



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Miscellaneous Case 280 of 2007**

**MURIU MUNGAI & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**NEW KENYA CO-OPERATIVE CREAMERIES  
LTD.....RESPONDENT**

**RULING**

On 24<sup>th</sup> May 2007, the taxing officer of this court taxed the applicant's advocate client bill of costs. The bill of costs was taxed in the absence of the respondent. The taxation was in respect of a conveyance that the applicant alleged to have undertaken on behalf of the respondent. The respondent was aggrieved by the decision of the taxing officer of this court. On 2<sup>nd</sup> July 2008, the respondent filed reference to this court pursuant to provisions of paragraph 11(2) of the Advocates (Remuneration) Order. The respondent sought the setting aside of the ruling of the taxing officer particularly as it relates to items no. 1, 7 & 10 of the bill of the said bill of costs. The respondent asked the court to make such orders as it may deem fit regarding the said items in the bill of costs. The respondent contends that the taxing officer erred in law in granting the amount in respect of the dispute items when in fact the applicant had failed to execute instructions given by the respondent and was therefore not entitled to full instruction fees. The respondent was of the view that the taxing officer had acted outside the settled principles in such matters. The reference is supported by the annexed affidavit of Milkah Mugo, the company secretary of the respondent and Paul Nyaga, the advocate for the respondent.

The reference is opposed. The applicant filed grounds in opposition to the reference. It stated that there was no competent reference before the court within the meaning of paragraph 11 of the Advocates (Remuneration) Order. It contends that there was no error of principle shown to have been committed by the taxing officer to warrant this court to interfere with taxation. The applicant argued that the reference was without foundation or merit as it seeks to challenge the decision of the taxing officer solely on the grounds of quantum of the costs assessed without demonstrating any error of principal or erroneous exercise of discretion. The applicant was of the view that there was no evidence to substantiate the averment made in paragraph 5 of the affidavit in support of the reference and therefore the court ought to dismiss the reference with costs.

Prior to the hearing of the reference, the applicant filed written submission in opposition to the reference. At the hearing of the reference, I heard rival arguments made by Miss Mambo for the respondent and Mr. Kabaiku for the applicant. I have carefully read the pleadings filed by the parties herein in support of their respective opposing positions. I have also considered the submissions presented to the court in the course of hearing of this reference. Two issues emerged for determination by the court: the first issue is whether the respondent had filed a competent reference to this court. The second issue for determination is whether the respondent established sufficient reasons for this court to interfere with the taxation of the taxing officer. According to the applicant, the respondent's reference was incompetent because the respondent had not filed objection to the taxation within fourteen (14) days of the taxation. It was the applicant's further contention that the respondent had not filed reference within fourteen (14) days after the taxing officer had given his reasons for the taxation in writing. The respondent denied that it had objected to the taxation out of time. It annexed a copy of its objection to the taxation dated 28<sup>th</sup> May 2007 which was received by the court on 29<sup>th</sup> May 2007. The bill of costs was taxed on 24<sup>th</sup> May 2007. It is therefore clear that the claim by the applicant that the respondent failed to file objection within

the stipulated fourteen (14) day period is without foundation. The respondent objected to specific items that are subject to this reference within five (5) days of the taxation of the same by the taxing officer of this court. Paragraph 11(1) of the Advocates (Remuneration) Order requires any party objecting to the decision of the taxing officer to give notice in writing of the items of taxation to which he objects to within fourteen (14) days of the decision of the taxing officer. The respondent complied with this requirement. There is no merit to the applicant's challenge to the competence of the reference on that ground.

As regard whether the respondent filed reference within fourteen (14) days of being given reasons of the decision of the taxing officer as required by paragraph 11(2) of the Advocates (Remuneration) Order, it was the applicant's contention that the respondent had failed to file reference within fourteen (14) days of the taxing officer giving his reasons. From correspondence exchanged between counsel for the respondent and the Deputy Registrar of the court, it was evident that confusion seems to have arisen as to the precise date when the taxing officer gave the reasons for taxation. There is a letter of the Deputy Registrar dated 6<sup>th</sup> May 2008 which notified the respondent that the reasons for taxation were contained in the ruling of the taxing officer. Apparently, this letter was not received by the respondent. I was persuaded that the letter in question was not sent to the respondent in light of the effort made by the respondent to secure the said reasons from the taxing officer after the said date. Letters by the Deputy Registrar addressed subsequently to the respondent did not clear the air. They appear to suggest that the taxing officer's reasons would be availed to the respondent upon payment of the requisite court fees. Be it as it may, the respondent filed the present reference on 2<sup>nd</sup> July 2008. Having set out the chronology of the events that transpired, it was evident that the respondent cannot be blamed for the failure by the taxing officer to give reasons at a precise date that can be determined by the court. This court has discretion to find that a party filing reference has substantially complied with the requirements of paragraph 11(2) of the Advocates (Remuneration) Order if it forms the opinion that such a party made effort to comply with the requirements of the rule. In the present reference, it was clear that the respondent made effort to comply with the requirement of the rule. The numerous letters written by the respondent to the Deputy Registrar of the court is sufficient proof that the respondent made every effort to obtain the said reasons from the taxing officer. This court is fortified in its decision by the ruling by the Court of Appeal in *Kipkorir Titoo and Kiara Advocates vs Deposit Protection Fund* [2005] 1 KLR 528 at page 535 where it was held that:

*“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 therefore hold that the reference filed by the respondent in the present suit is competent. I find no merit with the applicant's objection to the reference in regard to the said ground.

On the merit of the reference, upon evaluation of the facts of this case, it was evident that the taxing officer assessed the applicant's bill of cost without the benefit of the input of the respondent. The taxing officer was satisfied that the date scheduled for the taxation of the said bill of cost was taken by consent hence his decision to assess the said bill of costs in the absence of the respondent. During the hearing of this reference, it was clear that the respondent was challenging the decision of the taxing officer on the ground that the learned officer failed to appreciate the fact that the applicant had not completed the work that it was instructed to undertake. It was evident to this court that if the taxing officer was put in the picture of the work that had been undertaken by the applicant, it was likely that he would not have assessed the bill of costs in the manner that he did. I therefore hold that the respondent established that there was error of principle committed when the taxing officer failed to consider the quantum of work that was undertaken by the applicant. I think it is fair and just that the respondent be given an opportunity to ventilate its position before the taxing officer, especially in light of the amount that it will be required to pay as legal costs.

The upshot of the above reasons is that the reference filed by the respondent is allowed. The taxation

in respect of items no. 1, 7 & 10 by the taxing officer is set aside. The assessment of the applicant's bill of cost in respect of the said items in the bill of costs is remitted for taxation before another taxing officer other than K. L. Kandet, Deputy Registrar. Since it was failure by the respondent to attend court during the taxation of the said bill of costs that brought about the state of affairs that necessitated the filing of this reference, I direct that the costs of the reference shall be paid by the respondent to the applicant.

DATED THIS 14<sup>TH</sup> DAY OF OCTOBER 2009

**L. KIMARU**

**JUDGE**