REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MISCELLANEOUS APPLICATION 410 OF 2008

A.M. KIMANI & CO. ADVOCATES …..…… APPLICANT

VERSUS

KENINDIA ASSURANCE CO. LTD ....…… RESPONDENT

RULING

Coram: Mwera J

Mr Shilenje for Respondent/applicant

Ms Kimani for Applicant/Respondent

The respondent/applicant insurance company – the client in this miscellaneous application, filed a chamber summons dated 18/9/09 under paragraphs 11 (2), (4), 50 of the Advocates (Remuneration) Order (of Cap. 16) and Section , 3 3A CPA for orders in respect of the taxation by Mr. Muya contained in his ruling of 12.2.09. There reference by way of that summons desired that this court do set aside the taxed costs in regard to:

(a) Item 1 – instruction fee because the taxing officer directed that besides the sum of sh. 6m – subject matter (value of claim of a certain motor/vehicle) also sh. 450,000/= per day claimed in general damages also do form part of the subject matter, with – an interest rate of 26% p.a.

(b) Item 2 – where a sum of Sh. 30,000/= was taxed to be paid on application of a counter-claim that was never drafted and filed.

(c) Ten stated Items in the bill which related to Advocate/Client attendances and correspondences when the advocate /respondent had opted to charge 50% on fees.

(d) A further five Items where costs were allowed when fees had not been earned/awarded yet.

M/s Kimani the advocate in the matter filed grounds of opposition claiming that the summons under review lacked merit and was made in bad faith. Further, that it was not only and fatally defective but also the applicant had failed to disclose full particulars.

Mr Shilenje laying most emphasis on prayers (a) and (b) (above) pointed out that in HCCC 1148/02 which the respondent/advocate was handling had special damages put at Sh. 6m for a motor vehicle that was damaged and written off. The cause also claimed Sh. 450, 000/= per day as general damages to be assessed for loss of user. This could not also form part of the subject matter because it was speculative and it fell to be decided by the court. And in any case one could not claim up to 6-7 years of loss of user of the motor vehicle bearing in mind that the plaintiff had a duty to mitigate loss. Such loss could only be limited up to 90 days, as per practice and no more. The taxing officer should not have incorporated that sum in the subject matter when taxing the bill totalling Sh. 1,335,414/=.

Moving to Item 2, counsel urged the court to find that no instructions were taken to file a counter-claim for Sh. 650,000/= and none was filed. Only a letter of 29.7.02 was written to the respondent/advocate to consider possibility of a counterclaim and that was only envisaged in the defence dated 13.8.02. Costs on the Item ought to have been rejected and Sh. 30,000/= ought not have been allowed on it.

Mr Shilenje then moved to the minor items (see prayers (b), (c) above) and stressed that the sums awarded were insignificant BUT in principle he was obliged to impeach the validity of those sums awarded. The first lot related to attendances on and letters to the applicant by the advocate and the latter having accepted 50% additional in the fees, she was not entitled to charge on such things again. It amounted to double-charging. And that the other Items related to the bill of costs itself and were yet to be incurred in order to attract costs. And finally that 26% p.a. interest depended on the outcome of the claim. In any event this was a commercial rate and not the 12% court rates that prevailed.

On her part Ms Kimani began by terming this reference defective and premature. It had been filed contrary to paragraph 11 (above) in that the applicant did not apply for and obtain the reasons for the way the taxation was done the way it was, as a basis to file the reference. The applicant had exhibited the Taxation Ruling of 12/2/09 which could not pass for reasons for taxation at all.

As for the merit of the reference itself Ms Kimani told the court that this was lacking because the taxing officer had not erred on any principle to warrant this court's interference in his usually wide discretion when taxing bills. The plaint claimed Sh. 6m – loss of a motor vehicle and loss of user at Sh. 450,000/= per day. And although the case was still pending, after instructions were withdrawn from the respondent, the applicant should not be permitted to pre-judge its out-come. A counter-claim was only contemplated as per the applicant's letter but it was never filed.

Further, counsel stated that the applicant was raising Items besides no. 1 and 2 this time, when they passed without dispute at the time of taxation. It was estopped from doing that and SCHEDULE VI (b) referred to by the applicant did not apply here. The respondent paid for eg. the certificate of costs and thus there should be no complaint about prayer (d) in the summons.

Mr Shilenje responded that this chamber summons was not premature or defective because on 2.3.09 the applicant wrote to the taxing officer/deputy registrar objecting to the taxation. On 22.7.09 Justice Ali-Aroni directed that the objection be treated as request for reasons of taxation and on 3/3/09 (or 3.9.09) the registrar forwarded the Taxation Ruling to the applicant on payment, then this application was field on 22.9.09. Paragraph 11 was thus complied with. And that even if Mr Shilenje's predecessor/lawyer did not object to Items (in prayer(c) (d) his taxation thereon being contrary to the law, could not be subject to estoppel.

The main provision paragraph 11 of the Advocates (Remuneration) Order under which this reference was brought reads:

> "11. (1) 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.
>
> (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

M/s Kimani argued that Mr Shilenje did not comply with the above to which a response was that he did as per a filed objection and a judge's order.

The record has it that on 2/3/09 an objection to the taxation of 12.2.09 was served on the registrar. It was dated 26.2.09 and paragraph 11 (1) (2) above was cited.

The record has it that on 23.7.09 Ali – Aroni Judge orderd:

" 1. That the time for serving notice in writing to the taxing officer under sub paragraph 11 (1) be and of the objection be (sic) and is hereby enlarged and the objection filed on 2nd March, 2009 be deemed as having been filed within time.

2. That the Registrar do forthwith record and forward to the objector the reasons for his decision on the items being objection (sic) upon."

Mr Shilenje told the court that following the above on 03/09/2009 be paid for a copy of the taxation ruling dated 12.2.09 on invitation of the registrar who had copied his letter of 3/3/09 calling on both parties to collect the ruling. It was added that thus the applicant therefore took it that the taxation ruling supplied, following the filed objection, constituted the reasons by the taxing officer as required under para 11 and so the present reference was filed. In these circumstances this court is inclined to accept and it accepts that the reference under review is competent and must thus be heard and finally determined. If the registrar was served with an objection to taxation of a bill and he sent to the objector, not reasons for his decision but, a copy of the taxation ruling, then the objector should not be faulted by filing the reference based on that ruling.

As to the merits of this reference, the court heard both sides on, first the objection to Item 1 – the value of the subject matter. Basically this is gleaned from the pleadings. In the present cause it was not in dispute that the subject matter was in the form of special damages – Sh. 6m the value of a motor vehicle. The pleadings also alluded to loss of user put at Sh. 450,000/= per day for whatever period pleaded. This part of the claim actually constituted general damages to be proved and assessed by the court. The court could as well reduce the claimed sum or discard it all together. It could therefore not form part of the subject matter upon which fees could be based. So in sum while the taxing officer properly set out Sh 6m as the value of the subject matter, he was in error to include the loss of user claim. That part is accordingly set aside.

The court heard that on the calculated total of loss of user the taxing officer imposed a rate of 26% - p.a in interest. There was no basis for this. Any sum which the court could have found as constituting loss of user was not a commercial loan to attract a commercial interest. At least the rate that could apply, if warranted, could be up to 12% the court rates applicable at the time in question. So on finding that loss of user ought not have formed part of the subject value, similarly the said interest at 26% p.a. ought not have been imposed. Likewise any sum in the taxed costs representing interest of 26% per month ought to be set aside.

The court then addressed the fact that the taxing officer allowed a sum of Sh. 30,000/= on a counter-claim that was merely contemplated but was never drafted and filed. Accordingly costs awarded on this aspect ought to be set aside.

There were other Items in paragraphs (c) and (d) of the chamber summons which, although considered by both sides as not major, the parties canvassed them. As Mr Shilenje pointed out that the respondent ought not have sought costs on one lot because she was already catered for on the agreed fees or that the other lot was for items/services yet to be executed, Ms Kimani held a contrary view. She maintained that Mr Shilenje's predecessor on record had not disputed those Items at the time of taxation and so the applicant was estopped from raising them now. On the other hand Mr Shilenje told the court that costs on those Items were contrary to schedule VI part B and so the question of estoppel did not arise where the law was flouted. This court agrees that estoppel does not apply where the issue of law features and adds that even if the Items were considered minor, may they be entertained afresh in the light of the following order:

i) Orders as sought are granted. There will be a fresh taxation herein before a different officer as soon as possible. Costs to the applicant.

Ruling delivered on 2/2/10.

J. W. MWERA

JUDGE