



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Misc. 178 of 2006**

**NYAMOGO & NYAMOGO ADVOCATE .....APPLICANT**

**VERSUS**

**CHARLES IRUNGU MAINA..... RESPONDENT**

**RULING**

1. The Chamber Summons dated 4.2.2009 is premised on paragraph 11(1) and (2) of the Advocates Remunerations Order and the grounds on which the advocates, M/s Nyamogo & Nyamogo rely on are that:

- i. *“The learned Taxing Officer acted arbitrarily and without jurisdiction in the manner in which he purported to taxed the Bill of Costs.*
- ii. *The learned Taxing Officer erred in failing to appreciate the true/full import of the mandatory provisions of paragraph 7 of the Advocates (remuneration) Order*
- iii. *The learned Taxing Officer fell into further error in finding that “... the Bills were canvassed jointly...” a legal impossibility considering that the Bills arose from two independent and separate suits in which, inter alia, services we rendered on diverse dates and places.”*

2. The advocates then pray as follows:-

*“The Applicant pray that the decision of the Taxing Officer be reversed and that the Bill of Costs dated 4.10.2006 be allowed as presented since it answers to the very minimum figures provided by the Advocates. (Remuneration) Order which the Taxing Officer had neither jurisdiction nor discretion to disturb or that the same be remitted to the Taxing Officer to re-tax according to law and finally that the Costs of the Reference be awarded to the Applicant.”*

3. In his Supporting Affidavit sworn on 4.2.2009, Mr.Nyamodi Ochieng Nyamogo advocate depones that when parties appeared for taxation of the Bill of Costs in H.C.Misc No. 178/2006 parties agreed that the Ruling thereto would apply to H.C. MISC 179/2006 That on 30.11.2006 when taxation was to commence, the Respondent objected to the same but the preliminary objection was overruled and taxation adjourned to 27.1.2007. On that day, after submissions by Mr. Nyamogo, the Respondent declined to respond to the taxation arguing that he intended to call witnesses first. That the taxing officer allowed the oral application and thereafter allowed the Respondent time to call witnesses, a procedure Mr. Nyamogo termed a “*strange/alien*” journey in matters of taxation. This went on for 18 long sittings but that on 6.6.2008 a new taxing officer found the procedure improper and ordered taxation to proceed in the usual

manner. Mr. Nyamogo contends that he was entitled to fees for the extra sittings during the period when witnesses were to be called for taxation.

4. That in any event, there was no consolidation of H.C.Misc 178/2006 and H.C.Misc 179/2006 and therefore it was improper to allow one item in one cause and disallow it in another. Further, it was wrong to tax the Bill of Costs under schedule V of the Advocates Remuneration Order while clearly schedule VI of the Order was the applicable one. It was also improper, he added to allow any item below the minimum provided by the order.

5. Mr. Nyamogo further deponed that inspite of all his submissions backed by legal authorities, the taxing officer delivered his Ruling and on 3.11.2008, a notice of objection was given and reasons for the taxation availed on 3.2.2009 which reasons he depones are neither backed by evidence nor the law. That therefore the learned taxing Officer fell into error and his ruling on taxation ought to be set aside.

6. In his Replying Affidavit sworn on 19.2.2009, Mr. Makau, Advocate for the Respondent deponed that the contested Bill of Costs was properly taxed and the taxing officer acted within the law in reaching his decision. That the Applicant accepted the decision and upon entry of judgment accepted the taxed costs which were then paid in full. That in any event, the taxing master accepted the point that H.C.Misc 178/2006 and H.C. Misc 179/2006 were consolidated and therefore there was no reason to award attendance fees twice. Further, that reliance on Rule 13A of the Advocates Remuneration Order was proper and there was nothing wrong with that fact. Lastly, that there was no under-taxation and the Reference should be dismissed with costs.

7. I have noted the submissions made substantially along the same lines as above and my appreciation of the matter before me is as follows:-

8. Firstly, I will not go into the issue whether is proper to take evidence in a taxation of any bill of costs because the matter is no longer in issue. However, I should begin by addressing the issue of the connection between H.C. Misc 178/2006 and H.C. Misc 179/2006. On 16.5.2008 while cross-examining the Respondent Mr. Nyamogo is recorded as stating thus;

*“We are proceeding on the understanding that though we are on H.C. Misc 178/2008 the Ruling will also apply to H.C. Misc 179/2006.”*

Mr. Makau replied;

*“That is the position”*

9. In previous proceedings on 30.11.2006, Mr. Nyamogo had similarly stated:-

*“We have agreed that my objection to the Preliminary Objection shall apply to H.C. Misc Application No. 179/2006.”*

Mr. Makau Responded-

*“That is correct”*

10. Thereafter all submissions made proceeded on that premise and in his reasons following taxation of the Bill of Costs the learned taxing master stated that the reasons were in respect of taxation in “ *Misc application nos. 178 and 179*” and referred to the issue relating to “*Bills*” meaning the Bills of Costs in both files. Was this proper?

11. I have taken cognizance of the fact parties proceeded as if H.C. Misc 179/06 and 179/2006 had been consolidated but to my knowledge consolidation cannot happen at the point of taxation because each Bill of Costs is separate and relates to services rendered in each separate matter. If however two matters are consolidated then as stated by Kuloba, J. in Judicial Hints on Civil Procedure 2nd Edition.

*“Where suits or appeals are consolidated, there should be an apportionment of costs, including the instructions fees. The advocates for the parties cannot expect to be paid twice over the same work. In other words an advocate is not entitled to get paid money three times over for the same work because he has won three actions.*

*On the question of how to assess an instruction fee, consolidated actions stand on the same footing as a test case for this purpose: M.F Patel Taxing Officer in Bronislaw Sirley and Israel Somen vs Commissioner of Income Tax an Local Committee for the Nairobi Area, Supreme Court of Kenya at Nairobi, Appellate side, civil appeals Nos 16 and 17 of 1962 (consolidated).”*

12. In the situation before me I gather that in fact there was no consolidation and therefore it was an error for the taxing officer to conclude that:

*“Since the Bills were canvassed jointly I could not treat each separately and duplicate the costs awarded.”*

I say this because there was no formal order of consolidation and interlocutory proceedings per se cannot be the basis for consolidation.

12. It is also instructive to note that the Bills of Costs arose from two separate proceedings;

- i. H.C. Misc Application No. 206/2003 and
- ii. H.C. Civil Appeal No. 83/2004

13. It is the expectation of the law that unless there is consolidation and I have said that there was none (and none was properly conceivable in the present situation) the Bills of Costs should have been taxed separately as indeed the learned taxing officer did but on the wrong premises as I have shown above. Mr. Nyamogo is therefore right and he indeed proceeded to object, separately to the taxation of the Bills of Costs and filed separate reference to this court. I have to add here that the taxing officer should have given separate reasons for the separate taxations and it was erroneous in an appeal and in a miscellaneous application to lump the reasons for arising at certain figures in respect of totally different items of two separate Bills of costs Rules 11(1) and (2) of the Advocates Remunerations Order are clear as to what both the objector should object to i.e *“items of taxation to which he objects”* and the reasons to be given by the taxing officer *“the reasons for his decision on those items.”* Once the reasons are general, then the expectation of Rule 11 have not been met.

14. Having so said, it is clear to me that the taxing officer fell into error on a fundamental question and the whole process of taxation thereafter became flawed. I will therefore address no other issue; including whether the taxing officer erred when he allowed taxation on the extra days spent on cross-examination of the Respondent before taxation. That issue can be canvassed afresh in the separate taxations of the separate Bills of Costs. Individual items of the Bills of Costs will also be canvassed before the taxing officer following my final orders which are these;

15. Let the Bills of Costs in H.C. Misc 78/2006 and H.C. Misc 79/2006 be remitted back for taxation separately by a taxing officer other than S.M. Mungai Esq. - Senior Principal Magistrate.

16. Costs of this reference shall be borne by each party and since the issues I have addressed are the same, I would have addressed in H.C. Misc 79/2006, the same orders are made in that file and a copy of this Ruling should be placed in that file and the same orders above to apply equally in that file.

17. Orders accordingly.

Dated and delivered at Machakos this 19<sup>th</sup> day of May 2009.

**Isaac Lenaola**

**Judge**

In the presence of; Mr Makau for Respondent.

**Isaac Lenaola**

**Judge**