



REPUBLIC OF KENYA



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Muri Mwaniki & Wamiti Advocates v Sanlam General Insurance Limited (Miscellaneous Application 371 of 2019) [2023] KEHC 17301 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 17301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 371 OF 2019**

HM NYAGA, J

MARCH 16, 2023

BETWEEN

MURI MWANIKI & WAMITI ADVOCATES APPLICANT

AND

SANLAM GENERAL INSURANCE LIMITED RESPONDENT

RULING

1. By a Chamber Summons dated 3rd November 2021, the Applicant/Advocate has objected to the taxation of its Bill of Costs dated 16/5/2019. The taxation in question was made by Hon. A.M. Analo the taxing officer vide his Ruling dated 5th August 2021.
2. The Applicant seeks the following prayers;
 1. That this Honourable Court be pleased to set aside the ruling of the Deputy Registrar Hon. Analo delivered on 5^o August 2021 (hereinafter 'Ruling') and any resultant Certificate of Taxation to the extent that it relates to the reasoning and determination pertaining to taxation of the following items in the Advocate/Client Bill of Costs dated 17th September 2019:
 - a. Item 1
 - b. Items 2-8, 10-28, 31-32, 35-43, 46-47, 50-53, 55-60, 62-64, 67-71, 73-75, 77-82, 85-91, 95-97, 99-100
 - c. Items 9,30,34,45,49,54,61,66,72,76,84,92,94,98,101
 - d. Items 29,33,44,48,65,83,93
 - e. Items 103
 - f. Items relating to taxation costs relating to attendance to the Deputy Registrar and attendance to the registry



2. That this Honourable Court be pleased to tax the items of the Bill of Costs dated 17th September 2019 set out in j (a)-(f) above.
 3. That in the alternative to Prayer 2 above, this Honourable Court do remit the items of the Bill of Costs dated 17th September 2019 set out in 1(a)-(f) above to another Taxing Officer for taxation with direction on the taxation.
 4. That the Advocate/Applicant be awarded costs of this application.
3. The applicant is supported by the grounds set out on the face of it and the affidavit of Martin G. Mwaniki. I will deal with some of the grounds in the course of this Ruling.
 4. The application/reference was opposed by the Respondent/client who filed a Replying Affidavit sworn by one Sharon Mwasi, a legal officer of the Respondent.
 5. In a nutshell, the Respondent states that the Taxing Master did not make any errors of principle in assessing the Bill of costs in question and in application of schedule 7 of the Advocates Remuneration Order. That the Taxing Officer correctly taxed off the items that were not provided for under schedule 7 of the Advocates Remuneration Order. That V.A.T. is only payable on instruction fees and not the entire bill. That the Bill of Costs as taxed was not manifestly low and the Taxing Officer rightly used his/her discretion in taxing the Bill of Costs.
 6. Parties were directed to file Written Submissions but at the time of writing this Ruling , only the Advocate/Applicant had filed theirs.
 7. A brief history of the matter is necessary. The Advocate/Applicant had represented the client's insured in Machakos CMCC No. 121 of 2008 Stephen Nzioka Mutunga vs Daniel Muthee Ngatia where the claimant sought general damages and special damages of Kshs. 2,100/=. The case was dismissed for want of prosecution on 6th December 2016.
 8. Subsequently, the advocate filed the Advocate-client Bill of Costs in question. Contemporaneously, the Advocate filed a Notice of Election under Paragraph 22 of the Advocates Remuneration Order electing to charge fees under schedule V part II thereof.
 9. In his Ruling, Hon. E. M. Analo taxed the Bill at Kshs. 50,777/= less from Kshs. 15,000/= paid on account, leaving a balance of Kshs. 35,777/=
 10. In his findings the Taxing Officer found that schedule 7 of the Advocates Remuneration Order of 2006 was applicable.
 11. The first ground of the reference is the purported application of the Advocates Remuneration Order of 2006. It is the Applicant's case that the Taxing Officer erred in applying the Advocates Remuneration Order of 2006, rather than the Advocates Remuneration Order of 2006, 2009 and 2014, since the suit was commenced in 2008 but was concluded in 2018.
 12. From the material before me, it is apparent that the suit was filed in 2008. The instructions to defend were given on 10th March 2008 while the Applicant seems to suggest that the bill was taxed using the 2008 Advocates Remuneration Order, a look at each item as taxed suggests that the Taxing Officer used the applicable Advocate Remuneration Orders. The Applicant has not pointed out which particular item was wrongly taxed.
 13. As regards item 1, the Taxing Officer clearly pointed out that the suit was for general damages and consequently after, the dismissal of the suit, the value of the subject matter could not be determined. Using his discretion he allowed Kshs. 25,200/= as instruction fees. Being a discretionary order, the



Applicant was bound to show the court that the assessment was based on an error in principle. I see no such error in place.

14. It is also submitted by the applicant that the Taxing Officer erred in applying schedule 7 rather than schedule 5 of the Advocates Remuneration Order. Ideally, this should have been the first ground to be raised by the applicant because if I concur with him, then I would not have needed to look at the other grounds.
15. Paragraph 22(1) of the Advocates Remuneration Order provides that:-

Liberty to advocate to elect Schedule 5; election to be communicated to client in writing

- (1) 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 such Schedule, his remuneration shall be according to Schedule 5, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.
 - (2) Subject to paragraph 3, an advocate who makes an election under subparagraph (1) of this paragraph may not by reason of his election charge less than the scale fee under the appropriate Schedule.
16. It is not clear if at the time of taxing the bill, the Taxing Officer was aware of the advocate's election to use Schedule 5 rather than schedule 7. The Notice of Election was duly filed contemporaneously with the Bill of Costs as required. It is also not clear that this was brought to the attention of the Taxing Officer at the beginning of the taxation. However it was the duty of the Taxing Officer to scrutinize the entire bill prior to taxation. I do understand that Taxing Officers do work under immense pressure and the failure to note that Notice of Election was probably an oversight, rather than a misapprehension of the law.
 17. In *Nyamongo and Nyamongo Advocates vs Protex (k) EPZ LTD*, Machakos HCMCA 176 of 2007 it was held that:-

‘It is clear from the statement above that the learned Taxing Officer was wholly unaware that together with the Bill of Costs, the Applicant also filed the letter signifying the election and in the Bill of Costs itself, the Applicant again specifically put in the heading, “Advocates Bill of Costs under Schedule V”. The Applicant fully complied with paragraph 22 (1) aforesaid and the learned Taxing Officer like in the Aldrin Ojiambo case (supra) acted in error. The error is however so substantial that having acted on the wrong principle, the proceedings thereafter were all conducted wrongly to the prejudice of all the parties.’

18. Similarly in *Aldrin Ojiambo t/a Ojiambo & Co. Advocates vs Mohamedraza Hussein Jagani & Another* Misc. Cause 320/2005 (U.R.) at Milimani the court held as follows:-

The paragraph speaks for itself clearly... 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.”

19. In the Ugandan case of *Makula International vs Cardinal Nsubuga and Another* (1982) HCB 11, the Court of Appeal set out the task of a Taxing Officer as follows:-

The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons



for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it.”

20. Having considered the said decisions, which I agree with, I am of the view that the failure by the Taxing Officer to apply the 5th Schedule as elected by the Advocate was an error in principle.
21. I am thus constrained to set aside the Ruling dated 5th August 2021 and direct that the Bill of Costs be remitted back before a different Taxing Officer to tax the bill afresh.
22. I have deliberately omitted to address the other issues as they may unfairly influence the decision of the Taxing Officer who is to take over the matter thereby diminishing his impartiality and independence.
23. There will be no orders on costs of the reference.

DATED, SIGNED AND DELIVERED VIRTUALLY FROM NAKURU THIS 16TH DAY OF MARCH, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Immanuel

N/A for parties

