



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO.404 OF 2016

MWANGI KENGARA & COMPANY ADVOCATES.....PLAINTIFF/APPL

VERSUS

INVESCO ASSURANCE LIMITED.....DEFENDANT/RESP

ARISING FROM

CHIEF MAGISTRATE COURT AT MILIMANI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO.4613 OF 2004

CEPHAS ONYANGO OCHICHO.....PLAINTIFF

VERSUS

GERALD MAINA MACHARIA.....DEFENDANT

R U L I N G

This is a ruling on reference brought by way of chamber summons dated 29th May 2017. It seeks to set aside in its entirety Advocate/Client Bill of Costs dated 6th September 2016 and it be remitted back for taxation.

Grounds on the face of the application are that the learned taxing master erred in principle and law in taxing the bill under Schedule VII of the Advocates Remuneration Order, 1997.

That the taxing master failed to find that the Advocate had made an election under paragraph 22(1) to proceed with taxation under Schedule v part II of the Advocates Remuneration Order and hence the bill could only be taxed under Schedule V part II.

That the taxing master erred in principle by failing to apply legal notice No.159 Of 11/11/2006 and legal notice No.35 Of 1/4/2011 to work done after 17/11/2006 when the 1997 ARO had been repealed.

That the taxing master erred in taxing items 2, 3, 10, 12, 13, 16, 17, 19, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33, 37, 38, 40, 41, 42, 43, 44, 47, 48, 51, 52, 53, 56, 57, 58, 59, 62, 63, 64, 68, 69, 70, 71, 72, 73, 73, 89, 91, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108 and 109.

That the taxing master erred in taxing off Kshs 46,453.32 from the Advocates /Client Bill of Costs.

The application is supported by the annexed Affidavit of Mercy Nduta Mwangi. She averred that the Advocate is aggrieved by the ruling of 6/4/2017 in terms of the above grounds. She attached the said ruling to the Supporting Affidavit.

In response the Respondent/Client filed an Affidavit sworn by Paul Gichui who was the claims and legal manager of the Respondent from 15th July 2005 to 29th February 2008 and from 18th January 2010 to 7th April 2014.

He averred that he personally handled matters and cases relating to the Client/Applicant company.

He averred that there exists an Agreement on Advocates/Client fees, between the Applicant and the Respondent herein which is allowed under s.47 of the ARO provided that it falls within the agreed minimum fees under Schedule II of the ARO.

He averred that the instructions to the Advocate were given on the basis of the understanding that she would charge fees under Schedule VII of the ARO; that as testimonial to this, she drafted an agreement in October 2006 involving 300 matters under Schedule VII of the ARO prevailing then. He added that the Advocate herein charged fees under Schedule VII for work even where they had not done; that the full amount as per the agreement was fully paid but has not been accounted for thus forming the basis of injunction and suit in HCCC NO.633 of 2015

He averred that having charged under the Schedule and received full instruction under the agreement, the Advocate is estopped from disowning the agreement or purporting to move from Schedule VII by giving notice of election to bill or proceed with taxation under Schedule V of the RO. He added that no notice of election was given to the Client before filing Bill of Costs in this matter; and if even if they were to elect, it would be null and void for the above reasons.

He averred that the taxing master has discretion to direct a party to proceed under one Schedule or the other if there are glaring irregularities on record and particularly where the matter is proceeding exparte provided that such discretion is exercised judiciously

He concluded that in view of the fact that the Advocate herein is yet to account for 20 million paid, this hearing ought to be stayed pending the hearing and determination of accounting suit.

I have considered the application herein. I wish to consider Whether the Advocate made an election under paragraph 22(1) of Chapter 16 LOK and the effect of such election if any.

I note from the documents filed herein that the issue of agreement and accounting of money alleged to have been paid is subject of HCCC No.633 of 2015. I will not deal with issue 1 and 2 as I am not privy to proceedings in HCCC No.633 of 2013.

I will consider whether the taxing master erred in assessing costs under Schedule VII instead of Schedule V.

On perusal of the Court file, I note that the Advocate issued notice to the Client dated 6th September 2016. The Bill of Costs was filed on 7th September 2016 it was served together with the Bill of Costs on 13th September 2016.

Paragraph 22 of the Advocates Act CAP 16 LOK provided that notice of election to proceed under Schedule V may be rendered before or at the same time with the Bill of Costs drawn between the Advocate and Client.it is evident that the notice and the Bill of Costs was served on the Client. Both the notice and Bill of Costs were stamped as received by the Client on 13th September 2016. That service is not disputed. Upon election being made the assessment should have been done under Schedule V as provided by paragraph 22 (1).the ground raised by the Applicant herein is valid. The taxing aster erred in principle by failing to apply Schedule while assessing costs.

I note from the ruling delivered by the taxing master on 6th March 2017 that she did state reasons for the items taxed off. She ruled as follows:-

“the other items are taxed off entirely”

I will not interfere with the action of taxing off the items but direct that he gives reasons for taxing off.

The Bill of Costs is hereby remitted back to taxing master for assessment under Schedule V.

Dated and Delivered at Nairobi this 14TH day of March 2018

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

.....COURT ASSISTANT

.....COUNSEL FOR APPLICANT/CLIENT

.....COUNSEL FOR RESPONDENT/ADVOCATE