



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

MISC. CIVIL APPLICATION NO. 2 'B' OF 2018

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE & CLIENT

AND

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER, 2014

BETWEEN

MANYONGE WANYAMA & ASSOCIATES.....APPLICANT

AND

THE COUNTY GOVERNMENT OF KIRINYAGA.....RESPONDENT

RULING

1. By a notice of motion dated 2nd July 2019 brought under the provisions of **sections 80, 63(e), 1A, 1B & 3A of the Civil Procedure Act (Cap. 21); Order 45 Rule 1 and Order 51 of the Civil Procedure Rules 2010; Article 159 of the Constitution of Kenya 2010 and all other enabling provisions of the law**, the Respondent/client sought the following orders:

a) *Spent.*

b) *That this honourable court be pleased to review, vary and or set aside its own ruling made on 20th June 2019 setting aside the Certificate of Costs dated 28th January 2019.*

c) *That the application by the advocates/Applicant dated 30th January 2019 be heard and determined afresh.*

d) *That costs of this application be provided for.*

2. The said application was based upon the several grounds set out on the face of the motion. The gist of the application was that the Respondent's replying affidavit and written submissions were not considered by the court in its ruling dated 20th June 2019 on the Applicant's reference under **paragraph 11 of the Advocates Remuneration Order**.

3. The court had indicated in its said ruling that the Respondent's replying affidavit and submissions were not on record whereas they had in fact been filed within the stipulated timeline. However, at the time of delivery of the ruling, the Respondent's replying affidavit and submissions were in deed found in the court file. The Respondent, therefore, contended that it was not accorded a fair hearing in the reference.

4. The Applicant filed a replying affidavit sworn on 11th July 2019 in response to the said application. The Applicant conceded that indeed there was an error on the face of the record because the Respondent had filed and served its replying affidavit and written submissions within time. It was contended, however, that a consideration of the Respondent's response and submissions would not affect or alter the decision rendered by the court on 20th June 2019. It was contended that the court was correct in arriving at the ruling of 20th June 2019 since it considered the correct principles in reaching the decision.

5. The court has considered the Respondent's replying affidavit to the Applicant's reference. In its replying affidavit sworn by Carolyne Kinyua, the Respondent supported the taxation by the taxing officer in every respect. It was contended that the taxing officer was right in

holding that there was no novelty, difficulty or complexity involved in the petition; that the value of the subject matter was inapplicable since it could not be ascertained from the pleadings or judgement; that value added tax (VAT) was not chargeable only upon professional services rendered and not on disbursements; and that the taxing officer had applied the correct schedule of the **Advocates Remuneration Order**.

6. The court has perused its ruling of 20th June 2019 on the said issues. It is apparent that the court found that the taxing officer was right in all those aspects. The court agreed that there was no complexity or novelty involved; that the value of Kshs.8.1 billion was not applicable; that VAT was not applicable to disbursements; and that the taxing officer had applied the correct scale during taxation. The court, however, found that the taxing officer had erred in principle in the assessment of instruction fee by failing to specify the minimum scale fee before either reducing or increasing it. The court also found that the taxing officer had failed to take into consideration some factors such as the nature and importance of the subject matter, the time and responsibility involved and the volume of documents involved in the petition.

7. The Respondent also supported the decision of the taxing officer in the taxation of mentions at Kshs.1,100/- and half day court attendances at Ksh.5,000/- per attendance. The Respondent also supported the decision of the taxing officer to tax service of court process at Kshs.30,000/- A perusal of the ruling dated 20th June 2019 reveals that the court also agreed with the decision of the taxing officer on those items.

8. The court has considered the Respondent's submissions on the taxation of item No. 3 i.e. drawing of the petition. The Appellant supported the decision of the taxing officer even though the ruling of the officer does not indicate whether or not the item was taxed at all. The court shall maintain its decision in paragraph 18 of its earlier ruling that this item be taxed afresh per scale.

9. The Respondent also supported the taxation of item Nos. 5 - 18 whereas there was no material on record to demonstrate how those items were taxed. The court maintains its decision in paragraph 22 of its earlier ruling that these items be taxed afresh per scale.

10. The last issue raised by the Respondent was that the Applicant had already been paid a fee deposit of Kshs.3,200,000/- hence not entitled to any other fee. In fact, it was submitted that the said amount far exceeded what the Applicant was legally entitled to under the **Advocates Remuneration Order**. The Applicant denied having received any such payment on account of the brief in question. The court is of the opinion that payment of a fee deposit does not necessarily preclude an advocate from filing an Advocate-client bill of costs for taxation. How else will the Advocate know whether he has been overpaid or underpaid? And how will the client know whether it has overpaid or underpaid the Advocate in the absence of taxation? The court is of the opinion that a taxing officer's primary duty is to tax an itemized bill of costs in accordance with the applicable scale of the Remuneration Order. Any deposit paid by a client can always be taken into account during the process of recovery of the balance, if any, of fees due. Since there was no cross-reference by the Respondent on this issue, the court shall say no more on it.

11. As indicated in the earlier ruling, the court had considered the principles to be taken into account by a court in dealing with a reference under **paragraph 11** of the **Advocates Remuneration Order**. In particular, the court bore in mind the circumstances under which a superior court may interfere with the exercise of discretion by a taxing officer. The applicable principles are expressed in more or less similar manner in the various decision cited by both the Applicant and the Respondent. A superior court should rarely interfere with the decision of a taxing officer unless there is clear demonstration that the taxing officer committed an error of principle or the amount awarded is so manifestly high or low as to be a wholly erroneous estimate of costs.

12. The court has fully considered the Respondent's replying affidavit and written submissions in light of the applicable principles for consideration of a reference. The court is still of the opinion that the two errors of principle identified have not been discounted by the Respondent. The Respondent's response and submissions have not cured the two errors of principle identified.

13. The upshot of the foregoing is that even though the ruling of 20th June 2019 contained an error apparent on the face of the record, a consideration of the Respondent's response and submissions do not warrant an alteration of the outcome of the reference. The two errors of principle are still intact hence the Applicant's amended bill of costs ought to be submitted for a fresh taxation before another taxing officer. Consequently, the Respondent's notice of motion dated 2nd July 2019 is hereby disallowed with no order as to costs.

14. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **28TH DAY OF NOVEMBER 2019**.

In the presence of Ms. Nzekele holding brief for Mr. Wanyama for the Applicant and Mr. Were holding brief for Ms. Beacco for the Respondent.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

28.11.19