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

Misc Appli 789 of 2005

F. M. MULWA ADVOCATES …....….....……..…...ADVOCATES

VERSUS

PATRICK MUTHEKE NDETI ……..…….....…….……CLIENT

RULING

On 7th March 2006 the learned taxing officer, Mr. E. C, Cherono awarded to the advocate the sum of Kshs.211,503/90, as his taxed costs.

The advocate was convinced that the learned taxing officer had erred in the process of the taxation. He therefore brought this reference, pursuant to the provisions of Rule 11 (2) of the Advocates Remuneration Order.

When canvassing the reference, the advocate made it clear that he was only disputing the sum awarded in respect to the instruction fees.

He then went on to contend that the learned taxing officer erred by failing to take into account prayer (b) in the Plaint, when he was ascertaining the value of the subject matter of the claim. It was said that the taxing officer limited his mind to prayer (a) only.

As far as the advocate is concerned, the taxing officer ought to have noted that in the statement of account, which was produced before him, the debit balance had, at some point in time, reached Kshs.7.7 million. Therefore, in the advocate's view, the subject matter was not the sum of Kshs.3.5 million, as that sum was exclusive of the interest which had been claimed for, at the rate of 4.1% per month.

Furthermore, the client is said to have offered, in his written submissions, the sum of Kshs.261,000/-. Therefore, by awarding only Kshs.211,503/90, the taxing officer was said to have been dispassionate.

Another issue that was taken up by the advocate was in relation to the mathematical calculations which resulted in the taxed costs of Kshs.211,503/90. The advocate says that the calculations were erroneous.

For those reasons, the advocate submitted that the learned taxing officer had erred in principle; and that therefore, the Bill of Costs ought to be remitted for re-taxation de novo. In the alternative, the advocate submitted that this court might as well proceed to tax the Bill.

In response to the reference, the client expressed the view that the reference was lacking in merit, as the advocate is said to have failed to demonstrate the manner in which the taxing officer's decision could be construed to be erroneous.

It was the client's view that as the only submissions put forward by the advocate were in relation to the Instruction Fees, the advocate must be deemed to have accepted the results of the taxation on all other items.

The position, as I understand it, is that the advocate challenged not only the decision on the Instruction Fees, but also the calculations leading up to the final sum which was awarded as the taxed costs. Implicit in that understanding, is that the advocate did not dispute any decisions on the separate items on the Bill, save for the item on Instruction Fees.

I have given due consideration to the submissions made by both parties. I have also given consideration to the reasons advanced by the learned taxing officer, in relation to his decision on the Instruction Fees.

Basically, the reason given is that the advocate had been instructed by the client;

"to defend a claim of Kshs.3,549,173/40 being the principal, plus interest at 4% per month, as at 31st January 1999. The fees charged is based on the said sum of Kshs.3,549,173/40 upto 31st January 1999."

It is noteworthy that during the taxation, the advocate had asserted that;

"The said interest was progressively escalating and it is not inconceivable that as at the time of judgement the sum claimed was in excess of Kshs.35 million."

Since those submissions, which were made on 24th January 2006, the advocate has changed his position somewhat. He now believes that the taxing officer should have derived guidance from the statement of account, from which the outstanding sum had accumulated to kshs.7,782,783/40, as at October 1999.

I say that the advocate had changed his position, because in his submissions before me, he did not make any reference to the figure of Kshs.35 million.

On the other hand, I note that at paragraph 5 of his supporting affidavit, the advocate still reiterated that;

"the accumulated principal amount exceeded Kshs.35million, by reason of interest claimed, an amount which could be determined arithmetically."

In the light of these three figures, can it be said that the learned taxing officer erred in principle, when he calculated the Instruction Fees, on the basis of the principal sum of Kshs.3,549,173/40?.

By virtue of the provisions of paragraph 1 of Schedule VI of the Advocates (Remuneration) Order;

"the value of the subject matter can be determined from the pleading, judgement or settlement between the parties."

In this case, there was neither a settlement nor a judgement from which the value of the subject matter could be determined.

There is no provision in the rules, for arithmetically determining the amount which would have been due as at the time judgement would have been delivered. Therefore, to contend that the subject matter would, conceivably, have been Kshs.35 million at the time of judgement, is to engage in idle speculation. Nobody could tell, with any decree of certainty, when judgement would have been given in the suit, if the case had proceeded to a full trial. Secondly, there is no certainty that the sum claimed would have continued to grow, as the borrower might have decided to make some repayments.

In a nutshell, when a taxing officer is ascertaining the value of the subject matter of the suit, he should not be drawn into any speculative processes, such as assuming that the sum claimed would "progressively escalate", so that the sum that might be due "as at the time of judgement" would conceivably be so much.

But, can the taxing officer determine the value of the subject matter from pieces of evidence such as statements of account?

Again, the rules expressly state that the basic guide, for determining the value of the subject matter is the judgement, the pleadings or the settlement. Therefore, the learned taxing officer was well advised to disregard such evidence as may have been tendered by either party during the taxation or even during the proceedings which preceded the said taxation.

In the result, the taxing officer did rely on the value cited in the Plaint. By so doing, he complied with the direction provided by the provisions of paragraph 1 of Schedule VI. Therefore, the learned taxing officer cannot be said to have erred in principle, or at all, in calculating the instruction fee based on the principal sum claimed, which was Kshs.3,539,173/40.

And although the client did offer Kshs.261,782/70, in his submissions before the taxing officer, the said offer was not binding on the taxing officer. Therefore, by awarding a lesser sum, than the client had offered, the taxing officer cannot be said to have erred in principle.

Finally, as regards the alleged miscalculation in the figures awarded by the taxing officer, the advocate did not draw the court's attention to any specific errors. Therefore, I was unable to go through a process of checking all through the figures, with a view to ascertaining whether or not there were any errors. But if there should be any arithmetical mistakes in the figures awarded by the learned taxing officer, the same may be corrected by him, once his attention is drawn to the errors. In effect, the advocate is required to draw the attention of the taxing officer to the alleged errors, if any; whereupon the necessary amendments can be effected, pursuant to the provisions of Section 99 of the Civil Procedure Act.

In conclusion, I find no merit in the reference. I therefore decline to set aside the decision of the learned taxing officer. And, the costs of the application dated 8th April 2006 are awarded to the client in any event.

Dated and Delivered at Nairobi, this 3rd day of July 2006.

FRED A. OCHIENG

JUDGE