



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. APPLICATION NO. 125 OF 2019

MURI MWANIKI & WAMITI ADVOCATES.....APPLICANT/ADVOCATE

VERSUS

KENYA ORIENT INSURANCE LIMITED.....CLIENT/RESPONDENT

RULING

Brief facts

1. The applicant in this application dated 5th March 2020 brought under Section 11(1) & (2) of the Advocates Remuneration Order seeks for orders to set aside the ruling of the Deputy Registrar Hon. C.R. Kefa delivered on 5th February, 2020.
2. The respondent did not file any response to the application. The application is therefore basically unopposed.
3. It is the applicant's case that they filed an Advocate's Bill of Costs dated 4th December 2019 against their client for the taxation of fees payable to their firm of advocates, upon being retained in Nyeri CMCC No. 39 of 2008. The bill of costs was taxed on 5th February 2020. Following the ruling the applicant wrote a letter dated 18th February 2020, to the Deputy Registrar objecting to the taxation and calling for reasons for the ruling. By a letter dated 19th February 2020, the Deputy Registrar responded by pointing out that the reasons for the ruling were contained in the said ruling.
4. As such, the applicant objects to the taxation in the ruling of 5th February 2020 for the foregoing reasons:- that the suit that culminated with the Bill of Costs herein began in 2009 and was concluded in 2016 and therefore both schedules of 2009 and 2014 Advocates Remuneration Orders ought to have been applied.
5. The applicant states that he filed a Notice of Election dated 4th December 2019 together with the Bill of Costs herein, electing under Paragraph 22 of the Advocates Remuneration Order to charge the bill of costs under Schedule V, Part II of the Order.
6. The applicant further states that the taxing officer erred in law and in principle in taxing off items relating to perusal, producing photocopies, drafting, correspondence and travelling costs on the premise that they are not provided in Schedule VII of the Order of 2009, despite the fact that the applicant filing a Notice of Election electing to charge under Schedule V, Part II of the Order where all the above mentioned items are provided for and thus subject to taxing.
7. The applicant contends that items Nos. 15, 20, 91, 93 and 95 relating to attendances at Kshs. 1,400/- subject to paragraph 6 of the Schedule VII of the Order of 2009 were taxed off when they ought to have been charged under paragraph 3 of Schedule V of the order of 2009 and 2014 for items nos. 15 and 20, and Items Nos. 91, 93 and 95 respectively.
8. The applicant further contends that Items No. 42, 48 and 66 relating to attendances for hearing at Kshs. 2,100/- subject to paragraph 7 of the Order of 2009 were taxed off when they ought to have been charged under paragraph 3 of Schedule V of the Order of 2009 and 2014 for items Nos. 42 and 48, and Item No. 66 respectively. As such the taxing master made an award deficient in the sum of Kshs. 125,917/-. Therefore, in the interest of justice, the applicant prays that the ruling of 5th February 2020 be set aside and this Honourable Court be pleased to tax the Bill of Costs or remit it to another Taxing Officer for taxation.
9. Although the court directed that parties canvass the application by way of submissions, the applicant is the only one who put in and filed his submissions. A summary of the applicant's submissions is as follows:-

The Applicant's Submissions

10. The applicant submits that the applicable regime of law in respect to the Bill of Costs herein is the Advocates Remuneration Order of

2009 and 2014 with the order for 2014 kicking in for all items on or after 11th April 2014, namely from Item No. 62 onwards. This is so because the suit herein commenced in 2011 and was concluded in 2016.

11. Moreover, the applicant filed a Notice of Election dated 4th December 2019 where he elected to charge under Schedule V, Part II, in accordance with Paragraph 22 of the Advocates Remuneration Order to which the applicant filed and served the respondent. It so follows that the Taxing officer was bound to tax the Bill of Costs under Schedule V of the Orders of 2009 and 2014. In saying so the applicant relies on the cases of Mwangi Keng'ara & Co. Advocates vs Invesco Assurance Company Limited [2018]eKLR and Nyangito & Co. Advocates vs Doinyo Lessos Creameries Ltd [2014] eKLR.

12. The applicant contends that Items Nos. 2 – 102 which relate to perusals, making copies, drafting correspondence and travelling costs were erroneously taxed off by the Taxing Officer on the basis that they are not provided for under Schedule VII. The applicant submits that since he filed a Notice of Election, it follows that Schedule V was the proper Schedule which provides for all the above mentioned items and not Schedule VII as directed by the Taxing Officer.

13. The applicant contends that Items Nos. 15, 20, 42, 48, 66, 91, 93 and 95 which items relate to court attendances were taxed at Kshs. 1,400/- and Kshs. 2,100/- subject to Paragraph 6 of Schedule VII of the Order of 2009 when the items ought to have been charged under Schedule V Paragraph 3 of the Order of 2009 and 2014. As such, the applicant prays that this Honourable Court allow his application dated 5th March 2020 as prayed.

Issues for determination

14. After careful analysis, I identify only one issue for determination as to whether the Taxing officer misdirected herself on the legal principles applicable in the assessment of the bill of costs.

The Law

Whether the Taxing Officer misdirected herself on the legal principles applicable in the assessment of the bill of costs.

15. Paragraph 22 of the Advocates Remuneration Order provides :-

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.

16. In the instant reference, the applicant made an election to tax the Bill under Schedule V and proceeded to communicate the same to the respondent. Paragraph 22(1) of the Advocates Remuneration Order provides an advocate with an option to elect the schedule under which he wishes to proceed with the taxation of an Advocate/Client Bill of Costs in the following terms:-

(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 the scale applicable under the other Schedule.

17. As Ochieng J correctly remarked in Aldrin Ojiambo t/a Ojiambo & Co. Advocates vs Mohamedraza Hussein Jagani & Another Misc. Cause 320/2005 (U.R) at Milimani:-

“The paragraph speaks clearly for itself.....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.”

18. It was held in the case of Mwangi Keng'ara & Company advocates vs Invesco Assurance Company Limited {2018}eKLR that:-

19. Thus, the issue herein is as to when the high court can interfere with the Taxing Officer's discretion on a decision of taxation. This was enunciated in the case of Nyangito & Co. Advocates vs Doinyo Lessos Creameries Ltd [2014] eKLR, where Odunga J laid out the principles as follows:-

a) “That the court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle or the fee awarded was manifested excessive as to justify an inference that it was based on an error of principle;

b) It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself. Some of the relevant factors to be taken into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved; the interests of the parties, the general conduct of the proceedings and any direction by the trial Judge;

c) If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion. “

20. It is an established principle that the taxing master has discretion while handling taxation matters. However, such discretion ought to be exercised fairly, judiciously and in the wider interest of justice. Notably, such discretion cannot be interfered with unless it is shown that the taxing officer's decision on taxation was based on an error of principle or fee awarded was manifestly excessive so as to justify an interference that it was based on an error of principle.

21. In this case, I note that the Notice of Election under paragraph 22 (1) of the Advocates Remuneration Order was filed in court and duly served upon the respondent in accordance with the law.

22. It is apparent from the taxing master's ruling that the law as set out in paragraph 22 was disregarded in that the applicant's election was not considered. The court proceeded to tax the Bill of Costs under Schedule VII. The taxing master is bound by the law and has no power to oust an advocate's election that has been exercised in accordance with the law.

23. I am of the considered opinion that the reasons given herein do justify this court's interference with the taxing master's decision on the taxation done by the taxing master on 5th February, 2020.

24. I find this application dated 5th March 2020 merited and allow it accordingly.

25. This matter is referred to the Deputy Registrar other than Hon. C.R. Kefa for taxation.

26. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 3RD DAY OF JUNE, 2021.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 3RD DAY OF JUNE 2021.