



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO.555 OF 2013

MWANGI KENG'ARA & COMPANY ADVOCATESAPPLICANT

VERSUS

INVESCO ASSURANCE COMPANY LIMITEDRESPONDENT

RULING

1. By a Chamber Summons dated 21st August 2014 and brought under the provisions of Rule 11(2) of the Advocates (Remuneration) Order, the Advocates Act, Cap 16 Laws of Kenya.
2. The applicant/advocate brings this reference seeking orders that this court do vary the decision of the taxing officer on instructions fees delivered on 11th July 2014 and that the said order be set aside and the bill of costs dated 15th July 2013 be remitted back to the taxing master with appropriate directions for taxation; and that costs of the reference be awarded to the respondent/applicant
3. The application is based on the grounds that:
 1. The taxing master misdirected himself in principle in holding that instruction fees in the bill of costs dated 15th July 2013 fell under Schedule V1(1) L of the Advocates Remuneration Order and not Schedule V1 1(b).
 2. That the learned taxing master misdirected himself in principle in finding that the sum of kshs 787,456/20cts was not subject matter of the suit.
 3. That the assessment of instructions fees at kshs 15,000/- which is below the minimum prescribed instructions fees was erroneous and inordinately low and not commensurate with the case and hand .
 4. That it is in the interest of justice that the orders sought herein are granted.
4. The Chamber Summons was further supported by the affidavit of Mercy Nduta Mwangi advocate sworn on 21st August 2014 wherein she deposes that she filed several bills of costs in respect of HCC Miscellaneous Application 430,472,154 and 473 all of 2013 wherein the total sum of fees claimed was kshs 787,456/20cts. That in this cause which was instituted separate from the bills of costs, it became a new cause of action wherein the respondent was contesting the stated bills of costs on the grounds that (a) some of the bills were statute barred;(b) that the bills were premature and presumptive . That in view of the new cause of action, the advocate believes that she is entitled to

instructions fees under schedule V1 1 (b) as the suit was clearly brought by way of Notice of Motion and not under Schedule V1 1 (L) as held by the taxing master hence his decision was wrong and hence it ought to be set aside/varied and that this court do determine the value of the subject matter of the suit and the proper schedule for assessment of the instructions fees. That she has followed the procedure laid down in Rule 11 of the Advocates Remuneration Order for the filing of References and that the reference has been filed timeously hence it is in the interest of justice that the orders sought are granted.

5. The Reference was opposed by the respondent who filed Grounds of Opposition dated 16th November 2015 contending that:

1. The taxing master considered all the relevant factors including the written submissions by counsels and awarded the objector a fairly generous sum.
2. The application is a frivolous and lacks merit and the same should be dismissed with costs.
3. No instructions fee is chargeable on taxation matters.
4. The court should (sic) interfere with the decision of the taxing officer in questions solely of quantum as that is an area where the taxing officer is more apt to the job.
5. The costs should not be allowed to rise to such level as to confine access to court to the wealthy bearing in mind that the costs arises from.....

6. The taxation of advocate's instructions fees should avoid any prospect of unjust enrichment, for any particular party or parties.

7. The parties agreed and filed written submissions to dispose of the Reference. The applicant/advocate/objector filed hers on 4th December 2015 whereas the respondent/client filed on 20th January 2016.

8. In their submissions in support of the Reference, the advocate submitted that the bill of costs were part of the respondent's annexures to the Notice of Motion dated 4th June 2013. That the respondent having opted not to challenge the advocate's bill of costs through the taxation cause and instead filed a separate suit to challenge the same, however defective the procedure adopted by the respondent might have been, it was still a suit and not a bill of costs for taxation under paragraphs 13 and 69 of the Advocates Remuneration Order. Reliance was placed on **George Amuga Sino T/A Johe Brooks Consultants Ltd Vs Patrick J.O Geoffrey D. Yogo t/a Atieno Yogo & Company Advocates [2012] e KLR where at page 8** the court is said to have dealt with the issue of whether a Notice of Motion is a suit and held that:

“These provisions both the definition of the suit is in Section 2 (supra) and the part of the Remuneration Order. We have reproduced above do persuade us that matters commenced by way of a Notice of Motion as the matter before us was, is in law a suit.”

9. That in the above case the court dealing with the issue of value of the subject matter of a suit held that ***“surely, if a client instructs an advocate to claim a certain amount from a defendant, is the advocate not expected to strive to have the client realize that amount whether he succeeds in doing so or not is another matter but that is what he is instructed to do and he cannot be denied the fact that he worked to realize the claim. In our view, his fee would be pegged on that amount and on the amount that the court later finds due.”***

10. The applicant therefore maintained that on the strength of the above authority, the Notice of Motion dated 4th June 2013 was a suit and hence the taxing officer was required to assess instructions fees in line with the provisions of Schedule 6 paragraph I of the Advocates Remuneration Order which recognizes the value of the subject matter, the applicant having defended the Notice of

Motion and filed replying affidavit in opposition thereto. Reliance was placed on the decision in **Joreth Limited V Kigano & Associates [2002] EA 99** where the court held that:-

“ We would at this stage point out that the value of the subject matter of a suit 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 ascertained the taxing officer is entitled to use his discretion to assess such instructions fees as he considers just taking into account, amongst other thing, the nature and importance of the case or matter.” And that Page 100.....” Instruction fees are an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached.”

11. The applicant also relied on **First American Bank of Kenya V Shah & Others [2002] EA 64** where the court held that:

“ The full instructions fees to defend a suit was earned the moment a defence was filed and the subsequent progress of the matter was not relevant .”

12. Based on the above decisions it was contended that the taxing officer should not have applied Schedule 6(1) of the Advocates Remuneration Order which provides that ***“ to sue or defend in any case not provided for above; such sum as may be reasonable but not less than 8400;”*** whereas the correct scale was as provided at paragraph 1 (b) of Schedule 6 under which a claim of kshs 787,456.20 cts would attract instructions fees of shs 77,000/- consequently the applicant beseeched this court to set aside, vary the taxing officer’s decision and allow this reference with costs.

13. In the respondent’s submissions dated 19th January 2016, it was contended, while relying on all the 6 grounds of opposition file herein that the issues for determination were:-

1. Whether there were instructions fees chargeable upon miscellaneous application for taxation of bills.

14. On the above issue, it was submitted that no instructions fees were chargeable on taxation of bills proceedings and a party and party bills of costs hence item 1 was misguided hence it should be taxed off entirely. Reliance was placed on paragraph 13(3) of the Advocates Remuneration Order, 2009 which provides: ***“ The Bill of Costs shall be filed in a Miscellaneous Cause in which Notice of Taxation may issue, but no advocate shall be entitled to an instructions fee in respect thereof.”*** That to charge such a fee would be in violation of Article 48 of the Constitution which obliges the state to ensure access to justice for all persons and, if any fees is required, it shall be reasonable and shall not be reasonable and shall not impede access to justice. That costs in taxation proceedings are included in the certificate of costs as provided for under Section 51(2) of Cap 16 ***that “ the certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, as in a case where the retainer , is not disputed, an order that judgment be entered for the sum certified to be due with costs.”***

15. The respondent maintained that any costs due to the advocates was included in the taxed amount as costs of the proceedings; and that the chamber summons is not a pleading to be the basis for determination of instructions fees; and that the subject matter was the party and party bill of costs which had already been taxed. Further, that taxation must come to an end and costs incurred should not be a basis for yet another bill of costs. The respondent relied on the decision in **Nyangito &Company Advocates V Doinyo Lessos Creameries Ltd [2014] e KLR** where G.V. Odunga J outlined the circumstances under which the High Court interferes with the taxing officer’s exercise of discretion . That in this case the taxing officer was correct in using the schedule that he used in arriving at his discretion as the sum of shs 15,000/-. It was also submitted that it was an abuse of court process for the applicant to change instruction fees as per item 1 of the bill of costs and that this application is aimed at unjust enrichment by the advocate hence prejudicing the respondent client and hence the Reference should be dismissed with costs.

16. I have carefully considered the Reference herein by the advocate Mwangi Kengara & Company Advocates whose proprietor is Mercy Nduta, the same advocate who swore an affidavit in support, the grounds, grounds of opposition by the respondent client INVESCO Assurance Company Ltd and the parties' respective written submissions and authorities relied on by both parties.

17. The genesis of this dispute/Reference is that on 4th June 2013 the respondent herein who is the client and main applicant filed a Notice of Motion seeking orders to stay of taxation of the applicant/advocate's bills of costs against the client in the following matters;

HCC Miscellaneous 154/2013

HCC Miscellaneous 430/2013

HCC Miscellaneous 472/2013

HCC Miscellaneous 473/2013

HCC Miscellaneous 524/2013

HCC Miscellaneous 493/2013

3. An order consolidating all the bills of costs for good order and case management.

4. that the court do find that in HCC Miscellaneous 430/2013, 472/2013, 154/2013, 473/2013 the cases subject matter of the bills were still ongoing and the respondent/advocate was still on record for client and therefore bills were premature.

5. That some bills were statute barred.

a) The advocate do render a statement of account on all the matters she had filed d bills of costs and thereafter accounts be taken into establish what is due if at all to the advocate.

b) The bills had been filed under Schedule 9 of Advocate Remuneration Order without the respondent giving the applicant notice to elect to proceed under the schedule.

6. The court determines and gives directions.

7. Costs on the cause.

18. That application dated 4th June 2016 was vehemently opposed by the advocate/respondent who filed an elaborate replying affidavit on 7th June 2013 attaching all the bills of costs; some payments received from the client, fee notes rendered and several correspondence between the parties hereto together with instructions notes among others. The said application was canvassed by way of written submissions.

19. The matter initially came up under certificate of urgency before Honourable Waweru J on 5th June 2013 duty judge who observed that "***The application ought to have been made in one of those other matters. Permitting it to proceed here can only cause confusion or other mischief.***"

20. The Learned Judge then directed the client to serve the advocate for interpartes mention on 10th June 2013. On the latter date, the mater was again set for mention on 20th June 2013. On 20th June 2013 both parties appeared - Miss Mwangi for respondent and Mrs Omoro for applicant. The respondent Miss Mwangi asked the court to strike out the application and indeed the court did strike out the applicant with costs to the respondent advocate on account that there was a similar HC Miscellaneous Application No. 524 of 2013 (No. 18 on the cause list of that day).

21. It was upon that order of Honourable Waweru J striking out the Notice of Motion that originated this file that Miss Mwangi advocate/ respondent filed her bill of costs dated 15th July 2013 on 17th July 2013 which she called party and party bill of costs under Schedule VI of and providing there under item No. 1 as **“ 6th June 2013 to instructions fees to defend the suit herein instituted by way of Notice of Motion dated 4th June 2013 wherein the total value of the subject matter is kshs 787,456/20cts kshs 77,000.”**

22. The whole bill of costs was totally kshs 87,355.00 and drawn by Mwangi Kengara and Company Advocates who also took out and served a Notice of Taxation upon the Respondent/client’s advocates Maina Njuguna & Company Advocates; who vigorously opposed the bill of costs and particularly item No. 1 on instructions fees contending that it was not chargeable because the bill was from a Miscellaneous Application and not a suit, among other grounds contained in their replying affidavit sworn by Paul Gichuhi legal Manager of the client sworn on 10th February 2014.

23. As expected, that bill was considered by the taxing officer Honourable A.K. Ndungu Deputy Registrar (as he then was) on 29th May 2014 who eventually rendered his decision on 11th July 2014 with a finding that by the client electing to commence the completely new proceedings when other similar proceedings were pending as observed by Honourable Waweru J, the Notice of Motion was a suit within the meaning of Section 5(2) of the Civil Procedure Act. He then proceeded to tax the bill of costs and awarded instructions fees under schedule VI (1) (L) at shs 15,000 as being reasonable. He allowed all other items as charged. The entire bill of costs was taxed at shs 25,355.

24. It is the above ruling on taxation which the advocate was aggrieved by as a result of which she filed this Reference giving reasons. From the rival positions considered above. The main and sole borne of contention is the instructions fees allowed; and whether it ought to have been charged or awarded in the first instance place and if so, under what schedule and paragraph.

25. The applicant argues and maintains that the taxing officer erred when he ordered that the basic instructions fees for the application (Notice of Motion) as struck out by Honourable H. Waweru J was awarded under Schedule VI 1(L) of the Advocate Remuneration Order; since the Notice of Motion in question was an independent proceeding(suit) as defined under Section 2 of the Civil Procedure Act. On the other hand, the respondent contends that instructions fees in this matter as struck out by Hon Waweru J ought not to have been awarded and that if any was awardable, in any event, then the same was indeed under Schedule VI 1 (L) of Advocate Remuneration Order since there was no substantive claim made for the award of shs 787,456.20 contained in the various bills of costs filed in other proceedings.

26. This court nonetheless notes that the respondent did not file any Cross –Reference contesting the award on the instructions fees under Schedule VI 1(L) of the Advocates Remuneration Order. That notwithstanding, this court has been urged to determine whether the instructions fees ought to have been awarded by the Taxing officer or at all in the circumstances of this case. According to the applicant, she was entitled to the instructions fees under a different paragraph of schedule 6. On the other hand, the respondent client claims that the advocate is seeking to unfairly enrich herself and that the exorbitant fees sought would inhibit access to justice.

27. So then, was the applicant advocate strictly entitled to instructions fees in the matter of this nature? Without rewriting what the parties have placed before me, I have carefully analyzed the filed Notice of Motion, the replying affidavit and subsequent appearances made on record . I note that the applicant firm of advocates has its proprietor as Mercy Nduta Mwangi t/a Mwangi Kengara & Company Advocates. In her replying affidavit dated (sworn on 7th June 2013 in response to the Notice of Motion dated 4th June 2013 under certificate of urgency, she deposes at paragraph (1) thereof as follows:

“1) THAT I am the proprietor of the respondent herein and as such am competent to swear this affidavit.

At paragraph 4, she deposes that: 4. “It is true that my firm was retained by the applicant to represent its insured’s interest in the cases giving rise to taxations listed as No. 2 (1) to (V1) in the Notice of Motion.”

28. Again when filing the party and party bill of costs subject of this reference under Schedule V1 which bill is dated 15th July 2013 following the striking out of the respondent’s/applicant’s application which originated this file dated 4th June 2013, the Bill of Costs between party and party is filed by the firm of Mwangi Kengara and Company Advocates. The same law firm received notices of taxation issued by the Deputy Registrar on 13th November 2013. It is the same firm that filed written submissions in support of party to party bill of costs dated 16th July 2013 on 18th February 2014 urging the court to award them instructions fees of shs 77,000 based on the principal sum of 787,456/20cts being the value of the subject matter.

29. Without venturing into whether or not this was a ‘suit’ ‘proceeding’ or not, capable of attracting instructions fees under Schedule V1 of the Advocates Remuneration Order, in my view, the most important question for determination in this matter is whether an advocate who represents himself or herself (firm) in a suit or cause or matter would if successful be entitled to charge under the party and party bill of costs advocates instructions fees.

30. In this case, Item 1 on the party to party bill of costs gives a type of service as “ ***To instruction fees to defend the suit herein instituted by way of a Notice of Motion dated 4th June 2013 wherein the total value of the subject matter is kshs 787,456/20cts.***”

31. The “suit’ which the advocate was defending was a matter against herself as an advocate. Thus, the applicant herein who was the respondent in the struck out Notice of Motion is a firm of advocates and counsel representing the firm is the proprietor thereof - Ms Mercy Nduta Mwangi.

32. Therefore, to answer that important question as to whether an advocate who is self represented or prose litigant would be entitled to advocates instructions fees, I must first establish the purpose of the instructions fees regime. It is not in dispute that instructions fees under the Advocates Remuneration Order is charged by advocates whether in party to party bills of costs or in advocate/client bill of costs. The applicant advocate in this case had acted for her clients the respondent in cases against third parties and she did file her several bills of costs wherein she charged legal fees and sought for their taxation prompting the respondent client to institute the proceedings against her, subject of this file. The advocate proprietor of her law firm has acted for herself in the entire process of litigation against her client herein and as a party to the proceedings and seeking to protect her own interests. That being the case, should she be heard to be asking for advocates instructions fees as though she was acting for a client or a different party in her own cause?

33. In my humble view, whereas a successful party to proceedings would be entitled to costs of the suit or cause as the case may be, whether such party is an advocate or any other litigant, such costs, where the party is representing themselves as is in this case, would be party and party bill of costs and would only be limited to disbursements and or court attendance and not instructions fees. This is what emerges clearly from the arguments and documents presented in this case.

34. The above position is nonetheless inapplicable where an advocate instructs another advocate to represent him in a matter, for parties are entitled to the right to be represented by advocates of their own choice. If an advocate chooses to represent oneself in a matter, then they automatically waive the right to advocates instructions fees since a self represented or prose advocate does not act in the capacity of an advocate representing (self) advocate. He or she acts as a party to proceedings like any other ordinary litigant and in my view, to hold that they are entitled to charge advocates instructions fees is indeed to say that advocates should be permitted to unfairly enrich themselves. A party to the suit is defined by **Black’s Law Dictionary 8th Edition** as

“1. One who takes part in a transaction?”

2. One by or against whom a law suit is brought.”

35. In the instant case, the advocate Mercy Nduta Mwangi T/A Mwangi Keng'ara & Company Advocates was dragged before this court by her client the Respondent, as a party vide an application dated 4th June, 2013 whose details I have provided in this ruling. She did not engage an advocate to represent her in the matter which was struck out in her favour. If she had so hired an advocate to act for her in the matter, or if the matter had concerned her seeking to recover costs from her client for the services rendered, then that other advocate or the applicant herein would, in filing his/her bill of costs under party and party or advocate/client bill of costs, as the case may be, be entitled to charge instructions fees. The advocate Mercy Nduta Mwangi having elected to represent herself in this matter, there is no distinction between her and any other ordinary litigant who chooses not to engage counsel.

36. In the persuasive case, **Kisumu HCC 47/2011 Charles Lutta Kasamani T/A Kasamani & Company Advocates Vs Patrick Johnson Okwaro & Geoffrey Denis Oluoch T/A Otieno Yogo & Company Advocates [2015] e KLR** H.K. Chemitei J faced with a similar scenario as in the present case held inter alia:

“ My understanding is that the spirit of the Remuneration Order was to reward a party who has expended resources in hiring an advocate by being reimbursed, so to speak, what he has spent.” However, when a party takes it upon himself to file or defend a suit then he cannot in my humble view ask for costs except the usual disbursement which he expended but not instructions fees. In essence, he has not retained anybody to represent him. He is representing himself and any effort he has expended on the case in the form of research and the usual trouble of going through in litigation has been done by himself.”(Emphasis added).

37. The Learned Judge in the above case ordered that the plaintiff advocate was only entitled to such costs and disbursements that he had incurred, not instructions fees. I wholly agree with the Learned Hon Justice Mi Chemitei J decision in the above case for I find it to be good law. It is for that reason that I am in agreement with the respondent/client's advocate's submissions that the applicant/advocate was not, for purposes of this matter, wherein she was a party, thus, **“one by or against whom a suit is brought,”** and not an advocate claiming for her costs of representing her client, entitled to instructions fees. She was nonetheless entitled to other costs of disbursements.

38. Although the issue of the advocate representing oneself would not be entitled to instructions fees was not one of the arguments made by the respondent who maintained that the applicant herein was not entitled to instructions fees but for different reasons, in **Barclays Bank of Kenya Ltd V Patriotic Guards Ltd [2015] e KLR** the Court of Appeal made it clear that:

“.....It is also trite law that a point of law can be raised at any stage even on appeal even though not raised before the court of first instance. The court can also on its own motion raise a point of law at any point and make a determination based on the same even where such point has not been canvassed by the parties. The learned judge did not therefore do anything outrageous by raising the issue of non compliance with Regulation 79 of the Table A of the Companies Act and acting on it.”

39. In this case, the main issue raised by the respondent is whether the applicant advocate was entitled to advocate's instructions fees. It then proceeded to give reasons other than the reason that I have provided that instructions fees are in any event meant to compensate a party for expenses paid to its advocate. In this case, the advocate did not instruct any external advocate to represent her or her firm in defending the application filed by the respondent/ client dated 4/4/2013 as reproduced in this ruling. Accordingly, the advocate fell in the genre of a party acting in person. However, as the respondent herein did not file any cross reference to the Reference herein challenging the already awarded and crystallized costs, I decline to interfere with the awards already made by the taxing officer.

40. In the end, I find that the reference by the advocate as filed challenging the award of Kshs 15,000 as basic instructions fees in this matter, which instructions fees as awarded I find gratuitous since an

advocate cannot instruct oneself, lacks merit for the reasons that I have supplied above and in abundance.

41. It therefore follows that I need not delve into the issues of whether or not the Notice of Motion dated 4th June 2013 was or was not a suit and or under what paragraph of Schedule 6 of the Advocates Remuneration Order it ought to have been brought as determination of those issues will not make any difference. Accordingly, I dismiss the application/Chamber Summons/Reference filed by the advocate/applicant dated 21st august, 2014.

42. Costs follow the event. However, in this case, in order to bring to an end this ever widening and unnecessary litigation between the advocate and her client the respondent/applicant INVESCO Assurance Company Ltd, I hereby order that each party bear their own costs of the Reference.

Dated, signed and delivered in open court in Nairobi this 13th day of July 2016.

R.E. ABURILI

JUDGE

In the presence of:

Misos Mwangi advocate /applicant

N/A for the Respondent

Court Assistant: Adline