



REPUBLIC OF KENYA

High Court at Bungoma

Miscellaneous Application 58 of 2012

**WANJALA KIMUNGUI t/a
KIPOWA STATIONERIES ::::::: PLAINTIFF/APPLICANT
versus
PATRICK W. KHAEMBA :::::::DEFENDANT/RESPONDENT**

RULING

Request for reasons of taxation

[1] I have perused the court record. It reveals that, on 16/8/2011, the Applicant filed a notice in writing requesting for reasons of the taxation by the taxing master. The last paragraph of the notice reads “...*the plaintiff herein calls upon the taxing master to give reasons for arriving at the said Bill of Costs*”. The Notice could have been put in a better and simple language. Nonetheless, from the face of the notice the purpose is clear; that it was asking for reasons for the decision of the taxing officer made on 9/8/2011. It is therefore a proper request for reasons of the decision of the taxing officer as envisaged under rule 11 of the Advocates Remuneration Order. The argument by the Respondent that there was no formal request for reasons for the decision of the taxing master is not therefore correct. Legally, there can be no argument on that limb whatsoever. That aspect as urged by the Respondent fails.

COMPETENCE OF THE REFERENCE

[2] The next question being asked by the Respondent is: Whether the Reference before the court is competent having been filed out of time and before reasons for the decision of the taxing officer are accordingly given.

The question of *Res Judicata*

[3] Before I consider question [2] above, let me correct the impression created by the Respondent that the ruling by Hon. Nyarima, Chief Magistrate, Bungoma, on 19/6/2012 renders the Reference herein *res judicata*. That ruling cannot render the Reference to this court made through application dated 27th June 2012 *res judicata* for the following reasons:-

- 1) *The applications were filed in the lower court;*
- 2) *The applications were seeking relief the party filing them felt was entitled to under the jurisdiction of the Chief Magistrate's Court;*
- 3) *The applications dated 12/10/12 and 14/8/12 were not a Reference to the High Court as envisaged under the aforesaid law.*

4) *The decision of the Chief Magistrate was not therefore a decision upon a Reference as he did not have jurisdiction to preside over a Reference under rule 11(2) of the advocates Remuneration Order.*

In simple terms, although those applications raised issues which are akin to a Reference, the ruling by the chief Magistrate was not a ruling by a Judge of the High Court on a Reference filed under Rule 11 (2) of the Advocates Remuneration Order, 2009. In such circumstances, *res judicata* does not arise. The cases relied by the Respondent on the question of *res judicata* relates to very different circumstances, are therefore incompatible with and inapplicable to the present case.

The Reference is competent

[4] I now direct myself on the other issue raised; whether the Reference is competent having been lodged out of time and without reasons having been supplied by the taxing officer to the Applicant. Again let me correct the Respondent's submissions at paragraph 3 of page 4 of his submissions when he stated that: "*From the date the taxation ruling was made on 9/8/2011 to 16/8/2011 when the purported objection was filed, its (sic) been 12 months*". That statement is totally indefensible and not correct. The period between the two dates is at most 8 days.

[5] I have found that a proper request for reasons was made by the Applicant. The objection was to the entire taxation but more specifically to *travelling expenses and other subsistence expenses*. As a matter of law, the taxing officer should have provided reasons for the decision on the items objected to particularly on "*travelling expenses and other subsistence expenses*" within the prescribed time. The ruling delivered by Mr. Nyarima, Chief Magistrate, on 19/6/2012 only gave directions and was a confirmation of total inability, thus failure on the part of the taxing officer to record and provide reasons on the taxation had on 9/6/2011 when he rendered himself that:

"Taxation of the defendant's bill of costs was done by U.P. Kidullah (learned Chief Magistrate) who has since retired from judicial service. It is that officer only that could have stated the reasons for her decision. Rule 11 (2) of the Advocates Remuneration Order cannot in the present circumstances be complied with by myself. The objector may however use the ruling on taxation to seek redress at the High Court."

[6] Following that ruling the Applicant, on 25/6/2012, filed a Chamber Summons dated 27th June, 2012 under Rule 11 (2) of the Advocates Remuneration Order which constitutes the Reference under the applicable law. In all the applications made by the Applicant to the Chief Magistrate's court the issue of failure by the taxing officer to record and provide reasons for the taxation featured prominently. It is not therefore fair to cast the Applicant as an indolent litigant. Accordingly, the time started to run on 19/6/2012 when, the taxing officer totally failed to record any reasons and to forward them to the objector. The Court of Appeal in **KIPKORIR, TITOO & KIARA ADVOCATES & DPF BOARD [2005] E KLR** pronounced failure to record and forward reasons to the objector as required by the law:-

"...would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference."

[7] I therefore find that the Reference herein is competent. A request for reasons to be recorded and be supplied to the objector was made on 16/8/2011 which was within 14 days are required by the law; and the Reference was filed within 14 days upon communication by the court on 19/6/2012 of the total failure of the taxing officer to give reasons for the taxation.

Error in principle

[8] I have found that the Reference was competent and was filed within time. I now proceed to examine whether the taxing officer in taxing the costs violated any legal principles that guide the exercise of discretion. Ordinarily, quantum of costs is regarded as purely a matter within the discretion of the taxing master, and it will not be interfered with by the judge on a Reference unless the taxing officer has fallen into an error in principle, and an example of such error in principle would be found *where the costs*

allowed are manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles or did not take into account relevant material for taxation of the items objected to. For further illumination on this see **ARTHUR V. NYERI ELECTRICITY UNDERTAKING [1964] EA 497**, **DEVSHI DHANJI V. KANJI NARAN PATEL NO.20 [1975] KLR 243** and **KIPKORIR, TITOO & KIARA ADV. V. DPF BOARD [2005] E KLR**.

[9] In the present case, the taxing officer taxed of a sum of Ksh.88,000/= on items 27 – 34 and a sum of Ksh.96,000/= on items 35 – 46 of the bill of costs. Those items related to “*Expenses on travelling, accommodation & substance food*.” I think the word *substance* refers to subsistence. Such expenses, in law, require strict proof by way of proper documentation and receipts in accordance with the Advocates Remuneration Order, Stamp Duty Act and the Evidence Act. I have perused the file and come to the conclusion that the taxing officer did not consider any or relevant materials and factors, or failed to base the taxation on the required documentary evidence for such claims when made in a bill of costs as provided for under the Advocates Remuneration Order.

[10] Consequently, as the taxing officer did not base its decision on relevant materials as required by law, and looking at the nature of the expenses under taxation, and the law applicable, there is an inescapable inference that the decision of the taxing officer was clearly wrong. This kind of error entitles a judge to interfere with the discretion of a taxing officer as it was not exercised judiciously.

[11] For those reasons, the taxation done on 9/8/2011 is hereby set aside. I direct that the Respondent's bill of costs dated 28th February 2011 to be taxed by the Chief Magistrate in accordance with the law. It is so ordered.

Dated, signed and delivered in open court this 4th day of February, 2013.

F. GIKONYO
JUDGE

In the presence of:

Wangila for Applicant

Respondent in person present

Alusa: Court assistant

Court: Ruling read in open court in the presence of the parties.

F. GIKONYO
JUDGE