



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

Miscellaneous Case 690 of 2007

MURIU MUNGAI & CO. ADVOCATES PLAINTIFF

VERSUS

NEW KENYA CO-OPERATIVE

CREAMERIES LTD..... DEFENDANT

R U L I N G

Chamber Summons dated 14/3/2008 brought under **Rule 11 (2) Advocates Remuneration Order** seeking orders:-

- 1. That the decision of Taxing Officer delivered on 25/7/2007 relating to items 1, 2, 3, 4, 7 and 8 of the Bill of Costs be set aside and refer back to the Taxing Officer for re-taxation.**
- 2. In the alternative the honourable court be pleased to re-tax the said items 1, 2, 3, 4, 7 and 8 of the Bill of Costs – on the ground that item (1) was allowed at Kshs.102,250/= with VAT at Kshs.16,260/= is manifestly excessive as to represent an error in principle on the part of the Taxing Officer. He did not consider the provisions of paragraph 18 and 23A of Advocates Remuneration Order.**

Regarding item (3) the Taxing Officer erred in principle by failing to

Appreciate that the business transacted under item (3) was transacted only once yet the advocate had claimed the fees in several other bills filed against the client arising out of instructions to transfer other properties and fees allowed under item 3 which is duplication. The Taxing Officer failed to appreciate that fees allowed under item (1) covered the business represented by item (7) and item (8) of the instructions given to the advocates.

Furthermore Kshs.5,000/= was allowed item (4) whereas under Schedule 1, there is no provision for business represented by item (4). The counsel for the advocate filed 2 grounds of oppositions:-

1. That the reference is without merit or foundation there being no reasons of the Taxing Officer to demonstrate of the basis of alleged errors of principle and;

2. The application is misconceived having been filed without the reasons of Taxing Officer as provided under Regulation 11 (2).

Both parties have filed written submissions in support of their

respective positions. The reasons for taxation dated 28/2/2008 is filed and it is clear the time for filing the same was duly extended.

“The bill dated 13/4/2007 is taxed at Kshs.213,610/= for the following reasons:”

Item one was taxed as follows: The applicant was instructed to transfer Nakuru Municipality/Block 4/152 whose value is Kshs.5,750,000/=. The bill is drawn under Schedule 1 formular” and I award 16% VAT. The total for item 1 is Kshs.118,610/=.

Item 3, 4, 7 and 8 were taxed as drawn. The part of the items are taxed off as they are provided for.”

The advocate/applicant submits that there is no dispute between advocate and client on the issue of retainer. However, the taxed amount was based on value of the property was valued at Kshs.5,750,000/= which was insurance value while real valuation was Kshs.5,290,000/=. Therefore, on item one the taxation should have been based on that figure of Kshs.5,290,000/=.

In addition, the advocate submits that the correct scale is Schedule One. Advocates Remuneration Amendment Order 1997 and that minimum scale fees amounts to Kshs.94,400/= under item one. The work done was undertaking preliminary investigations on title and proportion of document. On transaction preparation of vesting order and registered the said orders on relevant title to enable them transfer to the client. And the transfer was completed and title given to the client.

The Schedule Scale 1 for conveyance assignment or other assurance or an agreement to convey, assign for the sum of Kshs.5,750,000/= is Kshs.101,300.00 as provided on page 10 of Scale of charges on sales and mortgages Schedule 1 and stamp duty payable. Where consideration is Kshs.5,760,000/=.

Item 1 dated 6.5.05 under which a sum of Kshs.151,500/= less Kshs.32,390/= was taxed off relates to instruction fees and receiving instructions to transfer the property known as Nakuru Municipality/Block4/152 (formerly LR No.451/409), which property is valued at Kshs.5,750,000/= from the Old KCC to the New KCC to undertake preliminary investigations and search on the title/title documents, all the times having regard to the case and labour required, the nature and importance of the matter, the value of subject matter, the interest of the parties and complexity of the matter and the special circumstances of the work.

Item 2 was the charge for VAT at 16%. These items go hand in hand as the VAT is a percentage of the instruction fees charged. By a letter dated 22/3/06, the client (New KCC) instructed the firm of Muriu Mungai & Co. Advocates (the respondent here) in the following terms:-

“Dear Sirs,

Re: Transfer of Assets.

We refer to the above matter.

Please find herewith rates clearance certificates in respect of the following properties:-

1. L.R. No. 631 in Kericho 3 shops

2. L.R. No. 451/1057 or Block 6.65 in Nakuru, Milk Reception Centre & Factory

3. *L.R. No. 451/574 or Block 6.68 in Nakuru Sales Depot*
4. *L.R. No. 451/572 or Block 11.38 in Nakuru Kipsigis Rise Milimani Residential Houses*
5. *L.R. No. 451/365 or Block 11.45 in Nakuru Kipsigis Rise Milimani Residential Houses*
6. *L.R. No. 451/112/XXXV or Block 12/120 in Nakuru Milimani Residential Houses – Elgeyo Avenue*
7. *L.R. No. 451/112/XXX or Block 12/121 in Nakuru Milimani Residential Houses – Elgeyo Avenue*
8. *L.R. No. 451/112/XXXV or Block 12/122 in Nakuru Milimani Residential Houses – Elgeyo Avenue*
9. *L.R. No. 451/4611 or Block 12/112 in Nakuru Milimani Residential Houses*
10. *L.R. No. 451/879 or Block 13/215 in Nakuru Staff House Flamingo Road*
11. *L.R. No. 451/879 or Block 13/216 in Nakuru Staff House Flamingo Road*
12. *L.R. No. 451/591 or Block 152 in Nakuru 4 Flats Owashiki Road.*

Kindly proceed to transfer the properties to New KCC.”

The valuation of this property is said to be not Kshs.5,750,000/= which valuation was purpose of insurance but Kshs.5,290,000/= was actual value – a difference of Kshs.460,000/=. This was based on valuation by Tysons Ltd. Therefore the assessed value for purposes of taxation was not correct. Instructions to perform the jobs itemized as number 3 does not have to be given or proven. And the clearance certificates claimed under item 4 were already provided by the client as stated in the letter dated 22/3/2006.

The client submits that the registration of the vesting order would constitute the transfer. No vesting order is registered. In view of the fact that there was no sales, purchases and mortgages of immovable property, this bill falls under paragraph 18 (f) of the Advocates Remuneration Order, the client submits, and therefore the Taxing Officer did not comply with paragraph 23 (A) of the said order.

Regarding the disbursements charges the same are to be proved and receipts exhibited before payment can be allowed. Upon considering the application herein and the record, it is clear that the taxation commenced on the incorrect basis of the value of subject matter. The instruction fees would have been much lower. This affects the amount of assessed fees. The other point is that the work done seems to be outside of instructions given.

To transfer, to register assignment and vesting order seems to be duplication. The Taxing Officer seems not to have considered provisions of paragraph 23 (A) and paragraph (f) of **Advocates Remuneration Order**.

In the circumstances, it is my view that this bill ought to be referred back to the Taxing Officer to carry out the exercise in accordance with proper principles. The taxation and certificate therefore dated 25/7/2007 are hereby set aside.

The application is allowed with costs to the applicant.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 30th day of October, 2009.

JOYCE N. KHAMINWA

JUDGE

