



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 189 (OS) OF 2008

NEW KENYA CO-OPERATIVE

CREAMERIES LIMITED.....APPLICANT

VERSUS

EDWARD MURIU KAMAU

NJOROGE NANI MUNGAI

PETER MUNGE MURAGE

ESTHER NJIRU OMULELE (All trading as

Muriu, Mungai & Co. Advocates).....RESPONDENTS

RULING

1. The application dated 19th October, 2016 seeks orders that:

1. That the decision of the Taxing Officer delivered on 29th August, 2016 as far as the same relates to re-taxation of item 1 of the 5th and 6th Defendants Bill of Costs herein be and is hereby set aside.

2. That the Honourable Court be pleased to refer back the matter to the Taxing Officer for re-taxation of item 1 of the 5th and 6th Defendant's Bill of costs herein and with proper directions thereof

3. That in the alternative to prayer 2 above, the Honourable Court be pleased to re-tax the said item 1 of the 5th and 6th Defendant's Bill of Costs herein.

4. That the costs of this application be borne by the Applicant.

2. It is stated in the grounds in support of the application that the instruction fees allowed in item No. 1 of the Bill of Costs herein at Ksh.2,000,000/= is manifestly excessive as to represent an error of principle on the part of the Taxing Officer. That the Taxing Officer failed to appreciate the nature of the instructions given to the Advocate by the client and further failed to appreciate the provisions of Schedule VI 1(i) of the Advocates (Remuneration) Order by multiplying instruction fees in a Party and Party Bill of Costs by 250 times. That the Party and Party Bill of Costs in the main suit was taxed at Ksh.1,581,015/= hence the taxation herein was based on the wrong principles and is manifestly excessive. That the 5th and 6th Defendants were wrongly sued and the Taxing Officer failed to highlight the research and complexity involved. That in a similar matter in Nbi HCCC No. 204 of 2008 (OS) between the same parties, the Party and Party Bill of Costs by the 5th and 6th Defendants was taxed at Ksh.559,766/= thereby connoting an error in law and principle and failure to follow precedent.

3. The application is opposed. The Respondents relied on the replying affidavit sworn on 28th March, 2017 which also adopted the contents of the replying affidavit filed herein on 25th January, 2017. It is stated that following an application by the 5th and 6th Defendants to be struck off the suit, the Plaintiff withdrew the suit against the 5th and 6th Defendants. That judgment on costs was entered in favour of the 5th and 6th Defendants against the Plaintiff but the said Defendants have not been able to enjoy the fruits of their judgment due to the multiplicity of applications herein designed to frustrate them.

4. It is further deponed that the 5th and 6th Defendants Bills of Costs were initially taxed in the year 2011 for the sum of Ksh.5,019,044/= and the amount deposited in court following objections by the Plaintiff. That the issue of the said deposit was later compromised. That in the year 2015 a ruling was delivered on the Plaintiff's reference and cross-reference and a ruling delivered setting aside the Taxing Officer's taxation in item No. 1. That the Bills of Costs were referred to another Taxing Officer who in the year 2016 taxed the same at Ksh.2,023,594/= for each of the Bills.

5. That discussions to settle the matter have not borne any fruit. It is contended that only item No. 1 of the Bill of costs is challenged. That the value of the subject matter was expressly pleaded at 46,000,000,000/= and that the suit related to documents which included titles, logbooks etc. The Respondents view is that the taxation herein in item No. 1 is well below what as required by statute as the minimum amount for Party and Party Costs.

6. On 30th May, 2018, the parties opted to proceed with the application by way of written submissions. The Respondent filed their written submissions on 25th September, 2018 together with a Notice of Preliminary Objection. The Applicant thereafter filed further submissions on 4th March, 2019. Thereafter the parties took a ruling date. There were no directions given on the hearing of the Preliminary Objection. However, both parties in their written submissions have argued both the application and the Preliminary Objection. This court will determine both the Preliminary Objection and the application together without undue regard to technicalities of procedure as the issue of directions on the hearing of the Preliminary Objection has been overtaken by events.

7. The Preliminary Objection dated 20th September, 2018 is on the following grounds:

“1.The law firm of Mereka & Co Advocates has a clear conflict of interest as it has a dispute, Cause and/or suit against its own client, the Plaintiff herein, which is still pending before this Honourable Court in Misc. Civil Application No. 499 of 2012 Mereka & Co. Advocate v New Kenya Co-operative Creameries Limited. The subject matter therein is related to the instructions which were initially with the Law Firm of Muriu, Mungai & Co. Advocates thus a clear conflict.

2. Your law firm of Mereka & Co. Advocates is in breach of the provisions of Rules 8 of the Advocates (Practice) Rules and it cannot purport to represent the Plaintiff as set out in the case of Francis Mugo & 22 others v James Bress Muthee & Others

3. The Plaintiff's submission should be expunged as it introduces new facts and/or disputed facts that cannot be introduced before this Honourable Court in a Reference through submissions without an affidavit.

4. The Plaintiff's Reference was commenced by a Notice of Objection under Provision of Order 11(1) of the Advocates Remuneration Order which set out an objection to item 1 only and other objections are fatal and cannot be sustained in law or at all.”

8. In response to the Preliminary Objection, the Applicant's filed the grounds of opposition dated 22nd October, 2018 which state:

1. The Preliminary Objection is fatally defective since it does not raise a pure point of law.

2. The Preliminary Objection cannot be raised on conflict of interests since it requires ascertaining of facts.

3. There is no confidential information that will be used against the Applicant in this reference.

4. A Preliminary Objection cannot be raised against submissions.

5. The Advocate will not be called as a witness in this matter hence not been barred from acting on account of Advocates Practice Rules.

6. The Applicant has a constitutional right to be represented by the counsel of its choice.

7. The Applicant will suffer irreparable damage if its advocate is barred from acting in this matter which is a series of over 150 taxations between the same parties and which have been consolidated under MA No. 799 of 2007 and are about to be finalized.

8. The Respondent's Preliminary Objection is an afterthought made in bad faith after undue delay and in any event the Advocates do not hold brief for the Applicant.

9. The preliminary Objection is a delaying tactic and an abuse of the court process meant to vex the Applicant's advocate and should be dismissed with costs.

9. I have considered the application, the response to the same, the Preliminary Objection and the submissions filed.

10. As stated in the celebrated case of **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) EA 696:**

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer

the dispute to arbitration.”

Sir Charles Newbold P. added as follows at page 701:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

11. In the case at hand, there are facts which require to be ascertained to wit whether the law firm of Mereka & Co. Advocates has a conflict of interest for having a dispute with its own client pending in **Misc. Civil Appeal No. 499/2012 Mereka & Co. Advocate v New Kenya Cooperative Creameries Limited** the subject matter which relates to instructions that were initially with the law firm of Muriu Mungai & Co. Advocates. The matter of the Applicant’s written submission can be dealt with by this court in this ruling. Consequently, the Preliminary Objection has no merits and this court will proceed to deal with the application at hand.

12. There has already been two taxations carried out by two different Taxing Officers herein. That is the one in which the Bill of Costs was taxed at Ksh.5,019,044/= vide ruling herein by the P. Gichohi dated 8th December, 2011 which was set aside by Hon. Justice J. K. Sergio on 6th February, 2015 following an application by the Applicant. This led to a second round of taxation by Hon. R. Makungu at Ksh.2,000,000/= for each of the Respondent’s vide the ruling dated 29th August, 2016. This is the ruling that is the subject of the current application.

13. There has also been other rulings herein by Hon. Justice K. H. Rawal and by, Hon Justice G.V. Odunga. Although the Party and Party Bill of Costs herein was filed in the year 2008, the applications have been handled in the ordinary course of business. The Respondents have decried the delay in having this matter come to an end but it is noted that the parties had the sum in dispute deposited in court by consent and thereafter filed a further consent on the disposal of the same.

14. Nbi HCCC No. 204/08 (OS) wherein the taxation was at Ksh.559,766/= has been referred to herein as having set a precedent in the taxation of the Bill of Costs herein. It is however noted that the Taxing Officer belong to a court of equal and concurrent jurisdiction and non can make a decision that is binding on the other.

15. It is noted that the objection herein is only on item No. 1 which is on instruction fees. It is clear from the ruling of the Taxing Officer that before arriving at the figure of Ksh.2,000,000/= she considered the nature of the pleadings, the enormous responsibility entrusted to counsel, the time involved, the voluminous documents involved, research involved and also the fact that the case against the 5th and 6th Defendants was disposed off in a summary manner. The Taxing Officer in her ruling states that the Value Added Tax is not applicable to a Party and Party Bill of Costs which reflects that the Taxing Officer was aware that she was dealing with a Party and Party Bill of Costs and not an Advocate/Client Bill of Costs as alleged herein. The Taxing Officer took all the relevant matters into account before exercising here discretion and this court is not persuaded to interfere with the said taxation.

16. As stated in the case of **Republic v Ministry of Agriculture & 2 others Exparte Muchiri W’njuguna & 6 others [2006] eKLR:**

“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 interference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) order itself some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. 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... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for... The complex elements in the proceedings which guide the exercise of the taxing officer’s discretion, must be specified cogently and with and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs...”

(See also **Joreth Limited v Kigano & Associates Civil Appeal No. 66 of 1999 [2002] 1 EA 92** and **Frist American Bank of Kenya v Shah and others [2002] 1 EA 64**)

17. With the foregoing, I find no merits in the application and dismiss the same with costs. The Preliminary Objection is also dismissed with costs.

Dated, signed and delivered at Nairobi this 26th day of June, 2019

B. THURANIRA JADEN

JUDGE