



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI HIGH COURT

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 485 OF 2012

THOMAS NJUGUNA MATU.....1ST PLAINTIFF

JANE WAMBUI MULWA.....2ND PLAINTIFF

VERSUS

LILIAN WAMBUI MATHU.....1ST DEFENDANT

DR. ERASTUS FRED.....2ND DEFENDANT

CONSOLIDATED BANK LTD.....3RD DEFENDANT

RULING

1. This is a Reference in which this Court is moved under the provisions of Rule 11 of the Advocates Remuneration Order 2009. The Chamber Summons dated 17th August 2017 seeks the following prayers:-

- 1. The decision of the Taxing Officer delivered on 3rd July, 2017 on the bill of costs dated 23rd June, 2016 on item No. 1 be set aside.**
- 2. The bill be remitted for taxation afresh with appropriate directions.**
- 3. The costs of this application be provided for.**

2. The challenge is only in respect to the Taxation of item 1 of the Party and Party bill of costs dated 23rd June 2016. That item is in respect to Instruction fees.

3. The contention by the Applicants is that Taxing Officer taxed the Bill under schedule 6 of The Advocates Remuneration Order 2009 and 2014 instead of under schedule 6 of 2009 and 2014 orders.

4. The application is opposed and in the Replying Affidavit sworn on 31st August 2017, Counsel John Kariuki takes up two issues. First that there is flagrant, excessive and inordinate delay in filing of the Application. Secondly, that the scale fee applied by the Taxing Officer was that applicable at the filing of the suit.

5. Before considering the merit of the Application it is apposite to first determine whether the Application is properly before Court. In the written submissions by Counsel for the Respondents, it is asserted that the Applicants merely sought for reasons for the Taxing Officer's decision without making a formal objection and that at any rate the letter seeking these reasons was out of time.

6. Paragraph 11 of the Advocates Remuneration Order reads:-

- 11. (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.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired".

7. The decision of the Taxing Officer was dated, delivered and signed on 3rd July 2017 (and not 3rd June 2017 as submitted by the Respondent). Any party wishing to object to the Decision had 14 days within which to notify the Taxing Officer in writing of the items of Taxation to which he/she objects. Promptly, on 6th July 2017, the Applicants' Advocates wrote the following letter to the Deputy Registrar:-

6th July, 2017

The Deputy Registrar

Milimani Commercial and Admiralty Division

NAIROBI

Dear Sir,

RE: HCC NO. 485 OF 2012

THOMAS NJUGUNA MATU & ANOR VERSUS LILIAN WAMBUI MATHU & 2 OTHERS

We refer to the above matter in which Hon Elizabeth Tanui (Deputy Registrar) delivered a ruling on 3rd July 2017.

Kindly issue us with the reasons for the taxation for the purpose of filing a reference.

Yours faithfully

NJUGUNA & PARTNERS.

8. Looking at the letter, Counsel for the Applicants does not use the word 'object' but by making it clear that it requires the giving of reasons for purposes of filing a Reference it would be quiet obvious that the Applicants objected to the said Decision. A Reference is filed only because an Applicant is aggrieved and does not agree with the Decision of the Taxing Officer. Put differently a Reference is filed in objection to the Decision of the Taxing Officer.

9. That said, the Applicant's Notice did not set out the items of Taxation which aggrieved them. Is this infraction serious enough to deal a fatal blow to the Reference proceedings? Party and Party Bill of Costs invariably and typically sets out and gives particulars of the various services rendered or undertaken by the Party or his Counsel. These are the items of the Bill of Costs. A Party may be aggrieved by the Decision of the Taxing Officer on some or all of the items. The purpose of paragraph 11 sub rules 1 and 2 of the Rules is to enable a party desirous of filing a Reference to point out the items of Taxation objected to and to bespeak the reasons of the Decision on those specific items from the Taxing Officer.

10. Now, on the wording of the Rule, it contemplates that a Taxing Officer, can after hearing parties, Tax a Bill in ex tempore fashion, without rendering reasons and only give reasons upon request. However the practice that has emerged, and one to be encouraged, is that Taxing Officers have given reasoned decisions when taxing Bills. Nevertheless even where the Decisions are reasoned, the requirement of paragraph 11(2) for seeking reasons remains because it cannot be assumed that the Decision rendered by the Taxing officer when taxing the bill contains all the reasons for the Decision.

11. Given the intent of paragraph 11, as I see it and explained above, this Court cannot see any prejudice that the Respondent suffered when the Applicants did not specify which item or items it objected to. In the Reference before Court the Applicant specifies that it is aggrieved by item 1 and this gave the Respondent sufficient warning to prepare a reaction to it. And as will be apparent shortly, has ably responded! The omission by the Applicant was, in my view, not fatal and I so hold.

12. It is common course that the suit herein was filed in the year 2012. The Court record shows it was filed on 30th July 2012. The only item that aggrieves the Applicant is on Instruction fees. The Bill shows that the Applicant received Instructions to file suit on 15th July 2011. Which then is the Remuneration Order applicable to the Bill?

13. The Applicants Advocate argue that the Taxing Master erred in principle in applying the 2006 Remuneration Order as opposed to the 2009 Remuneration Order. This argument is without a doubt mistaken! The Advocates (Remuneration) (Amendment) Order 2009 was

published vide Legal Notice No. 20 of 25th March 2009. The Order amended certain schedules to The Advocates (Remuneration Amendment) Order, 2006. But the Amendments were limited. They were only in respect to two out of the ten schedules of the 2006 Order. The two schedules were in respect to fees on sales and purchases of Registered Land, fees on Mortgages or Charges, Equitable Mortgages and Debentures under Schedule 1 and fees on Leases, Agreement for Leases and Tenancy Agreements under Schedule 2.

14. Crucial and important for this matter is that the 2009 order made no amendments in respect to schedule vi of 2006 Order where the Bill herein fell for dealing. The Deputy Registrar was correct when she applied the 2006 order and cannot be faulted.

15. The Reference of 17th August 2017 is without merit and is for dismissal. It is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 15th day of February 2018.

F. TUIYOTT

JUDGE

PRESENT:

Akello for Mubanya for Plaintiff

Mwangi for Kingori for 1st Defendant/Respondent

Dennis - Court Clerk