



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U, J

MISC. CIVIL APPLICATION NO. 151 OF 2019

CIC INSURANCE COMPANY LIMITED.....APPLICANT

VERSUS

ALBERT MOGOSI MOKAYA.....RESPONDENT

JUDGEMENT

1. The reference herein sought that the decision of the taxing officer rendered on the respondent's bill of costs dated 29/8/2019 be set aside and the matter be remitted to a different taxing officer for taxation. It was sought that the certificate of costs be set aside.
2. Alternatively, the court was asked to set aside the decision of the taxing master and to tax the said bill of costs.
3. When the matter was canvassed before court on 14/10/2019, directions were given that the parties hold a meeting and try to reach agreement on any uncontentious items leaving any contested items for consideration by the court.
4. To the credit of the parties, this they did and by far and large were able to agree upon a substantial position of the bill of costs. They have since filed a report and I note both parties have filed submissions in respect of the disputed items.
5. The applicable principle in regard to the powers of the court to interfere with the decision of a taxing officer was well enunciated by Ringera J (as he then was) in the case of First American Bank of Kenya –vs- Shah and Others [2002] 1 EA 64 where he stated;

“First, I find that on authorities, this 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 so manifestly excessive or low as to justify an inference that it was based on an error of principle. It would be an error of principle of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors....”

6. (i) Disputed awards by the applicant

Court attendance (fare from Naivasha to Kisii):

The applicant disputes the award.

(ii) Writing demand letters

The taxing officer awarded Sh 8000 for drawing of a demand letter. The Advocates’ remuneration order provides for the amount payable in respect of letters. By awarding Sh. 8000 for a letter, the taxing officer fell into error..

(iii) Accommodation

This is a reimbursement cost and should be supported by vouchers. There is no evidence that such vouchers/receipts were presented.

(iv) Transport from Naivasha to Kisumu

Sh. 1000 was awarded. It is stated that the record of the court below does not contain such proceedings. No receipts were presented.

(v) **Court attendances**

These are specifically provided for in the remuneration order. 3 items are contested.

(vi) **Service on 15/11/2018 and 23/8/2019**

The service fee of Sh 2800 is contested. Service fees are provided for.

Proper evidence of service ought to be presented of costs on this head. It is urged that no documentary proof was availed. In his pleading, the respondent averred he is a resident of Kisii. I am urged to strike out these awards.

7. I have considered this objection. It is, in my view, possible for a party to change residence during the pendency of a trial. This could come about due to changed circumstances e.g employment or transfer of business. However, such a party would only succeed on the claim of fare/travel as a reimbursement cost that must be supported by vouchers. There is no evidence of this expense. It is not enough for the respondent to state that the applicant did not appear in court to ask for the documents now sought. The duty and burden of proof to prove the expenses was on the respondent. There is no evidence that payment vouchers/receipts were presented to the taxing master and as such the award of Sh 3000 for transport costs from Naivasha was not founded on good ground.

8. Had, the taxing officer considered this, he would have arrived at a different outcome.

9. Disputed awards by Respondent.

The respondent has disputed the findings of the taxing officer for failing to award him items dated 11.2.2019, 25.7.2019, 26.7.2019, 6.8.2019 and 24.8.2019.

The respondent challenges the submissions by the applicant that these items should not be awarded in the following words;

“My Lord it will be unjust and disrespect (sic) of justice if the Hon. learned friend for the applicant can submit such to this Hon. Court without due reason ad reference of any act in the Constitution, my Lord I request that you allow the awards, for I deserve them and I used them on the dates traversed (sic) as 11.2.19, 25.7.18, 26.7.19, 6.8.19 and 24.8.19.

10. I have considered that plea. The respondent has misapprehended the gist of the applicants’ submissions. The submission of the applicant is that the respondent did not file a cross reference and therefore is not entitled to reliefs sought as they have not been prayed for.

11. In the absence of a cross reference, the reliefs sought by the respondent are unavailable to him.

12. It is not the true province of a Judge to re-tax or re-asses the bill of costs (**See First American Bank case (supra)**). Whereas the Judge has discretion to re-tax a bill, the proper course is to remit it to the taxing master. If the bill is to be re-assessed on different principles, it should be placed before a different taxing master. (see **Steel Construction & Petroleum Engineering (EA) Ltd –vs- Uganda Sugar Factory Ltd [1970]EA 141, D’Souza –vs- Ferrao [1960]EA 492**. See also **Desai Sarvia & Pallan Advocates –vs- Jambo Biscuits (Kenya)Ltd HC Nairobi Misc. App No. 3 of 2013** unreported.

13. In the end, I find the reference successful and order that the plaintiff’s bill of costs dated 28/8/2019 and filed in court on the same day be remitted for taxation before any taxing officer of this court except P. Nyota DR and the taxation be limited to;

1. Re-assessment of all items on costs for travel from Naivasha to Kisii.
2. Re-assessment of costs for drawing letters.
3. Re-assessment of accommodation costs.
4. Re-assessment of transport from Naivasha to Kisumu.
5. Re-assessment of costs for court attendance on 18/1/2019.
6. Re-assessment of service fee on 15/11/2018 and on 23/8/2019.

14. Any other items remain undisturbed. Each party to bear its own costs.

Dated and Delivered at Kisii this 19th day of February, 2020.

A.K NDUNG’U

JUDGE

Bosire for the applicant

Respondent in person