



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Misc. Appli. 1280 & 1281 of 2005**

**WAKINI KIARIE & CO. ADVOCATES.....APPLICANT**

**AND**

**NAIROBI CITY COUNCIL.....RESPONDENT**

**RULING**

1. By the application dated 19/03/2007, brought by way of Chamber Summons under Rule 11(1), (2) of the Advocates (Remuneration) Order, Cap 16 of the Laws of Kenya and all other enabling provisions of the law, the applicant seeks orders that:-

(i) *This Honourable Court be pleased to set aside the order of the Taxing Master in respect of item No. (2) of the Bill of Costs dated 25/08/2005 and order that the same be placed before the Taxing Officer upon proper directions;*

(ii) *Costs of this application be provided for*

for the reasons that the Taxing Officer misdirected himself on the issue of the instruction fee and therefore that the Taxing Officer erred in principle in arriving at the instruction fee. The application is also supported by the sworn affidavit of Wakini Kiarie advocate who says that he instructed his advocates to object to the disputed item during the taxing of the Bill on the 16/01/2007, and that the objection was raised on 26/01/2007; that though the objection was raised on 26/01/2007, his advocates were not supplied with a copy of the ruling containing the reasons thereof until 8/03/2007.

2. In his Supplementary Affidavit sworn on 20/12/2007, the applicant says that the brief that his firm received from the respondent herein involved a lot of paper work that was both involving and complex hence this application. Mrs. Ngugi argued the application on behalf of the applicant and reiterated the averments of the Supporting Affidavit, only adding that the Taxing Officer ought to have considered the value of the subject matter in arriving at the taxed costs. Mrs. Ngugi referred to the various annexures to the Supplementary Affidavit and said that the subject matter of the brief fell under Rule 5(1) of the Advocates Remuneration Rules and therefore should have attracted a special fee because of the complexity. She also submitted that if the Taxing Officer had carefully considered Schedule V, he would have reached the conclusion that the matter was complex with a value of Kshs.98 million. In Mrs. Ngugi's view the taxed costs of Kshs.120,000 under item (2) of the Bill of Costs was too low and not justifiable.

3. Mr. Abwao for the respondent opposed the application and submitted that the Taxing Officer taxed the bill in accordance with the rules. Mr. Abwao pointed out that

§ *The matter before the Procurement Complaints Board took only 3 days*

§ *The paper work was only of moderate volume and not very demanding*

§ *There was need for due care in handling the taxation which care was exercised by the taxing officer before arriving at the taxed amount of Kshs.120,000.*

§ *The Bill itself showed no issue of complexity and no schedule was pleaded in the Bill.*

4. In response to Mr. Abwao's contention that the matter took only 3 days before the Procurement Complaint's Board, Mrs. Ngugi said that it could not have taken longer since a decision was required within 30 days; and that the three days were days of continuous sittings and thus entitled the applicant to a higher instruction fee.

5. Rule 11 of the Advocates (Remuneration) Order makes provision for, *inter alia*, objection to decision on taxation and subrule (1) and (2) thereof provides as follows:-

*"11(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.*

*(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."*

6. Having complied with the above, Mrs. Ngugi's major complaint is that the taxing officer did not adequately consider the nature of the brief which the advocate handled on behalf of the respondent at the Public Procurements Complaints Review and Appeals Board in application No. 14 of 2003 being Rama Engineering Services Ltd. –vs- Nairobi City Council. According to the facts placed before the taxing officer, the respondent was alleged to have flouted the rules of procurement in awarding a contract worth Kshs.98449034/50. In his ruling, the taxing officer noted that the applicant did not indicate which Schedule had been used to charge his costs, though the taxing officer drew the inference, after a careful analysis of the Bill of Costs that the applicant had applied Schedule VI of the Advocates (Remuneration) Order. The taxing officer said that the said Schedule VI was inapplicable because it deals in the main with Costs of Proceedings in the High Court. In the Taxing Officer's view, the applicable scale is Schedule V of the Advocates (Remuneration) Order under which a taxing officer is required to consider the care and labour required for the brief and the complexity of the matter, the paper work involved and the interest of the parties when assessing the instruction fees. The taxing officer has also to consider the amount or value of the subject matter involved and all other circumstances of the case.

7. The taxing officer made the following remarks in his ruling, and indeed these were the reasons for taxing item (2) of the Bill of Costs at Kshs.120,000/=:- (a) that though counsel deserves a decent pay, such pay must be commensurable with the work done and that care had to be taken to avoid awarding high costs that would only result in making access to the corridors of justice only available to the wealthy to the exclusion of the less endowed; (b) that the proceedings at the Procurement Complaints Board took only three days; (c) paper work was moderate and not enormous and very demanding; (d) the value of the tender was about 98 million; (e) that he could not use that amount as the value of the subject matter since that is not the criteria under Schedule V; (f) that the parties interest in the matter must have been very high and counsel needed to exercise more diligence in handling it.

8. After carefully considering the reasons given for the ruling and especially that the parties stakes in the matter were very high and therefore that the counsel needed to exercise more diligence in handling the matter, I am of the view that the taxed sum of Kshs.120,000/= under claim (2) of the Bill of Costs was definitely on the lower side. The matters to be taken into account by the taxing officer are:-

- *The care and labour required*
- *The number and length of the papers to be perused*
- *The nature or importance of the matter*
- *The amount or value of the subject matter involved*
- *The interests of the parties*
- *Complexity of the matter*
- *All other circumstances of the case*

9. The taxing officer considered all the above and in my view they were all in favour of the applicant, save that the taxing officer misdirected himself in holding that he would not use the value of the subject matter as a basis of taxation under Schedule V. In my view too even the moderate paper work which the taxing officer noted required the exercise of more diligence on the part of counsel, could not be taxed at only Kshs.120,000/= against the counsel's proposed cost of Kshs.1516,736.

10. In the result I allow the applicant's application dated 19/03/2007 and order:-

(a) *That the Taxing Officer's order of taxation in respect of item No. (2) of the Bill of costs dated 25<sup>th</sup> August 2005 be and is hereby set aside and the same be placed before a taxing officer other than Muirui Senior Deputy Registrar for taxation.*

(b) *That the costs of this application shall be in the cause.*

Orders accordingly.

Dated and delivered at Nairobi this 13<sup>th</sup> day of June 2008.

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:?