



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc. Civ. Appli. 691 of 2007

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

VERSUS

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

R U L I N G

The Client/Advocate filed two references to challenge the Taxing Officers' decision in allowing certain items or the Advocate/Respondent Bill of Costs. When the application came up for hearing the Advocates for the Client/Applicant with the references and the Advocate/Respondent's Advocate agreed to argue **Misc. Cause No. 693 of 2007** and that the ruling given by the court in that case would be binding to **Misc. Cause No. 691 of 2007** where the Client/Applicant has filed a similar reference.

Mr. Njenga held brief for Mr. Nyaga for the Applicant and adopted the written submissions filed by the Client/Applicant's Advocates. Mr. Werimo on the other hand opposed the application by making oral submissions.

The application is the Chamber Summons dated 4th February, 2008 brought under paragraph 11(1) and (2) of the Advocates (Remuneration) Order. It seeks:

2. That the decision of the Taxing Officer made on 6/7/07 allowing item No. 1, 2, 3 and 5 of the Bill of Costs dated 4/4/07 and filed on 27/4/07 at Kshs.143,415/- all inclusive be set aside/varied.
2. That this Honourable Court do exercise its inherent jurisdiction and allow such fees in the above items as it shall deem fit and/or make such other or further orders as regards the bill of costs in the issue.
4. That costs of this application be provided for.

The grounds for the application are two fold.

- a) The Taxing Officer misdirected himself on both law and facts and thereby awarded a sum that was manifestly excessive and based on erroneous legal principles.
- b) That the Taxing Master failed to exercise his discretion judiciously.

The Company Secretary of the Client/Applicants, MILCAH MUGO, has filed a supporting affidavit

also dated 4th February, 2008.

The reference is opposed through grounds of opposition in which the following three grounds are raised.

1. The Application is without foundation or merit as the applicant has not annexed the reasons of the taxing officer to demonstrate the basis of the alleged errors of principle and objection to the taxation;
2. The application is misconceived and incompetent having been filed without the benefit of the reasons of the taxing officer for the decision sought to be challenged under the provisions of Regulation 11(2) of the Advocates Remuneration Order;
3. That the said application nonetheless seeks to challenge the taxation of the said Bill on quantum based on wrongful exercise of discretion which cannot be properly and fairly addressed without presentation of the reasons for the same for analysis on reference by the High Court.

Starting with the first two grounds of opposition, which are related, the Advocate/Respondent challenges the competence of the reference for failure by the Applicant to annex reasons of the Taxing Master for the decision being challenged. Mr. Kibera did not respond to this issue in his oral submissions. In the written submissions however the Court's attention was drawn to the supporting affidavit where it is alleged that the Applicant had demonstrated efforts made to obtain the ruling and the reasons of the taxing master. It is submitted that it was at the point of collection of the said ruling that it emerged that the reasons were not availed despite the Deputy Registrar's indication by the letter dated 23rd January 2008 (exhibit 2).

I have looked at that letter. The Deputy Registrar's letter is a notice that copies requested for by the said Advocate were ready for collection upon payment of court fees. The letter does not indicate what kind of copies was requested. The letter refers to a letter by J.M. Njenga & Co., Advocates for the client, dated 20th July 2007. That letter is also in the file. Nowhere does the letter raise any objection to the Bill of Costs nor is it indicated that any reasons for taxation were required. The Advocates submission to that effect was therefore misleading and incorrect.

Paragraph 11(1) of the Advocates (Remuneration) order is very clear how a reference should be raised and it stipulates as follows:

“11.(1) should any party object to the decision of the taxing officer, he may within fourteen days after the decision on those items and the objector may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.”

The party wishing to object to the taxation must first serve a notice of objection indicating items of the bill objected to within 14 days from the date of the decision objected to.

I have perused the entire record of the proceedings and documents. I find no written notice of objection filed by the Applicant. There is no indication in the proceedings that such an issue was ever raised with the taxing master. All I saw in both files are copies of a similar letter from J.M. Njenga & Co., Advocates for the Client/Applicant, seeking a copy of the ruling. As stated nowhere was a notice of objection ever served on the Taxing Master as required under paragraph 11(1) of the Order. That renders this reference incompetent. The situation would have been different if a request was made and the taxing master failed to provide reasons as requested. That was the gist of the Court of Appeal ruling in **KIPKORIR, TITOO & KIARA ADVOCATES VS. DEPOSIT PROTECTINO FUND [2005]1 KLR 528** at page 535 where it was held 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.”

It is clear from the foregoing court of Appeal decision that where the Client sought reasons for the taxation and the same are not supplied, is a good ground for reference to the High Court. Where however none was sought, the reference is rendered incompetent and should therefore not be entertained. The first two grounds of opposition by the Advocate are well founded and I accordingly uphold them.

The third ground of opposition was challenging the reference on the basis that it was challenging the exercise of the Taxing Officer exercise of discretion on quantum. In the case of **Kipkorir**, supra, the Court of appeal had this to say at page 533:

“On a 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 vs. 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’.”

I have glanced at the written submission by the Client/Applicant herein and without commenting further in view of my findings on the first two objections raised by the Advocate, I do not agree that the Client/Applicant was challenging merely issues of quantum. However, as stated above, the reference was incompetent because there was no notice of objection to the taxation served on the Taxing Officer within the prescribed period nor was any reasons sought for the decision on any items on the Bill of Costs.

Having come to that conclusion that I have of this reference, I uphold the grounds of opposition raised by the Advocate/Respondent and strike out the chamber summons application dated 4th February, 2008 with costs to the Advocate.

These are the orders of the Court.

As the parties agreed that this ruling will also bind the application in **HC Misc. Cause No. 693 of 2007**, the application in 693 of 2007 is also accordingly struck out with costs.

Dated at Nairobi, this 4th day of July, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

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

Mr. Werimo for the Advocate/Respondent

LESIIT, J.

JUDGE

