



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

Misc. App. 323 of 2006

RUSTAM HIRAADVOCATE

VERSUS

ORIENTAL COMMERCIAL BANK
(FORMERLY THE DELPHIS BANK LTD) LTD).....CLIENT

R U L I N G

This is a reference brought by way of a Notice of Motion dated 18th February 2009. It is brought under Section 3A of Civil Procedure Act, Order L rule 1 of Civil Procedure Rules and paragraph 11 of the Advocates (Remuneration Order). Orders 1, 2 and 3 are moot. The orders sought are 4, 5 and 6 which provide:

4. THAT the decision of the taxing master delivered on 31st July 2008 be set aside.
5. THAT the Court do Order that the Advocate/Respondent's Bill of Costs filed herein be remitted back to the Deputy Registrar for taxation afresh.
6. THAT the costs of this Application be provided for.

The application is opposed. The Advocate with the Bill has filed a replying affidavit.

I have considered the application, the affidavits sworn for and against the reference and submissions by both counsel. The client/Applicant herein has given three reasons why the Taxing Master's decision in the taxation done on 6th June 2008, and the subsequent ruling given on 31st July 2008, should be set aside. The first ground is that the Client/Applicant was not represented at the time of the taxation due to failure by the Advocate's clerk to inform his master of the date for taxation. The date had been taken by consent. For the proposition that an *ex-parte* order should be set aside in order to give each party a chance to be heard, Counsel relied on Muchangi Nduati & Co. vs John Chomba (2005) eKLR. The Court held:

"I incline to the view that this is an order, which is capable of being set aside since a bill has been taxed ex-parte. It is a general principle of law and procedure that where anything has been done ex-parte it can be set aside, if the circumstance merit, to allow a person to be heard who had been excluded. This applies to taxation as well as any other procedure."

The Advocate who took over the matter on behalf of the Applicant explained the reason for the failure to attend court for the taxation of the Bill. The third ground argued is that the Client's Advocate moved with speed to file the application after realizing that the Taxation had proceeded *ex parte*. The final ground argued was that no reasons were given for the taxation and that the failure to give reasons is a good ground to set aside the Taxation. For this proposition, the Applicant relies on two cases. Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board [2005] 1KLR 528, holding 9 where the Court of Appeal stated:

"If a taxing officer totally fails to record any reasons and to forward them to the objector as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference."

The second case is Kulecho & Co. Advocates –vs- Joel Kiema Mutinda and Another [2006] eKLR where the Court stated:

"The clients in coming to court have invoked the courts to exercise its discretion. The court indeed has wide discretion to make orders as may be necessary for the ends of justice. This is a typical case for the exercise of that discretion, why do I say so. The advocate Nzomo Mutinda was transferred to Kenyatta National hospital in February 2006, from Nairobi West Hospital. It does seem that Mr. Mutinda may have been sick before being transferred to Kenyatta National Hospital and I find that the client's contention that Mr. Mutinda was sick even as the bill of costs came up for taxation was not controverted by the advocate. I find that accordingly that this is a fit and proper case for this court to exercise its discretion in favour of the clients."

The Advocate/Respondent to the instant reference opposes the application on three grounds: one that the fact Client was not represented during the taxation of the Advocate/Client Bill of costs in this case was not sufficient reason to set aside the taxation; and two, that no items have been identified in the Bill of costs as the ones being challenged or objected to; and three that the application was filed 5 months after the taxation and was therefore way out of time. Mr. Were for the Respondent has submitted that since no demands was made on efforts made to have the file placed before the Deputy Registrar to give her reasons for the Taxation, the application is without merit.

Having carefully considered submissions by both counsel and the case cited, I rule as follows:

Paragraph 11(1) of the Advocates (Remuneration Order) requires an Advocate to request for reasons for the taxation stating the items in the Bill they will be objecting to.

The letter by the Clients Advocate to the Taxing Master dated 4th August 2008 did not specify which items of the Bill it was objecting to. It however indicated that any items taxed found not to be on scale would be objected to. It is my view that the letter of 4th August 2008 meets the requirement of Rule 11(1) of the circumstances of this case. It requested for reasons for the decision of the Taxing Master and indicated that objections would be raised on any items found not to have been taxed to scale. That letter met the required test under the Advocates (Remuneration) Order. Further, there are several letters written by the Advocate with the Bill to the same Taxing Master requesting for reasons for Taxation. All the letters elicited no response from the Taxing Officer. There is no requirement that an Advocate wishing to have reasons for a Taxing Officer's decision must prove that the file was placed before the Taxing Officer to give reasons. The rule requires an Advocate to prove that a formal request for reasons was made. The Applicant's Advocate herein has discharged his obligation in that regard.

I have looked at the ruling on the Taxation. Indeed I see nothing in the file qualifying as a ruling. It is in fact a one paragraph sentence stating as follows:

"The Advocate/Client Bill of Costs dated 3/4/2006 is taxed and certified at Kshs.2,847,033.70."

The ruling does not show how the figure is arrived at. Neither does it show how the Bill was taxed, which items were taxed and which were allowed or disallowed. Further no reasons for the decision were

given in the ruling. The Taxing Master did not attempt to meet the standard set in the Court of Appeal case of Kipkorir, Titoo & Kiara, supra. That ruling is not sufficient and does not serve the purpose it was intended.

The Taxing Officer not only failed to supply reasons for her decision but failed to record any in her ruling. Indeed both Advocates, to the parties required the reasons and they expressed that view in writing in their various letters to the Taxing Officer, which are also before the court.

The court's powers under paragraph 11 of the Advocates (Remuneration Order) are wide and meant to be exercised in order to make orders as are necessary for the ends of justice to be met. In this case the Taxing Officer failed both to record and to forward any reasons for her decision to the Advocates as required under Rule 11 of the Advocates (Remuneration Order). The contents of the ruling are inadequate and do not show, what principles, if any, were applied in taxing the Bill. For this reasons I find merit in the application and allow it. I will order that each party bearing their own costs. The ruling of the Taxing Master dated 13th July 2008 be and are hereby set aside. The Bill of costs should be taxed before a different Deputy Registrar.

A copy of this ruling be supplied to Miss Maina who taxed this Bill in the first instance.

Those are the orders of the court.

Dated at Nairobi this 29th day of May, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Marete for the Applicant

Mr. Were for the Respondent

LESIIT, J.

JUDGE