



REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 314 of 2012

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER

BETWEEN

LENAH WANJIKU KOINANGEAPPLICANT

AND

MAJANJA LUSENO & COMPANY ADVOCATES.....RESPONDENT

RULING

By an application dated 5th September 2012, the applicant herein sought the following orders-

- (1) that the application filed herein be admitted under the vacation rules and it be heard on priority basis,
- (2) that the honourable court hear and determine this matter in the first instance and service thereof be dispensed with,
- (3) that the honourable court do order that there be a stay of execution of the Ruling delivered on 24th August by Hon. J Njoroge until the appeal is heard and determined,
- (4) that the order made by the Taxing Officer herein on allowing the sum of Kshs. 4,519,688/= as costs for the Respondent be set aside,
- (5) that the respondent's bill of costs dated and filed on be referred to a taxing officer with directions for fresh taxation
- (6) that the costs of this application be provided for.

The 1st, 2nd and 3rd orders have already been dispensed with and this Ruling therefore relates to prayers 4, 5 and 6 of the application. The application is based on the grounds on the face of it and on the further grounds enumerated in the Supporting Affidavit of Joyce W. Munene Advocate sworn on 12th September 2012 and is further supported by the submissions filed on 9th November 2012. In opposition thereto, the Respondent filed Grounds of Opposition, submissions and list of authorities all dated 8th October 2012 and filed on 9th October 2012.

In this Reference, the Applicant challenged the order of the taxing officer made on 24th August 2012 awarding the Respondent Kshs. 4,519,688/= as costs for work carried out by it on behalf of the Applicant in High Court Civil Suit No. 350 of 2008 . According to the Applicant this sum was excessive because the nature of the matter was not complex as to require extensive research on the part of the Respondent. In addition, the Applicant argued that the taxing officer erred in awarding the Respondent the said sum whereas the parties had already agreed, in accordance with Section 45 of the Advocates Act, on an all inclusive sum of Kshs. 2,000,000/= as fees which sum had been fully paid. The Applicant also accused the taxing officer of failing to consider the fact that the High Court matter was still pending. The Applicant argued that in the circumstances, the taxing officer erred in principle and wrongfully exercised his discretion. She therefore urged the Court to set aside the Order made on 24th August 2012 allowing the sum of Kshs. 4,519,688/= as costs to the Respondent and to refer the Respondent's Bill of Costs dated 20th April 2012 and filed on 24th April 2012 to a taxing officer with directions for fresh taxation.

The Respondent raised 7 grounds in opposition to the Application. The first ground was that the Applicant had not challenged the decision of the taxing officer either within time or at all in terms of Rule 11 of the Advocates (Remuneration) Order. Rule 11 provides that 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. The Applicant acknowledged at paragraph 9 of her submissions that she did not serve the notice within the required time. Under sub rule (4) the High Court has unfettered discretion , by order, to enlarge the time fixed under Rule 11 notwithstanding the time sought to be enlarged has expired. She nevertheless alleged that by an application dated 25th October 2012, she sought orders to enlarge the 14 days period fixed under Rule 11(1) and the same was allowed by Emukule, J. However neither the application nor the order allowing the same were annexed to the present application. I have also carefully perused the court record and could not find the application referred to or any order allowing the Applicant to give the notice of objection to the taxing officer out of time. In the absence of an order enlarging time within which to serve the notice of objection, any such notice issued after the expiry of the 14 days period was null and void in light of the clear provisions of the law.

However, the Respondent has argued that the Applicant never requested for reasons of the decision from the taxing officer and therefore has no basis in law to challenge the award. At the time of making the award, a taxing officer is not required to give reasons for his decision. Rule 11 provides that where a party is aggrieved with the decision of the taxing officer, he is to issue a notice in writing stating clearly the items against which he objects. Thereafter, the taxing officer shall give reasons for his decision on the items objected to and it is this subsequent ruling that can be challenged before this court. The courts have severally held that in the absence of these reasons, a reference to the High Court is rendered incompetent. In the case of Muriu Mungai & Co. Advocates vs. New Kenya Co-Operative Creameries Ltd Nairobi (Milimani) Hcmc No. 692 of 2007, as cited with approval in Evans Thiga Gaturu, Advocate V Kenya Commercial Bank Limited [2012] eKLR Mwilu, J held that:

“It is mandatory for an applicant who objects to a taxation to annex the ruling, giving reasons by the taxing master supporting the taxation...Nowhere is it provided that if there be a delay in the taxing master giving reasons for taxation then a party may file a reference. Instead, rule 11 (4) gives the court power to enlarge time if the same lapses before a step needed to be done is done or taken...Under the rules the taxing officer is required forthwith, upon receipt of the notice of objection to give reasons for the decision and where they fail to do so, the thing to do is not to file a reference to the High Court...In the court’s view, the applicant moved the court too soon. More reminders should have been sent to the taxing officer for reasons or any other legal action that would have resulted in the taxing officer giving reasons to be taken to have the reasons given. Nobody else can give those reasons but the taxing officer and it has not been shown that the taxing officer is not available. And more importantly the court cannot determine the matter in the absence of the taxing officer’s reasons for her decision in taxing the bill of costs as she did”

In Paul Gicheru T/A Gicheru & Co. Advocates V Kargua (K) Construction Co. Ltd [2008] eKLR Ibrahim J (as he then was) held-

“There are no reasons on record after the Notice of Objection. The application / reference herein dated 11th day of September,2007 is null and void ab initio it is a nullity.

This omission is incurable as the requirement for the recording and forwarding of reasons is a mandatory one. The effect of this is that this Court truly in the said circumstances has no jurisdiction to entertain the application. It was stated by the Late Justice of Appeal, the Honourable Justice Nyarangi in the case of The Owners of the Motor Vessel “Lilian” -vrs- Caltex Oil Kenya Ltd (1989) KLR 1 – “Jurisdiction is every thing. Without it a Court has no power to make one more step. ”

I entirely agree with the finding in the above case that without the reasons of the taxing master, a reference is incompetent. The Applicant maintained that she obtained leave and served a notice of objection upon the taxing officer who then failed to respond to the same. In such an instance the court, the court of appeal however held in **Kipkorir Titoo & Kiara Advocates V Deposit Protection Fund Board {2005} 1 KLR 529** that a reference could still be filed in the High Court in the absence of reasons for the award but only where the taxing officer had been served with a notice of objection and had failed after reasonable time, to respond to the same.

In the present case, the alleged notice of objection that was served upon the taxing officer was not annexed to the application and it is not in the court record. I therefore conclude that the taxing officer was never served with any notice and it is for that reason that he did not deliver a ruling giving reasons for his decision. Without such ruling, the court is unable to determine whether the taxing officer erred in principle or exercised his discretion wrongly. It therefore has no basis of setting aside the award of the taxing officer. Consequently, the 2nd ground of objection succeeds.

The third and fourth grounds are that the taxing officer did not err in principle in the taxation and that there is no jurisdiction for interference with the taxing officer's decision in regard to quantum. I do not agree with these submissions. The taxing officer in determining a bill of costs exercises discretion. This court may interfere with such discretion where it is satisfied that the taxing officer's decision was based on an error of principle or that the award was manifestly excessive as to justify an interference and that it was based on an error of principle, (see the case of **Joreth Limited vs Kigano & Associates[2002] 1 EA 92**). The Court of Appeal further stated in the case of **Kipkorir** (*supra*)that-

“the taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience merely because it thinks that the award is too high or too low; it will only interfere if it thinks that the award is too high or too low as to amount to an injustice to one party or the other.”

In conclusion, I find and hold that the reference herein is incompetent because the taxing officer was not issued with a notice of objection and the same having been filed before the reasons of the taxing master had been furnished. I would therefore uphold the grounds of objection dated 8th October 2012 and forthwith dismiss the Application dated 12th September 2012 with costs to the Respondent.

Dated, signed and delivered at Nakuru this 12th day of April, 2013

M. J. ANYARA EMUKULE

JUDGE