REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL CASE NO. 42 OF 2019

ODHIAMBO OWITI & CO. ADVOCATES.....ADVOCATE/APPLICANT

-VERSUS-

EMMANUEL OTIENO..... CLIENT/RESPONDENT

RULING

The application before me is in the nature of a reference from taxation.

1. The learned Taxing Officer had taxed the Advocate/Client Bill of Costs in the sum of Kshs 307,890/=.

2. The application was opposed on 2 counts; first that it was defective, and secondly, that it lacked merit.

3. The Respondent submitted that the application should be struck out because the Applicant had filed it without following due procedure. The procedure which the Respondent was referring to is provided for at **Rule 11 (1)** of the **Advocates Remuneration Order**, which reads as follows;

> ***"Should any party object to the decision of the taxing officer, hemay within fourteen days after the decision, give notice in writing to the taxing officer of the items of taxation to which he objects."***

4. The Applicant did not give notice to the taxing officer, indicating the items which he was objecting to.

5. In the case of **TOM OJIENDA & ASSOCIATES Vs NAIROBI CITY COUNTY ASSEMBLY, MISC. APPLICATION NO. 5 OF 2017**, Odunga J. rejected a reference as the Applicant had not issued a notice to the taxing officer under **Rule 11 (1)** of the **Advocates Remuneration Order**.

6. It is noteworthy that in that case there had been an application for the enlargement of time to file the reference. However, as the learned Judge said;

> ***"One of the steps that a party who intends to challenge the decision made on taxation is to, within fourteen days after the decision, give notice in writing to the taxing officer of the items of taxation to which he objects."***

7. The said step was distinct and separate from the application for the enlargement of time to file a reference.

8. In the case of **LUCAS A. O. N. OCHIENG Vs JUDITH OTIENO OWITI & ANOTHER, ELC NO. 48 OF 2017**, Olao J. expressed himself thus;

> ***"My understanding of this provision is that the jurisdiction of this Court to reconsider the decision of a taxing officer in respect to a Bill of Costs is triggered by the Objector filing 'a notice in writing to the taxing officer of the items of taxation to which he objects."***

9. In that case, the Objector had stated that the quantum of costs that had been awarded by the taxing officer was manifestly high. The said statement was made in the Objector's supporting affidavit. Nonetheless, the learned Judge concluded that that did not constitute compliance with **Rule 11 (1)**. This is how the court addressed the issue;

"However, before she could mount any proper challenge to the same, the defendant was obliged to comply with the provisions of Rule 11(1) of the Advocates Remuneration Order. And since she did not do so, she still had a window under sub-rule (4) to approach the Court to enlarge the 14 days period.

She did not take advantage of that provision either. It is not enough that she disputes the Bill of Costs. It is only by complying with the rule as to notice, that she could cloth this Court with the jurisdiction to interrogate her complaint."

10. In the face of those submissions, the Applicant submitted that **Rule 11 (1)** does not apply to this case because the reference was filed pursuant to leave which had been granted by the court.

11. It is true that the court did grant leave to the Applicant to file a reference.

12. The said leave was granted when the Applicant had asked the court to extend time for filing a reference.

13. As Olao J. held in the case of **LUCAS A. O. N. OCHIENG Vs JUDITH OTIENO OWITI & ANOTHER** (above-cited), there is a distinction between the requirement for lodging a reference within 14 days from the date when the taxing officer delivers a Ruling on taxation, and the requirement that Notice be given to the taxing officer specifying the items which the Applicant wished to object to.

14. Rule 11 (1) gives the Applicant a period of 14 days to give Notice to the taxing officer. The said Notice must be in writing, and it should specify the items of taxation which the Applicant objects to.

15. Upon receipt of the Notice, the taxing officer will give his reasons in respect to those specified items. Those reasons are supposed to be provided as soon as possible, after the taxing officer receives the Notice.

16. When the reasons are given, the Applicant has 14 days to file the reference.

17. The question that may arise is whether or not the Ruling of the taxing officer has reasons within it, is the Applicant obliged to wait for reasons?

18. To my mind, the purpose of the Notice to the taxing officer is to elicit reasons from the taxing officer.

19. Therefore, when reasons were already given within the Ruling of the taxing officer, there would be no need to seek more reasons.

20. In this case the ruling by the taxing officer is in the following few words;

"BOC is drawn to scale & reasonable save for items 2 & 30, which are taxed off. I proceed to tax the BOC dated 28/3/19 at Kshs 307,890/=."

21. In my considered view, there is lack of clarity about why the taxing officer awarded the costs as she did. I say so because when a Bill of Costs is drawn to scale, it matters not whether or not it was deemed reasonable.

22. Depending upon whether it was the advocate whose Bill of Costs was being taxed or if it was the client, their respective perception of fairness may be very different. As in this case, the advocate considers the award as very reasonable, whilst the client considers it to be unjustifiably excessive.

23. However, the lack of clarity is not necessarily synonymous with the lack of reasons for a decision. It is possible that the decision maker will have given reasons, but the said reasons lack clarity.

24. In this case the taxing officer taxed the Bill of Costs on the grounds that it had been drawn to scale and it was reasonable. Whilst the reasons were not clear, to my mind, they constituted the basis upon which the costs were assessed. Therefore, the Applicant may have been justified in holding the view that he did not need to seek more reasons.

25. And because this Court had granted leave to the Applicant to lodge a reference, I cannot see how I can now turn around and tell the Applicant that I cannot proceed to give due consideration to the reference which I had permitted him to file.

26. In the case of **EVANS THIGA GATURU ADVOCATE Vs KENYA COMMERCIAL BANK LIMITED, MISC. APPLICATION NO. 343 OF 2011**, Odunga J. held as follows on the interpretation of **Rule 11 (1)** of the **Advocates Remuneration Order**;

"It is therefore clear that the Interpretation by the Court, especially the High Court on this issue is far and varied. In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles.

However, where there are reasons on the face of the decision,it would be futile to expect the taxing officer to furnish other reasons.

The sufficiency or otherwise is not necessarily a bar to the filing of the reference, since that insufficiency may be the very reason for preferring a reference. Otherwise mere adherence to the procedure may lead to absurd results, if the advocate was to continue waiting for reasons."

27. I do concur with those views of my learned brother.

28. As the learned Judge said in that case;

"In most cases, the court is well aware that, taxing officers, in their decisions on taxation do deliver comprehensive rulings which are self-contained thus obviating the necessity to furnish fresh reasons, thereafter. In such circumstances it would be foolhardy to expect the taxing officer to redraft another'ruling', containing the reasons."

29. In the result, I find that the failure to give Notice to taxing officer was not fatal, in the circumstances of this case.

30. On the issue about the merits of the reference, I appreciate that the Judge would not normally interfere with the exercise of discretion by the taxing officer, unless it is shown that the taxing officer had erred in principle.

31. In the case of **NGATIA & ASSOCIATES ADVOCATES Vs INTERACTIVE GAMING & LOTTERIES LIMITED, JUDICIAL REVIEW MISC. APPLICATION NO. 8 & 9 OF 2016**, Aburili J. quoted, with approval the following words of Ojwang J. (as he then was) in **REPUBLIC Vs MINISTRY OF AGRICULTURE & 2 OTHERS EXPARTE MUCHIRI W. NJUGUNA & OTHERS MISC. CIVIL APPLICATION NO. 621 OF 2000**;

"The taxation of Advocate Instruction fees is to seek no more than and no less than reasonable compensation for professional work done;

The taxation of advocates instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties ……"

32. In this instance, Judgment was entered in favour of the Plaintiff/Client, for Kshs 180,000/= together with costs and interest.

33. I feel greatly troubled that the Advocate/Client Bill of Costs was taxed in the sum of Kshs 307,890/=! It would appear that although the Client was successful, he would have to dig into his pockets to pay the costs charged by his advocate. I hold the considered view that justice demands that the said fee be looked at afresh.

34. Secondly, I find that the taxing officer failed to specify the items in respect to which VAT was chargeable. By failing to make that distinction, the taxing officer erred.

35. Accordingly, I allow the reference, and set aside the ruling dated 13th June 2019.

36. I award the costs of the reference to the Client.

37. And I order that the Advocate/Client Bill of Costs be taxed afresh, by a taxing officer other than Hon. A. Odawo.

DATED, SIGNED and **DELIVERED** at **KISUMU** this **18th** day of **May** 2021

FRED A. OCHIENG

JUDGE