REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KERICHO

Misc 102 Of 2005

IN THE MATTER OF THE TAXATION OF ADVOCATE BILL OF COSTS

COUNTY COUNCIL OF BURETI …….. APPLICANT

VERSUS

KENNEDY NYAMOKERI T/A NYAMOKERI & CO. ADVOCATES…… RESPONDENT

RULING

This is a reference by the applicant County Council of Bureti made under ***paragraph 11(2) of the Advocates (Remuneration) Order*** seeking to have the decision made by the taxing officer on the 12th October, 2005 set aside. The applicant was aggrieved by the decision of the Deputy Registrar of this court who had taxed the advocate – client bill of costs between the firm of Kennedy Nyamokeri t/a Nyamokeri & Co. Advocates (hereinafter referred to as the respondent) and the applicant. The Deputy Registrar of this court had taxed the advocate – clients bill of costs at Kshs.504,020/-. The applicant being dissatisfied by the said taxation issued a notice pursuant to ***paragraph 11(1) of the Advocates (Remuneration) Order*** to the Deputy Registrar to give reasons for the said taxation in view of the fact that there was no evidence that the respondent had given instruction to the applicant to make such demands. The Deputy Registrar replied to the applicant pursuant to ***paragraph 11(2) of the Advocates (Remuneration) Order***. He stated that the issue of lack of evidence of instructions was not a matter which was in dispute and which had been placed for determination by the court during taxation. He further stated that he had relied on the information supplied in the bill of costs only to arrive at his decision. He finally stated that there was no evidence that instructions fees were not payable in debt collection. The respondent was also dissatisfied by the said decision and similarly filed a notice of objection to the Deputy Registrar. However, when reasons were given, the respondent did not file a chamber summon as envisaged by ***paragraph 11(2) of the Advocates (Remuneration) Order***. It is only the applicant who filed reference to this court.

In its reference to this court, the applicant complained that the taxing officer had awarded the respondent the said sum of Kshs.504,020/- without considering the fact that the ***Advocate (Remuneration)(amendment) Order, 1997*** did not provide for taxation of advocate – client bill of costs in a matter where a suit had not been filed by an advocate. The applicant further complained that the reasons given by the Deputy Registrar in allowing 16% Value Added Tax on the bill of costs was untenable since there was no proof that the respondent had been registered under the Value Added Tax regime. The applicant was aggrieved that the Deputy Registrar had not considered the fact that the applicant had not issued any instructions to the respondent to make such demand notices in view of the fact that the applicant maintained no valuation roll for the properties within its area of jurisdiction.

The respondent objected to the reference. He filed grounds of opposition to the reference. He stated that the application was *res judicata* in light of the fact that the issues raised herein were issues which the Deputy Registrar had considered in the taxation. He further stated that the reference was untenable, misconceived, bad in law, procedurally fatal and an abuse of the court. The respondent further stated that the applicants were dishonest and had filed the reference with unclean hands. The respondent was of the view that the reference was meant to delay the just conclusion of the taxation of costs.

I heard the rival submissions made by Mr. Rono learned counsel for the applicant and Mr. Nyamokeri learned counsel for the respondent. Mr. Rono basically reiterated the contents of the chamber summons and the supporting affidavit filed by the applicant in its reference to this court. Mr. Nyamokeri apart from reiterating the grounds of opposition submitted that he had had the authority of the applicant to issue the demand notices. He further submitted that the issue of the authority of the applicant was not an issue before the Deputy Registrar when he taxed the bill. He further submitted that although the applicant had been served with the notice of taxation, it failed to send a representative to court and therefore the taxation was undertaken exparte by the Deputy Registrar. In his view, the applicant ought to have made an application to set aside the exparte taxation before filing a reference to this court. He submitted that the reference was therefore incompetent. He urged this court to dismiss the reference with costs.

I have considered the submissions made by the parties to this reference. In my considered opinion, the issues for determination by this court are twofold: Did the applicant give instructions to the respondent to demand the rates from the rate payers within the jurisdiction of the applicant's county council? Secondly, if the answer to the above is yes, what part of the Advocates (Remuneration) Order ought to have been applied by the Deputy Registrar in taxing the Advocate – client bill of costs? In answer to the first issue, the respondent has submitted that he was instructed by the applicant to make the demand to the land owners within the jurisdiction of the applicant's county council to pay the rates due. I agree with the respondent that this was not an issue when the matter was before the Deputy Registrar. However, as it has been raised by the applicant on this reference, in my view, it is an issue which goes to the root of the matter in dispute herein and therefore cannot be ignored or wished away by this court.

The respondent did not annex any letter or instructions by the applicant authorizing him to make the demands in question. The applicant being a public authority established under the ***Local Government Act (Cap 265 Laws of Kenya)*** cannot make decisions where public money will be expended for services without a resolution of the council or where the sum involved is more than ten thousand shillings, without tender ***(See section 143 of the Local Government Act***). The applicant is not an individual who can make a decision to engage the services of an advocate at the spur of the moment or without ceremony. The law mandates the applicant to give instructions which may result in it incurring expenditure in writing ***(see section 86A of the Local Government Act)***. It was therefore imperative that the respondent, knowing that he was dealing with a public authority, to demand that the instructions given to him be in writing.

In this case, no such instructions were exhibited in the miscellaneous application which was filed by the applicant seeking the advocates – clients bill of costs to be taxed. The respondent was put on notice by the applicant when he was served with this reference. He did not take the opportunity to file such instruction from the applicant to dispel once and for all the applicant's protestation that it did not give instructions to the respondent. It is imperative that the instructions of a public authority be in writing, just like in the case of a company or a public corporation. This is because such a Public Authority can only act through its established organs. In the case of the applicant, its decisions are made by the council during its approved meetings.

Therefore as provided by ***section 45 of the Advocates Act*** where such agreement is in writing then it would form valid instructions which an advocate can in case of disagreement, file an advocates – clients bill of costs. In the present case, there are no such instructions in writing.

The respondent has not made any effort to demonstrate to this court how he was able to get instructions from the applicant. In the absence of such instructions, the respondent cannot in law be said to have been instructed by the applicant. He cannot therefore file advocates – clients bill of costs against such a "client".

In the circumstances of this case, I am not prepared to hold that the applicant was a client to the respondent. I will therefore allow the reference. It is not necessary for this court to consider the second question on whether the Deputy Registrar had properly taxed the advocates – clients bill of costs which was filed by the respondent. I will further not give a determination of the arguments made by the applicant and the respondent on matters that did not touch directly the decision that this court has now given in this reference. In my view the arguments were surplus to the issues in dispute.

In the premises therefore, the said taxation by the Deputy Registrar of this court is hereby set aside and substituted by an order of this court dismissing the said application for the taxation of the advocates – clients bill of costs as the respondent failed to jump over the first hurdle: that of first establishing that indeed there existed an advocate – client relationship and further that such a client had given instructions that can be recognized by the law. The applicant shall have the costs of this reference and the costs of the dismissed application for the taxation of the advocates – clients bill of costs by the Deputy Registrar of this court.

DATED AT KERICHO THIS 10TH **DAY OF** February**, 2006**

L. KIMARU

JUDGE