



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

**AT MERU**

**HIGH COURT MISC. APPLICATION NO. 62 OF 2009**

**P. M. WAMAE & CO. ADVOCATES .....APPLICANT**

**VERSUS**

**NTOITHA M'MITHIARU ..... RESPONDENT**

**R U L I N G**

This is an application under paragraph 11(2), 13 and 13A of the Advocate (Remuneration) Order by P. M. Wamae and Co. Advocates seeking the following Orders:-

- 1. *The ruling of Taxing Officer, S. N. K. Andriessen, PM given on 16<sup>th</sup> July, 2010 on advocates/clients Bill dated 7<sup>th</sup> September, 2007 be reviewed.***
- 2. *The aforesaid ruling set aside with regard to items 1, instruction fees,17,18,21,22,2,35,39,41,42,44,46,47,48,53,55,56,57,58,59,60,82,83,84,85,86,91,92,93,94,95, the item on***
- 3. *V.A.T,96,97,104,105,108,109,110,113 and the additional fees of one half thereof awarded therein.***
- 4. *The Advocate/client bill of costs dated 7<sup>th</sup> September, 2009 be remitted for taxation on all items mentioned in prayer 2 herein-above before a different Taxing Officer of this court.***
- 5. *Costs of this application be provided for.***

The application is grounded on grounds of objection in the Chamber Summons No. (a) to (g) following recording and forwarding in writing to the Objector/Applicant the reasons of Taxing Officer through response to the objection to taxation of Advocate/Client Bill of Costs dated 7<sup>th</sup> September, 2009, through a letter dated 11<sup>th</sup> July, 2010.

The respondent filed a Replying Affidavit dated 10<sup>th</sup> November, 2010. The respondent in his affidavit deny service of the Bill of Costs and notice of taxation but states he finds the amount awarded to be fair. The respondent state that the applicant was not appointed by him directly but was introduced to him as a volunteer offering his services in support of the National Rainbow Coalition NARC Party which was respondent's sponsoring party in the 2002 General Election. That on 20.03.2003 the applicant confirmed in writing to the respondent he was appearing as a volunteer but added the rider that it had been agreed presumably with the party that individual candidates were to pay sum of Kshs.400,000 in fees and he

referred to annexure in his affidavit marked "NMI". The applicant in his affidavit states that he came to establish later the lawyers in the team had volunteered their services in support of party and were not entitled to payment from individual candidates and there was no agreement for payment of Kshs.400,000 to the applicant as stated in the letter of 20<sup>th</sup> March, 2003.

The respondent in his affidavit claim to have made several payments to the applicant as per annexed receipts marked "NM2". The respondent states that he is surprised by the applicant's filing of bill of costs seeking Kshs.8,731,711/- and even claiming process servers fees which respondent claim to have paid. The respondent further claim to have personally financed all the applicant's trips to Meru,met his transport, food and accommodation. That no demand or rendering of bill was made to the respondent before filing bill of costs. The respondent claim the amount claimed by the applicant in the bill of costs is exaggerated and not commensurate with the services rendered on a volunteer basis.

When the matter came before me on 24<sup>th</sup> October, 2011 Mr. Ng'ang'a Advocate argued for the applicant and Mr. Kiogora Advocate opposed the application for the respondent.

Mr. Ng'ang'a Advocate stated that the reason for awarding Kshs.150,000 under item No.1 was that the matter did not go to full trial and was struck out in 2003 which is the same year it was filed for want of service. It was submitted before me by Mr. Ng'ang'a Advocate that was an error in principle in assessing the fee payable. I was referred to the case of Joreth Limited – Vs- Kigano & Associates C.A No.66 of 1999 on Page 17 and 18 in which Court of Appeal held:-

***“ By the first ground thereof the respondent states that instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. In principle that is correct. ....the learned Judge was clearly wrong in saying that one-half the work done qualifies for one-half instruction fee”.***

In response Mr. Kiogora Advocate stated that the fees due to the applicant was agreed as per annexure "NMI" and amount was fully paid. It was further claimed the counsel conducted the petition as a volunteer. It was also argued the amount taxed on item No.1 was not so low to call for interference.

Mr. Ng'ang'a Advocate quickly responded that there was no agreement and referred to Section 45(1) of the Advocates Act which provides:-

**“Subject to Section 46 and whether or not an Order in force under section 44, an advocate and his client may.....**

- (a) before, after or in the course of any contentious business, make an agreement fixing the amount of advocate's remuneration in respect thereof;***
- (b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocates instruction fee in respect thereof or his fees for appearing in court or both;***
- (c) before, after or in the course of any proceedings in a criminal court or a court martial make an agreement fixing the amount of the advocate's fees for the conduct thereof.***

and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf”.

In view of Section 45(1) of the Advocates Act, I find and hold that there was no agreement between the advocate/applicant and respondent/client in writing and duly signed as required. The letter marked "NMI" did not meet the required conditions of Section 45(1) of the Advocates Act and I reject the same as it is not an Agreement on fees due to the counsel.

On ground (a) in the Chamber Summons dated 3<sup>rd</sup> September, 2010 I find that the Taxing Officer made an error in principle.

In Joreth Limited case(Supra) on page 16 the Court of Appeal held:-

***“ if the Judge comes to the conclusion that the taxing master has erred in principle he should refer the bill back for taxation by the same or another Taxing Officer with appropriate directions on how it should be done”***

***But before I make my final decision it would be appropriate to consider other grounds raised in this application.***

Mr. Ng'ang'a Advocate further argued that the taxing master failed to take into account the nature and importance of the cause on matter, the interest of parties, the complexity of the petition and other relevant circumstances including the emoluments which a member of parliament earns. He also stated further to item No.1, the bill of costs for services rendered by the petitioners advocates in election petition No.1/2003 at Meru, between the same parties, in respect of which another party and party Bill of Costs was filed by the 1<sup>st</sup> respondent has already been taxed and the instruction fees on party and party basis for the said bills should not be a different on the ground that on similar facts and the same issues, courts of law should make consistent decision.

I have on calling for H.C.PE No.1/2003 confirmed that the 1<sup>st</sup> respondents Bill of Costs was taxed at a total of Kshs.3,362,735/- on 11<sup>th</sup> August, 2008. The Taxing Officer awarded Kshs.3,000,000/= on instruction fees to the 1<sup>st</sup> respondent in respect of 1<sup>st</sup> respondents bill of costs filed on 15<sup>th</sup> February, 2008.

Mr. Nga'ng'a Advocate argued that the applicant was awarded Kshs.150,000/- whereas 1<sup>st</sup> respondent was awarded Kshs.3,000,000/= and submitted there ought to be uniformity. He referred me to case of **Frenchard Rinchand & Another – Vs – Quarry Services of East Africa Africa Limited and Others(1972) E.A 162** (being authority relied upon by the respondent). The Court of Appeal on Page.163 stated:-

***“ We would add two other considerations. First, the general level of the remuneration of Advocates must be such as to attract worthy recruits to an honourable profession.***

***Secondly, there must, so far as is practicable, be consistency in the awards made, both to do justice between one person and another and so that a person contemplating litigation can be advised by his advocates very approximately what, for the kind of cause contemplated, is likely to be his potential liability for costs”***

Mr. Ng'ang'a Advocate went on to submit the amount awarded is grossly lower than the amount awarded in similar matter. He also relied on attached decisions of previous taxations on similar matters. He averred there was an error in principle and court has jurisdiction to disturb the decision and refer the taxation to a different Taxing Officer in line of prayer 4 of the applicant's application.

Mr. Ng'ang'a Advocate went on to state that all other grounds in the applicant's application are factual. That VAT was rejected as no certificate was produced. That court did not ask for proof for receipts and erred by failing to invoke the relevant paragraph 13A of Advocates(remuneration) Order which provides:-

***“ For the purposes of any proceedings before him, the Taxing Officer shall have power and authority to summon and examine witnesses, to administer oaths, production of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him”.***

Mr. Kiogora Advocate in reply relied on case of **Prencard Rinchand & Another (Supra)** which he submitted has the guiding principle in matters of taxation. He further stated that **HCEP NO.1 of 2003 Ntoitha M'Mithiaru – VS- Richard Maoka Maore & others** has a pending reference and cannot be used as a guide. I have perused the record of Election Petition the authorities referred to me and I am in agreement with the counsel for the applicant and the authorities thereto. I have also perused various decision attached on taxation and do agree that the amount awarded in the taxation in this matter is

grossly lower than amount awarded in similar matter.

Considering the nature of the matter, its complexity, the voluminous paperwork, the importance of the matter, the interest of the parties and the fact that election petition are no ordinary suits, I find the amount awarded to be unreasonably low. I further find unjustified and inconsistent for Taxing Officer to award a different amount on instruction in similar matter for which one party is awarded Kshs.150,000/= on instructions whereas the other is awarded Kshs.3,000,000/-.

I have gone through the items objected to under prayer 2 of the chamber summons dated 3<sup>rd</sup> September, 2010 as well as the court record and Bill of Costs dated 7<sup>th</sup> September, 2009 and reasons given by the Taxing Officer under items 35, 39, 41, 53 and 60, I find no error on part of the Taxing Officer as he taxed the items but he did not indicate that he taxed the same under what schedule. I note the said items were not amongst the items applicant objected to in his letter dated 29<sup>th</sup> July, 2010.

The other items listed under ground (f) *save nos 29,95,96,97,104,105,108,109,110,113 and on half of instructions fees for Advocate/client fees were not objected to through the letter dated 29<sup>th</sup> July, 2010 and as such I won't deal with the same. I would however like to add that on taxing Advocate/Client Bill the amount taxed should be increased by one half. Further VAT has got to be calculated and added.*

The court record shows that counsel was in attendance on dates sums are claimed and Taxing Officer should have had the same allowed. On item Nos.95,96,97,104 and 105, except item 108 which is a repeat under item No.41 the Taxing Officer ought to have called for proof and proceeded to make appropriate orders.

Having considered the arguments before me and having considered the authorities laid before me I find the Taxing Officer erred on matter of principle and considered irrelevant matters in arriving at his decisions.

I also find the Taxing Officer made inconsistent awards in the same matter and did not do justice between the parties.

That I have come to the conclusion that the Taxing Officer erred in principle, I do refer the Advocates/client Bill of Costs dated 7<sup>th</sup> September, 2009 back for taxation by a different Taxing Officer of this court on all claims mentioned in prayer 2 of applicant's Chamber Summons dated 03/09/2010. As the error in taxation was done by taxing master, I order that each party bear its own costs in this application.

Dated and delivered at Meru this 17<sup>th</sup> day of November, 2011

**J. A. MAKAU**  
**JUDGE**

Delivered in open court in presence of :

1. Mwirigi hb for Mr. Nganga for applicant
2. Kiogora hb for Mr. Gitonga for respondent

**J. A. MAKAU**  
**JUDGE**