REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISCELLANEOUS APPLICATION 25 OF 2008

NATION MEDIA GROUP LIMITED ……. APPLICANT

VERSUS

KEPHA OSIAGO MAGARE …….. RESPONDENT

RULING

Under Rule 11(1) of the Advocates (Remuneration) Order, should any party object to the decision of the taxing officer, here may within fourteen days after the decision give notice in writing to the Taxing Officer of the items of taxation to which he objects.

And, under Rule 11 (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.

By this application dated 3rd March 2009, the Applicant seeks to have the ruling on taxation delivered on 22nd January 2009 set aside and that items Nos. 1, 4, 16 & 17 in the Bill of Costs be taxed afresh by this Court.

The application is based on the grounds contained in the body of the chamber summons and the facts contained in a supporting affidavit by the Applicant advocate dated 3rd March 2009.

The Respondent opposes the applicant on the basis of the grounds of opposition filed herein on the 27th April 2009.

A notice of preliminary objection to the application accompanied the grounds of opposition but appears to have been overtaken by events or its input was made to form part of the Respondent's arguments at the hearing of the application.

Abuse of Court Process on the part of the Applicant was the main issue in the preliminary objection. The Respondent through the Learned Counsel, Mr. Gichaba, argued that this application is an abuse of the Court process because the Applicant filed an application dated 23rd February 2009 under Rule 11 of the Remuneration Order which application is pending yet ex-parte orders were granted in favour of the Applicant.

In response, Learned Counsel for the Applicant Mr. Kagucia, argued that there was no abuse of the Court Process since it was the Court which decided that the present application be heard first.

Indeed on the 12th March 2009, this Court ordered that the present application be heard first after being informed by the Applicants Learned Counsel that the application dated 23rd February 2009 which was due for hearing on that day had been overtaken by events even though it was not withdrawn.

The applicant cannot be blamed. If the present application was given priority over that dated 23rd February 2009 following the direction given by the Court.

Be that as it may, the Applicant's objection to the material Bill of Costs is aimed at the taxation of items 1, 4, 16 and 17 of the taxed Bill which is dated 11th December 2008 and was taxed on 22nd January 2009. Item 1 was the instruction fees at KSh.49,000/=, item 4 was getting up fees at KSh.16,333/33, item 16 was service of bill of costs at KSh.14,000/= and item 17 was VAT at KSh.17,407/04. The reasons given by the Deputy Registrar for her decision respecting the disputed items are contained in a letter to the Applicant's advocate dated 5th February 2009.

On the instruction fees, the Deputy Registrar indicated that KSh.49,000/= was allowed under schedule 6 (1) (a) (b) of the Remuneration Order since a Notice of Motion forms part of the proceedings under the said provision. It followed therefore that getting up fees in item 4 was chargeable. With regard to the service of bills of costs in item 16, the Deputy Registrar indicated that it was not disputed that the applicant's counsel was served in Nairobi by the Respondent's advocate and as regards VAT (item 17) the Deputy Registrar indicated that the applicant did not contest that the amount was chargeable but said that it depended on what was to be calculated.

Learned Counsel for the Applicant, argued and contended that under item 1, the instruction fees should have been assessed at a minimum of KSh.3,500/= on the basis of schedule 6 1(0) (VIII) and that the sum of KSh.49,000/= was not justified. On the getting up fees, counsel contended that there was no getting up as envisaged under the Remuneration Order and if there was getting up then the fees due is calculable on the basis of instructions fees.

On service costs, Learned Counsel argued that the expense of KSh.14,000/= was unreasonable and was in any event not established by evidence.

On V.A.T. counsel argued that it should have been computed from the aggregate of all the other items.

In countering the foregoing arguments Learned Counsel for the Respondent contended that the instruction fees was correctly assessed on the basis of schedule 6 (1)(a) (b) of the Remuneration Order and since there was extensive arguments in court the getting up fees was automatic and was based on the instruction fees. He further contended that schedule 6 (1) (0) (VIII) did not apply as it related to different types of proceedings. He also contended that the service costs were not opposed before the taxing master and that VAT depends on the amount taxed and is automatic.

From the foregoing, the basic issue that arises for determination is whether the Deputy Registrar applied the wrong principles in arriving at her decision on the disputed items.

Generally, a Court will not interfere with the award of a taxing officer unless it thinks that the award is so high or so low as to amount to an injustice to one party or the other **(see Premchand Raichand Ltd & Another Vs. Quarry Services of E. Africa Ltd & Another (1972) (E.A. 162).**

Invariably, injustice would arise if wrong principles are applied by the taxing officer.

Schedule VIA of the Advocates (Remuneration) (Amendment) Order, 2006 provides for taxation of party and party costs. Paragraph 1 (a) and (b) provides for the scale of fees chargeable in suits commenced by plaint, petition, originating summons or notices of motion. Clause (a) provides for undefended suits

while clause (b) provides for defended suits.

The minimum chargeable as instruction fees in defended suit where the value of the subject matter does not exceed KSh500,000/= is a sum of KShs.49,000/=. This is the amount that the Respondent claimed in the disputed Bill of costs and based on this amount a getting up fees of KSh.16,333,33/= was claimed. The two claims (i.e. item 1 and 4) were awarded by the Taxing Officer under the aforementioned schedule VIA (1) (a) and (b). The same schedule VIA (1) (0) (VIII) provides for matters arising during proceedings and states that where an application is opposed, the fee chargeable may not be less than KSh.3,500/-. Invariably, the getting up fees (if any) would be calculated on the basis of this minimum fees subject to any discretionary increament.

The record shows that the disputed Bill of Costs arose from the dismissal of on application dated 10th March 2008, seeking extension of time for the Applicant to file an appeal against the decision of the Learned Senior Resident Magistrate at Winam in SRMCC No. 435 of 2005.

The application was a fresh matter in the High Court and not a continuation of the matter in the lower court. It was commenced in this court by a notice of notice and was not a matter arising during proceedings. It would therefore fall under the ambit of schedule IVA (1) (a) and (b) rather than schedule IVA 1 (0) (III) of the Advocates (Remuneration) (Amendment) Order of 2006.

Consequently, this court is disinclined to uphold the contention that the instruction fees and the getting up fees (i.e. Items 1 and 4 of the Bill) ought to have been assessed under schedule IVA (i) (0) (VIII) of the aforementioned remuneration order.

A trial means - "**A formal judicial examination of evidence and determination of legal claims in an adversary proceedings."** (See Blacks Law Dictionary 8th edition Pg. 1543).

An application commenced by a Notice of Motion would qualify as a trial by another names without the necessity of calling witnesses to appear and testify before a judge as implied by the Applicant.

The considered opinion of this court is that items 1 & 4 of the material Bill were correctly assessed by the taxing officer as provided by schedule VIA (1) (a) and (b) of the material Remuneration Order.

However, with regard to Item 16, the amount of KSh.14,000/= required justification and proof by documentary evidence even though service was not disputed and considering that previous service of process did not have to cost that much.

With any change in the assessment of Item 16, the assessment on Item 17 would definitely be affected.

In the end result, applying the principle set out in the case of **Steel Construction Petroleum Engineering (E.A.) Ltd Vs. Uganda Sugar Factory Ltd [1970] E.A. 141.**

This court now orders that the material Bill be remitted to another taxing officer to re-assess Items 16 and 17 with a view to determining the appropriate amount payable in finality.

Each party shall bear own costs of the application.

Ordered accordingly.

J. R. KARANJA

JUDGE

[Read & Signed this 22nd Day of May, 2009.

JRK/mo