REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS APPL. NO. 33 OF 2017

IN THE MATTER OF THE ADVOCATES ACT CAP 16 AND

THE ADVOCATES (REMUNERATION) ORDER, 2009

AND

IN THE MATTER OF THE ADVOCATES (REMUNERATION) (AMENDMENT) ORDER, 2014

AND

IN THE MATTER OF THE ADVOCATE-CLIENT BILL OF COSTS

BETWEEN

MUMIAS SUGAR COMPANY LIMITED.....APPLICANT

AND

PROFESSOR TOM OJIENDA & ASSOCIATES.....RESPONDENT

[Being a Reference filed pursuant to the leave of court granted on 20th March, 2018 against Hon. P.W. Mbulikah's (the taxing officer's) Ruling in Misc Application No. 33 of 2017]

RULING

This is a Ruling on a Reference from taxation.

1. By her Ruling dated 11th October 2017 the learned taxing officer taxed the Advocate/Client Bill of Costs in the sum of Kshs 11,326,608/=.

2. In this reference the client, **MUMIAS SUGAR COMPANY LIMITED**, has raised several issues. I will delve into each of the said issues in turn.

Jurisdiction

It is common ground that the advocate, **PROFESSOR TOM OJIENDA & ASSOCIATES ,** had done some work on behalf of the client, in a case which was before the **SUGAR ARBITRATION TRIBUNAL**.

3. As at the time when the advocate lodged his Bill of Costs for taxation, the case before the Tribunal was still ongoing. It had not been concluded.

4. The advocate said that he had written several letters to the client, asking the said client to collect their files from the advocate's offices, as the advocate was no longer interested in continuing being their advocates.

5. The client insists that they never received the letters from the advocate.

6. In any event, the client insists that the advocate had still remained on the record, in the case before the Tribunal.

7. It was the client's submission that because the advocate was still on record as their advocates, it was untenable for the advocate to tax his

Bill of Costs.

8. But the advocate submitted that there was no statute which would bar him from having his Bill taxed, whilst he was still on record as the advocate for the client.

9. That issue was canvassed before the learned taxing officer who then made a finding that there is no legal requirement that an Advocate must cease to act for his client before the advocate can demand for his fees.

10. In the case of **GICHUKI KING'ARA & CO. ADVOCATES Vs MUGOYA CONSTRUCTION & ENGINEERING LIMITED [2010]eKLR**, the Court noted that the advocate was asking his client to pay for work which the advocate had already done. That request for payment was made whilst the principal suit was subsisting and whilst the advocate was still on record. The Court held as follows;

> ***"Since the retainer lasts till the work is done, the Respondents should patiently do the work to its completion and then tax the bill of costs. Their claim to be paid for the work done todate contradicts the principle that the retainer is one entire contract, to be remunerated after completion, and amounts to seeking payment on a quantum meruit basis. To allow the taxation at this stage would result in allowing taxation at or even before the conclusion of the business for which the Respondents were retained. This would create a bad precedent whereby an Advocate could tax his bill at will, before the business for which he was retained is concluded, and this could result to a multiplicity of taxations in the same retainer, which would be greatly prejudicial to the client."***

11. Of course, if an advocate had his Bill of Costs taxed against his client, and he continued to act for the said client in the matter in respect to which the Bill was taxed, there could arise a multiplicity of Bills. That would be undesirable.

12. In my view, when an advocate had reached a stage when he was getting his Bill taxed against his client, that would be an indicator that the relationship between the two was no longer rosy. It would then be difficult for the advocate to give his full attention to the client's case, after the advocate had felt the compulsion of having his bill taxed. And on the other hand, the client may not feel confident that the advocate who was already taking steps to chase for his fees, would continue rendering his best services to the client.

13. In this case, the advocate had not sought leave of the court to cease acting.

14. The advocate had also not filed any Notice of Cessation to act for the client.

15. Therefore, whether or not the advocate was no longer interested in continuing to act for the client, he remained recognized by law, as the advocate for the said client.

16. However, as the advocate has expressly stated that he is no longer interested in continuing to act for the client, it is most improbable that he would be filing any other Bill of Costs against his client.

17. Although it is undesirable for an advocate to have his Bill taxed against his client whilst he was still on record for the said client, there is no law that actually bars an advocate from taking that route.

18. In the event, the learned taxing officer had jurisdiction to tax the Advocate/Client Bill of Costs.

Which Schedule of the Advocates Remuneration Order is Applicable?

The taxing officer ruled that it was **Schedule 6** of the Advocates Remuneration Order that was applicable.

19. It is common ground that the said Schedule 6 was applicable to matters which were before the High Court.

20. The case in which this matter arose from, was not before the High Court. It was before the **SUGAR ARBITRATION TRIBUNAL**.

21. Nonetheless, the taxing officer made a finding that pursuant to the **3rd Schedule** of the **Sugar Act**, the Tribunal has the power of the High Court.

22. The advocate has submitted that the Tribunal has a status similar to that of the High Court.

23. Both parties have cited **Section 8** of the **3rd Schedule** as the basis for their respective submissions. The said section reads as follows;

> ***"The Tribunal shall have the powers of the High Court –***
>
> ***(a) to administer oaths to the parties and witnesses to the proceedings;***
>
> ***(b) to summon witnesses and to require the production of documents;***

(c) to order the payment of costs; and the provisions of the law relating to the Commissions of Inquiry in Kenya ……..”

24. That provision does not elevate the Tribunal to the status of a High Court. It only enables the Tribunal to exercise the powers of the High Court for the specified purposes.

25. Pursuant to **Article 169(1)(d)** of the **Constitution of Kenya**, Tribunals have the status equivalent to that of Subordinate Courts.

26. The **Sugar Act** did not, and could not have changed the pronouncement embodied in the Constitution, so as to elevate the **Sugar Arbitration Tribunal** to the status of the High Court.

27. The fact that the Chairman of the Tribunal must have qualifications which could enable him to be appointed as a Judge of the High Court, did not give to the Tribunal the status of the High Court.

28. I find that the learned taxing officer made an error of principle when she held that the **Sugar Arbitration Tribunal** has powers of the High Court.

29. As the Tribunal has a status equivalent to that of a Subordinate Court, the taxing Officer erred when she held that **Schedule 6** of the Advocates Remuneration Order was applicable to this matter.

The Value of the Subject Matter

The taxing officer noted that the pleadings did not disclose the monetary value of the subject matter.

30. She took into account the fact that;

“There were 70,000 farmers interest in the claim.”

31. She then taxed the Instruction Fee at Kshs 5,000,000/=.

32. Even though the learned taxing officer said that she had taken note of the nature and importance of the cause; the amount of work put into the matter; the time spent on it; the several “suit visits”; the research done and the interest of the parties in the matter, I have been unable to correlate the sum of Kshs 5,000,000/= to the other relevant finding of the taxing officer.

33. The said other relevant finding was that the basic Instruction Fee in this case, as provided for in the Advocates Remuneration Order was Kshs 75,000/=.

34. If that be the case, the award of Kshs 5,000,000/= appears to be excessively high, leading to the inescapable conclusion that there was an error of principle.

Disbursements

In this case the taxing officer awarded the sums which the advocate had claimed in the Bill of Costs.

35. The learned taxing officer did not seek any proof from the advocate, to ascertain whether or not the sums claimed had been disbursed.

36. When a taxing officer awards disbursements when taxing a Bill, he or she needs to ascertain that the sums claimed had actually been disbursed. The reason for that is that the person whose Bill was being taxed, would be looking for a reimbursement of the sums that he or she had disbursed. Therefore, unless he/she can satisfy the taxing officer that he had disbursed the money being claimed, there would be no sound basis for reimbursing such money.

37. I hold the considered view that the learned taxing officer erred in principle when she taxed the Bill and awarded disbursements which the advocate had not proved having disbursed.

38. Finally, the taxing officer failed to give any reasons that could justify the increase of the taxed costs by 50%.

39. As the Bill of Costs being taxed was an Advocate/Client Bill of Costs, there is no basis for the increase.

40. For all the reasons given above, I find that there is merit in the reference, and I therefore set aside the Ruling made on 11th October 2017.

41. I award to the client, the costs of the reference.

42. I further order that the Advocate/Client Bill of Costs be taxed afresh, and that the said fresh taxation be handled by a taxing officer other than the one who taxed it originally.

DATED, SIGNED and DELIVERED at KISUMU This 6th day of February 2019

FRED A. OCHIENG

JUDGE