



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 6 OF 1991

DANSON MUTUKU MUEMA.....APPLICANT

VERSUS

JULIUS MUTHOKA NDOLO

PETER NGILA

JOSEPH MAWIA.....RESPONDENTS

E.B. MUTISO (DECEASED)

PHILIP NGEZI

RULING

- 1). The reference dated 16-6-2003 seeks orders that the decision of the taxing officer dated 6-6-2003 be set aside and the amount allowed be substituted with an amount consistent with the provisions of the Advocates (Remuneration) order.
- 2). That in the alternative the bill of costs be remitted for re-taxation.
- 3). The reference is based on the following grounds:
 1. **The taxing officer erred in refusing to comply with the mandatory provisions of paragraph II (2) of the Advocates (Remuneration) Order. She erred in failing to assign specific reasons for her decision in respect of the items for which objection were raised under paragraph II (1) of the said order.**
 2. **The decision of the taxing officer in respect of amounts charged for instructions in respect of interlocutory applications are inexplicably varied thereby manifesting caprice hence an error in principle.**
 3. **The decision of taxing officer was in gross misconception of the principle governing taxation hence a misdirection.**
 4. **The taxing officer erred in allowing items in respect of letters and perusals the necessity of which were not disclosed in the appellant's Bill of Costs.**
 5. **The amount allowed on taxation was so excessive as to amount an error in principle.**
- 4). The reference is supported by the affidavit sworn by the applicant's counsel, Francis Mwanzia Mulwa. It is stated that the objectors were dissatisfied with the ruling on taxation. That pursuant to paragraph No. 11 (1) of the Advocates (Remuneration) Order, the applicant came to the taxing officer requesting for the reasons in the decision on the following items:

- a. **Item 1,5a,22a, to 22e,26,27a,27b and28a,33a,45a,47a,48a,67.**
- b. **All items in respect of letter whose purpose was not disclosed in the Bill of Costs.**
- c. **All items in respect of perusal of letters whose purpose was not disclosed in the Bill of Costs.**
- d. **Items 117,121,122,123,124 and 126.**
- e. **Items 132d and 133.**

5). It is further stated that the taxing officer failed to give reasons for the decision and only made a comment “as per final ruling”.

6). The reference was opposed as per the grounds of objection filed on 23-1-2004 and the replying affidavit sworn on 5-3-2012. It is stated that the reference is an abuse of the process of the court in that the taxing officer gave a ruling dated 15-5-2003 which ruling was in accordance within the rules. That this was a second taxation following a previous objection and therefore a further review cannot be carried out. That the amount taxed, Kshs. 96,023/= is not so inordinately high taking into account the nature of the case which involved numerous court attendances and interlocutory applications and the time counsel spent in court. That the application has been overtaken by events in that the taxed costs were paid in the year 2004 and it would be unfair to reopen the matter.

7). The reference was canvassed before me by way of written submissions which I have duly considered.

8). A perusal of the court record discloses that a similar application was made following the ruling by the taxing officer dated 10-5-2001. The costs were taxed at Kshs. 200,138/=. The taxation was set aside and the matter remitted for re-taxation by a different taxing officer. On 15-5-2003, the costs were taxed at Kshs. 96,023/=. That is what has triggered the current application. I will therefore consider the principal prayer herein and consider whether the amount taxed is consistent with the Advocates (Remuneration) order. There are no merits in remitting the Bill of Costs for re-taxation before a different taxing officer for a third time.

9). On whether the taxing officer refused to give reasons for her decision in respect of the items that were objected to, paragraph No. 11 (2) of the Advocate’s (Remuneration) order provides as follows:

“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”

10). A perusal of the court record discloses a ruling by the taxing officer 15-5-2003. The said ruling gives reasons for the taxation. It was therefore not necessary for the taxing officer to give more reasons as the reasons were already on the record. As stated by Hon. Ochieng J in the case of **Ahmednasir Abdikadir & Co. Advocates –VS- National Bank of Kenya Ltd (2) [2006] 1 EA 5** in which he held as follows:

“Although rule 11 (1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in all the Bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of sub-rule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling”.

11). I have considered schedule VI of the applicable Advocate (Remuneration) order. On the instruction fees (item No. 1) of the Bill of Costs, the amount charged is Kshs. 100,000/=. The taxing officer allowed Kshs. 77,500/= the particulars of the service rendered are reflected as “Lodging an appeal” in a complex

land matter with two consolidated cases which involved considering the proceedings and the points of law”

12). The (Remuneration) order provides for a reasonable sum but not less than Kshs. 4,500/=. The taxing officer exercised discretion and awarded Kshs. 77,500/=. It is clear from the record that the suit involved two cases that were consolidated. It was not just a simple matter of access to a dam as argued by the objectors’ counsel. It was a case of trespass to land and interference with a common boundary. It was a complex matter and the taxing officer properly exercised her discretion.

13). As stated by the court of appeal in **Kipkoriri, Titoo & Kiara Advocate –VS- Deposit Protection Fund Board:**

“On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing office unless the taxing officer, erred in principle in assessing the costs. In Arthur –VS- Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this court said at page 492 paragraph 1:

“Where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases”.

An example of an error of principle is where the cost allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles see **Arthur –VS- Nyeri Electricity Undertaking (supra)** or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit **(see Devshi Dhanji –VS-Kanji Naran Patel (No. 2), [1987] KLR 243”**.

14). I have considered all the other items complained about concerning the drawing of applications, opposing applications, site visit and perusal of letters bearing in mind the total amount taxed herein and cannot fault the taxing officer in the manner in which she exercised her discretion. The taxing officer substantially complied with schedule IV and the proviso thereto.

15). With the foregoing, I find not merit in the reference filed and dismiss the same with costs.

Dated, signed and delivered at Machakos this 21st day of December, 2015.

B. THURANIRA JADEN

JUDGE