



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CAUSE NO. 1148 OF 2002

DOREEN NASIEKU PUSSY, ADVOCATE.....APPLICANT

-VERSUS

MARA CONSERVANCY.....RESPONDENT

JUDGEMENT

1. Reference under the Advocates (Remuneration) Order

This reference application, dated 14th November, 2003 and filed on 21st November, 2003 was brought under Rule 11 of the Advocates (Remuneration) Order, sections 3A and 13 of the Civil Procedure Act (Cap. 21), and Order XLIV rules 1, 2 and 3 of the Civil Procedure Rules. It carried the following prayers:

- (i) that, the Court do set aside in its entirety the taxing master's decision in a ruling of 4th April, 2003;
- (ii) that, the Court do order that the plaintiff/applicant's taxed bill of costs be taxed in a different manner;
- (iii) that, the Court do review and set aside the taxing master's ruling of 4th April, 2003;
- (iv) that, costs of this application be provided for. The application is premised on the following grounds:
 - (a) that, the taxing master erred in fact and in law in failing to tax the applicant's bill of costs as drawn;
 - (b) that, the taxing master erred in fact and in law in finding that the applicant had not prepared a management lease agreement;
 - (c) that, the taxing master erred in fact and in law by holding that the applicant's annexures were not conclusive;
 - (d) that, the taxing master failed to comply with the applicable rules, by neglecting or refusing to give reasons for the said ruling, despite many requests.

Evidence to support the application is in the depositions of Doreen Nasieku Pussy dated 14th November, 2003. She avers that in the year 2000 she received instructions from the respondent to prepare a management agreement and/or lease, for a reserve in Transmara District. She deposes that she conducted research, attended meetings and was dedicated to the assigned task over a period of some 12 months and this enabled her to complete the said agreement and/or lease, to the respondent's satisfaction. She thereafter raised fee notes which, however, were not settled by the respondent — and in consequence

she filed her bill of costs.

The said bill of costs, it is deponed, was taxed at Kshs.254,855/= all-inclusive — and a ruling to that effect delivered. The deponent avers that on or about 9th April, 2003 she dispatched to the taxing master a notice of objection to the taxation. Subsequently, on or about 19th August, 2003 the deponent wrote to the taxing master requesting reasons for the impugned taxation. This request was, however, not responded to.

The respondent's grounds of opposition dated 27th November, 2003 were filed on 24th November, 2003. The main points stated in those grounds are as follows:

- (i) the application (or Reference) does not show that the taxing officer erred in the findings and in the reasons stated;
- (ii) the Reference is supported by an unsworn affidavit purporting to be the affidavit of Doreen Nasieku Pussy; there is no service of proper process;
- (iii) the agreement the subject of the Reference and the taxation is clearly a "Management Agreement" and not a lease agreement; the respondent has never been a lessee or tenant of any person under the "Management Agreement";
- (iv) the applicant's bill of costs cannot and ought not to be taxed as originally drawn.

2. The Applicant's Case: Submissions

Learned counsel, **Mr. Mutua**, who represented the applicant before the Court, raised objections to the taxation of his client's bill of costs by the taxing officer on 4th April, 2003. He urged the Court to revise or set aside the ruling given by the taxing officer. He presented the case as resting on the factual foundation represented by the depositions of the applicant dated 14th November, 2003 — even though the validity of that evidence was itself to be contested by counsel for the respondent. Mr. Mutua submitted that the taxing officer had misdirected herself, or exercised her discretion wrongly — by allowing item 1 of the bill of costs (instruction fees to prepare a Management Agreement (which leases a parcel of land) whose subject matter is an annual consideration and/or rent of Kshs.41,656,800) at the figure of Kshs.200,000/= whereas the applicant had set it at Kshs.2,500,000/=. Counsel contended that the taxing officer had not taken into account the time expended in drawing the agreement. He said the amount of time involved in the work in question was well illustrated in the supporting affidavit as 12 months. **Mr. Mutua** submitted that the taxing officer should have regarded the Management Agreement as a contract, and computed the instruction fees on the footing that the work done had been in respect of a legal document, a contract, the value of which, as shown in the supporting affidavit, was Kshs.540 million.

Prayer No. 3 in the application was an alternative prayer: "that alternatively, the Honourable Court do review and set aside the taxing master's decision/ruling made on 4th April, 2003". Making submissions on this prayer, learned counsel stated that he had repeatedly sought of the taxing officer reasons to explain the taxation on item 1 (instruction fees for Management Agreement) and item 2 (instruction fees for Management Agreement). Item 1 claimed Kshs.2,500,000/=: while item 2 claimed Kshs.4,050,000/=: and the total claim on the bill of costs was Kshs.7,854,855/=. Learned counsel stated that for some two years now the request for reasons by the taxing officer has remained unanswered. He urged that the Court has a discretion to give directions in a matter such as this. He urged that the Court should exercise a discretion under s.3A to decide the bill of costs question, on the basis of its inherent jurisdiction.

3. The Respondent's Case: Submissions

Learned counsel, Mr. Mwenesi, submitted that the applicant's Reference rested on a weak foundation, as it made no claim and did not show that the taxing officer had erred in her taxation.

On the demand for reasons made to the taxing officer by the applicant, Mr. Mwenesi submitted that there was no need for any reasons, as these had been adequately set out in the taxing officer's ruling of

4th April, 2003.

The taxing officer's reasoning is set out as follows:

“On Item 1 the applicant states that the instruction fees were [for preparing] a Management Agreement whose annual consideration and/or rent is Kshs.41,656,800/=. “[She] relied on Schedule II of the 1997 Remuneration Order. I am afraid I must disagree with the applicant. I have perused the document prepared by the advocate and I find it is a management agreement and is not a lease. I do not see the basis of her arriving at an annual income of [Kshs.]41,656,800/= or a contract amounting to [Kshs.]54,000,000/=. The annexures are not conclusive in these circumstances.”

“Be that as it may she did not prepare a lease agreement and hence cannot rely on Schedule II of the 1997 Remuneration Order. The correct Schedule would be Schedule V Part II (1). Taking into account the complexity of the matter, the number and length of the papers perused, the length of time taken to draw up the management agreement and all other circumstances of the case, I find that an award of [Kshs.]200,000/= may be fair and reasonable as instruction fees.

“Item II is accordingly taxed off as a management agreement does not fall under Rule 48.”

In my view, just as counsel for the respondent urges, the taxing officer has not handed down a ruling without reasons. Her reasons are detailed and quite intelligible, with respect.

Learned counsel doubted the propriety of the applicant's appeal for exercise of discretion in her favour by the Court, by virtue of s.3A of the Civil Procedure Act (Cap. 21). Mr. Mwenesi submitted that the Advocates (Remuneration) Order is a complete code, and it did not leave room for a general discretion exercised by virtue of the Civil Procedure Rules; and the Civil Procedure Rules would not, in the circumstances, lie whether the motion was one of appeal or of originating character.

Learned counsel contested the claim made by the applicant, that the taxing officer's taxation at Kshs.200,000/= instead of Kshs.6,550,000/= as claimed in the bill of costs, could only have been arrived at by error or through misdirection. *Mr. Mwenesi* submitted that the taxing officer's decision was properly explained in her ruling and in any case, the determination of level of taxation was, subject to the provisions of the Advocates (Remuneration) Order, in the discretion of the taxing officer. This principle, counsel submitted, was to be observed in this Court's practice; and so it was improper for the applicant to urge that this Court should oust the exercise of discretion by the taxing officer.

Learned counsel remarked that the taxing officer had proceeded cautiously and given careful consideration to the provisions of the Advocates (Remuneration) Order; and she had found that the agreement which is the subject of this application was a management agreement and not a lease.

Mr. Mwenesi submitted that a further shortfall in the applicant's Reference is that it had no valid affidavit in support. The applicant's supporting affidavit of 14th November, 2003, counsel contended, was improperly drawn — and hence what was before the Court was a defective application which merited dismissal with costs.

4. Applicant's Reply: Submissions

Learned counsel, *Mr. Mutua* maintained that all the applicant's documents were properly commissioned and signed, and there was no valid objection being raised in this regard. He restated the point that the taxing officer had been in error when she taxed the first and second items of the bill of costs at the modest figure of Kshs.200,000/=.

5. Analysis, and Orders

The concise ruling delivered by the taxing officer, on 4th April, 2003 quite comprehensively sets out the reasons that led her to her award. It was not, in my view, necessary for the applicant to write letters to the taxing officer requesting “reasons”. Her main reason was that the agreement in question was a management agreement, not a lease, and so could not rightly be taxed under Schedule II of the 1997 edition of the Advocates (Remuneration) Order. The taxing officer found that the applicant had had no basis for computing her fees on the basis of a supposed annual income of Kshs.41,656,800/=, or of a contract the value of which was Kshs.54,000,000/=.

The taxing officer’s reasoning thus stated, which on the face of it is entirely logical, has not been contested on the basis of any analysis and strict accounting based on the Advocates (Remuneration) Order. This shows a lack of cogency in the applicant’s claim.

Counsel for the applicant has also not responded to the important point raised by counsel for the respondent: that the Advocates (Remuneration) Order is a comprehensive code guiding the mode of taxation of costs, and that it is inappropriate to invoke (as the applicant has done) the provisions of Order XLIV of the Civil Procedure Rules, or the general discretion of the Court under s.3A of the Civil Procedure Act (Cap.21).

From the papers filed and from the submissions made for the applicant, it has become apparent to me that the bill of costs as filed, was not founded on the specific prescriptions of the Advocates (Remuneration) Order; and the applicant in the Reference is only making a plea that the Court should intervene because the bill of costs was under-taxed. That cannot provide a basis for this Court to interfere with the exercise of her special discretion by the taxing officer. It must be shown that the taxing officer has departed from clear provisions of the law, before this Court can intervene.

Counsel for the applicant seems not to have appreciated the important point raised by counsel for the respondent, regarding the validity of the supporting affidavit.

The supporting affidavit dated 14th November 2003 and filed on 21st November, 2003 does not indicate the name and address of the person who filed it. Although there are conflicting decisions of the High Court on this matter, I think the meritorious position which may gain general acceptance in the future, is that proper indorsement of all documents filed for use in legal proceedings is a requirement of the substantive law and must be complied with. An ingenious argument had been advanced before me in relation to the same question, *in A.J. Ltd & Another v. Catering Levy Trustees*, Civil Suit No. 1488 of 2000. Counsel in that matter while conceding that the indorsement of the particulars of the person who drew and filed his client’s affidavit were missing, claimed that since the affidavit had come along with the plaint and the plaint was properly indorsed, the plaint did give sufficient cover of validity to the affidavit as well. I made the remark: “I do not myself regard such as a legal argument, but rather, a strenuous initiative on the part of counsel to show concern for the client’s interests.” I struck out the said affidavit, which left the application shorn of all supporting evidence, and the application itself was struck out.

In all the circumstances, I have not been convinced that the applicant has a serious case which should lead me to disturb the decision of the taxing officer.

I hereby dismiss the applicant’s Notice of Motion of 21st March, 2003 with costs to the respondent.

Orders accordingly.

DATED and DELIVERED at Nairobi this 13th day of May, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Applicant: Mr. Mutua, instructed by M/s. E.K. Mutua & Co. Advocates

For the Respondent: Mr. Mwenesi, instructed by S.M. Musalia Mwenesi Advocate.