



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 620 OF 2017

WAIGANJO WACHIRA & CO. ADVOCATES.....APPLICANT

VERSUS

PACIS INSURANCE CO. LIMITED.....RESPONDENT

R U L I N G

1. This ruling is the product of the Chamber Summons reference dated 7th February, 2019 brought by the respondent herein and supported by the grounds laid out on the body thereof as well as the facts deponed to in the affidavit of *Njoki Kinyua*. The respondent is seeking the following orders as set out in its application:

(i) THAT the decision made by the taxing master on 15th November, 2018 on the Bill of Costs dated 20th October, 2017 be set aside and the said Bill of Costs be taxed afresh before a different taxing master.

THAT in the alternative, the decision of the taxing master dated 15th November, 2018 be set aside and the Bill of Costs dated 20th October, 2017 be taxed at such amount as this Honourable Court may deem appropriate.

(iii) THAT costs of the application be provided for.

2. The deponent stated that vide a letter dated 6th August, 2013 the respondent instructed the applicant to file a suit on its behalf seeking the recovery of Kshs.499,369/= vide CMCC NO. 6568 OF 2013. That subsequently, the applicant served upon the respondent the Advocate-Client Bill of Costs dated 20th October, 2017 seeking to recover its fees totaling the sum of Kshs.146,140/=, which Bill of Costs was later taxed by the taxing master at Kshs.93,138/=.

3. It was the deponent's averment that being dissatisfied with the aforementioned ruling on taxation, the Respondent filed a Notice pursuant to paragraph 11 of the Advocates (Remuneration) Order on 29th November, 2018 objecting to the taxation of certain items in the Bill of Costs, thereafter applying for a copy of the taxing master's ruling, which ruling was made available on 31st January, 2019.

4. On behalf of the respondent, the deponent stated that the learned taxing master erred in finding that the claim in the abovementioned suit had been defended yet neither a memorandum of appearance nor a statement of defence were indicated as having been filed. It is thus the respondent's position that items 1 and 23 in the Bill of Costs ought to have been taxed at Kshs.28,000/= and Kshs.14,000/= respectively.

5. The deponent further asserted that the learned taxing master equally erred in allowing items 2, 4, 6, 9, 10, 12, 14, 15 and 16 in the Bill of Costs despite the same not having been provided for under Schedule VII of the Advocates (Remuneration) Order; adding that the taxing master also erred in allowing item 3 in the Bill of Costs taxed at Kshs.10,000/= even after arriving at the finding that no evidence had been adduced to indicate the distance covered during service.

6. The deponent also maintains that the learned taxing master failed to consider the respondent's submissions in arriving at his decision on taxation.

7. The applicant filed Grounds of Objection dated 15th February, 2019 arguing that the application is essentially an abuse of the court process, unnecessary and a mere afterthought intended to delay the proceedings.

8. Parties were directed to exchange written submissions on the application. In respect to items 1 and 23, the respondent contended that the learned taxing master erred in finding that the claim filed on its behalf by the applicant was defended in the absence of evidence suggesting this position, reiterating that the two (2) items ought to have instead been taxed at Kshs.28,000/= and Kshs.14,000/= respectively.

9. It was also the respondent's submission that items 2, 4, 5, 6, 9, 10, 12, 14 and 16 in the Bill of Costs should be entirely taxed off as the

same are not provided for under Schedule VII of the Advocates (Remuneration) Order.

10. In the same manner, the respondent argued that item 3 relating to the drawing and service of a demand letter should equally be taxed off for the reason that the learned taxing master not only failed to appreciate that Schedule VII of the Advocates (Remuneration) Order makes no provision for the drawing of letters, but that the taxing master further failed to consider its submissions to the effect that service of the said demand letter was effected by way of registered post and thus, the applicant was only entitled to postal charges.

11. As concerns items 11 and 13, the respondent has taken the position that the learned taxing master erred in awarding the sum of Kshs.1,000/= each which was more than the Kshs.500/= claimed by the applicant in the respective items. The respondent maintained that the same ought to either have been taxed off completely or taxed as drawn.

12. Last but not least, the respondent has urged that item 15 be taxed off on the basis that the drawing of a request for judgment is not catered for under the above-referenced Schedule VII.

13. In reply, the applicant contended that the respondent not only delayed in filing its notice objecting to the taxing master's decision but also filed the Chamber Summons reference now before this court outside of the timelines provided for under Paragraph 11 of the Advocates (Remuneration) Order.

14. It was the applicant's argument that the explanation brought forth by the respondent for the delay set out hereinabove holds no water and should be disregarded by this court in its entirety.

15. The applicant went ahead to submit that the learned taxing master properly exercised his discretion in taxing the Bill of Costs as he so did, thus offering no basis for interference with the ruling on taxation. Moreover, it was contended by the applicant that all the items set out in the Bill of Costs are well catered for under the Advocates (Remuneration) Order. Reliance was placed on a variety of authorities that have aptly addressed the subject.

16. I have carefully considered the grounds set out in the Chamber Summons, the facts in support thereof, the Grounds of Objection, the rival submissions filed before this court and the germane authorities cited. Having done so, it is of crucial importance for me to first ascertain whether the Reference is properly before this court before addressing its merits.

17. The procedure and timelines for challenging a taxation ruling are stipulated in express terms under **Paragraph 11** of the **Advocates (Remuneration) Order** read as follows:

“(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 his objection.”

18. The record confirms that the applicant did indeed lodge an Advocate-Client Bill of Costs on 24th October, 2017. Going by the record, it is clear the same went before the learned taxing master, D.K. Mungai (Deputy Registrar), who subsequently delivered his ruling on 15th November, 2018.

19. I am able to ascertain from the record that on 29th November, 2018 the High Court registry received the Notice filed by the respondent pursuant to **Paragraph 11(1)** (*supra*) requesting for the reasons forming the basis for the taxing master's decision. In reply, a note was made on the face of the aforesaid notice on 3rd December, 2018 to the effect that the reasons had been incorporated into the taxation ruling.

20. Thereafter, the respondent vide its letter dated 11th January, 2019 requested for a copy of the taxation ruling, though the said letter was received by the High Court registry on 31st January, 2019. The respondent intimated that a copy of the ruling containing the reasons was availed to it on the same date of 31st January, 2019.

21. In view of the provisions of **Paragraph 11(2)** (*supra*), any reference seeking to challenge the ruling ought to have been filed within 14 days from the date of receipt of the reasons influencing the ruling. In the present instance, the respondent filed its reference on 13th February, 2019 being well within the stipulated timelines. I therefore find no basis in the applicant's arguments brought forth in this regard.

22. Having settled the above issue, I now turn to the merits of the reference. It is noteworthy from the record that the learned taxing master relied on Schedule VII of the Advocates (Remuneration) Order, 2006.

ITEMS 1 AND 23:

23. The learned taxing master in addressing item 1 on instruction fees reasoned that the claim was for damages in the sum of Kshs.499,369/= and that the same was defended. Consequently, he went ahead to tax the item at the sum of Kshs.42,000/= as well as awarding item 23 which was half of the amount claimed under item 1 pursuant to Schedule VII.

24. The respondent attached to its reference various documents pertaining to the suit filed before the subordinate court. Therein lies a copy of the request for judgment filed on 20th November, 2014 on the basis that the defendant in that instance had not filed a statement of defence

within the stipulated timelines. There is no indication as to whether judgment was entered. That notwithstanding, it remains uncontroverted that the suit was not defended which points to the fact that the learned taxing master erred in finding otherwise.

25. Nevertheless, the learned taxing master opted to apply the higher scale of Kshs.42,000/= in taxing the instruction fees rather than the lower scale of Kshs.28,000/= proposed by the respondent. Going further, the learned taxing master taxed item 23, being half of the instruction fees, as drawn.

26. Going by the fact that the claim was undefended, the learned taxing master ought to have applied the lower scale pursuant to Schedule VII rather than the higher scale. I am therefore in agreement with the respondent that the taxing master erred in taxing these items as he did. Consequently and in respect to item 1, the lower scale applicable is Kshs.28,000/= whereas item 23 being half of the sum taxed under item 1 would amount to Kshs.14,000/=.

ITEMS 2, 4, 5, 6, 9, 10, 12, 14 AND 16:

27. I have perused the items indicated hereinabove as set out in the Bill of Costs and observed that they concern the receipt, perusal, drawing and photocopying of various documents. I have equally referred to Schedule VII and established that no provision has been made for the taxation of the said items (save for item 16, which to my mind was taxed in accordance with the Schedule). In the premises, I am of the reasoned view that the learned taxing master applied a wrong approach and should have instead taxed off the respective items.

ITEM 3:

28. This particular item concerns the drawing and service of a demand letter. Vide its submissions filed before the learned taxing master, the respondent argued that the amount of Kshs.34,000/= claimed by the applicant in its Bill of Costs was exaggerated, adding that no provision was made for the drawing of letters under Schedule VII (*supra*) and there was equally no proof of service of the demand letter upon the defendant.

29. In the end, the learned taxing master taxed the item at Kshs.10,000/= though noting that there was no evidence of the distance covered in effecting service.

30. Turning to paragraph 8 of Schedule VII, the same provides for costs of service. In the present instance, the respondent submitted that service was effected by way of registered post, though there is no indication as to whether a certificate of posting was availed as evidence of service. In the premises and more so the absence of an indication as to the mode of service, the learned trial magistrate ought to have taxed off the above item.

ITEMS 11 AND 13:

31. On these particular items, the applicant sought the respective sums of Kshs.500/=. On his part, the learned taxing master taxed the same at Kshs.1000/= each. It is my view that the taxing master had no reason to tax the two (2) items at a notably higher amount than what was sought. The same ought to be taxed on the basis of the sums sought.

ITEM 15:

32. Drawing from the Bill of Costs, this item was categorized as: 'Drawing of an application for request for judgment.' Under the same, the applicant sought Kshs.1,100/=. The learned taxing master ultimately taxed the amount at Kshs.500/=.

33. The respondent's argument was essentially that a request for judgment does not constitute an application under Order 51, Rule 1 of the Civil Procedure Rules and hence, this item ought to have been taxed off.

34. Upon perusal of Schedule VII, I am able to ascertain that the above item is not provided for and hence, the same ought to have equally been taxed off.

35. The upshot is that I find merit in the Chamber Summons reference and will allow prayer 1 of the same. Consequently, I hereby set aside the decision of the taxing master dated 15th November, 2018 and order that the Bill of Costs dated 20th October, 2017 be taxed afresh before a different taxing master. Given the nature of the Chamber Summons, I order each party to cater for its own costs.

Dated, signed and delivered at NAIROBI this 25th day of July, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent