



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. 295 OF 2014

MURIU, MUNGAI & CO. ADVOCATES.....APPLICANT

VERSUS

NEW KENYA CO-OPERATIVE CREAMERIES LIMITED.....RESPONDENT

RULING

1. The application dated 14th June, 2016 seeks the following orders:

- 1. That the decision of the Taxing Officer delivered on 25th May, 2016 on the Bill of Costs dated 24th March 2014 be and is hereby set aside.**
- 2. That the Honourable Court be pleased to refer back the matter to a different Taxing Officer for re-taxation or otherwise of the said Bill of costs while taking into account an earlier Advocate/Client Bill of Costs with proper directions thereof.**
- 3. That the costs of this application be borne by the Applicant.**

2. The application is premised on the grounds that the Client was awarded costs in HCCC No.122/07 on 23rd September, 2014 following a withdrawal by the Advocates of their Bill of Costs dated 19th February, 2007. That the Client filed its Bill of Costs for Ksh.6,408,505/= on 13th October, 2014. That submissions were filed in the said Party and Party Bill of Costs which bill is yet to be taxed. That the Taxing Officer therefore misdirected herself in law and principle in failing to tax the said Party and Party Bill of Costs prior to taxing the Bill of Costs herein dated 24th March, 2014 .

3. It is further stated that the Taxing Officer on 4th May, 2016 proceeded to entertain the highlights of the submissions in the Bill of Costs herein dated 24th March, 2014 although the Client had filed submissions on a preliminary issue for disposal. It is contended that the Taxing Officer erred in delivering a ruling on the Advocate/Client Bill of Costs herein dated 24th March, 2014 instead of delivery a ruling on the Bill of Costs dated 13th October, 2014. That the Taxing Officer failed to attend to the preliminary issues raised by the Client which led to an error in principle. That the Taxing Officer wrongfully relied on the submissions filed in HCC Misc. Appl. 122/07 to tax the Advocate/Client Bill of Costs herein dated 24th March 2014. That the Taxing Officer further erred in failing to obtain the court file the subject matter of the taxation herein in order to familiarize herself with the matter. That the Taxing Officer was impartial and favoured the Advocate.

4. In the alternative, it is stated that the Taxing Officer erred when she added ½ and charged VAT on items 1-73 of the Bill of Costs instead of charging on instruction fees. That the matter was settled without the filing of a response and therefore the Taxing Officer erred in awarding getting up fees. That the Taxing Officer further erred in failing to take into account that the Bill of Costs was time barred, that the Taxing Officer was misled by the Advocate on the history of the two related matters and that the Advocate had already been paid and was just taking advantage of the Client.

5. The application is opposed. It is stated in the replying affidavit sworn by Peter Munge Murage that the Client did not file any Reference against the decision of the Taxing Officer dated on 2nd September, 2015. That the Advocate herein filed a Reference on 12th November, 2015 challenging the ruling of the Taxing Officer delivered on 2nd September, 2015 but limited only to items No. 1, 8 and 82. That a consent was entered into that allowed the Reference for the taxing of the said items No. 1, 8 and 82. That during the submissions on the said three items the Client gave the value of the subject matter as 547,028,870/= and that the Client did not pursue arguments on any preliminary issue but only submitted on the three disputed items. That the ruling by the Taxing Officer of 25th February, 2016 was in respect of the three disputed items.

6. It was further averred that the HCC Misc. Appl. 122/07 is not related to the ruling of 25th May, 2016 as it is an entirely separate matter.

That the ruling of 25th May, 2016 arose from consent orders and there was no error in principle in the Taxing Officer's decision.

7. The Client filed a response as per the affidavit sworn by Cheryl Abok. It is deponed that the Client filed and served preliminary issues and urged the Taxing Officer to consider the issues owing to a ruling having been delivered on the wrong Bill of Costs based on the wrong submissions. That subsequently the Advocate withdrew the Bill of Costs in HCC Misc. Appl. 122/07 which related to HCC Misc. Appl. 845/05 (OS).

8. That the Client had not filed submissions to the Advocates Reference since directions on the preliminary issues had not yet been given. That the Advocate has filed 3 Bills of Costs relating to 122/07, 295/14 and 281/07 which the court struck out. That the Advocate also manufactured other Bills of Costs totaling to over 150 taxations.

9. It is further contended that the taxed amount is excessively high. That the Taxing Officer erred in law and in principle as she proceeded to make her ruling without the benefit of the original court file. That the award of getting up fees arising from the basic instructions was made in error as no defence had been filed, pleadings closed or issues agreed on. It is further averred that there was a mix up during the taxation process when the Advocate/Client Bill of Costs was taxed instead of taxing the Party and party Bill of costs in HCC Misc. Appl. 122/07.

10. The application was canvassed by way of written submission. I have considered the application, the response to the same and the submissions filed by the counsel for the respective parties including the Client's rejoinder submissions.

11. I have perused the court record herein. The Advocate/Client Bill of Costs herein is dated 24th March, 2014 and was filed in court on 27th March, 2014. The Bill of costs relates to HCC Misc. Civil Appl. 846/05 (OS) which involved a sale agreement between the Government of Kenya and Kenya Co-operative Creameries 2000 Ltd and Kenya Co-operative Creameries Holdings Ltd.

12. The said Bill of Costs was taxed and the ruling delivered on 2nd September, 2015. The Bill was taxed at a total of Ksh.1,076,394/=. Subsequently, the Client filed the application dated 11th November, 2015 seeking orders that the decision of the Taxing Officer be set aside as far as it related to item No. 1, 8 and 82. Secondly, that the matter be referred for re-taxation of the said items or that the decision be varied in respect of the said items.

13. On 9th February, 2016, the said application was compromised. Consent orders were recorded and the application allowed in terms of prayer No. 2 i.e. allowed fresh taxation of item No. 1, 8 and 82 of the Bill of Costs dated 24th March, 2014.

14. Subsequently the Bill of Costs was taxed on the three items aforesaid. Item No. 1 on instruction fees was taxed at Ksh.8,245,433/=, item No. 8 on getting up fees was taxed at 1/3 of the award in item No. 1 and came to Ksh.2,748,477.70. Item No. 82 was taxed off. The total came to Ksh.18,337,456.65 inclusive of all the other items which were not the subject of the re-taxation.

15. A perusal of the court record herein has not revealed any mix up as alleged by the Client's side. Following the filing of the application dated 11th November, 2015 by the Advocate, the parties compromised the application and recorded a consent herein which allowed the application in terms of prayer No. 2. The said prayer No.2 had sought orders that the Bill of Costs dated 24th March, 2014 be referred for fresh taxation on items No.1, 8 and 82. On 19th February, 2016 the both parties appeared before the Taxing Officer and agreed to file written submissions in relation to the aforesaid three items.

16. The submissions were filed and highlighted before the Taxing Officer on 4th May, 2016. On the said date, the counsel for the Client also stated that they had filed a Preliminary Objection the same morning. Parties then proceeded to highlight their submissions which resulted in the impugned ruling. In the said highlights, the Client's side conceded to the value of the subject matter as Ksh.547,028,870/= . It was also pointed out that the Party and Party Bill of Costs in HCC Misc. appl. 122/07 was still pending. That items No. 8 on getting up fees should be struck out as the matter did not proceed. This further demonstrates that there was no mix up when the Taxing Officer proceeded to tax the three items afresh. There was nothing to bar the Taxing Officer from proceeding with the re-taxation of the three items.

17. On item No.1 the Taxing Officer calculated instruction fees based on the value of the subject matter which is reflected as Ksh.547,028,870/=. This value was conceded to in the submissions by the Client's side. The settlement arrived at was for Ksh.57,028,870/=. The Client's side cannot be heard to now state that the said value was adopted in the Originating Summons only for the purposes of recording a settlement.

18. The Court of Appeal set out the principles to be followed during the taxation of instruction fees in the case of **Joreth Ltd v Kigano [2002] eKLR** as follows:

“We would at this stage point out that the value of the subject matter of a suit for the 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 so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and 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.”

19. It is apparent from the record herein that the copies of the pleadings and documents in the primary suit HCC Civil Misc. Appl. 846/05 (OS) were availed to the Taxing Officer vide letter dated 20th August, 2015. There is an application in HCC Misc. Appl. 846/05 (OS) dated 15th June, 2005 which reflects on the face of it that it was coming for hearing on 27th June, 2005, the same date reflected in items No. 8 of the Bill of Costs dated 24th March, 2014 as getting up fees for the hearing. The question that arises is whether the suit was coming up for the hearing of the Originating Summons or whether it was coming up for the hearing of the said application.

20. The proceedings in HCC Misc. Appl. 846 (OS) is what can confirm the correct position. If the application dated 15th June, 2005 which reflects it's hearing date as 27th June, 2005 was the only matter coming up for hearing on that date, then the fees for that day cannot be based on the instruction fees awarded in item No. 1. The application dated 15th June, 2005 was by a Third Party who wished to be joined in the proceedings.

21. In taxing item No.8 on getting up fees, the Taxing Officer observed in the impugned ruling that the matter was fixed for hearing on 27th June, 2007 when it did not proceed. The Bill of costs reflected item No. 8 as "getting up or preparing for trial when confirmed for hearing and proceeded to hearing". No fee for getting up and preparing for trial is chargeable until the case is confirmed for hearing. It is not clear from the ruling by the Taxing Officer or the material herein whether it was the Third Party application which was coming for hearing or the Originating Summons itself. It appears this relevant factor was not taken into account by the Taxing Officer which may have probably resulted in an excessive award under the said item No. 8 (See for example **Frist American Bank v Shah & others 200 EA 64** on applicable principles during taxation).

22. Item No.82 was struck out by the Taxing Officer so it cannot be an issue herein.

23. It is observed that there are several other issues raised in the submissions herein which were not part of what was before the Taxing Officer in respect of the re-taxation of the 3 items aforesaid and nor were they the subject of the application at hand. This includes the validity of the Bill of Costs and the jurisdiction of the court. This court will therefore not pronounce itself on the same.

24. With the foregoing, I find that item No. 8 requires to be cross- checked against the proceedings in the parent file. Consequently, I allow the application but limited only to the re-taxation of item No. 8. The application having been partially successful, each party to bear own costs.

Dated, signed and delivered at Nairobi this 6th day of May, 2020

B. THURANIRA JADEN

JUDGE