it put in any response to challenge this instant application which means it was also uncontested;

5. The applicant prayed that the taxing master's decision be set aside and the Bill of Costs be re-adjusted, or re-assessed and or sent back for re-taxation.

ISSUES FOR DETERMINATION

6. After reading the supporting affidavit filed herein this court finds only one issue for determination which is whether the taxing master applied the wrong principles during the taxation of the Bill of Costs;

ANALYSIS

7. The undisputed facts are that the applicant and the respondents had engaged in litigation with the applicant being awarded costs; the applicant submitted that she filed the Bill of Costs under Schedule V of the Advocates Remuneration Order and elected to use the said order in accordance with Paragraph 22(2) of the Advocates Remuneration Order; and the election was duly communicated to the respondent;

8. The applicant's main complaint is that the taxing master exercised her discretion unreasonably, unfairly, and injudiciously; and also applied wrong principles by failing to apply Schedule V to the items and thereby arrived at an erroneous conclusion on all the items taxed;

9. The applicable law is found at Paragraph 22(2) of the Advocates Remuneration Order which allows an Advocate to opt out of a Schedule and to make an election to be remunerated wholly under Schedule V; the only condition set is that the advocate must notify the client in advance or at the time of filing its Bill of Costs;

10. In the case of **Nyangito & Co. Advocates vs Doinyo Lessos Creameries Ltd [2014] eKLR** Odunga J laid down principles under which a Judge of the High Court may interfere the taxing masters' decision; the principles are as set out hereunder;

“1) That 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 manifested excessive as to justify an inference that it was based on an error of principle.

2) It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself. Some of the relevant factors to be taken into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved; the interests of the parties, the general conduct of the proceedings and any direction by the trial Judge;

3) If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment.”

11. In this instance this court notes that the Notice of Election under Paragraph 22(2) of the Advocates Remuneration Order was duly served upon the respondents in accordance with the provision of law;

12. It is quite apparent from the submissions and the record that the taxing master completely disregarded the applicant's election and proceeded to tax the Bill of Costs under Schedule VII; guided by the applicable law the taxing master is bound by the law and has no power to oust an advocate's election that has been exercised in accordance with the law;

13. For those reasons this court is satisfied that the taxing master erred in principle in ignoring and or disregarding the election and that there is good reason for this court to interfere with the taxing master's decision.

FINDINGS AND DETERMINATION

14. In the light of the foregoing this court makes the following findings and determinations;

i. The application is found to have merit and it is hereby allowed; the taxing master is found to have applied the wrong principles in taxing the Bill of Costs;

ii. The decision of the taxing master dated the 6/09/2019 is hereby set aside;

iii. The Bill of Costs is hereby referred back to the Taxing Master for re-taxation in its entirety;

iv. There shall be no order as to costs.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 12th day of March, 2020.

HON. A. MSHILA

JUDGE