



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Miscellaneous Civil Application 687 of 2007

**MBUGUA & MBUGUA ADVOCATES.....ADVOCATES/RESPONDENT**

**VERSUS**

**KENINDIA ASSURANCE COMPANY LTD.....CLIENT/APPLICANT**

**R U L I N G**

This is a reference filed by the Client against the decision of the Taxing Officer of a taxation that was ruled on the 14<sup>th</sup> August, 2007. The Client seeks to have the entire taxation set aside and an order made for taxation of the Bill afresh. The grounds on the face of the application are that the ruling was against natural justice and oppressive.

The application has been opposed through four grounds of objection filed on 26<sup>th</sup> March, 2009. The gist of the objection is that the reference has no merit as there is no evidence of breach of the rules of natural justice and for reason the Taxing Master rightly considered all matters in issue.

In the Court of Appeal decision of **KIPKORIR TITOO & KIARA ADVOCATES VS. DEPOSIT PROTECTION FUND BOARD 2005** 1 KLR 528 at page 535 the Court held:

***“Although there was no strict compliance with Rule 11(2) of the Order, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that 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.”***

I am guided by the decision of the Court of Appeal. It is quite clear that where an Applicant has demonstrated diligence in getting the reasons for the decision of the Taxing Officer, and when no reasons are forthcoming, such an Applicant would be allowed to proceed with a reference even in the absence of reasons for the decision of the Taxing Officer.

I have considered the submissions of Mr. Omwenga on behalf of the Client. If I got him correctly, he challenges the taxation of the Bill on grounds of an award on getting up fees, the award on VAT and the award on perusals and correspondences.

On the issue of the getting up fees, Mr. Omwenga submitted that they were neither applied for nor

earned. Counsel relied on Schedule VI paragraph 2 and proviso thereunder for the proposition that getting up fees is only earned when parties prepare to go to trial.

Ms. Githaiga for the Advocate urged the Court to find no merit in this complaint. Counsel submitted that the Taxing Master was correct in awarding getting up fees having found that parties had prepared in order to enter the consent order.

The issue begging for an answer is, when can a Taxing Master award getting up fees. Item 2 of the Bill of Costs sought fees for getting up and preparing for trial in the sum of Kshs.21,915/67/-. The Taxing officer in his ruling observed that ordinarily getting up was only chargeable if the matter had been confirmed for hearing. The taxing officer stated that in his view the getting up fees was chargeable because having looked at the proceedings and the correspondences copies that were exchanged between the parties and their Advocates (it becomes apparent that there was an intention to settle this claim amicably) the Deputy Registrar concluded, the fact that the Advocate who supplied all the necessary documents necessary to settle the suit out of court, that getting up fees had been earned and that the Applicant was entitled to claim the getting up fees.

The Taxing Master had no jurisdiction to award getting up fees where the suit was not confirmed for hearing and where from the onset the parties were negotiating with a view to settling the matter amicably out of court. It is not disputed that in fact the parties settled out of court. There was an error in principle by the Deputy Registrar by allowing fees for getting up and preparation for trial which were clearly not earned.

The second complaint was that the Taxing Master gave a composite sum for perusals and correspondences. Ms. Githaiga for the Advocate opposed that conclusion and submitted that the Taxing Master added each item separately to come up with the composite sum

I have perused the Bill of Costs and considered the Taxing Master's ruling. With respect to Mr. Omwenga, I find no merit in this complaint. The Taxing Master considered each item comprising perusals and correspondences to come up with the sum awarded.

The last complaint regarded VAT. Mr. Omwenga submitted that VAT was added to the entire Bill of Costs as opposed to the instruction fees. Ms. Githaiga's submission on this was that VAT was properly awarded.

Mr. Omwenga relied on case of **Mereke & Co. Advocates vs. National Bank, Misc. Application No. 540 of 2001** for proposition that VAT was only chargeable as gains the instruction fees.

Section 6(4) of VAT Act provides that:

***“Tax on any supply of goods or services shall be a liability of the person making the supply and (subject to the provisions of this act relating to accounting and payment) shall become due at the time of supply.”***

VAT is clearly chargeable as against goods supplied or services rendered. That means VAT should have been taxed as against the instruction fees.

The Taxing Master awarded Kshs.118,270/- on the Instructions Fees item and increased by half Advocate Client fees (Kshs.59,135/-) bringing total under this item to Kshs.176,405/-. That being the case VAT as against Kshs.176,405/- adds up to Kshs.28,384.80. The amount charged as VAT was therefore correct. The client's complaint against this item has no merit.

In conclusion, the client's complaint in regard to the getting up fees which is item 2 of the Bill of Costs is merited. I do find that the Taxing Officer erred in principle in the exercise of his discretion in awarding the getting up fees for a trial that never took place and which had not been confirmed. The sums awarded under item 2 of Kshs.21,915.60/- were irregular.

There is no point of returning the Bill of Costs to a Deputy Registrar to correct the error noted in this reference. In order not to waste judicial time and to save costs for the parties, I will correct the error by the Deputy Registrar by striking out the sum awarded in item 2. The taxed costs are allowed at Kshs.183,698.40/=.

That is the order of the court.

**Dated at Nairobi this 3<sup>rd</sup> day of July 2009.**

**LESIT, J.**

**JUDGE**

***Read, delivered and signed in presence of:***

N/A for Mr. Omwenga for the Client/Applicant

Ms. Githaiga for the Advocate/Respondent

**Dated at Nairobi this 17<sup>th</sup> day of July 2009**

**LESIT, J.**

**JUDGE**