



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 65 OF 2014

JOHN MATHIAKA KIMUNDU.....PLAINTIFF/APPLICANT

VERUS

LAWRENCE MWANGI T/A LAWRENCE MWANGI &

CO. ADVOCATES.....DEFENDANT/RESPONDENT

RULING

1. This suit was struck out with costs as incompetent by an order of the Court on the 5th March 2015. Thereafter, the plaintiff's party and party bill of costs dated 2nd June 2015 was taxed on the 8th August 2016 in the sum of Kshs.283,960/50.

2. By an application dated 8th September 2016 the Applicant and plaintiff in the case sought an order to stay recovery of the taxed costs, set aside the ruling on the taxation and/or vary the said taxation in respect of item number 1, raising the Bill of costs by one half and awarding getting up fees to the defendant. I have perused the Bill of costs. The taxing officer allowed instructions fees at Kshs.137,853/80 to the defendant.

3. The plaintiff/Applicant urged that the taxing officer ought to have reduced the instructions fees by 25% as the suit was struck out and was never fixed for hearing. Being a party and party bill of costs, the applicant submits that it is subject to **Schedule 6B of the Advocates Remuneration Order 2014** and therefore the taxing officer was in error when she raised the instructions fees by a half .

It is a further objection that as the suit was struck out the instructions fees ought not have been raised by 1/3 as getting up fees.

In the Respondent's notice of objection to taxation dated 19th August 2016, the above issues were stated.

4. In opposing the application the Respondent (defendant) has raised general objections:

(1) That the objection to the taxation was filed out of time on the 23rd August 2016 contrary to Rule 11 of the Advocates Remuneration Order 2014, that is outside the requisite period of 14 days while the

(2) Chamber Summons under Review was filed on the 13th September 2016, thirty seven (37) days later and outside the time allowed. For the above reasons, it is sought that the application be struck out as incompetent.

No objection was raised on the substantive issues on the objections on taxation by the taxing officer.

5. **Schedule 6 of the Remuneration Order 2014** provides for party and party costs for proceedings in the High court.

Section 1(b) provides that:

“To sue or defend in a suit in which the suit is determined in a summary manner whatsoever without going to full trial, the fees shall be 75% of the fees chargeable under item 1(b).

The instructions fees was assessed at Kshs.137, 853.80. There is no objection to the said amount. The case was summarily determined, by having it struck out.

Getting up fees is therefore not applicable. The instructions fees should be reduced by 25% coming to a sum of Kshs.103,390/35.

6. **Getting up fees** under **Schedule 6(2)** of the order should only be applied where issues for trial are joined by the pleadings and parties have taken pretrial directions and preparing the case for trial. But the taxing officer must be satisfied that the case has been prepared for trial See **Schedule 6(2)(ii)(iii) of the Order**. As the case was struck out at preliminary levels getting up fees should not be applied.

In **party and party costs**, as is the case in this application there is no provision for additional one half to the instructions fees. That is only applicable to Advocate-client Bill of costs under Schedule 6B of the order.

It is therefore evident that the Taxing Officer erred in awarding and adding one half fees and getting up fees to the instructions fees which ought to have been reduced by 25% to Kshs.103,390/35.

7. It is evident that the taxing officer erred in taxing the bill – a party and party bill of costs by treating it as an Advocate-client Bill of costs and adding half of the instructions fees of Kshs.79,226/30. The taxing officer ought not have allowed getting up fees of Kshs.45,951/= as the suit subject of the taxation was struck out in its preliminary stages. No issues were framed and no pretrial directions were taken.

8. For those reasons and, there being no objection on the instructions fees of Kshs.137,853/80 this amount is confirmed, but subject to a 25% reduction to Kshs.103,389/=. The getting up fees of Kshs.45,951/= loaded too must be reduced from the said sum of Kshs.103,389/=. That leaves the taxed Bill at Kshs.57,438/75. Added to the above should be disbursements allowed of Kshs.330/= making a total of **Kshs.57,768/75**.

I therefore allow the plaintiffs application dated 8th September 2016 prayer No. 3, and proceed to vary the taxed costs which I have ascertained ought to have been Kshs.57,768/75 as party and party costs.

9. Having made the above findings, I shall now consider the Defendants objections as raised in the replying affidavit. I have stated them above. They are on timelines for filing objections to the taxation.

Clause 11 of the Advocates Remuneration Order 2014 states that an objection or reference to the taxing officers bill of costs ought to be lodged within 14 days from the decision on costs by the taxing officer.

The taxing officer is obligated to record and forward to the objector the reasons for his decisions on the items objected to. The objector upon receipt is to apply, within 14 days to a Judge by Chamber Summons, to be served upon all parties setting out the grounds of his objection. (See **Clause 11(2). Subsection (4)** empowers the High Court in its discretion to enlarge the time fixed by **sub-paragraph (1) or (2)**.

10. I have considered submissions by the applicant. The bill of costs was taxed on the 8th August 2016 in the absence of both parties. 14 days to lodge an objection therefore expired on the 22nd August 2016.

In his supporting affidavit the applicant annexed the Notice of Objection addressed to the Deputy Registrar. It is dated 19th August 2016 within the 14 days of the taxation but filed on the 13th September 2016, outside the stipulated period.

It itemises the items objected to and grounds for the objection. It is stated to be served upon the respondents.

11. It is evident that the objection was lodged out of time, and 21 days outside the requisite period allowed under the rules. The opposition by the respondent is therefore merited. I have not seen any pleading where the applicant has sought extension of time to file the objection and/or deem the same as duly filed within the stipulated time.

12. The court has powers to stay execution of taxation for costs under the procedure provided in the **Civil Procedure Rules. Sections 94** of the Civil Procedure Act provides a general rule that execution of orders should await confirmation of costs by the taxing officer unless the court grants leave for execution before taxation. See **Labh Singh Harman sing -vs- A.G & 2 Others (2016) e KLR**. The Respondent has not extracted a certificate of costs nor obtained judgment on costs to be able to extract the decree for purposes of execution. Without the decree, there can be no execution.

13. Having stated that the objection was filed out of time and therefore candidate of dismissal, I want to ask myself what justice it will do to the applicant if the court proceeds to strike out the objection, that would lead to the plaintiff paying more than is allowed under the **Advocates Remuneration Order 2014**. The **Constitution of Kenya Article 159(2) (d) and Section 1A, 1B and 3A of the Civil Procedure Rules** enjoin the courts to do substantive justice as opposed to procedural technicalities that do not go into the merit or demerits of the case.

The Oxygen principles stated under the Civil Procedure Act above enjoin that justice be dispensed fairly and expeditiously to meet ends of justice.

14. I therefore come to the findings that the applicants prayer for stay of execution to be premature as no execution can issue without a decree.

The taxing officer's ruling delivered on the 8th August 2016 is set aside and varied in the following manner, that the party and party bill of costs dated 2nd June 2015 is re-assessed and adjusted to Kshs.57,438/75.

Interim orders of stay of execution issued on the 10th October 2016 are discharged.

Each party shall bear its own costs of the application.

Dated, Signed and Delivered this 13th Day of April 2017.

J.N.MULWA

JUDGE