



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Suit 259 of 2000

CHRISTOPHER MICHAEL STRONG PLAINTIFF

VERSUS

MWANGI MWANIKI GITONGA DEFENDANT

JUDGMENT

This is a Reference from the decision of the Taxing Master under the provisions of paragraph 11 of the Advocates Remuneration Order and Section 6 of the Judicature Act.

The Applicant seeks the following orders:-

- (i) That the Deputy Registrar's decision on taxation made on 17th July, 2007 in Eldoret HCCC No. 259 of 2000 be set aside or varied by increasing the fees awarded by Shs. 16,500/= taxed on account of an obvious typographical slip.
- (ii) The agreement of the parties recorded on 17.7.2007 be adopted and an aggregate sum of Kshs. 11,025/= be taxed off from items No. 2 to 79 of the bill of costs.
- (iii) Costs of reference be provided for.

The application is grounded on the following grounds;

that:-

1. The Taxing Officer's holding on the taxation is contrary and obviously incongruous with the consent taxing off Kshs. 11,025/= from items 2 to 79 of the bill.
2. The Taxing Officer erroneously lumped up instructions fees of Kshs. 55,000/= with the amount taxed off, thus giving rise to an erroneous total of Kshs. 66,025/=.
3. The Taxing Officer erred by failing to consider the consent of the parties wherein it was agreed that Kshs. 11,025/= be taxed off from the global sum of Kshs. 117,872/= (117,872 – 11,025/- = 106,847/=).
4. The Taxing Officer ought to have merely decided on the contentious item No. 1 of the bill only.
5. The Taxing Officer erred applying the rules of procedure by holding that parties are bound by their

pleadings and in so holding arrived at erroneous finding that “letting up fees” should be taxed off when in fact the “letting up fees” instead of “Getting up fees” was an obvious misnomer and mere typographic error which ought not deny a party costs. In any event no objection was taken by the Defendant as to the issue.

6. The resultant costs is inordinately low.

The Respondent opposed the Reference on the following grounds:-

- (a) The application is incompetent and unmerited in law as he had an option to apply for review of the consent order.
- (b) The application is an abuse of the due process of law.
- (c) The application is made in bad faith and aimed at vexing the Respondent.
- (d) There is an error apparent on record to warrant the application.

I have considered the Reference, the Supporting Affidavit,

the Grounds of Opposition and Submissions by Counsel. I have also perused the record.

In the affidavit sworn by Mr. R. R. Mwetich Advocate for

the Applicant he deponed inter alia:-

“(2) THAT on 10th July, 2007 Mr. Kimani Advocate and I sat together and taxed off an aggregate of Kshs. 11,025/= from items Nos. 2 to 79 of the Plaintiff’s Bill of costs dated 20th May, 2007 and we recorded the agreement before the Deputy Registrar.”

The Respondent did not file any replying affidavit to deny or rebut this statement on oath. The record shows that on 10th July, 2007 the two Counsels appeared before the Deputy Registrar, Mrs. A. B. Mongare in the morning. The matter was adjourned to 10.30 a.m. for mention. The record shows that later, the Counsel appeared and Mr. Mwetich told the Court that they had agreed on all items save for item 1 – instruction fees. That a sum of Kshs. 11,025/= to be taxed off from items 2-79. The Taxing Master reserved the Ruling on Item 1 to 17-7-07.

Consent on items 2 – 79 is confirmed in the Ruling delivered on 17-7-07 and later in the reasons supplied.

Being aggrieved the Applicant filed this application. It is the contention of the Respondent that the Applicant ought to have applied for review of the Consent Order and that the application is incompetent.

I do not agree with the submission. I think that the Applicant is not challenging the Consent Order but the taxation and reasons given by the Taxing Master in respect of the instruction fees and the process of calculation. It is my view that the only option or avenue he had was that of appealing to a Judge through a reference. This application is properly made and is competent.

Although it is not expressed with clarity or certainty, my understanding is that the Taxing Master awarded instruction fees on the sum of the subject-matter or value thereof of Shs. 800,000/= at a figure of Shs. 55,000/=. This is what the Applicant had sought and pleaded in his Bill of Costs. This was the only contentious issue before the Taxing Master. However the Taxing Master proceeded to tax off item 2 since it was described as “Letting up fees.” This was not decipherable or known to the Taxing Master. The sum taxed off was Shs. 16,500/= in item No. 2 although it was part of the consent.

With respect I think that there was a typographical error in this description which was manifestly discernible from the face of the record. A simple look at item 2 reveals that the Applicant meant "Getting up fees". This was a misnomer and typographical error that ought to have been corrected under the Slip Rule. Disallowing this item in its entirety was not proper. I do hold that the Applicant is entitled to getting up fees however the parties could not agree on the amount since the instruction fees was still in dispute and the Taxing Master invited to determine the question.

Under the Principal Order, the Advocates (Remuneration) (Amendment) Order, 1997 which was in force when the suit was filed and even in the existing Remuneration Order, of 2006, the Getting up fee shall not be less than 1/3 of the instructions fees allowed on taxation. The Taxing Master allowed instructions fees of Shs. 55,000/=. One third (1/3) of Shs. 55,000/= is Shs. 18,333/30.

In exercise of my discretion under the Advocates Act, I do hereby set aside the order disallowing Getting up fees. I do hereby allow the Applicant getting up fees. The instructions fees awarded being Shs. 55,000/=: I award one (1/3) thereof as Getting Up fees which is the legal minimum and in this case shall be Shs. 18,333/30. Items 3 to 79 shall remain as agreed in the consent of the parties.

The grand total of the items agreed upon comes to Kshs. 46,372/=. To this must be added the instruction fee and the Getting Up fee. This would work out as follows:-

Items No. 3 – 97 Kshs. 46,372.00

Add

Item No. 1 – Instruction fee Kshs. 55,000.00

Item No. 2 – Getting Up fee Kshs. 18,333.30

TOTAL Kshs. 119,705.30

Less

Amount taxed off by Consent Kshs. 11,025.00

GRAND TOTAL Kshs. 108,680.30

The net result is that I do hereby allow the application and tax the party and part costs at Kshs. 108,680/30. The Respondent shall pay costs of this Reference to the Applicant.

DATED AND DELIVERED AT ELDORET ON THIS 29TH DAY OF JULY, 2009.

M. K. IBRAHIM

JUDGE

In the presence of:-

Mr. Mwetich for Plaintiff

Mr. Mwinamo for the Defendant

Mr. Muhoho for the 3rd Party