



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**Civil Case 124 of 2007**

**PAUL GICHERU**

**T/A GICHERU & CO. ADVOCATES :::::::::: ::::: PLAINTIFF**

**=VERSUS=**

**KARGUA (K) CONSTRUCTION CO. LTD :::::: DEFENDANT**

**JUDGMENT**

This is an application by way of Chamber Summons under Rule 11 (2) of the Advocates (Remuneration) Order. The Applicant, the client being dissatisfied with the assessment of two items in the Respondent's Advocate – Client Bill of Costs filed this application on 11th September, 2007. The Bill of Costs was taxed on 28<sup>th</sup> August, 2007.

The taxing master assessed the instructions fees in the sum of Kshs 8,500,000 plus V.A.T. in the sum of Kshs 1,360,000/= (16%) bringing the total to Kshs 9,920,850/=. The final payable amount to the Law Firm was Kshs 9,870,850/= after credit of Kshs 50,000/= was given.

The grounds set out in the Objection are as follows:-

- (i) That the Learned Deputy Registrar erred in law in failing to consider the affidavit evidence by the Respondent.
- (ii) That the Learned Deputy Registrar erred in arriving at a decision not supported by the Law.
- (iii) That the Learned Deputy Registrar erred in law and in fact in failing to uphold the Preliminary Objection by the Respondent raised on taxation of the Bill.

The application is opposed by the Law Firm on the following grounds:-

1. The points of claim, the Subject of the arbitration indicates the sum of Kshs 405,798,925 as the value of the subject matter as per annexure P.6 in the affidavit dated 31<sup>st</sup> July, 2007.
2. The Managing Director of the Respondent Company one K. Gaudai swore an Verifying affidavit on record in confirmation of the claim.
3. The Respondent has not demonstrated that the taxing Master exercised her discretion wrongly/improperly in arriving at her decision.

4. The alleged Preliminary Objections was baseless as the applicant has already withdrawn its instructions from the Respondent.
5. That an Advocate is entitled to his fees from the Client.
6. The application is a non - reference and does not conform to the requirements of the Law.
7. No reasons for taxation are exhibited in the application.
8. That the alleged affidavit evidence is an attempt to hoodwink this Honourable Court.
9. That the applicant admits in the affidavit dated 27<sup>th</sup> July, 2007 that instruction fees would be based on the principal amount.
10. That this application is unmerited and ought to be dismissed forthwith with costs.
11. This Honourable Court has no jurisdiction to issue the Orders sought.

The Respondent in the aforesaid grounds claims that there is no reference before this Court and the application does not conform with the Law. The Respondent contends that there are no **Reasons** for taxation which have been given or exhibited in the application. I believe that this is the jurisdictional issue referred to in grounds 11 above. In view of this, that issue must be considered first by this Court.

Mr. Kalya for the Respondent submitted on this point that:-

- No reference has been filed in this Honourable Court.
- The Notice of Objection is not a sufficient basis to file a Reference.
- It is Mandatory that the Deputy Registrar must formally inform the Objector the reasons for the taxation.
- No reasons have been given in this case Mr. Kuloba for the Applicant argued that:-
- The reasons for the taxation was given in the Ruling of the Taxing Master delivered on 28<sup>th</sup> August, 2007.
- The Ruling was detailed.

Rule 11 (1) and (2) of the Advocates (Remuneration) Order provides as follows:-

**“ (i) Should any party Object to the decision of the taxing officer, he may within fourteen days of the decision give notice in writing to the taxing officer of the items of taxation to which reason he objects.**

**(ii) The taxing officer shall forthwith record and forward to the Objector the reasons for his decision on those items and the Objector may within fourteen days from receipt of the reasons apply to a judge by Chamber Summons which shall be served on all the parties concerned setting out the grounds of his Objection ..... ”**

In this case, the decision was delivered on 28<sup>th</sup> August, 2007. As required by the aforesaid Rule, 11 (1), the Applicant sent its Notice of Objection to assessment of items 1 and 2 of the Bill of Costs on 10<sup>th</sup> September 2007. It was within the prescribed period of 14 days.

Under Rule 11 (2), the taxing officer was required to record and forward to the Objector the reasons

for his/her decision on items 1 and 2. This is a Mandatory requirement as the word used is **“shall”**.

It is only after receipt of these reasons that an Objector may within another fourteen (14) days of receipt of the reasons that he can file the application raising his objections before a judge.

The Objector has referred me to the decision in H.C. Misc. Application No. 721 of 2000 (Milimani Commercial Courts)

**GATHENJI & CO. ADVOCATES –VRS- WAIHENYA CHOMBA AND 3 OTHERS.** In the said case, upon receiving the Notice under Rule 11 (1), the taxing master responded in the following manner:-

**“ The reasons for the ruling are contained in the body of the ruling.”**

While the taxing master did not give specific reasons even by reiteration and referred to the entire body of his ruling, I think that he complied with the requirement at least by way of procedure, if nothing else. In such a case, if the ruling is detailed and answers the inquiry, it is arguable that it would be superfluous for the taxing master to give any other reasons or repeat himself/herself.

With respect I do not agree with his Lordship Justice T. Mbaluto when he held that:-

**“ ..... The advocate for the Client completely misunderstood what is meant by the above words in paragraph 11 of the Advocates Remuneration Order. What is referred to as reasons for the taxing officer’s decision is no more than his ruling on the matter. Since such a ruling had been made, signed and delivered by the taxing officer on 2/10/2001, there was obviously no need to request for such reasons”.**

If his was the correct interpretation, then there would be no need for the Rules Committee to set out an elaborate and long procedure as set out in the Rules. All an aggrieved person would have been required to do is give notice of Objection within 14 days of the decision being made and thereafter file the application / reference within another 14 days. The words in Rule 11 (2) are certain and clear. The taxing master must give the reasons for the decisions within 14 days of the Notice of Objection being filed.

In my view, he could thereafter do either of the following:-

1). If he is satisfied that the Ruling is so elaborate, detailed and sufficient to express clearly all the reasons for decision on each item, then he could state as in the **Gathenji & Co. Advocates Case** that the reasons are in the body of the Ruling; or

2). He could summarize the specific reasons for decision on each item; or

3). If the ruling / decision given earlier is not detailed enough to enable the Objector lodge an effective and proper reference, then the taxing master would be obliged to give reasonably explanatory reasons for the decision on each of the items complained of.

I am not quite sure of the intention of the draftsman and the Rules Committee, but it would appear that the requirement for the reasons to be given was to ensure that an Objector fully knows the basis for the decision. Such a requirement appears reasonable since it is quite common and usual that the rulings or assessment of taxation are brief, precise and to the point. It is only where there is serious contentions and arguments that the taxing master would go into in-depth reasoning.

In any event, this Court must apply the law as it is, as I see no room for any other interpretation or need to use any other method of interpretation than the **“Golden Rule”** to meet the ends of justice.

In the present case, after the notice dated 10<sup>th</sup> September, 2007 the taxing master was required to record and forward the **reasons** for the decision on items 1 and 2 . No time is given for this and I presume that it

must be done within a reasonable time. However, no sooner, the Notice was filed that the Applicant the next day on 11<sup>th</sup> September 2007 filed this reference. This did not given any time to the taxing master to discharge her duty under Rule 11 (2). The Applicant acted prematurely and pre-empted the giving of the reasons by the Deputy Registrar as taxing officer / master.

There are no reasons on record after the Notice of Objection. The application / reference herein dated 11<sup>th</sup> day of September,2007 is null and void ab initio. It is a nullity.

This omission is incurable as the requirement for the recording and forwarding of reasons is a mandatory one. The effect of this is that this Court truly in the said circumstances has no jurisdiction to entertain the application. It was stated by the Late Justice of Appeal, the Honourable Justice Nyarangi in the case of **The Owners of the Motor Vessel “Lilian ” =vrs= Caltex Oil Kenya Ltd (1989) KLR 1** – “**Jurisdiction is every thing. Without it a Court has no power to make one more step.**”

Accordingly, I have no option but to strike out the application which I hereby do with costs to the Respondent.

**DATED AND DELIVERED AT ELDORET ON THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2008.**

**M.K. IBRAHIM,**

**JUDGE.**

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