



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 187 OF 2006

CITY CLOCK (K) LTD.....APPELLANT

VERSUS

KENYATTA NATIONAL HOSPITAL.....1ST RESPONDENT

N.K. BROTHERS LIMITED.....2ND RESPONDENT

RULING

The application dated 27th October 2015 mainly seeks the following orders:-

- 1. THAT the Court be pleased to set aside the taxation of the bill of costs dated 28th June 2013 for Kshs. 350,404 together with any and or all decisions of the Taxing officer in respect of the reasoning and determination pertaining to taxation of the entire Appellant's Bill of Costs dated and filed on 28th June 2013 as it relates to the 2nd Respondent herein and have the same taxed afresh before any other taxing master.**
- 2. THAT in the alternative the honorable Court be pleased to exercise its inherent Jurisdiction to set aside and accordingly alter or re-tax/re-assess the bill of costs dated 28th June 2013 for Kshs. 350,404 together with any and or all decisions of the Taxing officer in respect of the reasoning and determination pertaining to taxation of Items No. - 2,3 - 126, 128, 130 and Item No. 145 of the Appellant's Bill of Costs dated and filed 28th June 2013 as it relates to the 2nd Respondent herein or order the same be taxed afresh before any other taxing master.**

The application is supported by the affidavit of Wilfred Akhonya Mutabwa. The respondent filed a replying affidavit sworn by Tillman W. Proske sworn on 18th December, 2015. The application was determined by way of written submissions.

Counsel for the applicant (2nd respondent) submitted that the 2nd respondent was condemned to pay the decretal sum, costs to the appellant on the main suit as well as costs of the appeal. The appellant filed a bill of costs that was taxed. It is submitted that Rule 11 of the Advocates Remuneration Order allows the filing of a reference should a party object to the decision of the taxing officer. According to counsel, the reference raise the issue whether the taxing master erred in awarding items Number 1,2,3,126, 128,130 and 145.

On items 1,2, and 128, it is submitted that a decree and certificate of costs was issued to the appellant on 3rd July, 2006. This certificate dealt with the items and the same could not have been raised in the bill of costs. On item 130, it is stated that the appellant needs to move the Chief Magistrate's Court and cannot raise it in the Bill of costs. With regard to item 145, it is submitted that a party to party Bill of Costs does not attract an aspect of taxable supply as an Advocate Client Bill of costs would. Counsel relies on the case of **PYRAMID MOTORS LIMITED –V- LANGATA GARDENS LIMITED (2015) eKLR** where the court stated:-

“On the final issue of VAT, I hold the simple view that in allowing the same the Master erred under the Value Added Tax Act, 2013 particularly section 5 thereof. Value Added Tax (VAT) is chargeable in taxable supply made by any registered person. There was no taxable supply of either goods or services made to the Applicant herein by the Respondent herein. The Bills herein concerned Party and Party costs and VAT could then not apply as neither party fetched nor supplied services to the other. True, legal services were rendered but it is not the Advocate who was being compensated herein. The Master could only have awarded VAT if the Bills were Advocate-Client Bills or if there was tendered evidence before the Master that the Plaintiff had paid VAT and was consequently entitled to indemnity. But yet that again is also debatable whether the Plaintiff was a taxable person. I would vacate the award on VAT as the Master erred.”

Counsel for the appellant maintain that the application raises two issues namely:-

a) Whether the Taxing Master applied the correct remuneration order.

b) Whether the Taxing Master erred in awarding items No 1,2,3-126, 128, 130 and 145.

Counsel maintain that the Court of Appeal in the case of **JORETH LIMITED –V- KIGANO & ASSOCIATES, Civil Appeal No. 66 of 1999 (2002) E.A, 92 (2002) eKLR** held that unless the taxing officer has misdirected himself on a matter of principle, a Judge sitting on a reference against the assessment ought not to interfere with the findings. Counsel further referred to the case of **N.O. SUMBA ADVOCATES –V- PIERRO GANNOBIO MISC Civil Application No. 5 & 6 of 2015** where it was held:-

“An Advocate takes instructions from a client on the basis that the existing Remuneration order shall be used as a basis of assessing legal fees. There are pending in our Courts cases which are even ten (10) years old. If one were to instruct an advocate based on what was the prevailing Remuneration Order when the case was filed, very few advocates would take such a brief. The tendency of clients switching advocates at their own pleasure should not be encouraged. Such clients should know that their actions of charging advocates regularly comes with the cost of settling the full instruction fees of the existing advocate even if only minimal work was done.”

It is submitted that the Taxing Master applied the correct Advocates Remuneration Order as the Appeal was filed in 2006 and Counsel took instructions in the same year. The correct Remuneration order is the one of 2006.

Regarding the second issue, it is contended that item 2 is costs awarded in the lower court after the appeal was allowed. Items number 3-130 were drawn to scale. Item No. 145 is Value Added Tax (16%) and is payable by advocates. Counsel relies on the case of **A.N. KIMANI & COMPANY ADVOCATES –V- KENINDIA ASSURANCE COMPANY LTD (2010) eKLR** where Koome J (as she then was) held:-

“The last issue is on the VAT. The advocates submitted that under section 9(3) of the VAT Act it is provided that in calculating the value of services incidental costs incurred by the supplier should be taken into account and then included as taxable value. I am persuaded that VAT is applicable on the entire award and not only on the instructions fees. There is clearly an error as the taxing master also taxed off the disbursement such as photocopies, telephone calls, postage and no reasons were assigned. For those reasons I would allow the application and refer this matter for taxation before a different taxing officer. The advocate will also have the costs of this reference.”

On the issue as to which remuneration order was applicable, I do note that the appeal was filed in 2006. The High Court delivered its judgment on 16th March. The certificate of taxation dated 7th October, 2015 does not indicate which Remuneration Order was applied by the taxing master. Counsel for the applicant contend that the taxing master used the 2006 Remuneration Order. I do find that since the instructions to appeal were given in 2006 and the matter continued until 2012 when judgment was delivered, the taxing master was to be guided by the 2006 Advocates Remuneration Order.

The other issue involves items number 1,2,3 to 126,128,130 and 145. Counsel for the applicant mainly submitted on items 1,2,128, 130 and 145. The first three items were combined together. It is submitted for the first three items that a certificate of costs was issued on 3rd July 2006 and this issue cannot be raised in the bill of costs.

Item 1 is instructions to file CMCC No. 6414 of 2004. There was a judgment delivered by the trial court on 16th March 2012. Costs were awarded to the appellant. That judgment was later reviewed on 2nd July, 2012 but the awarded cost was not reviewed. There is no evidence that the certificate of costs issued by the trial court was settled. If that is the case, then the sum of Kshs.32,070/- shall be removed from the certificate so as to avoid double payment. If no payment was made, the logical conclusion will be that the bill combined costs before the trial court and the High Court.

Item 2 is instruction to lodge an appeal. It was drawn at Kshs.49,000. The taxing master does not indicate how much was taxed on that item.

Item 126 reads – “Filing plaint dated 24th November, 2003.” The amount in the bill is Kshs.22,595. This is under Disbursements. A receipt for that payment must be available in the lower court file or in possession of counsel for the respondent who drew the bill of costs. This is a disbursement item which can be settled by providing the official receipt issued by the court when the plaint was filed.

Item 130 according to the Bill of Costs dated 28th June, 2013 and filed in court on the same date is also a disbursement item. It is in the sum of Kshs.1,550/- being fees for filing of the Memorandum of Appeal dated 28th March 2006. The official receipt dated 3/4/2006 for this amount is still in the court file. I do find that there is no issue on this item as the respondent was recovering what had been spent in form of court fees. The submissions by the applicant’s original advocates (M/s Lubulellah & Associates) capture Item 130 as payment for typed copies of the proceedings. The amount drawn is Kshs.1920 and this is Item 129 according to the Bill of Costs. If the contest is that this amount is included in the Certificate of Costs issued by the Magistrate’s court, that can be understandable. However, if that certificate of costs does not include this disbursement item, then the amount is payable.

The other dispute involves VAT at 16%. It is submitted that this item is not payable. The drawn amount is Kshs.51,326/546. The entire Bill of Costs was for Kshs.372,117/46. It was taxed at Kshs.350,404. The 2nd bill was taxed at Kshs.288,582 having been drawn at Kshs.350,404. There is no ruling by the taxing master that can enable the court to know whether the taxation certificates include VAT or not. Given the figures in the certificates, it is evident that VAT is included in the certificates.

Given the fact that the taxing master’s notes are not in the court file and there is no ruling giving the reasons for taxation, I do find that it is quite difficult for this court to substantively deal with the reference. The amount taxed for each drawn item is not indicated. The applicant is also contesting items 3 to 126. It’s not indicated by the taxing master whether those items were taxed as drawn or they were reduced.

I do find that the proper Remuneration Order is the one of 2006. I do further find that in the absence of proper records showing how the Bills were taxed, it is prudent to remit the bills back to the taxing master for re-taxing on the contested item. Counsel for both parties can be of assistance to the taxing master on the issue of costs before the Magistrate's Court as to whether such costs were paid separately or is still pending. Counsel to also assist the court as to which bill is being contested.

The upshot is that the application dated 27th October, 2015 is merited and is hereby allowed. The Bill of Costs is hereby remitted to the taxing master for fresh taxation. Parties shall meet their respective costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JULY 2021.

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S. CHITEMBWE

JUDGE