



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Appli 69 of 2005

MUCHANGI NDUATI & CO. ADVOCATES.....PLAINTIFF

VERSUS

DR FRANCIS P. KIRANGADEFENDANT

RULING

The advocate with the bill of costs has made a reference under paragraph 11 of The Advocates (Remuneration) Order.

The court wishes to deal with each item raised by the applicant.

Item No. 1 instruction fees: -

The advocate argued that his firm was instructed by the Respondent (the plaintiff) to act for him in respect of the subject matter of kshs 5, 125, 537. This amount was reflected in the affidavit of the defendant in the suit that the advocate acted for the Respondent. That in that suit the Respondent sought an order for taking accounts and therefore affidavits sworn in that matter were of material importance in determining the subject matter. The advocate said that the taxing master refused to rely on that affidavit because he found that an affidavit is not a pleading.

The advocate submitted that if the affidavit could not be relied upon that the defence could be relied upon for it showed the subject matter to be kshs 4, 808, 748. 45.

The advocate prayed that the court do hold that the taxing officer was wrong in principle to have relied upon the plaintiff to determine the subject matter. The plaintiff had a claim for kshs 1, 753, 119. 75.

The respondent opposed the prayer on this item and faulted the advocate for relying on the amount reflected in the replying affidavit for determination of the subject matter. The respondent supported the taxing officer's finding and for basing the subject matter on the amount reflected in the plaintiff.

The taxing officer in respect of his taxation of this item stated:

“...the value of subject matter is kshs 1, 753, 119. 75 and not kshs 5, 128, 537 plucked from the affidavit....”

Schedule VI paragraph 1 of The Advocates (Remuneration) Order provides that the subject matter can be determined from the pleading, judgement or settlement between the parties.

Pleadings is defined in section 2 of the Civil Procedure Act as:

“Pleading” includes a petition or summons, and the statement in writing of the claim or demand of any plaintiff and of the defence of any defendant, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

For our purpose pleadings would be the plaint and defence. The advocate submitted that the defence had the value of kshs 4, 808, 748. 45. I have perused the file in this matter and I was unable to find a copy of the defence to confirm the submissions of the advocate. The only pleading I was able to trace is the plaint and therein I confirmed that the subject matter is kshs 1, 753, 119. 75. I reject the advocates submission that the figures in the replying affidavit can be used to determine the subject matter in view of the definition of pleadings herein before. The finding of the court therefore is that the taxing officer did not make an error of principle or otherwise in the taxation of item No. 1.

Item No. 7 Attending court for filing and service to the Defendant

The advocate argued that in respect of service on both defendant and filing the amount under schedule VI paragraph 9 (a) is kshs 120/- for service effected within 3 kilometres, and for both defendants it ought to be kshs 240/-. The taxing officer allowed kshs 150/-.

The respondent argued that service charge was not allowed under the schedule VI.

The finding of the court is that indeed the advocate is entitled to kshs 150/- under schedule VI paragraph 7 (b) in respect of attending court for filing.

In regard to service, I could not find evidence of that service and if indeed there was service such affidavit of service would need to mention the number of kilometres covered in the service for the same to qualify for consideration under paragraph 9 (a).

The advocates reference of item No. 7, for the reasons stated herein is rejected.

Items Nos 10, 47, 67 and 78 attending and advising client (Respondent)

The advocate argued that these items are provided under schedule 6 paragraph 7 (G). The taxing master ruled that these items are not provided for in schedule 6. The respondent agreed with the finding of the taxing officer.

Schedule 6 paragraph 7 (G) provides:

“All necessary attendance (including attendances to take minutes of evidence of witnesses other than the party for whom the advocate is appearing).....”

That paragraph does not include a client and accordingly the reference of those items is rejected for the court does find that those items are not provided for in schedule 6.

Items No. 15 commissioning and attending court for filing and service to the defendant advocate.

The taxing master only allowed kshs 150/- rather than the amount claimed by the advocate, that is kshs 750/- because as he stated that only kshs 150/- was appropriate for attending court to file document. The advocate argued that the amount claimed under this item was recoverable under paragraph 7 (g).

I have examined this item and I find that the correct amount is allowed by the taxing master, that is kshs 150/- the advocate's balance of the claim is not covered under schedule 6. The reference in regard to this item is also rejected.

Item No. 82 Drawing bill of costs (7 Folio)

The taxing officer taxed off the whole figure under this item of kshs 630/-.

The advocate submitted that this item is allowed under schedule 6 paragraph 4 (e). Indeed I find that this item is provided for in that paragraph and I find without taxing officer assigning a reason for taxing off this amount the advocate is entitled to the claimed amount. There is therefore merit in the reference in respect of this item. Having found so the court will allow that item to be included in the taxed amount.

The finding of the court therefore is that the bill of costs is increased by adding the amount of kshs 630 to kshs 36/- already taxed. The total comes to kshs 693/- plus $\frac{1}{2}$ client advocate increase of kshs 346.50. The 16% VAT on the total, that is kshs 1, 039.50, is kshs 166. 32.

The advocates bill of costs dated 20th January 2005 is hereby taxed at kshs 1, 205. 82, and therefore the amount taxed on 6.5.2005 and corrected on 12.7.2005 are hereby set aside.

The Respondent's prayer in his affidavit that the court do take regard of further payments made to the advocate which payments were not brought to the attention of the taxing officer cannot be entertained by this court because the Respondent has not made a reference to this court.

The advocate is awarded $\frac{1}{4}$ of the costs of the application dated 20th June 2005.

Dated and delivered this 13th June 2005.

MARY KASANGO

JUDGE