



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

Misc. Civ. Appli. 373 of 2007

MURIU MUNGAI & CO. ADVOCATES.....ADVOCATE

VERSUS

NEW KENYA CO-OPERATIVE CREAMERIES LTD.....CLIENT

R U L I N G

The Client/Respondent in this Miscellaneous Cause was dissatisfied with the decision of the Taxing Officer delivered on 6th July, 2007 relating to item 1 of the bill of costs and has therefore brought this reference invoking rule 11(2) of the Advocates (Remuneration) Order. The Client who is the Applicant herein, seeks to have the taxation of item 1 of the bill of costs set aside and an order referring the matter back to the taxing master for re-taxation of the said item with appropriate directions. In the alternative the client seeks to have this court re-tax the same item on the bill of costs.

The basis upon which the application is founded, are given on the face of the Chamber Summons application in the following terms:

- a) That taking into account the nature of instructions given to the Advocates and the extent of their involvement in carrying out such instructions as well as all the other relevant circumstances inclusive of the fact that no transfer of the subject property nor a vesting order were ever registered, neither was there a valuation report for the amount of Kshs.4,560,000/- as at the time of instructions, the instructions fees allowed under Item 1 of the Bill of Costs herein at Kshs.83,180/- together with VAT thereon of Kshs.13,308/- is manifestly excessive as to represent an error of principle on the part of the Taxing Officer.
- b) That in taxing Item 1 of the Bill of Costs herein, the Taxing Officer erred in principle in failing to appreciate the true nature of the instructions given to the Advocates by the client and the application of the provisions of paragraph 18 and 23A of the Advocates (Remuneration) Order in determining the instructions fees thereon.
- c) That this application is further supported by reasons contained in the taxation ruling of 06.07.07 as directed by the Taxing Master in his response to our request dated 29.02.08 attached hereto.

The Advocate with the Bill has filed a Notice of Preliminary Objection in which two grounds were raised. The first ground is that the Applicant has failed to comply with the provisions of **Order XXIV rule 4** of the Civil Procedure Rules and **Section 89 of Civil Procedure Act** and that therefore the application should be stayed. Secondly, that the application is incompetent and frivolous for lack of reasons by the Taxing Officer.

The Advocate has also filed grounds of opposition in which four grounds are raised as follows:

1. The Application is without foundation or merit as grounds upon which it is premised are not substantiated by admissible evidence to enable the court determine the validity thereof;
2. The Application is unmeritorious as the Applicant does not set out with precision the alleged errors of principle committed by the Taxing Officer;
3. There is no valid ground presented by the Applicant that call for interference with the decision of the Taxing Officer;
4. Moreover the said application seeks to challenge the taxation on quantum which cannot properly be a ground for reference as the same was as a result of exercise of discretion by the Taxing Officer.

Mr. Maondo argued the application on behalf of the client while Mr. Nganga argued the application on behalf of the Advocate.

Mr. Nganga for the Advocate first of all raised issue with the client's instant application on the grounds that the client was relying on a letter dated 18th February, 2008 which it annexed to the application, as the proof of reasons for the taxation. It was Mr. Nganga's contention that the letter does not suffice and that the application was incompetent and frivolous. Counsel relies on the first ground of objection to the effect that the application has not complied with the requirement of **Order XXIV rule 4** of the **Civil Procedure Rules** and **section 89** of the Act.

The client who is the Applicant in the instant application has annexed their letter to the Deputy Registrar dated 18th February, 2008 in which the client's Advocate requested the Deputy Registrar to forward to them reasons for the taxation to enable them file the reference in the High Court. It is on the same letter that handwritten notes are recorded stating as follows:

“Reasons are in the Rg

Signed,

DR

29/2/2008”

It is this letter which the Respondent/Advocate has objected to.

It is important that the objections raised in the Advocates Notice of Preliminary objection be considered first. The Advocate contends that the application is incompetent and frivolous because the reasons for taxation were not annexed to the application. The Advocate erroneously relied on **Order XXIV rule 4** and **Section 89** of the **Civil Procedure Rules** and **Act** to argue that the application is incompetent. **Order XXIV rule 4** deals with stay of subsequent suit where it is brought before payment of costs of a discontinued suit. It is clearly irrelevant to the instant application. **Section 89** of the Civil Procedure Act on the other hand is a general provision providing for procedure to be applied in miscellaneous proceedings. It is also irrelevant to the instant application.

Despite reliance on the wrong provisions of the law, I have considered the Advocate's objection to the application on the basis of the submissions by Mr. Nganga. Mr. Nganga contended that since the Taxing Officer did not give any reasons for the taxation as required, the instant application is incompetent. Under paragraph 11(2) of the Advocates (Remuneration) Order, the Taxing Officer's duty, once an objection to the taxation of a Bill of costs is raised is stipulated thus:

“11.(2) 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 the 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.”

The Client has annexed a copy of the letter it wrote to the Deputy Registrar on the 18th February, 2008, requesting for reasons for the taxation and referring to its notice of objection dated 9th July 2007. It is on that letter that the Deputy Registrar inscribed words to the effect that the “*reasons are in the Rg*”. I take Rg to mean ruling.

The ruling in question is in the file. I note that the Client filed the Notice of objection within the time specified under paragraph 11(1) of the Advocates (Remuneration) Order. It was not proper for the Taxing Officer, to inscribe on the client’s Advocates letter requesting for reasons for the taxation, his response to that request. The Taxing Officer should have complied with paragraph 11(2) of the Advocates (Remuneration) Order by providing the reasons as requested.

In the case of **KIPKORIR, TITOO & KIARA ADVOCATES VS. DEPOSIT PROTECTINO FUND [2005]1 KLR 528** at page 535 the Court of Appeal held:

“Although there was no strict compliance with Rule 11(2) of the Order, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that if a Taxing Officer totally fails to record any reasons and to forward them to the objector as required, then that would be a good ground for reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference.”

In Line with the Court of Appeal decision above, I am satisfied that there was substantive compliance by the Client Applicant herein with paragraph 11(2) of the order and the Taxing Officer’s failure to provide the reasons as prescribed under the order should not be visited on the Client.

Regarding the reference itself, the gist of Mr. Maondo’s submission is that the Deputy Registrar’s decision should be set aside because in his view no reasons were given for the taxation of item 1 of the bills of costs which was the item on instruction fees. Mr. Maondo submitted that when the client requested for the reasons for taxation, the Taxing Officer said that the reasons were in the ruling. However, Mr. Maondo was of the view no reasons were given in the ruling of the Taxing Officer.

I have perused the ruling of the Taxing Officer in regard to the taxation of Item 1 of the Bill of Costs. I am of the view that in the ruling, the Taxing Officer explains how he arrived at the sum allowed of Kshs.83, 000/- under Item 1. The Officer states in part as follows:

“The Advocate has based instruction fees under item on the value of the subject matter being Kshs.4,560,000/- as indicated in the attached valuation report prepared by Tyson Limited...”

The value of the subject matter ...has to be considered in line with what actual services the Advocate rendered in the execution of the instruction fees.”

The Taxing Officer then sets out the work done by the Advocate as follows:

“...To this end it was submitted that the land was in Muranga and the Advocates had to travel to undertake the search and preliminary investigations on the title. They also had to prepare a caution and obtain vesting orders in court and thereafter register it in the respective title as the title document. In addition the Advocate obtained a police abstract and prepared affidavits which were executed by the Company Secretary and the director of the Client to enable them obtain fresh title.

The instructions were to transfer the property and the above constitute what the Advocate did in furtherance of the said instructions. The applicable schedule is Schedule 1.”

Mr. Maondo’s submission that no reasons were given in the ruling is not correct. There are explanations

given why the Taxing Officer arrived at the decision he did, even though I agree that the decision should have been communicated differently from the manner adopted by the Taxing Officer.

Mr. Maondo has challenged the basis upon which the Taxing Officer taxed item one of the bill. Maondo was of the view that it was an error in principle for the item to be taxed under Schedule 1 of the Advocates Remuneration Order because the Advocate did not discharge instructions as mandated under that schedule to qualify to claim under the same.

Schedule 1 of the Advocates Remuneration Order stipulates as follows:

“For preparing and completing contract, answering any preliminary enquiries, deducing title (including any necessary abstraction to a freehold or leasehold property, answering any requisitions on title, perusing and completing conveyance or assignment.”

Mr. Maondo submitted that the Advocate with the Bill did not perform the work set out in Schedule 1 of the Advocates (Remuneration) Order and therefore, the kind of work that he did was not within the scope of business that should have attracted the charges specified under the said schedule. Mr. Maondo submitted that under the said Schedule the work should have entailed both preparation and completion of a contract, answering preliminary enquiries, deducing title and completing conveyance or assignment. Mr. Maondo submitted that the advocate did not discharge the instructions as mandated in that schedule to qualify to claim under it because there was no transfer executed in regard to the LR. No. LOC.3/GICHAGINI/369. Counsel also submitted that there was no evidence in regard to the stamp duty paid, and that there was no search attached to show that conveyance was completed as required under that schedule. Mr. Maondo submitted that the fact that a vesting order was attached as part of the Advocate’s list of documents, was proof that the nature of the instructions that the Advocate carried out had nothing to do with vendor or purchaser. The instructions to the Advocate was merely the vesting of the assets to the new owners, which is not what Schedule 1 of the order contemplates.

Mr. Maondo submitted that in so far as the instructions were not fully executed by the Advocate, it was an error for the Taxing Officer to tax it under that schedule. Mr. Maondo suggested that the item should have been taxed under **paragraph 18(f)** of the Advocates (Remuneration) Order which provides for taxation in respect of business that does not fall under any of schedules 1 to 10 under the Remuneration Order.

Mr. Nganga submitted that the Client/Applicant had not given any evidence to show that the Taxing Officer was guilty of wrong exercise of discretion in the taxation of the Bill. Mr. Nganga submitted that in regard to the vesting order, he admitted that there was a vesting order in the matter but submitted that it is the same that allowed the property to be assigned. He submitted that the work done by the Advocate included the obtaining of documents and the payment of rates. He submitted that the fourth scale of schedule 1 under which the Bill was presented provided for mortgage which includes assignment. Counsel submitted further that the Advocate was entitled to the full instructions fees payable irrespective of whether or not the instructions were fully completed. He relied on the case of **JOREH LIMITED VS. KIGANO AND ASSOCIATES** for this preposition.

Mr. Maondo on the hand has sought to distinguish **JOREH’S CASE**, supra, on the basis that the cited case was a litigation which was a contentious matter and therefore, could not apply to the facts of this case, since the matter before the court in the instant application was a conveyancing transaction which is non contentious.

I have considered the rival submissions of both counsel in this case. It was evident that the Advocate in this matter was given instructions to transfer LR. No. LOC.3/GICHAGINI/369 from the Kenya Cooperative Creameries Limited, (Old KCC) to the New Kenya Cooperative Creameries Limited. The value of the property was quoted as Kshs.4.9 million which was also supported by a Valuation Report from Tysons Limited. The Applicant’s contention that the Valuation Report should not have formed the basis of the taxation is without any merit. The Taxing Officer had the right to call for further information to assist him assess the value of the subject matter for the purposes of calculating the instructions fees

including reports made subsequent to the instructions. The reliance on the Tysons Report made after the instructions were given to the Advocate was therefore quite in order.

The Taxing Officer described the work done by the Advocate in execution of the instructions in his ruling, an excerpt of which is provided here below as follows:

***“...To this end it was submitted that the land was in Muranga and the Advocates had to travel to undertake the search and preliminary investigations on the title. They also had to prepare a caution and obtain vesting orders in court and thereafter register it in the respective title as the title document. In addition the Advocate obtained a police abstract and prepared affidavits which were executed by the Company Secretary and the director of the Client to enable them obtain fresh title.*”**

The instructions were to transfer the property and the above constitute what the Advocate did in furtherance of the said instructions. The applicable schedule is Schedule 1.”

The issue before the court is whether the Taxing Officer erred in principle. The issue is whether the Applicant established error in fact and in law on the part of Taxing Officer when taxing the Advocates Bill of Costs. The Court of Appeal has set out the principles to be considered by the court when determining a reference from a taxation by a Taxing Officer. In the case of **Kipkorir, Titoo & Kiara Advocates**, supra. The court 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.”

The Applicant in the instant application has complained that the Taxing Officer applied the wrong schedule in assessing the instruction fees in Item 1 of the Bill. I have set out Schedule 1, which was applied to tax the bill. The schedule provides what the instructions should entail in order to qualify to be taxed under that schedule. Clearly the instructions given to the Advocate are clearly covered under this schedule. The instructions given to the Advocate was to transfer the suit property from “Old KCC” to “New KCC” including the preparation of the conveyancing or assignment of documents. Indeed, going by item 2 of the Advocates Bill of Costs, a Deed of Assignment was indeed prepared, pursuant to the said Instructions. The Taxing Officer was not wrong in principle in applying Schedule 1 of the order. The amount assessed of Kshs.83,000 was not excessive as to justify an inference that the Taxing Officer erred in principle. In fact the Taxing Officer scaled downwards the sum claimed by the Advocate under this item.

As regards the taxation of item 1 of the Bill of Costs, I do find that the Applicant has failed to prove that the Taxing Officer erred in principle in the assessment of the instruction fees. Since no error in principle has been demonstrated, this court has no grounds upon which to interfere with the Taxing Officer’s exercise of discretion. That being the case the Client’s reference is without merit. The application is therefore dismissed with costs to the Advocate/Respondent.

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

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

N/A for Mr. Maondo for the Client/Applicant

Mr. Chehanza holding brief for Mr. Nganga for the Advocate/Respondent

LESIIT, J.

JUDGE