



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Misc 176 of 2007

NYAMOGO & NYAMOGO ADVOCATES APPLICANT

VERSUS

PROTEX (K) EPZ LIMITED RESPONDENT

RULING

1. Before me are two Applications; the first is dated 26/11/2007, by the Applicant seeking orders under paragraph 11 (2) of the Advocates Remuneration Order that the decision of the Taxing Master dated 26/10/2007 be reversed and that the Bill of Costs dated 28/6/2007 be allowed as filed since the same was not opposed. Costs of the Reference to this court are also sought. The second Application is dated 20/12/2007 and premised also on paragraph 11 (2) of the Advocates Remuneration Order and in it, the Respondent seeks orders that the Bill of Costs dated 26/10/2007 be varied downwards because it was unfair, overtaxed and outrageous.

2. I have seen the grounds in support of each of them and they are as follows:-

In respect of the former Application, that;

- i. The Learned Taxing Master erred by purporting to tax the Bill of Costs under Schedule VII instead of Schedule V.
- ii. The Learned Taxing Master erred by failing to give reasons for his decisions to reduce the amounts charged in the Bill of Costs.

In respect of the latter Application;

- i. **THAT** the judgment debt is only Kshs. 150,000/= and the bill taxed at Kshs.137,877/= is therefore exaggerated, overtaxed and outrageous.
- ii. **THAT** the Respondent only filed and taxed three applications and hence the aforesaid sum of Kshs.137,877/= is unfair and unjust in the circumstances.
- iii. **THAT** in taxing the bill the taxing master ought to have taken into account that the Respondent was not the only Advocate and therefore the bill of costs should not be larger than if a single advocate had been employed.
- iv. **THAT** the bill was also supposed to be accompanied by a certificate setting out the dates during

which all Advocates acted and in view of the fact that the certificate is not accompanied, the bill of costs as taxed is unfair, unreliable and outside the rules of law.

v. **THAT** the bill as taxed is unfair, unjust and highly exaggerated and therefore it is only fair that this Honourable Court varies it.

3. Mr Nyamogo, Advocate, a partner in the Applicant firm in his Supporting Affidavit sworn on 26/11/2007, depones that the biggest complaint he has with the Taxing Master's decision is the fact that whereas he argued that the Bill of Costs had been properly brought under schedule V of the Advocates Remuneration Order, the learned Taxing Master proceeded to tax the Bill under Schedule VII because the Applicant had allegedly not complied with paragraph 22 (1) of the Advocates Remuneration Order. That in fact there was compliance with that paragraph and I have seen annexure "NON 4" which is a copy of a letter by Mr Nyamogo, ostensibly to his client, in compliance thereof.

4. I think I should first deal with the arguments above before turning back to the Respondent's Application, if at all I should. In his submissions, Mr Nyamogo emphasized the point that there was no basis for the Taxing Officer to have denied the Applicant costs under Schedule V because the Bill of Costs specifically pointed him to that schedule and since there was no objection to it in spite of service on the Respondent, the Bill ought to have been allowed as prayed.

5. Paragraph 22(1) of the Advocates Remuneration Order provides as follows:-

"In all cases in which any other Schedule applies an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under the Schedule, his remuneration shall be according to the scale applicable under the other Schedule."

6. As Ochieng J correctly remarked in **Aldrin Ojiambo t/a Ojiambo & Co. Advocates vs Mohamedraza Hussein Jagani & Another Misc. Cause 320/2005 (U.R) at Milimani:-**

"The paragraph speaks for itself clearly... it is not open to the taxing officer to make an election to apply Schedule V. The right to make an election vests in the advocate."

7. I have perused the record in this matter and there are two significant issues that I must point out:

a. On 28/6/2007, the Applicant wrote a letter to the Respondent giving notice that the Bill of Costs dated 28/6/2007 **"...is prepared and brought under Schedule V of the Advocates (Remuneration) Order, Cap 16 Laws of Kenya, and the same shall attract interest at 14% per annum in accordance with paragraph 7 of the said Advocates Remuneration Order."** The letter was received in court on the same date and the court stamp is on it, signifying receipt.

b. In his order dated 31/10/2007 giving the reasons for the taxation, the learned Taxing Officer states as follows:-

"The reason for assessing the bill of costs under Schedule VII is that there is no evidence put forth by the applicant showing that the applicant has as required by rule 22 (1) of the Advocates Remuneration Order signified to his client that they wished to charge (sic) their costs under Schedule V and not Schedule VII. Such evidence would have been in form of a copy of the letter signifying such election."

8. It is clear from the statement above that the learned Taxing Officer was wholly unaware that together with the Bill of Costs, the Applicant also filed the letter signifying the election and in the Bill of Costs itself, the Applicant again specifically put in the heading, "Advocates Bill of Costs under Schedule V". The Applicant fully complied with paragraph 22 (1) aforesaid and the learned Taxing Officer like in the **Aldrin Ojiambo** case (supra) acted in error. The error is however so substantial that having acted on the wrong principle, the proceedings thereafter were all conducted wrongly to the prejudice of all the parties.

9. Regarding the Application by the Respondent, I see no need to go into it in view of the reasoning above. Since I will shortly make orders that the Bill be re-assessed in view of the general principle above, let the Respondent raise all complaints it may have at that forum.

10. I will order that the Bill be re-taxed because it is not good practice for the High Court to assume the jurisdiction which is one of discretion given to the Taxing Officer. That is why Kuloba J. in **Judicial Hints on Civil Procedure** stated as follows:-

11. “Whether, if the matter were to be remitted, it should be remitted to the same or to another different taxing officer; The proper course, where a taxing officer has erred in principle, is to make a remit to another taxing officer and to order a retaxation of the bill in terms of the court’s ruling. That is the usual and proper course: Cram J in a ruling dated 3 October 1958, at folio 18 on “Taxation Rulings”. Where a case is remitted, there is sometimes an advantage in its coming before a different taxing officer, sometimes an advantage in its coming before a different taxing officer, who can bring a fresh mind to it. On the other hand, if the taxing officer from whose taxation appeal was made, is familiar with what is a complex case, no objection being taken against him and especially if there is no other officer of comparable experience, the same taxing officer should re-assess the bill: Spry JA in *Steel Construction and Petroleum Engineering (EA) Ltd v Uganda Sugar Factory Ltd*, (1970) EA 141 at 146 (20 December 1969). Cf paragraph 180, Note 2, post.”

12. My directions therefore in conclusion are that since Mr Gicheru, SPM and Taxing Officer has left this station, let any other Taxing Officer of this court re-tax the Bill of Costs under Schedule V of the Advocates (Remuneration) Order and for the ends of justice to be met, let the Respondent also have a hearing. The Taxing Officer’s discretion should be exercised in the usual manner.

13. The costs of the Reference shall be awarded to the Applicant in any event.

14. Orders accordingly.

Dated and delivered at Machakos this 29th day of April 2008.

ISAAC LENAOLA

JUDGE

In the presence of:

Mr Nyamogo for Applicant

N/A for Respondent

ISAAC LENAOLA

JUDGE