



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
Civil Case 657 of 2004

NYAKUNDI & COMPANY ADVOCATES PLAINTIFF

VERSUS

KENYATTA NATIONAL HOSPITAL BOARD DEFENDANT

RULING

Before me is an Application expressed to have been brought under Rule II of the Advocates Remuneration Order (under Cap.16 of the Laws of Kenya), Section 3A of the Civil Procedure Act Cap.21 of the Laws of Kenya and all enabling provisions of the Law. The Application is seeking primarily one order and that is that the ruling of the Taxing Master given on 28th October, 2004 be set aside and the bill of costs dated 31st August 2004 be taxed afresh. The reasons for the Application are that:

- 1. The Taxing Officer erred in fact and in Law by awarding attendance costs that were manifestly excessive without the benefit of the record of proceedings in criminal case 2736/2001.***
- 2. The Taxing Officer erred in fact and in Law by not considering the Respondent Counsel's submissions in arriving at her decision.***
- 3. The Taxing Officer erred in Law and in fact by not taking into account the fact that the maximum penalty upon conviction under Section 34 of the National Social Security (NSSF) Act is a fine not exceeding Kshs 15000/= orally.***
- 4. The Taxing Officer erred in holding that the Advocates brief encompassed move then defending the client in Criminal Case No. 2736 of 2001.***
- 5. The award of Kshs 1,220,205/= is unconscionable excessive in the circumstances and contrary to public policy.***
- 6. The Taxing Officer misdirected herself, speculated on evidence not before her and thereby abused her discretion***

The Application is supported by an affidavit sworn by one Nzuki Mwinzi, the Senior Legal Officer of the Respondent Board. The application was opposed and there is a Replying Affidavit sworn by Kibagendi Assa M. Nyakundi an Advocate in the firm of M/S Nyakundi & Company Advocates.

The reference came up before me for hearing on 10th May 2005. Mr. Nyakundi Learned Counsel for the firm of Advocates aforesaid applied to raise a Preliminary Objection based on a Notice filed on 4th May 2005. I allowed arguments on the Preliminary Objection first before hearing the reference on merits.

Mr. Nyakundi argued that the Taxing Officer delivered her ruling on taxation on 28th October 2004. The Respondent filed its Objection on 9th November 2004 and did not file this reference until 22nd March 2005 which was out of time. Counsel submitted that the record of the Court shows that the Respondent applied for reasons for taxation by its advocates' letter dated 30th October, 2004 and on 10th February, 2005 followed it up with a reminder a copy of which reminder is annexed to his affidavit as "KAMNI". This letter has an endorsement that a copy of the reasons for taxation was received for the Respondent's Advocates by one Julius Mugala on 23rd February, 2005. This fact had not rebutted by the Respondent by way of affidavit. In Counsel's view, this reference should therefore have been filed by 8th March 2005.

Mr. Muyundo in opposing the Preliminary Objection argued that the time frame given in Rule 11 (2) of the Advocates Remuneration Order is not mandatory. In his view the time frame for filing a reference should not be used to defeat this reference. In any event, so Counsel argued it had not been shown that the said Julius Mugala who is alleged to have received the reasons for taxation was an agent of the Respondent.

The above are the rival positions taken in respect of the Preliminary Objection. I have considered the said positions. I have also carefully considered the relevant rule. Having done so I take the following view of the matter. Rule 11 (2) of the Advocates (Remuneration) Order reads:

“(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the Objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned setting out the ground of his objection.”

I have on my own checked the record and indeed seen the original letter dated 10th February, 2005 from the Respondent's Advocates addressed to the Deputy Registrar reminding her to forward her reasons for the taxation of 24th October 2004. It is indicated on this letter that one Julius Mugala received a copy of the reasons for taxation, on behalf of the Respondent's advocates on 23rd February, 2005. The Respondent has not stated when the reasons were received in this reference. The deponent of the supporting affidavit, the said Nzuki Mwinzi, at paragraph 5 of the said affidavit deponed that he was aware that the taxing master had given the reasons for her ruling. The date of receipt of the reasons for taxation was not disclosed.

Under Rule 11 (2) of the Advocates (Remuneration) Order quoted above, a definite time frame for filing a reference is given. It is fourteen (14) days from the receipt of the reasons. If an Objector is delayed in making his/her reference he/she may apply for enlargement of time to make the reference under Rule 11(4) of the same Order. There is no evidence that the Respondent sought and obtained enlargement of time to file this reference. I have no reason to doubt that the Respondent's Advocates received the reasons for taxation on 23rd February, 2005. Under Rule 11(2) of the Advocates Remuneration Order, the Respondent should have filed its reference on or before 9th March 2005. Accordingly I find and hold that this reference having been filed on 22nd March 2005, was filed out of time without leave. The reference is incompetent and is struck out with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MAY 2005.

F. AZANGALALA

JUDGE

Read in the presence of: