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

Misc Civil Appli 275 of 2007

MURIU MUNGAI & CO. ADVOCATE ….…….....ADVOCATE/RESPONDENT

VERSUS

NEW KENYA COOPERATIVE CREAMERIES LTD….CLIENT/APPLICANT

R U L I N G

The client, New Kenya Cooperative Creameries Ltd, was aggrieved by the decision of the taxing officer of this court in assessing the advocate-client's bill of costs. The client filed reference to this court pursuant to **paragraph 11(2)** of the **Advocates Remuneration Order** seeking the setting aside of the said entire order of taxation. The client further requested the court to refer back the taxation of the said advocate-client's bill of costs to the taxing officer for re-taxation of the entire bill of costs with proper directions thereof. In the alternative to the above prayer, the client requested this court to re-tax the said bill of costs. The grounds in support of the reference are stated on the face of the application. The client was aggrieved that the taxing officer had failed to take into account the nature of the instructions given as well as the relevant circumstances of the case before taxing Item I of the bill of costs at the sum of KShs.294,000/= plus VAT of KShs.47,040/=. The client was of the view that the said taxation was manifestly excessive as to represent an error of principle on the part of the taxing officer.

The client states that the taxing officer erred in principle in failing to appreciate that under **Schedule VI proviso (iv)** of the **Advocates Remuneration Order**, the value of the subject matter which ought to have been taken into account was the value which should form the basis of computation of instructions fees. The client took issue with the taxation of Item 2 in the bill of costs on account that it was manifestly excessive as to constitute an error in of principle. The client was aggrieved that the taxing officer failed to appreciate that Items 1 and 2 of the bill of costs, taking into consideration the nature of the instructions given by the client, constituted a flip side of the same instructions and therefore to award both items, constituted a duplication of the instruction fees payable. The client was aggrieved that the taxing officer had awarded the advocate getting up fees contrary to **Schedule VI (2)** of the **Advocates Remuneration Order** which provides that the said fees shall only become payable when a suit is confirmed for hearing.

The client was of the view that the taxing officer had committed an error in principle in allowing Item 17 of the bill of costs. The client further stated that the taxing officer had made an error of principle when it allowed items in respect of attendances to client and correspondence which were not recoverable under **Schedule VIB** of the **Advocates Remuneration Order** as the same is deemed to have been taken care of once fractional increment on instruction fees has been allowed on Item 1. The client stated that it filed reference before obtaining reasons from the taxing officer; however the taxing officer had responded to its request for reasons by stating that the reasons for the taxation were contained in the Ruling. The client urged the court to allow the reference as prayed.

The reference is opposed. The advocate filed grounds in opposition to the application. The advocate contends that the challenge on the taxation in respect of Item I together with VAT was solely based on quantum and failed to state with precision the nature of the alleged error of principle committed. The advocate argued that **Schedule VI proviso (iv)** relates to *"suits for specific performance of a lease"* which cannot be the applicable formulae for calculation of instruction fees by the taxing officer. The advocate contends that the taxing officer committed no error of principal as alleged by the client since he considered all the issues that were placed before him for taxation.

In particular, the advocate stated that the amount awarded in respect of perusal of correspondence was distinct from the actual instruction fees paid under Item I of the bill of costs. The advocate stated that it had not charged for attending to the client neither was such a claim allowed by the taxing officer. The advocate argued that it was entitled to increase its instruction fees by one half as provided by **part B** of **Schedule VI** which deals with the fees to be paid by a client to the advocate.

Before the hearing of the reference, the client filed written submissions in support of its reference. At the hearing of the reference, I heard oral submissions made by Mr. Ng'ang'a on behalf of the client and by Mr. Munge on behalf of the advocate. The issue for determination by this court is whether the client established sufficient grounds to enable this court set aside the taxation of the advocate-client's bill of costs by the taxing officer of the court. I have carefully considered the said arguments made including the authorities cited by the respective counsel for the client and for the advocate.

In determining whether to interfere with the discretion a Taxing Officer in taxing a bill of cost, this court is guided by the principles laid down by the Court of Appeal in **Kipkorir, Titoo & Kiara Advocates –vs- Deposit Protection Fund Board [2005] IKLR528** at Page 533, where the court held that:

"*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] E.A 497** Paragraph I: '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 interference that the taxing officer acted on erroneous principles – see **Arthur –vs- Electricity Undertaking** (supra) and where the taxing officer has overemphasized the difficulties, importance and complexity of the suit (See **Devshi Dhanji –vs- Kanji Naran patel (No.2) [1978] KLR 243**)".*

In the present reference, the client made several complaints challenging the exercise of discretion by the taxing officer in assessing the legal fees payable to the advocate. The client submitted that the taxing officer committed an error of principle when he taxed item I of the bill of costs at KShs.294,000/= together with VAT on Item 18 at KShs.47,040/=. The client submitted that the taxing officer erred by applying **Schedule VI paragraph A1** of the **Advocates Remuneration Order**, which basically deals with assessment of instructions fees where the value of the subject matter is discernable from the pleadings. The client proposed that since the value of the subject matter was not discernable from the pleadings, the taxing officer should have applied **Schedule VI proviso (iv) (a)** and **(b)** of the **Advocates Remuneration Order** which provides that:

" *For the purpose of assessing an instruction fee in any suit –*

(a)for the possession of premises, with or without a claim for arrears of rent: or

(b)for the specific performance of a lease, the value of the subject matter shall be taken to be the arrears of rent or mesne profits, if any, that may be found due, increased by a sum equivalent to the annual rental value of the premises or to one-tenth of the capital value of the premises whichever is higher; …"

On the other hand the advocate argued that the value of the subject matter was ascertainable from the

pleadings since the value of the suit properties was stated to be KShs.10,400,000/=. It was clear from the plaint filed on behalf of the client that the client was seeking repossession of four (4) parcels of land, being LR Nos. 37/458, 37/459, 37/460 and 37/544 which it alleged had been fraudulently transferred to one Atieno Kombe, the defendant in the suit, without the approval or the consent of the Board of directors of the client's predecessor in title.

In defence to the client's claim, the said defendant stated that she had purchased the suit properties from the said client's predecessor for a sum of KShs.10,400,000/=. It was therefore evident from the pleadings that the value of the suit properties, which was the subject matter of the suit, was ascertainable from the pleadings. The taxing officer, correctly in my view, applied the above value to determine the instruction fees payable to the advocate. Under **Schedule VIA(I)(b)** of the **Advocates Remuneration Order, 1997**, the party to party instruction fees payable to an advocate who has filed or defended a suit for the said value of KShs.10,400,000/= is KShs.196,000/=. Under **Schedule VIB** of the **Advocates Remuneration Order**, the advocate and client fees shall be increased by one-half of the amount payable under **Schedule VIA(1)**. One-half of KShs.196,000/= is KShs.98,000/=. When that amount is added to the sum of KShs.196,000/=, the instruction fees of the advocate adds up to KShs.294,000/=.

It was therefore clear that the taxing officer committed no error of principle when he assessed the instruction fees payable to the advocate. I did not subscribe to the argument advanced by the client to the effect that the advocate's instruction fees ought to have been assessed under **Schedule VIA proviso (iv)** of the **Advocates Remuneration Order**. It was clear from the plaint filed on behalf of the plaintiff that the plaintiff was seeking cancellation of the transfer of the suit properties to the defendant in the suit. The client was seeking the court's order to be declared as the legal owners of the suit properties. The client's suit was not for possession of the suit properties but rather declaration of ownership of the said properties. I was therefore not persuaded by the said argument advanced on behalf of the client.

As regard whether the advocate was entitled to be paid getting up fees under **Schedule VIA (2)** of the **Advocates Remuneration Order**, such fees are payable when an advocate establishes that he had prepared the case for trial and further that the case had been confirmed for hearing. I perused the court file in respect of the case which the taxation of the advocate-client's bill of costs arose. It was evident that apart from filing notice of change of advocates, the advocate took no steps to prepare the suit for hearing. In actual fact, the plaintiff's suit was dismissed on 28th September 2007 for want of prosecution. The advocate is therefore not entitled to be paid the sum of KShs.100,000/= as getting up fees. I will allow the reference filed by the client in respect of the said amount. The same is set aside.

Having carefully perused the other items in the advocate-client bill of costs, I find no reason or excuse to interfere with exercise of discretion by the taxing officer. The taxing officer, other than in regard to the single item mentioned above, committed no error of principle when assessing the fees payable to the advocate in the said taxation. The VAT payable on instruction fees was properly assessed by the taxing officer.

I will therefore deduct the said sum of KShs.100,000/= from the sum of KShs.458,405/=. The advocate-client bill of costs is therefore assessed at KShs.358,405/=. Since the client was partially successful in its reference, there shall be no orders as to costs. Each party shall bear its own costs.

DATED at **NAIROBI** this **27th** day of **NOVEMBER, 2008.**

L. KIMARU

JUDGE