



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Application 341 of 2007

KANDIE KIMUTAI & CO. ADVOCATES ADVOCATE/APPLICANT

VERSUS

TANA & ATHI RIVER DEVELOPMENT AUTHORITY..... RESPONDENT

RULING

The application before me is an application by way of Chamber Summons dated 20th May, 2009 brought pursuant to Rule 11 (1) and (2) of the advocates Remuneration Rules Section 44 of the advocates act and section 3A of the Civil Procedure Act. It is supported by the affidavit of *Samuel Kiprono Chepkong'a* Advocates and the grounds on the face of the application.

The application seeks to set aside the taxation of the advocates/client bill of cost lodged by the applicant on the 16th May, 2009 and to have the bill of costs remitted to the taxing officer for taxation a refresh. The application is opposed by the respondent who filed grounds of opposition dated 23rd July, 2009.

I have considered the pleadings in relation to this application submissions by learned counsel and authorities cited. The issue before is whether or not to set aside the taxation by the taxing officer given on 20th February, 2008.

The applicant contends that the taxing officer did not consider the correct principal in taxing item No.1 in the bill of cost thus arriving at an excessive low sum. That taxing officer further exercised his discretion wrongly by failing to consider the material fact presented before him. Further the taxing officer considered extraneous issues thus denying applicant fees due to them. That the respondent will not suffer any prejudice if the taxation is set aside to enable the applicant to properly and justly be remunerated.

On its part the respondent contends that the application is incompetent and bad in law and is an abuse of court process further that the taxing master correctly exercised his unfettered discretion and the application ought to be dismissed with costs.

The bill of cost rose out of HCCC No.2166/98 between the respondent and Kenya Power and Lighting Company before the applicant came on record another firm of lawyers K.W. Philip and Associates acted for the respondents. The subject matter of the said suit **Kshs.1,355,930,62/65/=**, the applicant came on record in 2003 when the matter had been stayed pending arbitration. A look at the bill of

cost show that the applicant made several correspondences on the matter and filed the application for arbitration as at the time of taxation there was another firm of lawyers on record.

In his ruling the taxing officer noted:-

“In taxing this bill, it is instructive to note that there are numerous other bills by other advocates in respect of services rendered in the same suit. If the court was to award each advocate an instruction of Kshs.20,000,000/=, at the end of the day the respondents will end up paying more than Kshs,100,000,000/= and in my mind that would be unjust infringement of the advocates at the expense of tax payers.

I am of the considered view that each advocate ought to be compensated for the work done proportionately and justly.

As regard to this particular bill of cost much of the work for the advocates was correspondence and the filling of the application for arbitration. The advocate is no longer ceased in the matter as another one is already on record.”

It is trite law that where there has been an error in principle, the court will interfere. In the case of *Joreth Limited & Kigano & Associates Civil Appeal No.66/1999* the Court of Appeal stated in part:-

In considering the issue of instructions fees:-

“We would at the stage point out that the value of the subject mater of the suit for the purposes of taxation of all of costs ought to be determined from the pleadings judgment or settlement) if such would be the case. But if the same is ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just by taking into account, amongst other matters the nature and the importance of cause or matter, the interest of the parties and general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

In the case of *Mays and Another vs. Hamilton & Others* (1975) EA 13 at 16 the court stated:-

“I accept that the moment an advocates is instructed to defend a suit become come entitled an instruction fee that is only necessary to look at the concluding words of the particular of instruction fee in the bill of costs now in issue. “Considering most difficult and conflicting case law in the matter to realize that an advocate will not entitled at the moment of the instruction to the whole of the fill which he may ultimately claim. The advocates would as I said be entitled to pay the minimum instruction fee but he would not properly claim in respect of work he has not done. The entitlement under the instruction fee grows as the matter proceeds.”

It is clear to me from the above authorities that on instruction an advocate is entitled to a limit of some fee the question is what would be the minimum amount payable. The applicable schedule under the advocate’s remuneration order would be schedule VI.

Dated and delivered at Nairobi this 19th day of November 2009.

ALI- ARONI
JUDGE