



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISCELLANEOUS CAUSE No 748 OF 2007**

**MURIU MUNGAI & Co ADVOCATES ..... APPLICANT**

**VERSUS**

**NEW KENYA CO-OPERATIVES CREAMERIES LTD ..... RESPONDENT**

**RULING**

1.The Matter now before the Court seemed to have had a long and convoluted history. It relates to a bill of costs dated 2<sup>nd</sup> May 2007. The Matter first came before this Court on 12<sup>th</sup> February 2017. Counsel for the Respondent Advocate told the Court that there was an Application that had been filed on 9<sup>th</sup> April 2009. The Arguments were filed (I assume that means written submissions) on 20<sup>th</sup> July 2010 and the Ruling was reserved to be delivered on 21<sup>st</sup> October 2010. In fact it had not been delivered. There was a Ruling on the file, and that ruling it was explained was dealing with the Application for extension of time. This Application seeks a reference. The Parties agreed that the Proceedings should first be typed and then confirmed by the Parties before a Ruling date is taken. The Court gave the Appropriate directions and on 28<sup>th</sup> October 2015 it was confirmed that the proceedings were typed and the Parties were happy to take a Ruling date. Unfortunately, that Ruling date was not met. In addition there was correspondence sent to the Deputy Registrar stating that the Parties wished for a mention date to file a consent. Again that does not seem to have been done. In the event that the Parties wish to file a Consent, that would take precedence over this decision.

2.The Application dated 9<sup>th</sup> April 2009 was in fact filed on 14<sup>th</sup> April 2009. It seeks the Orders that:

(1) The decision of the Taxing Officer delivered on 12<sup>th</sup> March 2008 as far as the same relates to taxation of the entire Bill of Costs dated 2<sup>nd</sup> May 2007 and/or as far as the same relates to items 1 and 2 of the Bill of Costs herein be and is hereby set aside.

(2) The Honourable court be pleased to refer back the matter to the Taxing Officer for re-taxation of items 1 and 2 of the Bill of Costs herein and with proper direction thereof.

(3) In the alternative to prayer 2 above, the Honourable Court be pleased to strike out the entire Bill of Costs and/or re-tax the said items 1 and 2 of the Bill of Costs herein.

(4)The Costs of the application be borne by the Applicants.

3. The Application was based on the Grounds which appear on its face. However, it helps to set them out

verbatim. They are that:

(a) The entire bill of costs is legally untenable and non-maintainable in law as at all material times there existed an agreement for fees between the client and the Advocate hence disentitling the Advocate from filing a Bill of Costs as legal fees for the transaction the subject matter of the Bill of Costs herein had already been agreed upon. Further and in the ALTERNATIVE;

(b) Taking into account the nature of instructions given to the Advocates and the extent of their involvement in carrying out such instructions as well as all other relevant circumstances the instructions fees allowed under item 1 of the Bill of Costs thereon at Kshs.55,750 and VAT thereon of Kshs8,920/= on item 1 is manifestly excessive as to represent an error of principle on the part of the Taxing Officer.

(c) In taxing item 1 of the Bill of costs herein, the Taxing Officer erred in principle in failing to appreciate the true nature of the instructions given to the Advocates by the client and the application of the provisions of paragraph 18 and 23 A of the Advocates (Remuneration) Order in determining the instructions fee thereon.

(d) Although the Notice of Objection was filed out of time on 10<sup>th</sup> April 2009, an application to enlarge such time was filed on 22<sup>nd</sup> May 2008 and allowed on 25<sup>th</sup> June 2008, the Taxing Officer requested to record and furnish to the Client/Respond his reasons for the decision on taxation of items 1 and 2 of the Bill of Costs in terms of the provisions of paragraph 11(2) of the Advocates (Remuneration) Order and a further reminder filed in court on 3<sup>rd</sup> July 2008 and 23<sup>rd</sup> January 2009 on reasons were furnished as requested;

(e) Pursuant to a consent entered by the parties before the Deputy Registrar Hon. Okato on 3<sup>rd</sup> April 2009 the reasons for taxation are deemed contained in the taxation ruling.

4. As stated above, the Advocates filed Grounds of Opposition. They oppose the Application on the Grounds that:

1. The application is incompetent and fatally defective for failure to comply with mandatory provisions of the Law;

2. The affidavit filed in support of the application is fatally defective and bad in law and it should be struck out

3. The application is an afterthought and intended to delay end of litigation;

4. The reasons for the delay have not been explained adequately.

5. The Dispute relates to the Taxation of a Bill of Costs. The Bill of Costs was taxed by Hon [Ongeri] at KShs.64,670. In her Ruling the Taxing Officer set out her analysis of each item and the amount she came to. In relation to item 1 she arrived at a fee of Kshs.55,750. Item 2 was VAT charged at 16% amounting to Kshs,8,920/=. The Case for the Client is that the Taxing Officer either misdirected herself by taxing those costs in the face of an alternative agreement or they are manifestly excessive. The Advocates dispute the existence of an agreement. The Client alleges the Agreement is NCK 4 of the Annexure. Clearly that was evidence before the Court. That is a letter. It did not convince the Taxing Officer that it was an agreement and this Court is not persuaded by that evidence. It does not set out the terms of the agreement. There is nowhere that signifies compliance. In fact the earlier letter of 2<sup>nd</sup> February 2005 (NCK 6) states that all previous agreements are no longer valid. There is no evidence to show how they became valid again or if there was a new agreement, what were the terms.

6. **Rule 11** of the **Advocates Remuneration Order 2009** provides:

*“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 change by chamber summons which shall be served on all the parties concerned, setting out the grounds of his objection...”*

7. Secondly, is the Taxation manifestly excessive? The Client has put forward no evidence as to what would be the correct figure on the scenario before the Court. In the circumstances, the argument for manifest error is not made out.

8. The Advocates, in argument put before the Court Rulings on different Bills of Costs between the same Parties where the Client has raised the same arguments without dealing with the specifics of each taxation. On each of those earlier occasions the Client was unsuccessful. Be that as it may, but each Bill and Taxation must be judged on its own merits. In this case, the Applicant Client has failed to demonstrate manifest error. It has failed to demonstrate that the Bill is manifestly excessive and it has failed to demonstrate any other reason of sufficient weight to interfere with the discretion of the Taxing Officer. In the circumstances, the Application is dismissed with costs. It is appropriate that the Client pays the costs because it was unsuccessful and has added to the delay in the Advocate being paid. Interest to be applicable to sums due at a rate of 14% pa from the date of the taxation until payment in full.

**Order accordingly,**

**FARAH S. M. AMIN**

**JUDGE**

**Signed and Delivered on the 16<sup>th</sup> day of May 2017**

In the Presence of:

Court Assistant: Mr Patrick Mwangi

Mr Monari Holding Brief for Mr Mereka for Advocates

No Appearance for the Clients