



**New Kenya Co-op. Creameries Ltd v New Kenya Co-op.
Creameries Ltd (Miscellaneous Succession Cause 364 of 2007)
[2010] KEHC 1394 (KLR) (Commercial & Admiralty) (1 October 2010) (Ruling)**

*NEW KENYA CO-OP. CREAMERIES LTD v NEW
KENYA CO-OP. CREAMERIES LTD [2010] eKLR*

Neutral citation: [2010] KEHC 1394 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
MISCELLANEOUS SUCCESSION CAUSE 364 OF 2007**

MK KOOME, J

OCTOBER 1, 2010

BETWEEN

NEW KENYA CO-OP. CREAMERIES LTD CLIENT

AND

NEW KENYA CO-OP. CREAMERIES LTD ADVOCATE

RULING

1. The Chamber Summons dated 3rd September 2009 is brought under paragraph 11(1) and (2) of the Advocates Remuneration Order. The Applicant is seeking to set aside or vary the decision of the Taxing Master made on 6th October 2001 in which item No. 1 of the Respondent's Bill of Cost was taxed and instruction fees of Kshs. 553,400/- was allowed. This application is based on the grounds that the Taxing Master misdirected himself on both law and fact and thereby awarded a sum that is manifestly excessive so as to be interfered with by this court. It is also supported by an affidavit of Milka Mugo sworn on 3rd September 2009.
2. Counsel for the Applicant argued that the taxing master failed to take into consideration that there was no agreement in regard to the transfer of the suit premises which was the subject matter of the taxation. The Respondent acted on a vesting order which had been obtained by the Attorney General on behalf of Government of Kenya which authorized the transfer of all the assets from the old KCC to the new KCC. Since there was no sale agreement, the instructions fees for the Advocate should have been reduced by one third.



3. This application was opposed by the Respondent, Mr. Maundu learned counsel for the Respondent relied on the grounds of opposition on points of law. It was submitted that this application was an abuse of the court process. It is the second reference after the first order of taxation was set aside by Kimaru J, in his ruling of 19th June 2008 when he directed the Bill be taxed by another officer and the value of the subject matter that should inform the Taxing Master in assessing the advocate's costs was Kshs. 35,900,000/-. When the bill was re-submitted for taxation the applicant did not bother to attend court. The taxing officer gave reasons why he applied schedule 1 of the Advocates Remuneration Order. Counsel urged the court to uphold the decision of the Taxing Master.
4. I have considered the rival submission as summarized above. The issue to determine is whether the taxing officer erred by basing his assessment on schedule 1 of the Advocates Remuneration Order following the directions of Kimaru J. The Taxing Officer is given discretion to assess the quantum of fees payable to an advocate and this court had directed the value of the subject matter. The principles to consider when dealing with an order of taxation are well articulated in a long line of authorities especially the Court of Appeal case of S R D'Souza & Others vs. Ferrao & Others (1960) EA 602. The Court of Appeal adopted the principles stated by Buckley CJ in the estate of Ogilvie: Ogilvie vs. Massey (1910) p 243.

“On questions of quantum the decision of the taxing master is generally speaking final. It must be a very exceptional case in which the Court will even listen to an application or review his decision. In question of quantum the judge is not nearly a competent as the taxing master to say what is the proper amount to be allowed; the court will not interfere unless the taxing master is shown to have gone wholly wrong. If a question of principle is involved if it different; on a mere question of quantum in the absence of particular circumstances the decision of the taxing master is conclusive. I think that the learned judge ought not to have interfered.”
5. What is curious about this application is the fact that the applicant did not attend court when the bill of costs that they are now challenging was taxed. No representation was made to urge the taxing officer to consider there was no sale agreement. The Applicant squandered the opportunity to make the submissions they are now making before this court. A party should not be allowed to abuse the court process. The applicant failed to make their representations before the Deputy Registrar, which was the right forum; they cannot now make the same submissions in the High Court.
6. I see no error of principle in the way the taxing officer assessed the instructions fees based on the earlier directions given by Kimaru J in his ruling of 19th June 2008. The applicants can only blame themselves for failing to represent their case. This application lacks in merit, and I have no hesitation to order it be dismissed with costs to the Respondent.

RULING READ AND SIGNED ON THE 1ST OCTOBER 2010.

M. K. KOOME

JUDGE

