



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

HCCC 1637 of 2007

LAWRENCE MUNGAI T/A LAWRENCE

**MUNGAI & CO. AVOCATES.....RESPONDENT/
ADVOCATE**

VERSUS

**REGENCY SLOTS LIMITED.....
.....DEFENDANT**

RULING

Chamber Summons application dated 20th March, 2008 a reference brought under Rule 11(2) of Advocate (Remuneration) Order seeks two orders:-

- 1) **THAT** the rulings and/or orders and/or decisions delivered herein on 22nd February 2008 by the Learned taxing officer Hon. M. Odero (Mrs) taxing the Respondents/Advocates Bill of Costs herein at Kshs.112,142/= and the Certificate of Taxation thereof be quashed and/or set aside.
- 2) **THAT** the bill of costs herein be taxed afresh by the High Court or remitted for fresh taxation by the Court Taxing Officer on the correct principles and/or proper provisions of the Law.

I have considered grounds on face of application, and the affidavits by both parties. The Applicant’s complaint is that the taxing officer.

- 1) misapprehended facts relating to work done by the Advocate vis a vis the nature and extent of instructions given by the client;
- 2) misapplied schedule 11(2) and miscalculated the bill resulting in a manifestly excessive award;
- 3) items 4 to 15 of Advocate Bill of costs was awarded but same is not provided for under the schedule since the instructions to the Advocate were to peruse and amend a lease. However the advocate only made suggestions on amendments to be made but the amendments were carried out by Archer and Wilcock Advocates.

Counsel for the Applicant submitted that the taxing master applied schedule 11(2) of Advocate (Remuneration) order, which is half of fees provided under schedule 11(1). The schedule relates to instructions for the Advocate to peruse, amend and complete conveyance.

The basis of calculating the instruction fees was annual rent for the premises which was 4,883,280.40. Ms. Masika submitted that the quantum should have been Kshs.60,916.64 and since Advocate did only part of job, he should get half of the said quantum i.e Kshs.30,000/=. For this proposition, Counsel relied on **HAYANGA & CO. ADVOCATES VS ROYAL GARDEN DEVELOPERS LIMITED MILIMANI MISC APPLICATION NO. 305 OF 2004** at page 4 where **Ochieng, J** observed:

“The proper consideration, whether or not the position prevailing in England applies here, is the ascertainment of the work actually done vis a vis the nature and extent of the instruction. In effect, if an Advocate was instructed to prepare an Agreement for sale, he would have earned his full instruction fee, as soon as the said Agreement for sale was ready.”

Mr. Kuria for the Advocate/Respondent submitted the Advocate was mandated only to peruse and amend the lease, which task was duly completed. Counsel submitted that the Letter of 28th September, 2007 “NMI”, was written after Terms and Acceptance were signed by the parties and that it could not have been the instruction to Advocate. Mr. Kuria admitted that Schedule 11(2) was the one applicable to the bill. Counsel admitted that items 4 to 15 of the bill were not provided for in the schedule. Mr. Kuria urged the Court to allow the said items as the Advocate went into other expenses when client refused to pay.

I have considered the submissions by Counsel in this matter. There are undisputed points of fact and law. The two parties to this reference admit that schedule II sub paragraph 2 of the Advocate (Remuneration) Order is the one applicable in the assessment of the Advocate’s Bill of Costs. It is also agreed between the parties that items 4 to 15 of the Advocates Bill of Costs is not provided for under Schedule II of the Advocate (Remuneration) Order. It is also not in dispute that the Client with the reference instructed the Advocate with the bill to peruse and amend a lease.

The point of divergence is two fold, whether full instruction fees under Schedule 11(2) were earned and secondly whether there was misapplication of the Law and mis-calculations of the quantum.

The principles that a court should apply in a reference on the taxation of a Bill of Costs were set out in the Court of Appeal case of **KIPKORIR, TITOO & KIARA ADVOCATES VS. DEPOSIT PROTECTION FUND [2005]1 KLR 528** at page 535 of the Court of Appeal held as follows:

“On reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer erred in principle in assessing the costs. In Arthur v. Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this Court said at page 492 paragraph 1:

“Where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the court will interfere only in exceptional cases.”

An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the Taxing Officer acted on erroneous principles – see Arthur V. Nyeri electricity undertaking (Supra) or where the Taxing Officer has over emphasized the difficulties, importance and complexity of the suit (see Devshi Dhanji vs. Kanji Naran Patel (No.2), [1978] KLR 243.”

I find that on the above authority, this court cannot interfere with the Taxing Officer’s decision on taxation unless it is shown that either the decision is based on an error of principle or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.

If the court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer for re-assessment. However if the Judge is satisfied that the error cannot materially have affected the assessment then it will not interfere with taxation.

See **JORETH LIMITED VS KIGANO & ASSOCIATES C.A NO. 66 OF 1999 (UN) NANYUKI**

ESSO SERVICES VS TOURING & SPORTS CABBS LIMITED [1972] EA 500].

The Court has jurisdiction to re-assess the bill himself. However the court is not entitled to upset a taxation merely on account of quantum (See **STEEL CONSTRUCTION & PETROLEUM ENGINEERING (E.A) LIMITED VS UGANDA SUGAR FACTOR [1970] E.A 141.**)

I have considered the ruling of the Taxing Master in which the basis of assessment of the bill are clearly set out as follows:

“in this case it is clear to the Court that the correct provision is Schedule II(2). Therefore the instruction fee will be calculated as follows:-

1st 3,000,000 x 4% = 120,000/= fee chargeable on balance 1,883,280.40 = 100,000/=. Thus the total chargeable instruction fee is ***Kshs.200,000/= less ½ = 110,000/=***”

Schedule II gives the basis of assessing instruction fees for preparation of leases, which is the subject matter of this case.

It provides thus where relevant:

“In respect of an amount where the annual rent is more than Kshs.3,000,000/=, such fee as may be agreed but in any event not less than Kshs.100,000/= and not more than the fee chargeable under paragraph 1(f) above plus 0.1% on the excess amount.”

On the basis of the above schedule, the amount of instruction fee chargeable for an annual rent of the amount of Kshs.4,883,280/=, should have worked out as follows:

Kshs.3,000,000 x 4% = 120,000

Kshs.1,883,280 x 0.1% = 1883.28

Total = 121,883.28

Under schedule 11(2) one half of the fee payable under (1) brings this figure to Kshs.60,941.64.

Has the Applicant established that the learned Taxing Master erred in principle. It is quite clear that the taxing master erred in principle and in spite of being correct in regard to the schedule applicable to the taxation bill, she fell into error by misapplying the schedule and assessing the fee payable far in excess of the sum awardable. I am also satisfied that the error involved in this case materially affected the assessment, causing the sum awarded to become manifestly excessive.

Ms. Masika for the Client/Applicant suggested that since the Advocate only perused but never amended the Lease Agreement he did not complete the instructions and therefore he is entitled to half of the sum awardable under schedule 11(2). Counsel relied on the ruling of **Ochieng, J** in **HAYANGA & COMPANY ADVOCATE**, supra. I have no quarrel with observations made by my learned brother in that ruling. This case is however distinguishable from the cited case in that the nature of the instructions involved in both is different. The cited case dealt with the preparation of an Agreement for sale while in instant application the instruction was to peruse and amend the lease. The considerations for both are different and are not comparable.

Ms. Masika argued that all the Advocate did in the instant matter was to peruse and make suggestions for amendment but never himself amended the lease. I agree with Mr. Kuria for the Advocate that the instructions to the Advocate with the bill were duly discharged as he both perused and had the lease amended. Whether the Client was satisfied with the amendments effected, as expressed in the letter NMI dated 28th September, 2007 is a different matter, especially having been raised long after the matter had been concluded and the amended lease executed. The Advocate was entitled to the full instruction fee as

prescribed under Schedule II(2) of the order.

I have asked myself whether this court should re-assess the bill or remit it to a Taxing Master to re-assess. I am convinced that it would be a waste of judicial time to remit the bill back to the Taxing Officer for re-assessment in the circumstances of this case. I think that the right course to take is to determine this matter with finality.

I have set out above the correct basis of assessing the Advocates Bill and the resultant amount awardable. The amount awardable for the instruction fee is Kshs.60,941.64. As the parties have agreed the schedule does not provide for the charging of any other items apart from the instruction fee, the sums taxed under items 4 to 15 of the Bill of Costs were taxed in error of principle and should not be allowed. They are accordingly set aside. In the result the Client/Applicant's reference is allowed with costs to the client and the instruction fee varied from Kshs.110,000/= to Kshs.60,942/=.

Those are the orders of this court.

Dated at Nairobi this 27th day of June, 2008.

LESIT, J.

JUDGE

Read, signed and delivered in the presence of

Mr. Wasonga holding brief for Ms. Masika for Applicant

Mr. Kuria for Respondent

LESIT, J.

JUDGE