

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Miscellaneous Application 1134 of 2007

**A.M. KIMANI & CO. ADVOCATES PLAINTIFF
VERSUS
KENINDIA ASSURANCE CO. LTD. DEFENDANT**

RULING

1. The chamber summons dated 19th August 2009 is brought under rule 11(2) of the Advocates Remuneration Order. The applicant was the advocate for the respondent and is seeking to set aside the decision of the Taxing Master delivered on 8th July 2009. Further the applicant seeks for the Advocates Bill of Costs dated 5th July 2007 be referred back to the Taxing Officer with appropriate directions. The application is based on the grounds stipulated on the body thereto and the supporting affidavit sworn on 19th August 2009.
2. Briefly stated, the applicant filed an advocate client bill of costs on 5th July 2007. The bill was taxed and by a ruling delivered on 8th July 2009 a sum of Ksh.24,036.70/- was taxed off the bill. The taxing officer found that the advocate had been paid a deposit of Ksh.29,270/- thus disallowed the costs of taxation because 1/6th of the total bill was disallowed on taxation. This is pursuant to the provisions of paragraph 77(1) of the Advocates Remuneration Order. Being aggrieved by this ruling the applicant filed the present application challenging that decision on the grounds that the assessment of the instructions fees was erroneous because the provisions of the Advocate's Remuneration Order allows for a minimum of Ksh.27,000/-.
3. The bill of costs was supposed to be taxed according to the provisions of schedule 5 part 2(6) of the Advocates Remuneration Order. Thus item 39 was erroneously taxed off and so is item no 4, moreover the Taxing Master taxed off the value added tax which is provided for under the Act. Under the Value Added Tax, an advocate is entitled to charge VAT on instructions fees and also disbursements. The taxing officer also failed to take into account that the bill of costs had taken into account credit of Ksh.29,270/-.
4. This application was not opposed despite the fact that it was served upon the respondents as per the affidavit of service. The respondents did not file any papers and they did not appear at the hearing. This being an application under rule 11 of the Advocates Remuneration Order the taxing master is given discretion to assess the quantum of the fees payable to the advocate. As in all matters involving the exercise of discretion it should be exercised judiciously based on reasons of facts, the law and fairness. The decision by the taxing master in this case is challenged on three principle items. The instruction fees, the assessment of the VAT and the refusal by the taxing officer to allow disbursements under item No.79.
5. I have gone through the bill of costs which was taxed and the subject matter of this reference I have no serious issue with the instructions fees considering the reasoning that was given by the taxing master because he proceeded under schedule 5 paragraph 5 of the Advocates Remuneration order 1997 which does not provide for the minimum amount of fees chargeable and the taxing master using his own discretion assessed the fees chargeable as Ksh.18,000/-. Even if he were to be guided by the provisions of schedule 6 the minimum amount would have been Ksh.20,000/- . As regards items No.4 and 39 I find the reasoning given by the taxing master not plausible because the remuneration order provides that an advocate is entitled to charge fees based on hourly rate and there is a provision under schedule 5 part 2 (4) for a minimum of Ksh.1,500/-. Thus item No.4 was taxed off Ksh.1,380/- unreasonably. So was the drawing of the submissions under item No.39. The taxing master should have considered time taken to draw submissions which are more time consuming and complex in the circumstances of the matter.

6. The last issue is on the VAT. The advocates submitted that under section 9(3) of the VAT Act it is provided that in calculating the value of services incidental costs incurred by the supplier should be taken into account and then included as taxable value. I am persuaded that VAT is applicable on the entire award and not only on the instructions fees. There is clearly an error as the taxing master also taxed off the disbursement such as photocopies, telephone calls, postage and no reasons were assigned. For those reasons I would allow the application and refer this matter for taxation before a different taxing officer. The advocate will also have the costs of this reference.

RULING READ AND SIGNED ON 29TH JANUARY 2010 AT NAIROBI.

M.K. KOOME
JUDGE