

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS CIVIL APPLICATION NO.58 OF 2011

IN THE MATTER OF THE ADVOCATES RENUMERATION ORDER

GERALD O. KIMANGA.....ADVOCATE/APPLICANT

t/a KIMANGA & COMPANY ADVOCATES

VERSUS

CHARLES K. TANUI.....CLIENT/RESPONDENT

R U L I N G

On 29th April 2011 the Deputy Registrar taxed items 1 and 2 of the bill of costs presented by Gerald O. Kimanga t/a Kimanga & Company Advocates (applicant) against his client Charles K. Tanui (respondent) in respect of **Kisumu HCCC No.42 of 2005** at Kshs.855,959/70. The respondent had sued National Bank of Kenya Limited over a facility extended to him and in respect of which there was an outstanding repayment of Kshs.62,604,948/=. The suit was filed through Balongo & Company Advocates. While it was pending, Balongo advocate was appointed to the Electoral Commission of Kenya. The respondent instructed the applicant who filed a notice of appointment on 20/9/05. He remained on record until a notice of withdrawal was filed on 21/8/09. The bill had sought Kshs.1,681,213/50. However, the contested items were 1 and 2. Item 1 was in respect of Kshs.969,074.= being instructions fees to file the suit and item 2 being VAT at 16% which came to Kshs.155,052/=. The suit was finally settled at Kshs.9,100,000/=.

It is clear that the Deputy Registrar did not give any reasons why he taxed instructions fees in item 1 at Kshs.500,000/=.

A decision on taxation can only be interfered with by the High Court under the provisions of sub-paragraph 2 of paragraph 11 of the Advocates (Remuneration) Order if either an error of principle is disclosed or the award is manifestly excessive (**STEEL CONSTRUCTION AND PETROLEUM ENGINEERING (EA) LTD. .V. UGANDA SUGAR FACTORY LTD. [1970] EA 141**). An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles or where the taxing officer has over-emphasised the difficulties, importance or complexity of the suit (**C. KIPKORIR, TITOO AND KIARA ADVOCATES .V. DEPOSIT PROTECTION FUND BOARD, Civil Appeal No.220 of 2004 at Nairobi**)

Lastly, a taxing officer should give reasons for his assessment of the costs on each item. Such reasons are essential when the judge is giving consideration to a reference. The reasons enable the judge to determine whether or not the taxing officer may have taken into account irrelevant factors, or if he has failed to take into account relevant factors; or if the officer has erred in principle (**NYAMOGO AND NYAMOGO ADVOCATES .V. KENYA BUS SERVICES, Nairobi High Court (MILIMANI) Misc. Civil Appl. No.587 of 2004**).

I have indicated in the foregoing that the taxing officer did not give any reasons for the taxation on the items. A taxing officer has the sole discretion and responsibility to decide the amount payable. Every judicial discretion, however, has to be based on reasons. This is a public function which has to be done in a transparent and accountable manner. Parties and the public are entitled to reasons when a court is making the decision so that they don't go away feeling that there was caprice, arbitrariness or

oppression in the determination.

Further, a bill of costs is a factual statement of services rendered and disbursements made. If any of the facts alleged in the bill are shown to be untrue, for instance, if it is shown that a particular service charged for has not been rendered or that a particular disbursement has not in fact been made, the relevant item in the bill will be taxed off (**BALWANTRAI D. BHATT .V. AJEET SINGH AND ANOTHER [1962] EA 103**). In the instant case, it is clear that the applicant came into the case after it had been filed. Instructions to file the suit were given to Balongo & Company Advocates. The applicant can only be paid for what happened subsequent to his joining in the matter up to when he ceased to act for the respondent. The taxing officer proceeded on the basis that the applicant was the one who received instructions to file the suit. This was an error.

These are the reasons why I allow the reference with costs. The taxation is set aside. I refer the matter back to the Deputy Registrar (or to another Deputy Registrar, if the one who taxed has been transferred) to tax the bill afresh while taking into consideration the comments made above.

Dated, signed and delivered this 24th March, 2014.

A. O. MUCHELULE

J U D G E