



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

Misc Cause 320 of 2005

**ALDRIN OJIAMBO T/a OJIAMBO & CO.
ADVOCATES...APPLICANT/ADVOCATE**

VERSUS

1. MOHAMEDRAZA HUSSEIN JAGANI

2. RAZCO LIMITED.....

.....RESPONDENT/CLIENT

RULING

This is a reference from the ruling of a taxing officer. The ruling in question was delivered by the learned taxing officer, Mrs C.W. Githua, on 15th September 2005.

It is not in dispute that the respondent had instructed the applicant, who is an advocate. It is also not in dispute that the said instructions were in relation to the review, amendment, perusal and approval of a Debenture which was to be created over its assets, by a financier.

Furthermore, there is no dispute that the respondent gave further instructions to the applicant, in relation to the review, amendment, perusal and approval of a Mortgage to be created over L.R. No. 29/6/4.

The value of the loans to be secured by the Debenture and the Mortgage was KShs. 30,000,000/=, in each instance.

After doing the work, the applicant rendered a bill in line with the provisions of Schedule 1 of The Advocates (Remuneration) Order.

However, the learned taxing officer proceeded to award costs on the basis of Schedule 5. It is for that reason that the applicant contends that the taxing officer erred in principle, and ought therefore to have her decision set aside.

In the ruling, the learned taxing officer expressed herself as follows;

“I find that item 1 and 2 which concern instructions to peruse, approve, adjust and advise on debenture and mortgage as described in the said items are not provided for in the third scale of

schedule 1, item 1 (b). In my considered view, they fall under schedule V part II para. 1 which provides for a fair and reasonable fee for instructions having regard to the care and labour required, the number and length of papers to be perused, the nature and importance of the matter, the amount or value of the subject matter involved, interest of the parties, complexity of the matter and all other circumstances of the case.”

For the record, I did extract the foregoing from the hand-written record of the court. I did so because I found that the typed version of the ruling did not make sense to me. I say so because it would constitute a contradiction in terms, for the taxing officer to have held that the items were provided for in the third scale of Schedule 1, item 1(b); and then go on to also say that the said items fall under Schedule 5.

A reading of the heading to Schedule 5 reveals that it relates to

“fees in respect of business the remuneration for which is not otherwise prescribed or which has been the subject of an election under paragraph 22.”

Therefore, if there is a prescribed fee for any business, or if there has been no election under paragraph 22 of the Advocates Remuneration Order, the provisions of Schedule 5 would be inapplicable.

The next question that then arises is as to the person who is entitled to make an election under paragraph 22. That question is important because in this case the decision to apply Schedule 5 was made by the learned taxing officer.

Paragraph 22 (1) reads as follows;

“In all cases in which any other Schedule applies an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under the Schedule, his remuneration shall be according to Schedule V, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.”

The paragraph speaks for itself. Clearly therefore, it is not open to the taxing officer to make an election to apply Schedule V. The right to make an election vests in the advocate. Therefore, by opting to apply Schedule 5, whilst the advocate had not so elected, was an error in principle.

But one may ask if indeed there was any other Schedule pursuant to which the items numbered 1 and 2 could be charged.

A perusal of the third scale of Schedule 1 reveals that it provides the scale of charges relating to debentures. And as regards Mortgages, the first scale of Schedule 1 provides the scale for charges. In effect, there are other Schedules which apply to both items 1 and 2 in the applicant’s Bill of Costs. Therefore, I hold the considered view that the learned taxing officer erred in principle by applying the provisions of Schedule 5. For that reason, her decision on those two items are hereby set aside.

The Bill of Costs shall now be remitted to the same taxing officer, with directions that she recalculates the costs for items 1 and 2, in accordance with the appropriate scales under Schedule 1 of the Advocates Remuneration Order.

The costs of the reference dated 23rd June 2006 are awarded to the applicant.

Dated and Delivered at Nairobi, this 12th day of October 2006.

FRED A. OCHIENG

JUDGE