



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION – MILIMANI**

MISC. CAUSE NO. 296 OF 2007

MURIU, MUNGAI & CO. ADVOCATES

.....RESPONDENT/ADVOCATE..

VERSUS

NEW CO-OPERATIVE CREAMERIS LTD.APPLICANT/CLIENT

R U L I N G

This application is brought by a Chamber Summons dated 19th March, 2010, and taken out under Paragraph 11 (1) and (2) of the **Advocates Remuneration Order** and all enabling provisions of the law. The Applicants pray for orders –

1. ***That the decision of the Taxing Officer made on 29th November, 2007, allowing items 1,2,3,4,5,6,7,8,10,11,12 and 14 of the bill of costs dated 23rd February, 2007 and filed on 27th February, 2007 at Kshs.139,365/= all inclusive be set aside/varied.***
2. ***That this honourable Court do exercise its inherent jurisdiction and allow such fees in the above items as it shall deem fit and/or make such other or further orders as regards the bill of costs in issue.***
3. ***That the costs of this application be provided for.***

The application is supported by the annexed affidavit of Peter Kennedy Ombati, the Legal Officer of the Applicant Company, sworn on 19th March, 2010, and is based on the grounds that –

- (a) ***The Taxing Officer misdirected herself on both law and facts and thereby awarded the sum that was manifestly excessive and based on erroneous legal principles.***
- (b) ***The Taxing Master allowed fees for services that were clearly not rendered by the Respondent herein.***
- (c) ***It is in the interests of justice that the instant application be allowed.***

Opposing the application, the Respondents filed grounds of opposition

stating that –

- (i) ***The application is incompetent and fatally defective for failure to comply with the mandatory provisions of the law and the Advocates (Remuneration) Order.***

- (ii) *The application was filed out of time and thus incompetent.*
- (iii) *The application is an afterthought and it is intended to delay the end of litigation.*
- (iv) *The reasons for the delay in filing the application have not been explained.*
- (v) *The application is incompetent for breach of the provisions of Paragraph 11 (1) of the Advocates (Remuneration) Order.*
- (vi) *There are no valid or good grounds set out in the application to warrant interference with the decision of the Taxing Master.*

They also filed a replying affidavit in which they allege, *inter alia*, that the application is brought in bad faith and the Applicant is guilty of inordinate delay.

After considering the pleadings, the written submissions filed by the respective parties and the authorities cited therein, I find that the main issues for determination are whether the Taxing Officer misdirected herself on the legal principles applicable in the assessment of the bill of costs herein especially on item (1); whether the Taxing Officer failed to consider and/or give reasons for rejecting the Applicant's written submissions; and whether the application was filed out of time. Regarding the first issue, I note that the bill was ostensibly filed under Schedule I of the **Advocates (Remuneration) Order, 1997**. It is further notable that the said bill was filed in Court on 27th February, 2007, and that the relevant order applicable was the **Advocates (Remuneration) (Amendment) Order, 2006**, promulgated under Legal Notice No. 159 which was published under Kenya Gazette Supplement No. 82 on 17th November, 2006. The main effect of that amendment was to amend the Principal Order by deleting all the Schedules thereto and substituting therefor new Schedules.

On the face of the record, whereas the bill of costs seems to have been filed under Schedule I of the **Advocates (Remuneration) Order, 1997** as observed above, it was taxed under Schedule V. The issue arising from this is whether the taxation took place under the correct Schedule. It is not in dispute that the bill in question related to the transfer of a plot known as Nakuru Municipality/Block 11/45 (formerly L.R. No. 451/365) from the Kenya Co-operative Creameries Ltd. ("Old KCC") to the New Kenya Co-operative Creameries Ltd. ("New KCC") which was a non-contentious matter. To that extent, the same was governed by Part II of the Principal Order whose paragraph 18 (f), insofar as is relevant to this matter, states –

“Subject to paragraph 22, the remuneration of an Advocate in respect of conveyancing and general business ... shall be regulated as follows, namely –

‘(f) In respect of any business referred to in subparagraph (a) and (c) of this paragraph which is not completed ... and all other business of a non-contentious nature, the remuneration for which is not herein before provided, the remuneration is to be that prescribed in Schedule V’.”

Since the Advocate's bill of costs was filed on 27th February, 2007, the Schedule V which should be applicable is the one introduced in 2006 and not the previous one of 1997. Part I of the new Schedule V provides for agreed hourly rates in respect of fees the remuneration for which is not otherwise provided and which has not been the subject of an election under paragraph 22. This matter does not seem to fall under Part I but rather it falls under Part II thereof which provides an alternative method of assessment. The latter method prescribes for instruction fees to be charged as follows –

“Such fee for instructions as, having regard to the care and labour required the number and length of the papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all other circumstances of the case, may be fair and reasonable, but so that due allowances shall be given in the instruction fee for other charges raised under this Schedule.”

It is obvious from the ruling of the learned Taxing Officer that the bill herein was taxed exclusively on the value of the property. This clearly did not take into account the formula for charging instruction fees as laid out in Part II of Schedule V as required herein above. For that reason, I find that the taxation was not in conformity with the dictates of Schedule V and that if the Taxing Officer had operated in strict compliance with that Schedule V, the instruction fees could possibly have been more or less than the computation based exclusively on the value of the property. This alone would be reason enough to warrant interference with the taxation.

The second issue is whether the Taxing Officer failed to consider the Applicant's written submissions as alleged or at all. This allegation is factually incorrect. In the Taxing Officer's ruling, a copy of which is attached to the application, the Taxing Officer clearly states in the opening sentence of the said ruling –

“The submissions filed herein in respect of the bill of costs dated 23rd February, 2007, are duly considered.”

The Applicant's allegation therefore lacks substance.

The final issue is the allegation by the Applicant that this reference was filed out of time. According to the Court record, the Applicant received the reasons for the taxation on 4th March, 2010. This application was then filed in Court on 19th March, 2010. Paragraph 11 (2) of the **Advocates (Remuneration) Order** gives an objector 14 days within which to apply to a Judge by Chamber Summons after receipt of the reasons. The application herein was filed on the 15th day after receipt of the reasons which was one day outside the period within which the reference ought to have been filed. This accordingly renders the application incompetent on the ground that it was filed out of time.

It is accordingly hereby struck out with costs to the Respondent.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 29th day of July, 2010.

L. NJAGI

JUDGE