



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**MISCELLANEOUS CASE NO. 206 OF 2015**

**MWANGI KENG'ARA & CO. ADVOCATES.....ADVOCATE**

**VERSUS**

**INESCO ASSURANCE COMPANY LIMITED.....CLIENT**

**RULING**

1. This is an application by way of chamber summons dated 21<sup>st</sup> June 2017 seeking that the decision of the Taxing Master dated 6<sup>th</sup> April 2017 be set aside in its entirety and the Advocate/Client Bill of Costs dated 7<sup>th</sup> May 2015 be remitted back for taxation and that costs of the reference be awarded to the Advocate/Applicant.

2. In support of the application the Advocate/Applicant relies on the grounds on the face of the application being inter alia:-

**i) THAT the Learned Taxing Master erred in principle and in law in taxing the bill of costs under Schedule VII of the Advocates Remuneration Order, 1997 instead of Schedule V part II of Legal Notices No.550 of 11/12/1997, 159 of 17/11/2006, and 35 of 11/4/2014.**

**ii) THAT the Learned Taxing Officer erred in principle and in law in failing to find that the Advocate/Applicant had made an election under Paragraph 22 (1) to proceed under Schedule V part II of the Advocates Remuneration Order and hence the bill of costs could only be taxed under Schedule V part II.**

**iii) THAT the Learned Taxing Officer erred in principle and in law in failing to apply Legal Notice No. 159 of 11/11/2006 and Legal No. 35 of 1/4/2011 to work done after 17/11/2006 when the 1997 Advocates Remuneration Order was repealed.**

**iv) THAT the Learned Taxing Officer, erred in principle and in law in taxing off the following items which are expressly provided for under Schedule V part KK of the Advocates Remuneration Order:-**

**1,2,5,7,10,12,15,19,20,21,22,26,,27,30,33(b),  
36,39,40,41,46,51,53,54,57,60,63,66,69,72,73,79,85,87,88,91,94,95,98,101,102,103,106,110,111 and 112.**

**v) THAT the Learned Taxing Officer erred in principle and in law in taxing off the following disbursements before complying with Paragraph 75 (1) of the Advocates Remuneration Order and in failing to find that the disbursements were supported by documents filed in court. Item Number:-**

**132,134,135,136,137,138,139,140,141,142,144,145,146,147,148,150,151,152,153.....**

**vi) THAT the Learned Taxing Officer erred in principle and in law in taxing off Kshs.52, 696/- and only allowing Kshs.86, 760/-.**

**vii) THAT it is in the interest of justice that this application is allowed.**

3. The Application is supported by supporting affidavit of Mercy Nduta Mwangi, an Advocate, in the firm of the Advocate/Applicant in which she has averred, that the ruling was delivered on 6/4/2017; that on 6/4/2017 she wrote a letter to the Honourable Court, objecting to the ruling and seeking reasons for the taxation (copy of the letter attached and marked Exhibit ("MNM-2")); that on 13<sup>th</sup> June 2017, the counsel collected a photocopy of the court's letter dated 9<sup>th</sup> April 2017 from the court file as the original one is yet to be received through the post office of the Advocate/Applicant, stating the reasons for the ruling (**exhibit "MNM-3"**); that prior to the filing of the Bill of Costs the

Advocate/Applicant averred an itemized fee-note had been submitted to Client/Respondent; that the legal fees would be charged under schedule V part 2 of the Advocates Remuneration Order (**Exhibit MNM-4**); that the Advocate/Client is aggrieved by the ruling of 6/4/2017 in terms of the grounds set out in the filed chamber summons; that on 7/5/2018 the Advocate/Client filed a notice under section 48 paragraph 22(1) of the Advocate Act (*Cap 16 Laws of Kenya*) simultaneously with the Advocate/Client Bill of Costs, notice served on 19/6/2015 as per affidavit of service dated and filed on 1/7/2016 (Exhibit ("**MNM-5**")); that election to proceed under schedule V part II was made prior to taxation; that the taxing master failed to pay regard to the Advocate/Applicant's submissions or the documents filed in support of the Bill of Costs (a copy of which is attached hereto marked ("**MNM-6**") and that the taxing master misdirected herself on principle and in law, hence wrongly taxed off the sum of Kshs.52,696/-.

4. The Client/Respondent is opposed to the application and in doing so has filed grounds of opposition alluding to the following:-

**i) THAT the application is incompetent and the orders sought are incapable of being granted.**

**ii) THAT the Bill of costs dated 7/5/2015 was taxed to scale.**

**iii) THAT the taxing master has the discretion to disallow an Advocate to proceed under a schedule where there are glaring irregularities.**

**iv) THAT the Taxing master rightfully taxed off items that are not provided for in the Remuneration Order.**

**v) THAT the reasons for taxation as well as the formula applied in assessment were clearly stated in the Ruling delivered on 6/4/2017 by the taxing master.**

**vi) THAT the Advocate referred to some documents in the Bill of costs yet failed to produce copies in the bundle of documents attached as proof.**

**vii) THAT the taxing master substantially complied with Rule 11(2) and paragraph 75(1) of the Advocates (Remuneration) order in taxing the Bill of costs.**

**viii) THAT this application is highly prejudicial to the Respondent as it is meant to merely harass the Respondent by subjecting it to unending judicial process.**

**ix) THAT this application is otherwise an abuse of the court process and ought to be dismissed with costs.**

5. The court in this matter gave directions that the application be determined by way of written submissions and parties be at liberty to highlight on the same. The Advocate/Applicant filed its submissions dated 30<sup>th</sup> June 2018 on 5<sup>th</sup> July 2018 together with supportive authorities whereas the Client/Respondent's submissions dated 16<sup>th</sup> July 2018 were filed on 16<sup>th</sup> July 2018. The Advocates relied on their respective written submissions and opted not to highlight on the same.

6. I have considered the pleadings, parties opposing submissions and the issue for consideration is whether the Advocate/Applicant has established sufficient grounds for the decision of the Taxing master delivered on 6<sup>th</sup> April 2017 to be set aside in its entirety to warrant the Advocate/Client Bill of Costs dated 7/5/2015 to be remitted back for taxation?

7. In the instant reference, the Advocate/Applicant prior to commencement of Taxation of the Bill of Costs, served upon the Client/Respondent an itemized fee note dated 1/4/2015 on 7/4/2015 by forwarding a letter and the fee note annexed to chamber summons marked as exhibit ("**MNM-4**"). The Notice is under Section 48 paragraph 22 (1) of the Advocates Act (*Cap 16*) Laws of Kenya which was simultaneously filed with the Advocate/Client Bill of Costs on 7/5/2015. The affidavit of service filed on 1/7/2015, Exhibit ("**MNM-J**") reveal that both the Bill of Costs and the notice were duly served upon the Client/Respondent at the same time on 26/5/2015. The said Bill of Costs is titled at the commencement of the Bill expressly as follows:-

**"Advocate/Client Bill of Costs under schedule 5 part 2 pursuant to an election by the Advocate made under paragraph 22(1) of the Advocates Remuneration Order."**

8. It is contended by the Client/Respondent, that the instructions to the Advocate/Applicant herein were given on the basis of the understanding, that she would charge her fees under schedule VII of the Remuneration Order and as such the Advocate is therefore estopped from disowning the agreement or purporting to move from schedule VII by giving a notice of election to proceed with taxation under schedule V of the Advocates Remuneration Order. The Client/Respondent urged therefore the purported notice to the client is null and void; however I have noted in this matter the Client/Respondent did not challenge the application or controverted the same by way of filing a Replying affidavit and attaching to it the alleged instructions in writing to the Advocate/Applicant. The Client/Respondent filed only grounds of opposition to which no such grounds has been raised leave alone filing of a Replying affidavit.

9. In the instant reference, under exhibit **MNM-4**, the Advocate/Applicant made an election to tax the Bill under schedule V and proceeded to communicate the same to Client/Respondent before filing the Bill of Costs. Paragraph 22(1) of the Advocates Act (*Cap 16*) Laws of Kenya enables or gives an Advocate option to elect the schedule under which to proceed with the taxation of an Advocate/Client Bill of Costs in the following terms:-

**"In all cases in which any other Schedule applies an Advocate may before or contemporaneously with rendering a bill of costs drawn as between Advocate and Client signify to the Client his election that, instead of charging under such Schedule; his remuneration shall be according to schedule V, but if no election is made his remuneration shall be according to the scale**

applicable under other schedule."

10. In the case of **Mutisya & Co. Advocates Vs. Lazaro Omita Nyagol [2004] eKLR** on page 5, the 4<sup>th</sup> paragraph, Honourable Mwera J, held as follows:-

**"The court considering both views above concludes that for any items that cost's fell to be paid but was not provided for under schedule VII, they were properly put forth under Schedule V and the Taxing Officer was obliged to consider them and tax according to her discretion as such and not strike them out altogether. Paragraph 22 applies when an Advocate knowing that here exists Schedule under which the remuneration ought to be charged opts out of it altogether and elects/decides instead to get remunerated wholly under Schedule V. In such case he will notify his clients in advance or at the same time as he files his Bill of costs."**

11. In the case of **Anthony Thuo KANAI T/A Thuo Kanai Advocates Vs. John Ngigi Ng'ang'a [2014] eKLR** on page 6 paragraph 3, Honourable Justice P. Nyamweya held as follows:-

**"I have perused the provisions of the Advocates (Remuneration) Order of 2009 of the fees to be charged with respect to contentious and non-contentious matters and find that the charging of fees in both types of matters in charging of fees is subject to election of the application of the Schedule V under rule 22 of the Advocates Remuneration Order."**

12. In the case of **Nyangito & Co. Advocates Vs. Doinyo Lessos Creameries Ltd [2014] eKLR**, Odunga J emphasized that the circumstances under which a Judge of the High Court interferes with the taxing officer's exercise discretion are now well known. These principles are:-

**"1) That the 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 manifested excessive as to justify an inference that it was based on an error of principle;**

**2) It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself. Some of the relevant factors to be taken into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved; the interests of the parties, the general conduct of the proceedings and any direction by the trial Judge;**

**1) If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion."**

13. In taxation of matters, whereas the taxing master has the discretion to disallow some itemized items, such a discretion should be exercised fairly, judiciously and in wider interest of justice but such discretion cannot be interfered with unless it is shown the Taxing officer's decision on taxation was based on an error of principle or fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle.

14. In this matter, I find that there is no dispute, that notice of the election under paragraph 22(1) was duly served upon the Client/Respondent in accordance with the law and the disregard of that by Taxing Officer, is in my view, an error in principle which invites the court to interfere with the Taxing Officer's decision on the taxation. In this matter, done on 6<sup>th</sup> April 2017 the Taxing Officer in this matter erred in principle in excluding the application of Schedule V part 2 and Taxing off all items that were not provided for under Schedule VII.

15. I have considered all the grounds of opposition and find that a Taxing master is bound to be guided by the Advocates Remuneration Order as regards items to be allowed or disallowed; but has no power to oust a legal right that has been exercised in accordance with the law. The Taxing master, however has discretion in taxing a Bill of Costs, which discretion must be exercised fairly, judiciously in accordance with the law and in the wider interest of justice. It is not the duty of this court to tell the Taxing master how to tax the Bill of Costs and which items to ignore or grant save to state the Advocate Remuneration Order, gives clear guidelines on taxation and which should be followed.

16. The upshot is that the application is merited and is granted in the following terms:-

**a) The decision of the Taxing Master delivered herein on 6/4/2017 be and is HEREBY set aside in its entirety and the Advocate/Client Bill of Costs dated 7/5/2015 be and is HEREBY remitted back for taxation.**

**b) Each party shall bear its own costs of the application.**

Dated, signed and delivered at Nairobi this 18<sup>th</sup> day of October, 2018.

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J .A. MAKAU

JUDGE