



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Income Tax Appeal 752 & 753 of 2003(consolidated)

UNILEVER KENYA LIMITED.....APPELLANT

VERSUS

THE COMMISSIONER OF INCOME TAX....RESPONDENT

R U L I N G

By a notice of motion filed on the 25th of September, 2007 Unilever Kenya Limited (hereinafter referred to as the applicant), seeks leave of this court to re-amend its amended bill of costs dated 3rd July, 2006 and lodged in court on 5th July, 2006. The motion was brought under Rule 71 of the Advocates Remuneration Order and Order L Rule I of the civil Procedure Rules. The application is supported by grounds stated in the body of the application as follows: -

- (a) Though full details of the nature, particulars and subject matter of the income tax appeal No. 753 of 2003 was set out in item No.1 of the amended bill of costs, a separate instruction fee, for the said income tax appeal was inadvertently omitted in item 1 of the said amended bill of costs.
- (b) The appellant is entitled to the instruction fee in respect of the said income tax appeal No. 753 of 2003.
- (c) The omission was a clerical error and the same is not fatal.

The application is also supported by an affidavit sworn by Kanji Jadva Kunverji Karman (Karman), who is the chief court clerk in the firm of Kaplan and Stratton Co. Advocates, the advocates for the appellant. It is explained that the matters under consideration arise from two separate income tax appeals No. 753 of 2003 and 752 of 2003 in respect of which the Commissioner of income tax is the respondent. There were two separate appeals filed because the appeals were in respect of returns for two different years. Later the two appeals were consolidated for hearing. A consolidated judgment was delivered and costs awarded to the applicants.

Karman depones that he drafted an amended bill of costs which was lodged in court but inadvertently omitted to include separate instruction fee in respect of income tax appeal No. 753 of 2003 in item No.1 of the amended bill of costs. The amended bill of costs was argued and a ruling delivered by the taxing officer, who taxed costs against the respondents in the sum of Kshs.1,652,880/=, but included no instruction fee, in respect of income tax appeal No. 753 of 2003.

The applicant filed an application under paragraph 11 (2) of the Advocates Remuneration Order, seeking review and enhancement of fees under items 1 and 47 of the amended bill of costs, or in the alternative the amended bill of costs to be remitted to the taxing officer with appropriate directions. That application came up for hearing before Hon. Visram J. when the parties agreed by consent, that the taxing officer do review the instruction fees for income tax appeal No. 753 of 2003. Thereafter, the matter was argued before the taxing officer, who ruled that there was no error apparent on the court record to warrant review of the instruction fee, in respect of income tax appeal No. 753 of 2003.

It was averred by Karman that the amount of the instruction fee in respect of income tax appeal No.753 of 2003 was omitted in item No. 1 by error, as was the getting up fees in respect of income tax appeal No. 753 of 2003 which was omitted from item No. 47 of the amended bill of costs. The applicant therefore sought leave of the court to re-amend its amended bill of costs dated 3rd July, 2006 to correct these errors.

It was submitted that the court has jurisdiction to make the amendments sought pursuant to Rule 71 of the Advocates

Remuneration Order. It was maintained that the reference procedures were still ongoing, and the substantive determination of the instruction fee could still be done.

Relying on the case of **G.P. Jani Properties Ltd vs Dar es salam City Council 1966 EA 281**, it was maintained that amendments can be made at any stage of the suit, and even on appeal.

The respondent objected to the application relying on a notice of preliminary objection, dated 20th December, 2007, and a replying affidavit sworn by Paul Matuku. It was maintained that the application is frivolous, vexatious, an abuse of Rule 71 of the Advocates Remuneration Order, and an abuse of the court process. It was contended that the applicants had filed an amended bill of costs which was argued before the taxing officer and a ruling subsequently delivered.

The applicant being dissatisfied with the ruling requested for the reasons for the ruling from the taxing officer and subsequently filed a reference to the high court in respect of items No. 1 and 47 of the amended bill of costs, asking the court to review and enhance the amount in respect of these items or remit the bill to the taxing officer with appropriate directions. Hon. Visram J. referred the amended bill to the taxing officer, who heard arguments and subsequently gave a ruling, observing that the amended bill of costs was correctly taxed and confirming the bill as previously taxed.

It was maintained that the application is mischievous and made in bad faith, because the applicant's advocates had numerous opportunities to make additions or alterations to the amended bill of costs as provided for under Rule 71 of the Advocates Remuneration Order but failed to do so. Referring to Section 7 of the Civil Procedure Act, it was maintained that this court is *functus officio*, having dealt with the reference and the taxation having been reviewed. It was submitted that the amendments not having been previously raised, the issue of the taxation can now only be revisited on appeal. The respondent's advocate relied on the following authorities: -

- **Criminal Application. No. 550 of 2004. Samuel Muchiri W' Njuguna vs Republic**
- **Lucy Wairimu Mwaura vs Aswinchand Hirji Shah HCCC (Milimani) 1130 of 1996**
- **Kalya and Kalya Advocates vs Tausi Assurance Co. Ltd. HCCC (Eldoret) Misc. Civil application No. 135 of 2004.**

The court was urged to dismiss the application as having no merit the matter having been substantially determined.

For the applicants it was submitted that the taxing officer had not made any award in respect of instructions fees for income tax appeal No. 753 of 2003 and the doctrine of *res judicata* could not arise as no decision had been made on the instruction fees. It was contended that the amendment sought was only in respect of figures which is a matter of arithmetical correction and not fresh billings. The court was urged to find the case of **Samuel Muchiri W' Njuguna** (Supra) distinguishable as in that case there was no error apparent on the face of the record whilst in this case it is contended that there is an error. The case of **Lucy Wairimu Mwaura** (Supra) and the case of **Kalya and Kalya Advocates** (Supra), were also distinguished. It was maintained that in this particular case, a reference has been filed in compliance with paragraph 11 of the Advocates Remuneration Order thereby keeping the issues alive.

I have carefully considered this application, the affidavit in support, the submissions of counsels, and the entire court record. It is common ground that the two appeals, i.e. Income Tax Appeal No. 752 of 2003 and 753 of 2003 were only consolidated at the point of hearing. It is also clear from the record that the original bill of costs was filed on 8th of February, 2006 and came up for hearing before the taxing officer on several occasions before an amended bill of costs was filed on the 5th July, 2006. The amended bill referred to income tax appeal 753 of 2003 but had no particular figure assigned in respect of instruction fees. The amended bill dated 3rd July, 2006 was finally taxed and a ruling delivered on 26th of August, 2006 wherein the taxing officer taxed off the sum of Kshs.950,000 from the figure of 2,150,000 in item No. 1 and also allowed getting up fees of Kshs.400,000/= in respect of item No. 47. The record further shows that by a chamber summons dated 26th September, 2006 filed on the same date the applicant filed a reference under paragraph 11 (2) of the Advocates Remuneration Order seeking review of the taxation done in respect of items No. 1 and 47 for the enhancement of the figures or in the alternative remittal of the amended bill back to the taxing officer with appropriate directions. On 20th November, 2006 the parties recorded a consent before Visram J. for the taxing officer to review the instruction fees on income tax appeal No. 753 of 2003.

Thereafter the parties argued the matter before the taxing officer. On the 8th of June, 2007 the taxing officer found that the applicant had claimed instruction fees for the two consolidated appeals and that the bill was taxed accordingly. The taxing officer found no error apparent on the face of the record or any other justification to warrant review of the taxation that he had previously done.

Following that ruling the applicant has by a letter filed on 18th June, 2007 given notice of his intention to object to the ruling under paragraph 11(1) of the Advocates Remuneration Order. In the meantime the applicant filed the current application seeking the amendments of the bill of costs dated 3rd July, 2006 lodged in court on 5th July, 2006. The applicants now seek to include an additional figure of Kshs.2,150,000/= under item 1 in respect of instruction fees for income tax appeal No. 753 of 2003 and also amendment of the getting up fees from Kshs.537,500/= to 1,075,000/=.

It is contended on behalf of the applicants that this amendment is necessary as the taxing officer was not able to review the amended bill of costs for the reason “that no figure of instruction fee in respect of income tax appeal No. 753 of 2003 was set out in item 1 of the said amended bill of costs.”

Paragraph 71 of the Advocates Remuneration Order provides as follows:

“No addition or alteration shall be made in a bill of costs by the parties submitting the same after the bill has been lodged for taxation except by the consent of the parties or by permission or direction of the court or taxing officer.”

The issue here is whether the applicant should be granted leave to re-amend its amended bill of costs dated 3rd July, 2006. The determination of this issue revolves on whether the taxation proceedings in respect of the amended bill of costs have been determined or are still alive. It is noteworthy that a reference had previously been filed against the initial taxation which was done by the taxing officer on the 24th of August, 2006. The ruling of the taxing officer made on the 8th June, 2007 was pursuant to that reference. The taxing officer has now finalized the taxation and his decision can only be challenged under paragraph 11 (2) of the Advocates Remuneration Order. Indeed the applicant has already given notice that it intends to do this. To that extent the taxation proceedings are still alive. Nevertheless, the ruling of the taxing officer was based on the re-amended bill of costs which was before him. An amendment of that bill of costs at this late stage would not be consistent with paragraph 11(2) of the Advocates Remuneration Order and would also prejudice the respondent. Moreover, it is evident that the applicant opted to present a consolidated figure in respect of the instruction fees and getting up fees and the taxing officer taxed the bill as such.

I have considered the case ***G.P. Jani Properties Ltd vs Dar es Salaam City Council*** (supra) which was relied upon by the applicant. However I do not find this case to be of much assistance to the applicant. The court refused to allow the amendment as the amendment sought to raise a fundamental issue at a very late stage and there was no question of inadvertence as the matter was mentioned in argument at the trial. That is precisely the position herein. The applicant raised the issue of instructions fees and getting up fees for appeal No. 753 of 2003 in the reference filed on 25th September, 2006. Corrections of any omissions or amendments to the amended bill of costs, ought to have been made at that stage before the matter was reviewed by the taxing officer and a ruling delivered. Contrary to the submissions of counsel for the applicant there is no error apparent on the face of the record. It is true that amendment of pleadings can be allowed at any stage of the suit. That is clearly provided for under Order VIA Rule 3(1) of the Civil Procedure Rules. That rule is not applicable to amendment of Bill of costs which is provided for under paragraph 71 of the Advocates Remuneration Order. Paragraph 71 does not limit the period within which such an amendment can be allowed. However, the court must be alive to the interest of the other party and can only allow such an amendment at a late stage only where there are very compelling reasons. In this case, there are no compelling reasons. The applicant is simply trying to have a second bite of the cherry. I therefore find no merit in this application and accordingly dismiss it.

Those shall be the orders of this court.

Dated and delivered this 15th day of May, 2008

H. M. OKWENGU

JUDGE