



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. APPLICATION NO. 74 OF 2016

MURIMI & COMPANY ADOCATES.....ADVOCATE/RESPONDENT

VERSUS

KENYA PIPELINE COMPANY LIMITED.....CLIENT/APPLICANT

RULING

Introduction.

The Respondent/Advocate (hereinafter referred to only as “the Respondent”) filed Advocate/Client Bill of Costs dated 9th May 2014 (hereinafter referred to only as “the Bill”) on 12th May 2014 for taxation in respect of the services that the Respondent had rendered to the Client/Applicant (hereinafter referred to only as “the Applicant”) in HCCC No. 2577 of 1990 (hereinafter referred to as “the High Court suit”). The Bill was filed in the High Court as Miscellaneous Application No. 437 of 2014. The application was transferred to this court and registered as ELC Miscellaneous Application No. 74 of 2016 which is its current case number.

The Applicant was served with a Notice of Taxation. Before the matter was transferred to this court, the Applicant had filed submissions in response to the Bill and had indicated to the court that the decree in the High Court suit on which the Respondent had based its instruction fees was contested as it was drawn irregularly without the same having been forwarded to the Applicant for approval. Since the court file for the High Court suit was before this court as it concerned a land dispute, an order was made by the High Court Deputy Registrar on 6th April 2016 that the Bill be taxed by the Deputy Registrar of this court. The matter was first mentioned before the Deputy Registrar of this court on 29th June 2016 when only the advocate for the Applicant appeared. On that day, the Applicant’s advocate informed the Deputy Registrar that the Respondent had indicated to him that it wished to withdraw the Bill. The Deputy Registrar stood over the matter generally for the Respondent to move the court when ready to tax its Bill.

The court on its own motion fixed the Bill for mention on 9th August 2018. The mention notice was served upon the Respondent’s advocates. With regard to the Applicant’s advocates, the process server indicated that they had vacated their offices and had moved to unknown place. They were therefore not served. When the Bill came up for mention on 9th August 2018, there was no appearance by both parties. That notwithstanding, the Deputy Registrar fixed the Bill for taxation on 1st October 2018 and ordered that the parties be served with notices to appear on that date. Once again, only the Respondent’s advocates were served with a Notice of Taxation. The Applicant’s advocates were not served. Come 1st October 2018, again there was no appearance by both parties. On that date, the Deputy Registrar without representation from any of the parties fixed the Bill for ruling on 25th October 2018. The ruling was not delivered on 1st October 2018. It was ultimately delivered the following year on 11th July 2019 in the absence of both parties. There is no indication on record that any of the parties was served with a notice for the delivery of the said ruling. In the ruling, the Senior Deputy Registrar (Hon. I.N. Barasa) (hereinafter referred to only as “the taxing officer”) taxed the Respondent’s Bill at Kshs. 2,312,597.36 all inclusive. In the said ruling, the taxing officer stated that the Bill was to be taxed under the Remuneration Orders of 1983, 1993, 1997, 2006 and 2014. The taxing officer considered the Applicant’s written submissions that were on record on the various items on the Bill more particularly the instruction fees that the Applicant had submitted should have been based on Kshs. 28,972,868/- which was the correct decretal amount rather than the sum of Kshs. 65,219,127.48/- on which the Respondent had based the instruction fees claimed in the Bill. The taxing officer stated that after perusing the record of the High Court suit, the submissions by the Applicant, the judgment in the High Court suit made on 1st August 2013, the time it took for the suit to be finalized and the interest of the parties in the said suit, she was persuaded that an instruction fees of Kshs. 1,000,000/- was fair and reasonable in the circumstances. The taxing officer therefore awarded the Respondent a sum of Kshs. 1,000,000/- as instruction fees.

The taxing officer did not indicate the Advocates Remuneration Order(ARO) that she used to arrive at the said amount and whether the amount was based on the decretal amount of Kshs. 28,972,868/- that the Applicant had claimed to be the correct decretal amount or Kshs. 65,219,127.48/- on which the Respondent had based the amount that it had claimed as instruction fees in the Bill. The taxing officer did not also indicate what the basic instruction fees was and whether she increased or reduced the same and the reason for doing so. The taxing officer thereafter proceeded to tax the other items in the Bill once again without any indication as to the Advocates Remuneration Order (ARO) that was being used for each item.

The Application before the court:

What is now before the court is a Chamber Summons application dated 9th April 2021 by the Applicant brought under Articles 25(c), 50, and 159 of the Constitution, Paragraph 11 of the Advocates Remuneration Order, 2009 and Section 3A of the Civil Procedure Act and all other enabling provisions of the law. In the application, the Applicant sought the following main orders;

1. THAT the court be pleased to extend time for filing a reference against the ruling of the taxing officer, Hon. I.N.Barasa (taxing officer) delivered on 11th July 2019.
2. THAT reference filed herein be deemed as properly filed within the stipulated time.
3. THAT the findings and ruling of the taxing officer in which she taxed the Respondent's Bill at Kshs. 2,312,597.36/- be set aside.
4. THAT the Bill be taxed a fresh.
5. THAT in the alternative the court be pleased to interrogate the Respondent's Bill in light of actual work done and adopt the Applicant's submissions filed before the taxing officer and make an appropriate award in place of the award that was made by the taxing officer.
6. THAT the court be pleased to adjust the contested items as the justice of the case may require, in lieu of remitting the same to the taxing officer.
7. THAT the cost of this application and of the Bill be paid by the Respondent.
8. THAT the court be pleased to make any such other order and or orders as it may deem just and appropriate in the circumstances.

The application was based on the grounds on the face thereof and on the supporting affidavit of Flora Okoth sworn on 9th April 2021 and supplementary affidavit of Elizabeth Rop sworn on 6th July 2021. The Applicant contended that the matter was mentioned before the taxing officer on 9th August 2018 in absence of the parties when the taxing officer directed that the Bill proceeds to taxation on 1st October 2018. The Applicant averred that on 1st October 2018 in the absence of the parties, the taxing officer reserved a ruling date. The Applicant averred that the court file was not made available until July 2020 and that the ruling on taxation dated 11th July 2019 was not supplied to the Applicant until March 2021 despite the payment for the same having been made on 28th July 2020. The Applicant averred that the said ruling was delivered despite the expressed intention by the Respondent to withdraw the Bill being on record.

The Applicant averred that its advocates had relocated from their offices at ACK Garden House in January 2015 and that there were letters on record received by the court indicating their new offices at Lenana Towers, 8th Floor, Lenana Road when the service of the taxation notice was ordered by the taxing officer. The Applicant averred that its advocates were not aware of the ruling of 11th July 2019 until 22nd July 2020 when they tried to fix the matter for taxation and were notified of the existence of the ruling.

The Applicant contended that the taxing officer made errors of principle in the said ruling in that at the time of considering the Bill and rendering the ruling, there was a pending application before court to set aside the decree that was unilaterally extracted against the Applicant in the High Court suit which application was determined on 18th April 2018 and a fresh decree issued on 8th June 2020 in the sum of Kshs. 27,943,111.63 from Kshs. 65, 219,127.48 on which the Respondent had based its instruction fees. The Applicant averred that it had raised the question of the contested decree of Kshs. 65, 219,127.48 in its submissions in response to the Bill hence the taxing officer ought to have awaited the court's decision on the issue as she did not have the correct value of the subject matter to assess instruction fees and getting up fees.

The Applicant averred further that the taxing officer erred in principle in not setting forth which Advocates Remuneration Order (ARO) she applied considering the fact that the High Court suit in which the Respondent had represented the Applicant was filed in 1990. The Applicant averred that the taxing officer also erred in not dismissing the Bill for want of prosecution since the Respondent had lost interest in the same. The Applicant averred further that it was not contested that it had made part payment to the Respondent amounting to Kshs. 846,358.00/- which the taxing officer did not consider in her ruling. The application was served upon the Respondent but it did not file a response thereto. The Applicant filed written submissions dated 9th July 2021 in which it cited several authorities in support of the prayers sought in the application.

Determination:

I have considered the Applicant's application together with the affidavits filed in support thereof. I have also considered the written submissions and the authorities cited in support of the same. The Applicant's application has four limbs; the Applicant has sought extension of time within which to file a reference, an order that the reference filed out of time be deemed as properly filed, an order setting aside the taxation by the taxing officer and finally, an order either remitting the Bill back to the taxing officer for taxation or proceeding with the taxation of the contested items.

Paragraph 11 of Advocates Remuneration Order (ARO) provides as follows:

- “(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.”

Paragraph 11(4) of the ARO provides that:

“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.”

The Applicant’s application is not opposed. The reasons put forward by the Applicant as to why it failed to file a reference on time are not controverted. I am satisfied that the Applicant’s prayer for extension of time within which to file a reference is merited. On its prayer that the reference filed herein be deemed as properly filed within the stipulated time, I am of the view that it would not be appropriate to do so in the circumstances. I have noted that the Bill had a total of 181 items. In its submissions before the taxing officer, the Applicant had conceded to several items and had at the same time contested a number of items. In her ruling, the taxing officer taxed all the items that were contested. Under paragraph 11 (1) of Advocates Remuneration Order (ARO), the Applicant was supposed to give a notice of objection in which it was required to set out the items in the Bill whose taxation it was objecting to. The Applicant did not file a Notice of Objection under that paragraph and as such it is difficult for the court to know the items in the Bill in addition to the instruction fees whose taxation are being contested. I am of the view that the proper way of dealing with the situation is to extend time for the Applicant to file a Notice of Objection setting out clearly the items in the Bill whose taxation it is objecting to and thereafter or simultaneously to file a reference. I would not have hesitated to deem the reference herein as having been properly filed if the Applicant had filed a Notice of Objection even if it was filed out of time. In the absence of a Notice of Objection, the court will find it difficult to determine the reference as it will proceed on assumptions. Due to the foregoing, I will not consider whether or not the taxing officer erred in her ruling of 11th July 2019. The little said on the merit of the ruling the better so as not to embarrass the court that will hear the reference to be filed by the Applicant.

Conclusion:

In conclusion, I hereby make the following orders;

1. The time within which the Applicant was to file a Notice of Objection to the ruling on taxation delivered on 11th July 2019 is extended by 21 days from the date hereof.
2. Since the Applicant already has a copy of the ruling by the taxing officer, the Applicant shall file the Notice of Objection and the reference to the said ruling delivered on 11th July 2019 together within 21 days from the date hereof.
3. Pending the hearing and determination of the reference to be filed by the Applicant, execution of the ruling and orders made by the taxing officer Hon. I.N.Barasa SDR on 11th July 2019 is stayed.
4. The stay order shall lapse automatically if the reference is not filed within 21 days from the date hereof.
5. The cost of the application shall be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 10TH DAY OF FEBRUARY 2022

S. OKONG’O

JUDGE

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERRING PLATFORM IN THE PRESENCE OF:**

MR. OPWAKA H/B FOR MR. KISAKA FOR THE APPLICANT

N/A FOR THE RESPONDENT

MS. C.NYOKABI-COURT ASSISTANT