



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.405 OF 2017

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

VERSUS

AFRICAN BANKING CORPORATION LIMITED.....CLIENT/RESPONDENT

RULING

(1) Before this Court is the Chamber Summons dated 7th November 2018 by which MURI MWANIKI & WAMITI ADVOCATES (the Advocate/Applicant) seek the following orders:-

“(1) The Honourable Court be pleased to set aside the decision of the deputy registrar Hon. Opande delivered on 20th June 2018 (hereinafter referred to as the ruling) to the extent that it related to the reasoning and determination pertaining to items no. 1,2,336 and 337 in the Amended Advocate/Client bill of costs dated 9th March 2018 (herein after Bill of Costs.

(2) This honourable court be pleased to re-assess the fees due on the aforesaid items of the advocates in respect of the Bill of Costs and make findings on the same.

(3) In the alternative and without prejudice to the foregoing, this honourable court be pleased to remit the aforesaid items of the bill of costs to another taxing officer for review and reconsideration with direction on taxation.

(4) The costs of this application be awarded to the Applicant advocate.”

(2) The summons was supported by the Affidavit of even date sworn by MARTIN G. MWANIKI an Advocate of the High Court of Kenya.

(3) AFRICAN BANKING CORPORATION (the Client/Respondent) opposed the summons through the Replying Affidavit dated 19th February 2019, sworn by EVALYN GACHOKI, the Respondent’s legal Officer. The Reference was canvassed by way of written submissions. The Applicant/Advocate filed its written submissions on 6th May 2019, whilst the Client/Respondent filed their submissions on 18th June 2018.

BACKGROUND

(4) The Applicant had been instructed by the Client/Respondent to represent it in a matter and file a counter claim. However, before the matter was heard to completion the parties fell out and the Advocate filed his Bill of Costs. The Amended Advocates Bill of Costs dated 4th March 2018 was taxed on 20th June 2018 and the Hon Deputy Registrar taxed the Bill at Kshs.1, 180,376.32.

(5) The Advocate being dissatisfied by the Ruling filed this Reference to the High Court. The Reference is premised upon the following grounds: -

“(a) The Taxing Officer erred in awarding lower instruction fees on item 1 than that provided in Schedule VI 1 (b) of the Advocates Remuneration Order.

(b) The Taxing Master erred by failing to award item 2 on getting up fees as provided in the Advocates Remuneration Order Schedule VI(2) even after the Advocates prepared the case for trial and the matter was confirmed for hearing on 5th

November 2015.

(c) The Taxing officer misdirected himself and acted contrary to the established principles by allowing lower fees on item 336 than provided for in Schedule VI and further failing to find that the Respondent/Client is liable to pay at least Kshs.1,021,856.08 on account of their expressed admission in their submissions.

(d) The Taxing master erred by failing to award item 337 on getting up fees for the counterclaim as provided in the Advocates Remuneration Order Schedule VI (2) even after the Advocates prepared the case for trial and the matter was confirmed for hearing on 5th November 2015 and further by failing to find that the said item 337 was not opposed by the Respondent/Client in their submissions.

(e) The taxing officer erred in law by failing to apply the applicable principles and taxed the Bill of Costs contrary to the applicable Schedule VI provided for in the Advocates Remuneration Order.”

ANALYSIS AND DETERMINATION

(6) I have carefully considered the rival submissions filed in this matter. I have also carefully perused the Ruling delivered by the Hon Taxing Master on 20th June 2018. The following issues arise for determination: -

(i) Competency of the Reference

The Respondent averred that the Reference was filed out of time and offends the provisions of **Order II** of the **Advocates Remuneration Order**. It is submitted that no enlargement of time was sought.

(i) Whether sufficient grounds have been advanced to warrant the setting aside of the Taxation of 20th June 2018.

Competency of the Reference

(I) **Paragraphs 11 of the Advocates Remuneration Order** provides for the filing of a Reference within 14 days of receipt of the reasons for the taxation. In this matter the Ruling containing the reasons for the taxation was delivered on 20th July 2018. The Applicant then gave a notice of Objection dated 25th June 2018 requesting the reasons for the ruling. The Certificate of Taxation is dated 4th July 2018. Thereafter the present reference was filed on 7th November 2018.

(II) **Paragraph II of the Advocates (Remuneration) Order** provides inter alia: -

“(1) Should any party object to the decision of the taxing Officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the Objector the reasons for his decision on those items and the Objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned setting out the grounds of his objection.

(3)

(4)

(III) It is quite apparent that this Reference was filed way beyond the 14 day period envisaged by Order II. In the circumstances the Court can only disregard such delay if sufficient reason is advanced. In **REPUBLIC –VS- KENYATTA UNIVERSITY & ANOTHER EX Parte WELLINGTON KIHATO WAMBURU [2018]eKLR**, Hon. Justice Mativo held as follows:-

“...The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to disregard the delay and admit the reference out of time. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. [6]

1.7. However, it is necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretion jurisdiction vested in the court. If sufficient cause is not proved nothing further has to be done; the application for excusing delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration... [own emphasis]

(10) The Applicants contend that they filed the reference within 14 days of receipt of the certified Ruling by the Taxing Master. However, **Paragraph II** provides that the reference should be filed within 14 days of receipt of the reasons for the decision. Thus the Applicants failed to comply with **Paragraph II**. In **EVANS THIGA GATURU –VS- KENYA COMMERCIAL BANK LIMITED [2012] eKLR**,

Odunga J observed as follows:-

“In most cases the court is aware that the 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 fool hardy to expect the taxing officer to redraft another “ruling” containing reasons.”

(11) The Applicants herein have not advanced any reasons to explain the delay of almost four (4) months in bringing this reference. In **TWIGA MOTOR LIMITED –VS- Hon. DALMAS OTIENO ONYANGO [2015] eKLR**, the Court stated: -

“The limits in Rule II of the Advocates Remuneration Order have been put there for a reason. Failure to adhere to the said time lines would mean that the application would be rendered incompetent in the first instance.”

(12) It is now well settled that where a Deputy Registrar has delivered a Ruling after a Taxation, it would be superfluous to ask for reasons. In **AHMED NASSIR –VS- NATIONAL BANK OF KENYA LTD [2006] E.A** his point was made thus:-

“Although Rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the Taxing Officer should do so within 14 days, after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of Sub-rule (2) of Rule 11 of the Advocates Remuneration Order demands so. The said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”[own emphasis]

(13) I find that the Applicants herein failed to file their Reference within 14 days as provided by paragraph II. Further no reasons have been advanced for said delay and no application for enlargement of time as envisaged by Paragraph 11(4) of the Advocates Remuneration Order was made. Accordingly, I find that the Reference herein is incompetent for having been filed out of time.

(iii)Merits of the Reference

(14) Notwithstanding the above finding for completeness I will proceed to consider the merits of the present Reference. As a general rule the High Court will not interfere with the decision of a Taxing Officer unless there exists an error in law or in principle. In **KIPKORIR TITOO & KIARA ADVOCATES –VS- DEPOSIT PROTECTION FUND BOARD [2005] eKLR**, the Court of Appeal held as follows:-

“On reference to a judge from the taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.”

(15) The Applicant faults the Hon. Deputy Registrar for awarding the sum of **Kshs.760,152.00** as instruction fees. The Applicant contends that under this heading the Taxing Master ought to have made an award of **Kshs.913,152.15** which the Applicant claims represents the minimum fee prescribed under the Remuneration Order.

(16) In the case of **ARTHUR –VS- NYERI ELECTRICITY UNDERTAKING [1961] E.A**, it was held that:-

“Where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the Court will interfere only in exceptional cases.”

(17) The value of the subject matter of a suit can be discerned from the pleadings, judgment and/or settlement. In **JORETH LTD –VS- KIGANO & ASSOCIATES (2002) 1 E.A** the Court of Appeal held as follows:-

“The value of the subject matter for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just taking in account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

(18) In this case the applicable order would be the **Advocates Remuneration Order 2006, Schedule 6** of that order provides for the manner in which instruction fees are to be assessed and also gives the taxing officer the discretion to increase or reduce the sum due. In his ruling dated **20th June 2018** the Hon Deputy Registrar found that the figure proposed by the Applicant as instruction fees was higher than scale and allowed a figure of **Kshs.760,152.00**. I find no evidence of error on the part of the taxing master. Accordingly, I do find no basis to interfere with exercise of his discretion by the Taxing Officer.

(19) The Applicant also took issue with the decision of the Taxing Master to disallow Getting-Up Fees arguing that the matter had been set down for hearing.

(20) The general principle is that Getting Up Fees is only allocated where a matter has actually been set down for hearing. The Respondent contended that Getting Up Fees is only charged when the hearing has actually proceeded **not** when a matter has merely been set down for hearing.

In his Ruling the Hon Deputy Registrar stated: -

“I have perused the record. By the time the Applicant ceased acting there is no record that the matter had been set down for hearing. The item on getting up is therefore struck out.”

(21) Given that the Applicant had ceased acting for the Respondent **before** the matter was set down for hearing, I find that he is **not** entitled to Getting Up costs.

(22) Based on the foregoing, I find there is no merit in the present reference. The Chamber Summons dated **7th November 2018** is dismissed in its entirety with costs to the Client/Respondent.

Dated in Nairobi this 21st day of May, 2020.

.....

Justice Maureen A. Odero