



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

**MISC. APPL. NO. 1106 OF 2013**

**ABUODHA & OMINO ADVOCATES..... PLAINTIFF/ADVOCATE**

**V E R S U S –**

**CONSTITUENCY DEVELOPMENT FUND.....RESPONDENT/CLIENT**

**RULING**

1. The subject matter of this ruling is the summons dated 26<sup>th</sup> October, 2015 in which Constituency Development Fund Board, the Respondent/Client sought for the decision of the taxing officer on the Advocate-Client Bill of costs to be set aside and or altered and for the same be referred for re-taxation and or this court re-assesses the costs. The summons is supported by two affidavits of Simon Ndweka. When served, Abuodha & Omino Advocates filed the replying affidavit of Franklin Omino and a notice of preliminary objection to oppose the summons. When the summons came up for hearing, learned counsels appearing in this matter recorded a consent order to have the same disposed of by written submissions.

2. I have considered the grounds stated on the face of the summons and those stated on the notice of the preliminary objection plus the facts deponed in the supporting and the replying affidavits. I have also considered the rival submissions. It is the submission of the Respondent Client that by the time of filing the summons the taxing officer had not given reasons and that the Client was apprehensive that the advocate was likely to commence execution proceedings hence it was prompted to file this application. The Client pointed out that its advocate requested for reason on three occasions i.e on 18/9/2015, 9.10.2015 and 9/2/2016.

3. The Respondent/Client is of the view that it acted diligently but was not supplied the reasons in time hence it cannot be blamed for the delay. The reasons were eventually supplied on 16.2.2016. For the above reasons the Respondent/Client is of the view that the current reference is properly before this court. It is the further submission of the Respondent/Client that the Applicant/advocate was fully paid his fees of 754,000/= as per the agreement dated 25.6.2013 hence there was nothing which should have gone to taxation. This court was urged to find that the taxing officer erred in law and in principle by ignoring the consent order recorded on 14.5.2015

4. The Respondent/Client also contends that the taxing officer erred in law and in principle in not applying Schedule VI (A) (1) (1) of the Advocates (Remuneration) Order which deals with prerogative orders where the minimum fee is kshs.28,000/=. The Respondent/Client also accused the taxing officer of failing to consider the submissions of the parties and the value of the subject matter involved and the nature and importance of the matter plus the interest of the parties and the general conduct of the proceedings.

5. In response to the Clients' submissions, the Applicant/advocate argued that by way of a preliminary objection, the reference was filed out of time hence this court is not seised with jurisdiction. The

Applicant advocate pointed out that immediately after the ruling was delivered the Client raised objections over items no. 1, 28, 29, 32, 34 and 35. The Client was prompted to seek for reasons which reasons were supplied on 21.9.2015. Basically the Client was told reasons were contained in the ruling. It is the submission of the Applicant/advocate that the Respondent/Client appears to have been dissatisfied with the reasons given but did not file any application until 27.10.2015, two months after the reasons were supplied. The advocate was of the view that by the time the reference was filed the 14 days allowed for one to file a reference from the date of supply of reasons had lapsed. The Applicant/advocate has accused the Client of attempting to stamp the letter advising on the reasons to look like the same was received on 2/11/2015. In short the advocate's preliminary objection is based on two grounds namely: First, that the reference was filed out of time and without leave of court and that the same was filed before supply of reasons, then it is premature hence unsustainable.

6. The Applicant/advocate also challenged the merits of the reference. It is argued that the taxing officer did not commit an error of principle and neither was the award high nor low hence this court has no jurisdiction to interfere. It is also pointed out that the reference is based on 2006 but the taxing officer properly applied the remuneration order of 2009. The Applicant/advocate argued that the consent recorded was in respect of the reinstatement of the application dated 22.09.2016 which had been dismissed for non-attendance and not to compromise the bill of costs as submitted by the Client.

7. Having considered the divergent arguments I take the following view of this matter. The first issue is whether or not this reference is competently before this court? I have already stated that it is the view held by the Applicant/advocate that the same was filed out of time and without leave of court. While the Respondent Client is of the contrary view. There is no dispute that the taxing officer taxed the advocate-Client bill on 17.9.2015 at ksh.4,024,592/=. The Client being dissatisfied filed a notice of objection on 18.9.2015 and requested for reasons. It would appear no reasons were forthcoming and this prompted the Client to send reminders on 9.10.2014 and on 09.02.2016. It would appear from the letter attached to both the replying affidavit of Franklin Omino and the further affidavit of Simon Ndweka that the taxing officer through the executive officer informed the Respondent/Client that the reasons were contained in the ruling. In the letter annexed to the further affidavit of Simon Ndweka, it shown the same was received on 2/11/2015 while the one annexed to the replying affidavit of the advocate, there is no stamp showing when it was received. The advocate has raised doubt as to the genuinity of the date of receipt. The learned advocates suspects the stamp was backdated. I have on my part examined the same and I am convinced that there was no evidence to show the date of receipt of the taxing officer's letter was backdated. It is possible the executive officer delayed to supply the letter to the Respondent Client. I am satisfied the same was served upon the Client's advocate on 2/11/2015.

8. The Respondent Client has informed this court that it was forced to file this reference when it found that reasons were not forthcoming from the taxing officer. This court has been urged to hold that in the circumstances the reference was prematurely filed, therefore it is incompetent. I have perused the summons and it is specifically pleaded that the taxing officer had not supplied reasons to the Client by the time of filing the reference. The question as to whether or not a reference filed before the reasons are supplied is incompetent was answered by the Court of Appeal in the case of **Kipkorir Titoo & Kiara Advocate vs= Deposit Protection Fund Board, 2005 1K.L.R at p. 535** as follows:

***“Although there was no strict compliance with Rule 11(2) of the order, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons of the ruling is another matter. Indeed, we are of the view, that if a taxing officer totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not be in itself preclude the objector from filing a competent reference.”***

9. In sum, I find the reference herein to be competently before this court. My finding here disposes of the preliminary objection raised by the Applicant advocate.

10. On the merits of the reference, the Respondent/Client has put forward various grounds to beseech this court to upset the decision of the taxing officer. However, I think the main ground which commends

itself for consideration is the question as to whether or not the taxing officer considered the Client's submission that the parties had a written agreement on fees. Both parties admit there they executed an agreement on the advocate fees. The Applicant/advocate is of the view what the agreement was in respect of another application which had been dismissed for want of attendance. The Client is of the view that the agreement is in respect of the subject matter of this reference. I have carefully perused the ruling and reasons for taxation delivered on 17.9.2015 by Hon. F. R. Wangila, learned taxing officer. It is apparent on the face of it that the learned taxing officer did not at all consider the issue touching on the agreement on fees. I have purposely avoided making a determination over the issue because I am convinced that the taxation should be done afresh before another taxing officer.

11. On this singular ground I allow the summons dated 26<sup>th</sup> October 2016. Consequently, the taxing officer's decision delivered on 17.9.2015 is set aside rehearing of the above.

**Dated, Signed and Delivered in open court this 19<sup>th</sup> day of August, 2016.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent