



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc. Appli. 1156 of 2006

WASUNNA & COMPANY ADVOCATES.....RESPONDENT/ADVOCATE

VERSUS

DELPHIS BANK LIMITED.....1ST APPLICANT/CLIENT

KASSIM BHARADIA.....2ND APPLICANT/CLIENT

RULING

On 13th March 2007, the taxing officer of the court assessed the advocate-client's bill of costs at KShs.1,340,250/=. The client was aggrieved by the said decision and duly filed a reference to this court. The client stated that the taxing officer erred in principal in assessing the said bill of costs. At the time the client filed reference to this court pursuant to the provisions of paragraph 11 of the Advocates Remuneration Order, the taxing officer had not given reasons for his decision in taxing the said advocate-client bill of costs in the manner that he did. Subsequently thereafter, before the reference was heard, the taxing officer gave reasons for his decision to the court. The reference was supported by two affidavits sworn by Kassim Bharadia, a director of the 2nd client. The reference was opposed. The advocate filed grounds in opposition to the reference. He stated that the reference was incompetent since the client had not sought or applied for reasons before filing reference to this court. He stated that the application was frivolous and an abuse of the due process of the court.

At the hearing of the reference, Mr. Marete for the client submitted that although the client had filed reference before obtaining reasons from the taxing officer, the client had availed the reasons given by the taxing officer in assessing the advocate-client bill of costs in a further affidavit filed in court. He submitted that in the High Court case that resulted in the advocate filing his bill of costs, a company known as Kenya Iron Mongers Limited was placed under receivership by Delphis Bank (*the 1st client*). The 2nd client, Kassim Bharadia was appointed as the receiver manager. He stated that the company which was placed under receivership filed suit against the bank and the receivers. The advocate in this reference was instructed to act for the bank and the receivers.

According to Mr. Marete, the advocate entered appearance and filed a defence on behalf of the bank and the receiver. He also filed an application for security for costs after which the bank and the receiver withdrew instructions from the advocate. He submitted that the work undertaken by the advocate basically related to dealing with or addressing an interlocutory application for injunctive reliefs. He maintained that the taxing officer had improperly exercised his discretion and therefore erred in principle when he arbitrarily arrived at the value of the suit property at KShs.45 million. He explained that the taxing master disregarded several factors when arriving at the valuation of the suit property for the purposes of assessing the advocate's instruction fees.

He relied on the Court of Appeal decision of **Joreth Ltd vs. Kigano & Associates [2002] 1EA 92** where it was held that where the value of the subject matter of a suit could not be ascertained from the pleadings, judgment or settlement, a taxing officer was entitled to use his discretion in assessing the instruction fee and in doing so the factors to be taken into account included the nature and importance of the case, the interest of the parties, the general conduct of proceedings, any directions of the trial judge and all other relevant circumstances. Mr. Marete submitted that the taxing officer failed to take into consideration the fact that the company which had been placed under receivership was insolvent. He also explained that the taxing officer failed to take into consideration that the advocate had not acted in the matter until the conclusion of the suit. He was of the view that the assessment of the advocate's costs at KShs. 1.3 million was therefore unconscionable.

He submitted that the fees which the advocate ought to have been paid was KShs.300,000/=. He reiterated that the taxing officer had abused his discretion when he assessed the said instruction fees payable to the advocate. He maintained that the advocate had not done anything extraordinary other than doing what was expected of an ordinary diligent advocate. He submitted that as the matter was still pending determination in the High Court, it was unfair for the taxing officer to assess the advocate's fees as if the matter was concluded. He reiterated that the taxing officer had exercised his discretion as a matter of formality and had failed to apply the established principles of the law in assessing the advocate's costs. He was of the view that the assessment of the costs in favour of the advocate was unjustified in the circumstances. He urged the court to allow the reference and remit the matter for taxation before another taxing officer. He further urged the court to set out the principles which should be taken into account by the taxing officer in fairly assessing the advocate-clients' bill of cost.

Mr. Mogeni for the advocate opposed the reference. He submitted that the client had misconstrued the position of the advocate in the matter. He submitted that Ibrahim J had made a ruling on 4th May 2004 in the main suit which gave an indication on what the costs of the suit was likely to be when considering the application for security of costs. He maintained that the taxing officer had used the findings made by Ibrahim J regarding the costs of the suit as a basis for assessing the costs due to the advocate. He submitted that the taxing officer had properly applied the law and considered the correct principles when assessing the advocate's bill of costs. He maintained that the work undertaken by the advocate on behalf of the client resulted in the resolution of the dispute since the company which had been placed under receivership was unable to provide security for costs and thus resulted in the said company's properties being sold off. He submitted that it was unfair for the client to state that the advocate did nothing.

He maintained that the advocate enabled the bank realize its security and therefore was entitled to be paid his fees. He submitted that the advocate had dealt with complex issues in the suit and was therefore deserving of the costs that was taxed in his favour. He explained that there was no basis upon which the client determined that the advocate should be paid the sum of KShs.300,000/= and not the amount assessed by the taxing officer. He submitted that there were no grounds placed before the court that would justify interference with the assessment of the advocate's bill of costs. He reiterated that the taxing officer had not erred in principle or wrongly exercised his jurisdiction in assessing the advocate-client bill of costs. He maintained that the value of the suit property had already been determined by the High Court in the main suit and therefore there was no basis upon which this court could interfere with the assessment of the advocate's costs by the taxing master. He urged the court to disallow the reference with costs.

I have carefully considered the rival submissions made by Mr. Marete for the client and by Mr. Mogeni for the advocate. I have also read the reasons given by the taxing officer in support of his decision in assessing the advocate-client bill of costs which the client seeks to impeach. 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 complained that the taxing officer had applied the wrong principle of the law in arriving at the assessment of the advocate's instruction fees on the basis of an alleged arbitrary assignment of the value of the suit property at KShs.45 million. The client further complained that the taxing officer had committed an error of principle in not taking into account the amount of work that the advocate had undertaken in the suit on behalf of the client before his services were terminated. The client was aggrieved that the taxing officer had not taken into account the fact that the plaintiff company in the main suit was insolvent. The advocate naturally was of the view that the taxing officer had applied the correct principles of the law in arriving at the said assessment of the instruction fees to be paid to him. The taxing officer explained that he had assessed the said instruction fees after he had considered the comments made by Ibrahim J when he ruled on application for the plaintiffs in the main suit to provide security of costs.

I had the occasion to read the said ruling delivered by Ibrahim J. In their said application, the client had submitted that the cost of the suit would be between KShs.3 million and KShs.4 million. It was common ground that the plaintiff in the main suit had been advanced a loan by the client on the basis of a title deed which had been offered as a security and which was valued at KShs.45 million. In his ruling, Ibrahim J ordered the plaintiff in the main suit to deposit the sum of KShs.1million as security for costs. It was therefore clear that the taxing officer was guided by the said decision of Ibrahim J in arriving at the assessment of the instruction fees payable to the advocate. I therefore find no fault with the

taxing officer's decision to base the assessment of the advocate's instruction fees on a sum which the High court considered as a basis of determining the amount to be deposited as security for costs. It was clear that the amount proposed by the client to be paid to the advocate as instruction fees was plucked from the air. There was no basis upon which the client could assert that the advocate ought to be paid instruction fees of KShs.300,000/=.

Having carefully evaluated the facts in dispute in this reference, it was evident that the taxing officer made no error of principle when assessing the instruction fees payable to the advocate. The taxing officer applied the figure which the client had used to obtain the order requiring the plaintiff in the main suit to give security for costs. The client cannot therefore approbate and reprobate. The client cannot change its story to suit the circumstances of the particular issue that is before the court for determination. If the client was of the view that the costs that it was likely to be paid in the main suit by the plaintiff was between KShs.3 million and Kshs.4 million, the client cannot turn around and seek to impeach the assessment of the advocate-client bill of costs when the advocate based his instruction fees on the same figures.

Further, it is trite that an advocate is entitled to be paid his instruction fees upon either filing his notice of appointment as an advocate or entering appearance on behalf of a client. The advocate cannot be denied his instruction fees on the grounds that he had only done part of the work that was expected of him when he was given the said instructions. In the present reference, it was evident that the advocate undertook his work with due diligence to an extent that the client was able to realize the security. The fact that the company which had sued the client is insolvent is no ground to deny the advocate his fees. From the foregoing reasons it is clear that the reference filed by the client lacks merit. The taxing officer committed no error of principle in assessing the fees due to the advocate. The taxing officer did not abuse his discretion when he assessed the said advocate-client's bill of costs.

The reference is for dismissal. The same is hereby dismissed with costs to the advocate.

DATED at NAIROBI this 5th day of NOVEMBER 2008.

L. KIMARU

JUDGE