



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. APPLICATION NO. 57 OF 2017

SAMSON W. NDEGWA T/A S.W NDEGWA & COMPANY ADVOCATES.....APPLICANT

VERSUS

MUKURU MUNGE.....RESPONDENT

RULING

The applicant herein was the respondent's advocate in Nairobi ELC No. 126 of 2016, Mukuru Munge v Paul Mutisya Mutuku Kalulu. The two disagreed on the issue of legal fees and the applicant filed an Advocate/Client Bill of Costs dated 6th April, 2017 in these proceedings in respect of the services rendered to the respondent in that suit for taxation. The applicant's bill was drawn at Kshs.96,893.70 inclusive of V.A.T Neither the applicant nor the respondent appeared before the taxing officer on the day that was fixed for the taxation of the said bill. The taxing officer taxed the bill ex parte on 27th July, 2017 at Kshs. 103, 674/- inclusive of V.A.T .

Aggrieved by the decision of the taxing officer, the respondent filed a reference to this court through Chamber Summons dated 11th September, 2017 seeking orders that the decision of the taxing officer with respect to items 1, 2, 4 and 42 of the said bill of costs be set aside and remitted to another taxing officer for re-taxation.

The grounds upon which the reference was premised were as follows:

1. That the learned senior deputy registrar erred in determining the value of the subject matter of the suit.
2. That the learned senior deputy registrar failed to adequately or at all address the source of the value of the subject matter of the suit.
3. That the learned senior deputy registrar erred in determining that the advocate was entitled to getting up fees when the suit remains unheard.
4. That the learned senior deputy registrar erred in duplicating the special fee added to the amount taxed.
5. That in any event, the sums allowed by the learned senior deputy registrar were so manifestly high as to amount to a miscarriage of justice.
6. That the respondent was not given an opportunity to be heard during the taxation which amounted to a miscarriage of justice.

The applicant did not respond to the application. During hearing of the application on 19th November, 2018, the respondent contended that the applicant did not render any services to deserve the award of Kshs. 103, 674/- that was assessed by the taxing officer as due to him. The respondent contended that he was acting in person in Nairobi ELC No. 126 of 2016, Mukuru Munge v Paul Mutisya Mutuku Kalulu.

Determination:

As I have mentioned herein earlier, the respondent's objection to the decision of the taxing officer was limited to items 1, 2, 4 and 42 of the applicant's bill of costs. The respondent also took issue with what he referred to as "special fees added to the amount taxed". Item 1 in the bill of costs concerned instruction fees. On this item, what I need to determine is whether the taxing officer applied the correct principles in determining the value of the subject matter of Nairobi ELC No. 126 of 2016, Mukuru Munge v Paul Mutisya Mutuku Kalulu while taxing the bill of costs dated 6th April, 2017.

The principles which guide the court when considering a taxation reference were set out in First American Bank of Kenya v Shah and others (2002) EA 64 as follows:

“First, I find that on the authorities, this court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify interference that it was based on an error of principle.”

In order for the court to interfere with the exercise of discretion by a taxing officer, it must be satisfied that the taxing officer applied the wrong principles of law or that the fees awarded is manifestly excessive. The respondent contended before this court that he was not represented by the applicant in Nairobi ELC No. 126 of 2016, Mukuru Munge v Paul Mutisya Mutuku Kalulu. The taxing officer perused the court file for the said suit and confirmed that indeed the suit was filed on behalf of respondent by the applicant and that the applicant rendered the services in respect of which he rendered the bill of costs in question save for one attendance. In the circumstances, I am satisfied that there was an advocate/client relationship between the parties. In considering the value of the subject matter of the suit that was the subject of the bill of costs, the taxing officer referred to a ruling that was delivered by the court in Nairobi ELC No. 126 of 2016, Mukuru Munge v Paul Mutisya Mutuku Kalulu on the respondent’s application for injunction where the court indicated that the subject matter of the suit was not ascertainable from the pleadings. Based on that ruling, the taxing officer held that it was not possible to ascertain the value of the subject matter of that suit from the pleadings. The applicant had claimed KShs.50,000/- for instruction fees. The taxing officer taxed off KShs. 5,000/- and assessed instruction fees at KShs 45,000/-. This amount is the minimum instruction fees provided for under Schedule VI Part A (1) (a) of the Advocates (Remuneration) Order where the value of the subject matter is between 0 - 500,000/-. I am of the view that Schedule VI Part A (1) (a) of the Advocates (Remuneration) Order is only applicable to instances where the value of the subject matter can be ascertained from the pleadings, consent or judgment. Since the taxing officer had already made a finding that the value of the subject matter of the suit could not be ascertained from the pleadings, the instruction fees should have been assessed under Schedule VI Part A under the heading of “other matters not provided for”. Under that heading, the minimum instruction fees provided for is KSh. 45,000/-. It follows that either way, the taxing officer was correct in her assessment of instruction fees. Since, the fees that was awarded by the taxing officer for instruction was the minimum allowed under the Advocates (Remuneration) Order, the same cannot be said to be excessive.

Item 2 of the bill of costs whose assessment was also objected to by the respondent related to the fees for filing an injunction application. This item was taxed at KShs 5,000/-. KShs. 5000/- was taxed off by the taxing officer. In my view, the item was taxed in accordance with the scale. I find no merit in the objection relating to the same.

The respondent’s other objection was directed at item 4 of the bill of costs which was drawn at KShs 3,000/- for court attendance on 4th August, 2017. This amount was taxed off by the taxing officer who noted from the record that there was no court appearance on the said date. The objection raised with respect to this item is misconceived. The same applies to the taxation of item 42 in the bill which was taxed as drawn at KShs 135/-. This amount was claimed as court fees incurred for extracting a court order. For the taxing officer to have allowed that amount, she must have confirmed that the fee was paid. The respondent did not place any evidence before this court showing that no such expense was incurred.

As I mentioned earlier, the respondent also took issue with “the special fees added to the amount taxed”. I believe that what the respondent was referring to here was the decision of the taxing officer to enhance the costs that were assessed by ½. What was before the taxing officer was advocate/client bill of costs. Under Schedule VI Part B of the Advocates (Remuneration) Order, the costs assessed under Schedule VI Part A of the Advocates (Remuneration) Order is supposed to be enhanced by ½ in advocate/client bill of costs. The enhancement of the assessed cost by ½ was in order to that extent. The problem is that the applicant did not seek that enhancement in his bill of costs and did not appear before the taxing officer during the taxation to seek the amendment of the bill to include the same. It was not open to the taxing officer in my view to award any costs that were not sought in the bill of costs without an amendment. The taxing officer ended up taxing the applicant’s bill of costs at an amount that was in excess of what the applicant had claimed in his bill of costs.

In conclusion, it is my finding that the taxing officer did not commit any error of principle in his assessment of items 1, 2, 4 and 42 of the applicant’s bill of costs. In the circumstances, there is no basis for the court to interfere with her decision on those items. The error that the taxing officer fell into was the enhancement of the taxed costs by ½ without such enhancement being claimed in the bill of costs. This error can be corrected by this court without remitting the bill as it does not require the exercise of discretion by the taxing officer.

The upshot of the foregoing is that the respondent’s application dated 11th September, 2017 succeeds in part. The decision of the taxing officer made on 27th July, 2017 is set aside and in place thereof the applicant’s bill of costs dated 6th April, 2017 is taxed at KShs. 71,571/- made up as follows:

Total of Part A	Kshs. 55,350/-
Add 16 V.A.T	<u>Kshs. 8,856/-</u>
	Kshs. 64,206/-
Add disbursements	<u>Kshs. 7,365/-</u>
Total	<u>Kshs. 71,571/-</u>

Since the reference has succeeded only in part, each party shall bear its own costs.

Delivered and Dated at Nairobi this 28th day of February 2019

S. OKONG’O

JUDGE

Ruling read in open court in the presence of:

N/A for the Applicant

Respondent present in person

Catherine -Court Assistant