



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISCELLANEOUS APPL. NO. 31 OF 2017

IN THE MATTER OF THE ADVOCATES ACT CAP 16 AND

THE ADVOCATES (REMUNERATION) ORDER, 2009

AND

IN THE MATTER OF THE ADVOCATES (REMUNERATION) (AMENDMENT) ORDER, 2014

AND

IN THE MATTER OF THE ADVOCATE-CLIENT BILL OF COSTS

BETWEEN

MUMIAS SUGAR COMPANY LIMITED.....APPLICANT

AND

PROFESSOR TOM OJIENDA & ASSOCIATES.....RESPONDENT

[Being a Reference filed pursuant to the leave of court granted on 20th March, 2018 against

Hon. P.W. Mbulikah's (the taxing officer's) Ruling in Misc Application No. 31 of 2017

as consolidated with Misc. Application No. 29 of 2017]

RULING

The reference before me arises from the decision of the taxing officer who had taxed an Advocate/Client Bill of Costs that was raised in respect of work which the advocate had done in a case which was before the Sugar Arbitration Tribunal.

1. By the time when the advocate was having his Bill taxed, he was still on record as the advocate for **Mumias Sugar Company Limited**, (“the Client”).

2. The advocate had written to the Client, asking them to collect their files from the advocate’s offices.

3. In the said letters, the advocate indicated that he was no longer acting for the client.
4. Once an advocate comes on the record as acting for a client, he would continue to be deemed as the advocate for the said client until and unless he was either replaced by another advocate or by the client; or if the advocate obtained the leave of the Court to cease acting for the said client.
5. In his case, the advocate, (**PROFESSOR TOM OJIENDA & ASSOCIATES**) has explained that the relationship between him and the client had become strained. It was for that reason that the advocate had come to the conclusion that he was no longer able to continue acting for the said client.
6. Of course, as the advocate has said, he cannot be compelled by the client or by any other person, to continue representing the client when the advocate no longer had any interest or will to do so.
7. But the writing of letters to the client cannot get the advocate off the record.
8. The party against whom the client has a case would have been made aware that the advocate was on record. Therefore, that other party would be entitled to continue treating the advocate as the recognized agent for the client, until the advocate had taken appropriate steps.
9. So, the issue of an advocate ceasing to act for a client whom he was representing in a case, is not a private matter between him and the client.
10. The court or the tribunal before which the case was, as well as the other parties to the case must become aware of the advocate's decision to cease acting. Indeed, the court may well have to give authority for the advocate to cease acting.
11. Before an advocate has got off the record in accordance with the applicable rules, he would, therefore, be deemed to continue acting, even where he had fallen out with his client.
12. And when an advocate was already taking such action as having his Bill of Costs taxed against his own client, that is a clear sign that the two were no longer in good terms.
13. It is untidy when an advocate remains on record, and was already taking action against his own client.
14. It is advisable that the Advocate/Client relationship should first be brought to a formal termination, before the advocate pursues his client for unpaid fees.
15. But there is no legal bar to an advocate having his Bill taxed before he formally ceases to be on the record for the client.
16. I therefore find that the Bill of Costs was not brought before the taxing officer when it was premature.
17. As regards the status of the Sugar Arbitration Tribunal, I hold that the provisions of **Section 8** of the Third Schedule to the **Sugar Act** does not elevate the Tribunal to the status of the High Court.
18. The said provision gives to the Tribunal very specific and limited powers, akin to those that the High Court exercises when;

(a) administering oaths to the parties and witnesses

during proceedings;

(b) summoning witnesses and requiring the production

of documents;

(c) making orders for the payment of costs.

19. Pursuant to **Article 169 (1) (d)** of the **Constitution of the Republic of Kenya**, Subordinate Courts include tribunals that may be established by an **Act of Parliament**. The Sugar Arbitration Tribunal is one such tribunal.

20. And just because there is a requirement that the chairman of the tribunal should have qualifications which would entitle him to be appointed as a judge of the High Court, does not elevate the tribunal's status to that equivalent to the High Court.

21. In the event, when the taxing officer applied Schedule 6 of the Advocates Remuneration Order, that was an error in principle, as that schedule is only applicable when taxing Bills arising from matters before the High Court.

22. That is sufficient to conclude this application, because it will be necessary to have the Bill of Costs dealt with afresh, using the appropriate schedule under the Advocates Remuneration Order.

Value of Subject Matter

The learned taxing officer noted that no monetary value of the subject matter was discernable from the pleadings.

23. As the advocate submitted before, the taxing officer;

“... assessed the instruction fees based on the nature, the interest and the importance of this cause to the parties and the general conduct of the proceedings.....”

24. If the taxing officer had been guided by those matters specified by the advocate, she would have been deemed to have applied her discretion in a judicious manner.

25. But I note that the taxing officer actually stated the sum of Kshs 1,012,070,451/= as the value of the subject matter.

26. I delved into the submissions which had been made before the taxing officer, and have found that the advocate had arrived at that figure as follows:-

“It is our submission that this was a matter involving the dealing which (Sic!) the relationship between Mumias Sugar Company and farmers and the core business of the Company which involved supply of sugar cane, the raw material whose subject matter runs into Kshs 1,012,070,451 inclusive of interest.”

27. In effect, the advocate suggested that there was a monetary value of the subject matter, and the taxing officer appears to have accepted the figure suggested by the advocate.

28. I find that when the taxing officer had reached the conclusion that the value of the subject matter was not discernable from the pleadings, it was an error of principle to then assign a monetary value to the same subject matter.

29. The learned taxing officer awarded to the advocate a sum in respect of Instruction Fees on the Counter-claim.

30. As the advocate's Bill of Costs did not include such a claim, it ought not to have been awarded.

31. By awarding something which had not been claimed, the taxing officer made an error in principle.

32. The taxing officer had awarded the sum of Kshs 27,365,802/48 at the taxed costs.

33. However, the client submitted that the taxed costs should have been in the sum of Kshs 27,741/48.
34. The advocate expressed the view that the sum suggested by the client was so manifestly low that it would amount to an injustice for the firm of Senior Counsel, as was not a measure of favourable compensation for the work done.
35. In my understanding, the taxing officer is not required to take into account the issue of an advocate's seniority when taxing the Advocate/Client Bill of Costs.
36. A senior advocate or Senior Counsel ensures that his or her position is recognized through a Fee Agreement which could either set an agreed fee or could set an agreed method of calculating the fee. Where there is no Fee Agreement, the taxing officer will tax the Bill in accordance with the Remuneration Order; and the said Order does not stipulate that the seniority or otherwise of counsel was a factor to be taken into account.
37. Finally, I hold that the learned taxing officer erred in principle, when she added 50% to the sum she had calculated. This is an Advocate/Client Bill of Costs. The taxing officer should have decided on the quantum which was being awarded through taxation, and should have stated that figure.
38. It is only when Party & Party Costs have been taxed that the taxing officer may determine the related Advocate/Client costs by adding 50% to the Party & Party Costs.
39. For all the reasons given above, I find that the decision of the learned taxing officer cannot be upheld. I therefore order that the said decision be set aside forthwith.
40. I further order that the Advocate/Client Bill of Costs shall now be handled by a taxing officer other than Hon. P.W. Mbulikah.
41. The costs of the reference are awarded to the client.
42. These orders will apply in equal measure to **Miscellaneous Application No. 29 of 2017**, as that matter was consolidated with **Miscellaneous Application No. 31 of 2017**.

DATED, SIGNED and DELIVERED at KISUMU

This 6th day of **February** 2019

FRED A. OCHIENG

JUDGE



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