



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
MISC. APPLICATION CASE NO. 847 OF 2009

MUGAMBI MUNGANIA & CO. ADVOCATES.....PLAINTIFF
VERSUS
JOSEPH MAINGI MUGWIKA.....DEFENDANT

RULING

Before me is an Appeal by way of a reference, brought under paragraph 11 (2) of the Advocates (Remuneration) Order, challenging the taxing officer's decision of 21st January, 2010, by virtue of which the Applicant's Bill of Costs dated 5th October, 2009 was struck out. The applicant prays for orders as follows:-

- 1 **THAT the decision of the taxing officer be set aside**
- 2 **THAT the court be pleased to remit the Bill of costs for re-taxation**
- 3 **THAT in the alternative this court be pleased to retax the Bill**
- 4 **THAT the respondent be condemned to pay costs of the application**

The Applicant contends that the decision of the taxing officer to strike out the applicant Bill of Costs was based on the wrong premises and a misapprehension of paragraph 62A of the Advocates (Remuneration) Order, which, according to the applicant, applies only to Party and Party Costs and not Advocates/Clients costs. In striking out the applicant's bill of costs, the taxing officer held that, in view of there having been a change of advocates once or more than once, the applicants were not entitled to present the bill of cost for taxation at that stage, having not been the advocates finally on record as stipulated under paragraph 62A(1) of the Advocates (Remuneration) Order.

When striking out the bill of costs the taxing officer made the following findings:-

- (i) **That there had been a change of advocates in the main suit HCCC 1403 of 2001**
- (ii) **That the advocate presenting the bill was the first to be retained by his client and not the one finally on record as contemplated in paragraph 62A of the order and therefore, ought not to have drawn the bill**
- (iii) **That the bill was not accompanied by a certificate as required under Section 62A (3)**

The said paragraph provides as follows:-

“62A(1) Where there has been a change of advocates or more than one change of advocates, the advocate finally on the record shall draw a single bill 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 of 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”.

The applicant contends that paragraph 62A contemplates a situation where a matter has been concluded and a costs therefor have been awarded to the parties in the suit. According to the applicant these provisions do not apply in the present case since the matter in respect of which the costs are claimed has neither been concluded nor costs awarded to any of parties to the suit.

The application is challenged on a technicality, mainly, that the reference was not filed within 14 days and no leave was obtained to extend the said statutory period. The applicants hold the view, therefore, that the same is statutorily barred and improperly on record. To this the Respondent's reply is that the delay was caused by the reason of the taxing officer's decision not being furnished until sometime in June. They say they filed the application immediately upon the receipt of the Registrar's reasons. To support their argument that the taxing officer erred, the applicants have submitted that the decisions in Machira & Co. Advocates –vs- Aurther K. Magugu & Another HCC Misc. App. No. 358 of 2001 and Mwaura & Wachira Advocates –vs- John Nduati Kariuki t/a Johester Merchants CC Misc. Cause No. 224 of 2004 apply in their favour. In the first decision the Hon. Mr Justice Ringera (as he then was) held that paragraph 62A of the Advocates (Remuneration) Order applies to the taxation of party and party costs, the object thereof (in the Learned Judge's opinion) being ;

“ to avoid loading a party against whom an order for costs has been made with excessive fees as a result of change of advocates by the adverse party in the course of the litigation”

The learned Judge advanced the principle that no litigant ought to be burdened with costs incurred as a result of change of advocates by the adverse party. In holding thus, the learned Judge departed from an earlier decision by the Hon. Mr Justice Mwera in Machira & Co. Advocates -vs- Arthur Magugu & Another HCC Misc. Appl. No. 151 of 2001, wherein Mwera J. had held as follows;-

“unless there was an agreement for costs whereby each step(?) service rendered maybe calculated, in general litigation, it will be the last advocates to present the bill of costs when the matter is finally settled for himself and all those that preceded him. It appears that that is what the rules committee had in mind when it published paragraph 62A of the Advocates (Remuneration) Order and one can add that it is not a practice if this court for each advocate when changed, to drawn up his/her bill of costs and have it taxed even as the cause is still going on”.

In the case of Mwaura Wachira & Co. –vs- John Nduati Kariuki (Supra) the Hon. Lady Justice Kasango was of the same persuasion as Ringera J. and similarly departed from the holding by the Hon. Justice Mwera. The applicants have submitted that this court should do likewise.

I have keenly scrutinized the above three decisions as well as a related decision of the Hon. Mr. Justice Emukule cited in Macharia Njeru t/a Macharia Njeru Advocates – vs- London Distillers (K) Ltd Civil Case Misc. No. 632 of 2004, wherein the learned Judge is quoted as having stated, (in a ruling delivered on 16th March, 2006), as follows;,

“In the matter at hand therefore and in light of the High Court's, conflicting interpretation of paragraph 62A of the Advocates (Remuneration) Order (Prohibiting the bringing of bills of costs before the determination of suit), the taxing officer is in my opinion bound to follow the preponderance of majority opinion of the High Court until the Court of Appeal expresses itself authoritatively on the true construction of the said paragraph 62A of the Advocates (Remuneration) Order, and for that matter Rule 108 of the Court of Appeal rules and paragraph 16 of the Court of Appeal Taxation of Costs Rules on whether or not an advocate/client bill of costs can be brought by an advocate whose services and engagement with a client have been terminated in the pendency of the suit”.

My understanding of the above holding by the Hon. Mr. Justice Emukule, therefore, is that being of the majority, the decisions of Ringera and Kasango JJ. ought to be followed in all situations where paragraph 62A of the Advocates (Remuneration) Order is in issue. With all due respect I find myself not persuaded that paragraph 62A applies only to taxation of Party and Party Bills and not Client/Advocates Bills. I say this because the said paragraph falls under Part III of the Advocates (Remuneration) Order and is therefore applicable to Advocates/Client bills by virtue of paragraph 49(1) which states as follows;-

“This part shall apply to contentious matters and the taxation of costs as between advocates and clients and between party and party in contentious and other proceedings”

I find that the burden foreseen in the reasoning of Ringera and Kasango JJ appears to have been provided for under paragraph 62A (2) which provides that the taxing officer

“shall be guided by principles, inter alia, “that the bill shall not be larger than if a single advocate had been employed”.

The intention that the last advocate on record files a final bill for all the others where there has been one or more changes of advocate is reflected in paragraph 71 of the Remuneration Order which states that

“Every bill of costs of taxation shall be lodged with the Registrar and shall be endorsed with the name and address of the advocate by whom it is lodged and also the name and address of the

advocate (if any) of whom he is agent, and the name and address of any other advocate or person entitled to receive notice of the taxation”.

There is no doubt that the above provision encompasses both advocate/client and party and party costs. The matter of taxation in respect of which Justice Emukule made his findings is, to my understanding the subject of a pending appeal before the Court of Appeal, where an interpretation of and/or the application of paragraph 62A above, is in issue. Considering that the decisions considered hereinabove are only persuasive and not binding upon me, it seems to me, therefore, that, pending an interpretation to the contrary, and unless and until the Advocates (Remuneration) Order is amended, the said paragraph applies as stipulated under paragraph 49 (1). This court holds with great respect the reasoning behind the Hon. Justice Ringera’s findings, as adopted by the Hon. Lady Justice Kasango, and is alive to the mischief and/or prejudice likely to ensue from the strict application of paragraph 62A. However, the court, as in the present case, will remain faced with a contest between what is desirable and what the law provides. In view of my findings as to the application of the contentious section I am of the considered view that the taxing officer acted within the law in exercising his discretion in the manner that he did.

In the premises I find that the Chamber Summons dated 16th June, 2010 fails. It is hereby dismissed with costs in the taxation which, unfortunately, must await the finalization of the suit. Orders accordingly.

DELIVERED and SIGNED at NAIROBI this 4th day of NOVEMBER, 2010

M. G. MUGO
JUDGE

In the presence of:

For the Applicants

For the Respondent