

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc 1382 of 2003

PETER NG'ANG'A MUIRURIAPPLICANT

V E R S U S

1. CREDIT BANK LTD

2. CHARLES AYAKO NYACHAERESPONDENTS

R U L I N G

This is a reference by the 1st Defendant under paragraph 11(2) of the Advocates (Remuneration) Order against the taxation of its bill of costs dated 8th April, 2004 done on 24th June, 2004. The costs were awarded on 5th February, 2004 by the Chief Justice when he sustained the Defendants' preliminary objection **"in as much as it concerned constituting a constitutional court to address the Applicant's complaints under sections 70(a) and 77(9) of the Constitution"**. The costs awarded were those **"occasioned by the preliminary objection"**.

Objection is taken to taxation of item 1 of the bill of costs (instruction fee) at KShs. 40,000/00 instead of the KShs. 122,000/00 claimed. It was submitted for the 1st Defendant that the remuneration order does not provide for instruction fee to be placed on the subject-matter at hand; therefore, the taxing officer should have been guided by Schedule VI, paragraph 1(b) as read with paragraph 1(d) of the remuneration order. It was further submitted that the preliminary objection before the Chief Justice was to the entire suit; the issue whether or not the originating summons amounted to a constitutional reference was determined. The effect of upholding the preliminary objection was to dispose of the originating summons. For purposes of taxation of costs the preliminary objection amounted to a denial of liability. The taxing officer therefore erred in principle by taxing item 1 of the bill of costs under Schedule VI, paragraph 1(h) of the remuneration order.

For the Plaintiff it was submitted that though the taxing officer erred, it was not for the reason given by the 1st Defendant. It was for the reason that Schedule VI, paragraph 1(h) under which she taxed item 1 applied only to guardianship and adoption matters. Taxation of that item ought to have been under Schedule VI, paragraph 1(o)(viii) of the remuneration order as the preliminary objection was in the nature of an interlocutory application. There is nothing in the ruling of the Chief Justice that can be construed to the effect that the originating summons was struck out by him. The originating summons is still on record. The Chief Justice merely refused to constitute a constitutional court to hear it.

I have considered those submissions of the learned counsels, including the cases cited. I have also perused the court record. I am in complete agreement with the Plaintiff's learned counsel that the ruling of the Chief Justice did not strike out the originating summons. It merely refused to constitute a constitutional bench to hear the summons. The originating summons remained, and still remains, on record and can be heard by a single Judge of this court. Indeed, the Chief Justice was careful to specify that the costs he awarded were those occasioned by the preliminary objection. He did not award costs of the entire suit; he would have done that only if he had struck out or dismissed the originating summons. It will be noted that long after the ruling of the Chief Justice the originating summons was placed before a single Judge for directions on how to proceed. See for instance the records of 23rd February and 16th March, 2005.

I have looked at the Advocates (Remuneration) Order. Schedule VI, paragraph 1(h) was clearly not

applicable as it applied only to adoption and guardianship matters. Schedule VI, paragraph 1(b) as read with paragraph 1(d) proposed by the 1st Defendant's learned counsel is also not applicable; it would have perhaps applied if the costs being taxed were for the entire suit (had the originating summons be struck out or dismissed).

I respectfully agree with the Plaintiff's learned counsel that the preliminary objection was, for purposes of taxation, in the nature of an interlocutory proceeding. The taxation should therefore have been under Schedule VI, paragraph 1(o)(viii). Had the taxing officer applied this paragraph to item 1 of the bill of costs, she would probably have awarded a much less sum than the KShs. 40,000/00 that she awarded. By taxing the item under the wrong paragraph of Schedule VI, she committed an error of principle. But there is no cross-application by the Plaintiff. Therefore I shall not disturb the award made by the taxing officer. However, the reference by the 1st Defendant must be refused. It is hereby dismissed with costs to the Plaintiff. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF NOVEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 23RD DAY OF NOVEMBER, 2007