



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MISC.CIVIL APPL E081 OF 2018

DENNIS K.N. MAGARE & BEN MUSUNDI

P/A MAGARE MUSUNDI & CO ADVOCATES.....APPLICANTS

VERSUS

PARMINDER SINGH MANKU.....CLIENT/RESPONDENT

RULING

The Applicant filed the reference on 13th June 2019 under **Sections 45, 48 & 49 of the Advocates Act Cap 16** and sought orders;

- a) The Ruling and Orders of Taxing Master dated 22nd May 2019 be set aside.
- b) The Petitioner's Bill of costs of 26th September, 2018 be taxed afresh by the Court
- c) The Costs of the Application be provided for.

The grounds are as follows;

- a) The taxation was very low and the Applicant did not consider the Applicant's/Advocates written submissions relating to Instruction fees.
- b) The Taxing Master proceeded with taxation on wrong principles and did not take into account the provisions of the Advocates Remuneration Order, 2014.

On 26th September 2019, Mr Onyango held brief for Mr Musundi for the Applicant and he informed the Court that the application of 13th June 2019 was served to the Respondent and an Affidavit of Service was filed on 17th June 2019. The application was unopposed and therefore ought to be granted.

Mr Maranga holding brief for Mr Macharia for the Respondent admitted that they had not filed any documents against/opposing the application; the Reference of Bill of Costs.

Mr Onyango informed the Court that he spoke to Mr Musundi and they agreed on filing written submissions. The Court granted each party 7 days to file and exchange written submissions to the application.

Submissions are summary of law and facts pleaded and relied on.

The Respondent did not oppose the Application.

To the merits of the Reference;

- 1) The applicant submitted that **Schedule 6 of Advocates Remuneration Amendment Order 2014** did not hold that instructions

fees chargeable was Ksh 250,000/-. The fees are too low and a mockery of Applicant's efforts in defending the Respondents.

2) That the Instruction fees were awarded inclusive of drawings, perusals, engrossing and filing documents as such items are independently provided for by the Advocates (Remuneration) Amendment Order 2014 and as such the same should be charged separately.

3) The Taxing Master did not consider the Applicant's submissions which had annexed correspondence between advocate- client.

The Client's submission were that the Taxing master relied on and took into account the principles of taxation in conformity with the Advocates Remuneration Order.

The Respondent relied on *KTK Advocates vs Baringo County Government Misc Cause No 1 of 2017* which referred to South African Case of *Visser vs Gubb. 1981 (3) SA 753 (C) 754H-755C* which held that;

***“the Court will not interfere with the exercise of such discretion unless it appears that the Taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should have properly considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or has acted on a wrong principle.*”**

DETERMINATION:

The issue for determination is whether the Taxing Master's Ruling on Bill of Costs of 22nd May 2019 should be up held or set aside.

The applicant filed the reference pursuant to **Section 11 of Advocates Remuneration Order** after an objection was raised before the Taxing Master,

The jurisdiction of this Court is to hear and determine the reference vide the objection raised to the taxed Bill of Costs.

Therefore, any issue or evidence or pleading or submissions not placed before the Taxing Master during taxation of Bill of Costs cannot be subject of the Reference herein. **Section 11** does not mandate the Judge to tax the Bill of Costs but after taxation by Taxing Master to consider parts of it, if contested, the process of taxation if it is in line with the Remuneration Order if contested or the whole Bill of Costs if contested and as was presented to the Taxing Master.

In the instant case, the Taxing Master's Ruling reads that;

“as per the Court record, the Respondent did not file submissions as per directions of 14th November 2018. The Bill of Costs was/is unopposed.”

At the same time, the Court record shows that the Respondent filed written Submissions on 10th December 2018, way after the 7 days that were granted by the Court for the Applicant to file them. The Respondent did not ensure that the submissions filed albeit late found their way to the Taxing Master or the Court record. To ask this Court to take into account the submissions by the Respondent that were filed out of time without leave of Court amounts to asking this Court to exercise the jurisdiction of the Taxing Officer which this Court lacks. Secondly, it would not be legally and procedurally proper for this Court to consider submissions that were not placed before the Taxing Master during taxation of the Bill of Costs. The Respondent advanced no explanation, reasons or circumstances to the Taxing Master to consider as to why the submissions were filed later than the scheduled date without leave of Court. The Respondent did not take up the matter under a review after the Ruling which confirmed the Bill of Costs was/is unopposed to obtain an opportunity to explain the anomaly and seek leave to have the written submissions be made part of the record and considered in the Taxation of the Bill of Costs.

To the 2nd issue raised by the Applicant with regard to the Objection is that the Instruction fees were awarded inclusive of drawings, perusals, engrossing and filing documents as such items are independently provided for by the **Advocates (Remuneration) Amendment Order 2014** and as such the same should be charged separately. Chief Magistrate Court Civil Suit 1466 of 2016 original court file and/or certified court proceedings and pleadings were not availed to determine drawings, perusals, documents filed and court appearances.

Section 50 & Schedule 6 of the Advocates Remuneration Order outlines Costs of Proceedings in the High Court Party to Party Costs. The matter before this Court is a reference arising out of an objection from the Bill of Costs filed and annexed is a bundle of Applicant's List of documents in **Chief Magistrate's Court Civil Suit 1466 of 2016**. In the bundle of documents is a Plaint of a suit filed on 4th March 2016 for a claim of Ksh 16,709,108/-. Without the Court record or certified Court proceedings, the bundle of documents are insufficient to consider and confirm what services the Applicant rendered and ultimately, whether the claim was sustained or settled by consent of the parties, Ruling or Judgment of the Court of part or whole amount claimed or execution proceedings were carried out.

Section 51 & Schedule 7 of Advocates Remuneration Order outlines Costs of Proceedings in the Subordinate Courts at higher and Lower Scale. The proceedings in *Civil Suit 1466 of 2016* were in the subordinate Court and not the High Court. Therefore, **Section 51 schedule 7** is applicable and not **Section 50 & schedule 6 of the Advocated Remuneration Order**.

In the absence of the original record of pleadings and documents filed and/or proceedings of the subject civil proceedings **Civil Suit 1466 of 2016** it is not possible to confirm or contest the taxed amount as too low or not.

Costs follow the event, the final determination of the Court and amount would aid the Taxing Master on the appropriate figure(s) to award. I am satisfied the Taxing Master applied **Schedule 7 of Advocates Remuneration Order** with the documents pleadings availed at the time.

DISPOSITION

For these reasons, the Court finds no legal basis to consider the reference on its merits in the absence of a complete record.

The reference is dismissed with costs

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH AUGUST 2020. (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

**WARUIRU, KARIUKI & MWANGALE ADVOCATE FOR RESPONDENT- N/A
MAGARE MUSUNDI & COMPANY
ADVOCATE FOR THE APPLICANT- N/A**

COURT ASSISTANT - TUPET