

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

MISC.CIVIL APPL. NO.739 OF 2001

KIBET & CO. ADVOCATES :::::::::::::::::::::::::::::::APPLICANT

VERSUS

IBRAHIM S. AHMED :::::::::::::::::::::::::::::::1st RESPONDENT

IBSOLE INVESTMENTS LTD :::::::::::::::::::::::2nd RESPONDENT

RULING

In High Court Miscellaneous Civil Application No.739 of 2001, the Advocates M/S Kibet & Co. advocates filed a bill of costs as between themselves and their clients. The total amount claimed was Kshs 298,746/=. The bill was taxed ex-parte in the sum of Kshs 279,923.00.

The clients through M/S Amuga & Company Advocates filed a Notice of Objection and sought reasons for taxation. Reasons were duly supplied and the clients filed the present reference.

The grounds for the reference are that the Taxing Officer erred in determining instructions fees on the purchase price of Kshs 9,500,000/= when the sale fell through and when the advocate did nothing more than drawing the sale agreement which agreement was in any event inadmissible for want of Stamp Duty. The clients' further complain that the advocates represented both the vendors and the purchasers and this fact was not considered by the Taxing Officer in determining the instructions fees. There is also a complaint that the Taxing Officer should not have increased the Advocates' fees by one half as the same is not provided for under schedule 1 of the Advocates (Remuneration) (Amendment) Order 1997. There is also objection to items 2 to 53 on the basis that the same did not constitute services rendered by the Advocates to the clients. The last ground for this reference is that the Taxing Officer erred in allowing interest at 9% per annum from 4th March 1998. This ground has no basis at all.

The application is supported by an affidavit sworn by the Advocate for the client. The application is opposed and there are grounds of opposition.

The application was canvassed before me on 16th November, 2004 by Mr. Amuga for the clients and Mr. Kanjama for the Advocates. Mr. Amuga recited the grounds in the Chamber Summons and emphasized that the Taxing Officer applied schedule 1 of the Advocates Remuneration Order which was not applicable. In his view as the conveyance was not completed the applicable schedule was V. If the Taxing Officer had applied this schedule he would have arrived at a different and lower figure. Counsel further argued that the increase of one half to the Advocates fees was an error, as the same is not provided for. The bill was therefore wrongly increased by a sum of Ksh s78,700/= which increase had not even been sought by the advocates.

Reliance was placed on the case of Thomas James Arthur –v- Nyeri Electricity Undertaking (1961) E.A. 492 for the proposition that where there has been an error in principle the Court will interfere. In Counsel's view there was an error committed by the Taxing Officer in taxing the Advocates bill of costs and this reference should be allowed.

Counsel for the Advocates opposed the reference and supported the decision of the Taxing Officer. In his view there was no error in the Taxing Officer considering instructions fees under schedule 1 of the

Advocates Remuneration Order. Counsel conceded that the conveyance was not completed and that for this reason the applicable schedule was V and not 1. This notwithstanding there was nothing wrong with the Taxing Officer basing instructions fees on the purchase price of Kshs 9,500,000/=. In his view an Advocate earns instructions fees the moment instructions are received. Failure to pay Stamp Duty was irrelevant. Counsel also relied on the same case cited by the client's Counsel i.e.: Thomas James Arthur – v- Nyeri Electricity Undertaking (supra) for the proposition that questions of quantum are regarded as matters with which the Taxing Officer was particularly fitted to deal and the Court will intervene only in exceptional cases. In Counsel's view this case is not exceptional and the instruction fees awarded should not be disturbed. Counsel conceded and in my view correctly that there is no provision for one half increase on instructions fees under schedules I and V. However, he argued that in the event that the reference is allowed the advocates should be allowed to charge interest at 9% per annum until payment in full.

I have now considered the application and the submissions made thereon. I accept the clients' submissions that the conveyance which was the interest of the parties was not concluded. Schedule 1 of the Advocates Remuneration Order was not applicable. And even if the said schedule applied there is no provision for one half increase. In any event the same had not even been sought by the Advocates.

It is now settled that where there is an error in principle the Court will interfere with the decision of the Taxing Officer. This was the ratio decidendi in the case of Thomas James Arthur –v- Nyeri Electricity Undertaking (supra).

In my view the Learned Taxing Officer erred twice. Firstly when he treated the transaction as a concluded one and received guidance from the provisions of schedule 1 of the Advocates Remuneration Order and secondly when he thought that under the Act the Advocates were entitled to increase of instructions fee by one-half. In my view these were clear misdirections. It is clear therefore that the client's complaints are not merely in respect of the Quantum awarded to the advocates. The clients challenge the principles applied by the Taxing Officer in arriving at the advocate's instructions fees. I find that to apply an incorrect schedule of the Advocates Remuneration Order is an error in principle. I also find that to award sums not provided for under the relevant schedules is an error in principle. The error is compounded when the sums awarded are not even claimed.

In the result this reference is allowed and the advocates' bill of costs is referred back for taxation before a different Taxing Officer with directions to tax the same under the provisions of schedule v of the Advocates Remuneration Order. As the taxation under consideration proceeded in the absence of the clients. I make no Order as to costs in this application.

Orders accordingly.

Dated and Delivered at Nairobi this 6th day of December, 2004.

F. AZANGALALA

AG. JUDGE