



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
MISC. CAUSE NO. 111 OF 2010
IN THE MATTER OF THE ADVOCATES ACT
AND
IN THE ADVOCATES REMUNERATION ORDER
AND
IN THE MATTER OF THE ADVOCATES-CLIENT BILL OF COSTS
SINGH GITAU ADVOCATES.....APPLICANT/ADVOCATE
VERSUS
CITY FINANCE BANK LIMITED.....RESPONDENT/CLIENT
RULING

Argued before me was a Chamber Summons in the way of taxation reference brought under paragraphs 2, 11(i) and (2) of the **Advocates (Remuneration) Order**, wherein orders are sought, *inter alia* as follows:-

1. That the court be pleased to review the taxing officer's award of 17th June 2010, in particular items 1(a) 2 and 3 and on the issue of interest.
2. That costs be in the cause

The application, which is supported by an affidavit sworn by learned counsel, James Singh Gitau is premised on the following grounds:-

1. That the Taxing officer erred in fact and law in assessing the Advocates Bill of Costs dated 2nd February 2010, on items 1 (a) 1 (b) 2 (a) 2 (b) and 3 as well as on the issue of interest.
2. That the taxing officer erred in refusing to award instruction fees despite having concluded that the Respondent had instructed the Advocate.

3. That the taxing officer erred in failing to note that only the Plaintiff's suit in H.C.C.C. No. 525 of 1998 (Consolidated with H.C.C.C. No. 2243 of 1997) Grandough Limited –vs- City Finance Bank Limited & Sotken was struck out while the counterclaim arising from H.C.C.C. No. 2243 of 1998 (Grandough Ltd –vs- City Finance Ltd & Sotken) is yet to be determined.

4. That the taxing officer used the wrong principles in assessing fees due to the advocate.

The application is opposed on the strength of 3 Grounds of Opposition filed on 17th May 2011 stating that:-

1. The application does not disclose any error in principle on the part of the taxing officer to the extent that he did not find that the Applicant had any instructions to act in the matters giving rise to the taxation.

2. The finding by the taxing officer that the Applicant was only entitled to instructions with respect to an application dated 25th May 2005, which led to the dismissal of one of the suits giving rise to the taxation (H.C.C.C. No. 2243 of 1998) but could not award the same, there not being any claim for it in the Bill, has not been challenged.

3. There is no basis upon which the court can interfere with the taxing officer's ruling as sought.

The taxation proceeded by way of written submissions and the brief ruling of the taxing officer delivered in the absence of the counsel representing the parties herein. Despite stating in the Bill that the instructions received from the client were to take over the conduct of the consolidated suits, from the law firm of Ndungu Njoroge & Kwach, the Applicant sought to have the instruction fee awarded at KShs.1,315,435.00 tabulated as follows:-

1. (a) Instruction Fees to sue in H.C.C.C. No. 525 of 1998 City Finance –vs- Grandough and 2 Others:-

1 st Defendant	295,435.00
2 nd Defendant	295,435.00
3 rd Defendant	295,435.00

1. (b) Instruction Fees to defend counterclaim (Previously Grandough Ltd –vs- City Finance Bank Ltd & Sotken Ltd)

490,000.00
1,315,435.00

It appears to me, even at the outset, that the Applicant would be doubly compensated if the award on 1(b) was to be considered, the same having been raised under 1(a) in respect of the suit, before the same was converted into a counterclaim. The amount under this head could not have been awarded, in any case. That aside, the question arising is whether the taxing officer was right in finding that instruction fees were not available to the Applicant in the circumstances of the case.

The taxing officer found that the instructions given to the Applicants were not in respect of suing the Defendants since the same were received on 15th May 2004, yet the suit had been filed on 24th September 1998. Also that all the Applicants did was to file an application for dismissal. He still did not award any fees in respect thereof on the basis that the same had not been claimed as an item in the bill.

The taxing officer also refused to award the getting up fee claimed under item 2 and the Advocate-

Client increment of ½ the scale fee under item 3 on the basis that the two were related to item 1 and so not available to the Applicant. As regards interest, the taxing officer stated in his ruling as follows:-

“The rest of the items are largely drawn to scale and I allow each of them as drawn save item on interest which is taxed off as drawn at KShs. 164,364/-“

It is well established as the guiding principle of law that a judge will not interfere with a decision of a taxing officer unless it is shown that in taxing a bill of costs, the taxing officer proceeded on the wrong premises or erred in law to the extent that he arrived at an erroneous decision wherein the costs awarded are either manifestly low or manifestly high. Although not so stated, a presumption is hereby made that the Applicant’s position is that the award made in its favour was manifestly low.

I have considered the submissions made herein as well as those made before the taxing officer, together with the authorities cited. It is not disputed that the Applicants took over the suit in respect of which they claim legal fees from another law firm and that they did successfully apply for the dismissal of the suit through a Chamber Summons application dated 25th May 2005. The suit having been “dismissed with costs” means that costs of the suit, in addition to costs of the Chamber Summons were earned. It appears that the taxing officer not only refused to grant the costs now complained of but also ignored the authorities cited by the Applicants to the effect that they were entitled to *“Some instructions fee.”* [See **SOFTA BOTTLING COMPANY –VS- NAIROBI CITY COUNCIL H.C.C.C. No. 263 of 2005** (unreported), **MAYERS & ANOTHER –vs- HAMILTON & OTHERS [1975] E.A. 13** and **KIPKORIR TITOO & KIARA –vs- RELIANCE BANK (IN LIQUIDATION) H.C. Misc. No. 914 of 2003.**

It has been implied, and correctly so that **paragraph 62A** of the **Advocates (Remuneration) Order** is applicable to this case as it provides for the charging of fees and the taxation thereof where there has been a change of advocates during the pendency of a suit. The said paragraph provides that:-

“(1) Where there has been a change of advocates or more than one change of advocates, the advocate finally on record shall draw a single Bill of Costs for the whole of the matter in respect of which costs have been awarded.

(2) On taxing the bill, the taxing officer shall take into account the following principles, that the bill shall not be larger than if a single advocate had been employed and that the party taxing the bill shall not obtain indemnity for costs, which he has not paid.

(3) The bill shall be accompanied by a certificate setting out the dates during which all advocates acted, together with all agreements for remuneration made with them, all sums paid to them for costs and whether those sums were paid in full settlement.” (Underlining by this court)

The taxing officer’s ruling is silent as to whether the above provisions were considered at all. It appears to me that the non compliance with the above provision, particularly **sub-paragraph (3)** thereof, by the Applicant, is what is critical to his bill as filed.

Even as I find that the taxing officer misdirected himself when exercising his discretion, I do not think, given the facts of the case before him he could have done any better. I am guided by the holding of SIR NEWNHAM WORLEY, President, Court of Appeal for Eastern Africa in **BHAGWANJI PRENCHAND & OTHERS –VS- J. M. GOMES & OTHERS [1956] 23 EACA 296**, followed in **BHATT –VS- SINGH 1962 E.A. 103** (and other subsequent decisions) that:-

“A Bill of Costs is a factual statement of services rendered and, if any of the facts alleged in the bill are shown to be untrue, e.g. 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 shall be taxed off.”

The Applicants, having purported to have earned full instruction fee, when they did not file the suit themselves, did not deserve more than a rejection of their bills, even if under the provisions of **paragraph 62A(1)** they were, in my view rightly entitled to present the bill and to include a charge for instruction fee. This however ought to have been in conformity with the requirements of **sub-paragraph (3) of paragraph 62A**.

For the above reasons, I am unable to uphold the decision of the taxing officer to the extent that he ought to have required the Applicants to either amend the bill presented or to withdraw the same and present a fresh one properly drawn, to suit the circumstances of the case. In the interests of justice therefore, I strike out the entire taxation, set aside the taxing officer's ruling and order that the costs in the struck out suit (H.C.C.C. No. 2243 of 1998) be taxed afresh under a properly drawn bill of costs, in conformity with **paragraph 62A** of the **Advocates (Remuneration) Order**.

I award the cost of this reference to the Respondents in any event.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 11TH day of NOVEMBER, 2011

M. G. MUGO

JUDGE

In the presence of:

Mr. Karanja holding brief for Mr. Singh Gitau For the Applicant

Mr. Mwanyale

For the Respondent