



ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CAUSE NO. E034 OF 2021

IN THE MATTER OF THE ADVOCATES ACT CAP. 16 OF THE LAWS OF KENYA

AND

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

TAXATION OF ADVOCATE AND CLIENT BILL OF COSTS

LUBULELLAH & ASSOCIATES.....APPLICANTS

=VERSUS=

ST. BAKHITA CARE & KINDERGATEN.....1ST RESPONDENT

FELISTA MUTHOKI.....2ND RESPONDENT

IN THE MATTER OF ADVOCATE-CLIENT COSTS FOR SERVICES RENDERED

IN NAIROBI ENVIRONMENT & LAND CASE NO. 318 OF 2015

BETWEEN

DELTA PLAINS MANAGEMENT CO. LTD.....PLAINTIFF

AND

ST. BAKHITA CARE & KINDERGATEN.....1ST DEFENDANT

FELISTA MUTHOKI.....2ND DEFENDANT

RULING

(In respect of the client/Applicant's Chamber Summons Application dated 22nd January 2022 seeking to set aside the Ruling of the Taxing Officer)

Background.

1. In the Chamber Summons application dated 22nd January 2022, the Clients/Applicants pray for the following reliefs: -

i. Spent

ii. An order setting aside the decision of the taxing officer with respect to the Advocate's Bill of costs dated 23rd February 2021.

iii. An order remitting the Respondent's Bill of costs dated 23rd February 2021 for taxation before another taxing officer other than Hon. Isabella Barasa (Deputy Registrar).

iv. Costs.

2. The clients' Application is based on the grounds on the face of the Application and the supporting affidavit sworn by Felista Muthoki Mutinda.

3. In a nutshell, the clients were dissatisfied with the ruling of the taxing officer which taxed the Advocate-client bill of costs dated 23rd February 2021 at **Kshs. 849,123.10**. The ruling was delivered on 19th November 2021. The clients' main contention is on the taxation of the instruction fees at **Kshs. 650,000/=**. The contention is that the taxing officer erred by calculating the instruction fees based on the value of the suit property.

4. The Clients/Applicants' position is that since the case Nairobi ELC 318 of 2015 revolved around the question of change of user and the client had merely been seeking injunctive orders, the taxing officer should have applied the scale with the heading "*other matters*" in the Advocates (Remuneration) (Amendment) order, 2014 in the circumstances. The Clients urge the court to make a finding that failure by the taxing officer to use the correct scale constitutes errors of law.

5. The clients aver that, in the suit where they had been represented by the Advocate-Respondent (Nairobi ELC 318 of 2015), the value of the suit property was not in issue, neither its ownership. They argue that taxing officer had also erred by finding that the value of the suit property had appreciated since 2014. Further that the appreciation of the value of the property was an irrelevant consideration.

6. The Advocate – Respondent opposed the clients' Application by way of grounds of opposition dated 14th February 2022.

7. In his grounds of opposition, the Advocate claims that the clients' Chamber Summons Application and the notice of objection to taxation are fatally defective and incompetent. He states that the same were filed outside the timelines permitted under the law and without leave of the court.

8. The Advocate – Respondent further contends that no notice of objection to taxation was filed and served within 14 days of the delivery of the decision of the taxing officer contrary to the mandatory provisions of paragraph 11(1) of the Advocates Remuneration Order.

9. The Advocates further asserts that though the Clients' Chamber Summons Application is dated 22nd January 2022, it was actually filed on 28th January 2022 outside the mandatory 14 days' timeline set under paragraph 11(1) of the Advocates Remuneration Order and 71 days after the ruling of the taxing officer.

Court's Directions.

10. The court directed that the Chamber Summons Application dated 22nd January 2022 be canvassed by way of written submissions. Both parties complied and filed their respective submissions. The court has perused the submissions of both parties and the authorities cited.

Issues for Determination.

11. Having perused the Chamber Summons Application dated 22nd January 2022 together with the supporting affidavit, the grounds of opposition filed by the Advocate – Respondent and the written submissions filed by both parties, I am of the view that the issues for determination in this matter are;-

a) Whether the chamber summons application is fatally defective and incompetent.

b) Whether the reference filed by the Clients - Applicants has merits to justify the setting aside of the ruling of the taxing officer dated 19th November 2021.

12. Although the parties in this matter have submitted on the issue of stay of the ruling of the taxing officer, that is no longer an issue. It is a prayer that is already spent. I believe the clients/Applicants were seeking to stay the ruling pending the hearing and determination of the Application.

Analysis and Determination

a) Whether the chamber summons dated 22nd January 2022 is fatally defective and incompetent.

13. I wish to note that the Ruling of the taxing officer that taxed the Advocates bill of costs dated 23rd February 2021 was delivered on **19th November 2021**. Both sides were represented during the delivery of the Ruling of the taxing officer.

14. I have made that note because the Clients/Applicants in this matter have in their Application consistently referred to a Ruling delivered on ‘19th October 2021’. The supporting affidavit sworn by Felista Muthoni Mutinda also makes reference to the date of 19th October 2021 but attaches the ruling of 19th November 2021. The Applicants’ submissions also refer to the date of 19th October 2021. The Applicants notice of objection to taxation dated 24th November 2021 as well refers to the Ruling of the taxing officer delivered on 19th October 2021.

15. Be that as it may, the Clients/Applicants in the affidavit in support of their Application have attached the ruling of 19th November 2021. I have no doubt that it is the ruling they seek to have set aside in accordance with their application.

16. After the Ruling was delivered, the Clients/Applicants through their Advocates filed a notice of objection to taxation dated 24th November 2021. The notice was filed in court on 25th November 2021.

17. Rule 11(1) of the Advocates Remuneration Order requires any party who may wish to object to the decision of the taxing officer to give a notice in writing to the taxing officer *of the items of taxation to which he objects* within 14 days after the decision.

18. Although the Rule 11(1) of the Advocates Remuneration Order does not prescribe the form of notice, it is clear that the notice should specify the items objected to.

19. The notice of objection dated 24th November 2021 filed by the clients/applicants did not specify the items objected to. The notice merely stated that *“the Respondent/Client objects to the decision and or ruling and or finding of the taxing officer delivered on 19th October 2021 with respect to the Advocate/Client bill of costs dated 23rd February 2021”*.

20. The Notice, as I had been noted earlier on, refers to a decision of 19th October 2021 whereas the decision of the taxing officer in this matter was actually delivered on 19th November 2021.

21. The notice of objection was therefore incompetent. It did not comply with the provisions of Rule 11(1) of the Advocates Remuneration Order.

22. Rule 11(2) of the Advocates Remuneration Order requires the taxing officer upon receipt of a notice of objection under sub-rule (1) to record and forward to the objector the reasons for his decision in respect of those items (objected to). The objector then, within 14 days of receipt of the reasons may file a reference by way of a Chamber Summons.

23. The Clients/Applicants aver that they did not receive the reasons from the Taxing officer but nevertheless proceeded to file this Reference on 22nd January 2022.

24. The Advocate/Respondent submits that the Reference was filed outside the timelines provided under Rule 11(2) of the Advocates Remuneration Order. Therefore, the Clients/Applicants ought to have moved the court first under sub-rule (4) for enlargement of the time fixed by sub-paragraphs (1) and (2) of Rule 11.

25. The Respondent in support of his submissions has cited two cases:-

i. Ahmednasir Adbikadir & Co. Advocates Vs National Bank of Kenya Ltd, where Justice Ochieng J held that where the reasons of the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wordings of sub-rule 2 of the Rule 11 of the Advocates Remuneration Order.

ii. Wambugu, Matende & Advocates Vs Kajulu Holdings Ltd & 3 Others (2014) eKLR, where J.B Havelock J (as he then was) expressed a similar opinion. He cited with approval the decision of Justice Odunga in Evans Thiga Gaturu Vs Kenya Commercial Bank Ltd, to the effect that where the reasons are contained in the decision (of the taxing officer), filing the reference more than 14 days after delivery of the same would render the reference incompetent.

26. Justice Odunga went further to state that, where the objector at a later date decided to prefer the reference notwithstanding the failure of the taxing officer (to supply reasons) after the lapse of the 14 days' period, he would be bound to apply for extension of time under sub rule (4) of Rule 11.

27. I agree with the reasoning of Justice Ochieng and Justice Odunga. The Clients/Applicants in this matter filed their reference on 22nd January 2022 without seeking enlargement of time under Rule 11(4) of the Advocates Remuneration Order. I find that the reference as filed is incompetent. The court had identified two issues for determination. I will nevertheless proceed to the 2nd issue.

b. Whether the reference filed by the Clients – Applicants has merits to justify the setting aside decision of the taxing officer.

28. Both parties have submitted on the principles that should guide the court in arriving a decision whether or not to set aside the ruling of the taxing officer dated 19th November 2021. The Applicants majorly complain against the taxation of the instruction fees at Kshs. 650,000/=. They have not referred to any other item in either their Application or submissions.

29. The Applicants aver that the taxing officer erred by calculating the instruction fees on the basis of the **value of the subject matter**. The Applicants argue that this was wrong since what they had been seeking were injunctive orders. The value of the subject matter was not in issue neither its ownership.

30. In the case of Nyangito and Co. Advocates Vs Doinyo Lessos Creamaries Ltd (2014) eKLR, Justice Odunga restated the principles to be considered in making a determination on application to set aside the decision of the taxing officer in the following terms:-

a. The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle.

b. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration order itself, some of the relevant factors to be taken into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interests of the parties, the general conduct of the proceedings and any direction by the trial Judge.

c. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high.

d. It is within the discretion of the taxing officer to increase or reduce the instruction fees and amount of the increase or reduction is discretionary.

e. The taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it.

f. The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees.

31. The Court of Appeal in **Kamunyi & Co. Advocates vs Development Bank of Kenya Ltd (2015) eKLR** affirmed the position that only an “*error of principle*” can justify the court’s interference with the decision of the taxing officer.

32. The Court of Appeal elaborated on the meaning of an error of principle as follows:-

“Failure to ascertain the correct subject matter in a suit is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instruction fees is arrived at on the wrong principle, it will be set aside.”

33. In the instant case, the taxing officer found that the value of the subject matter could be established from the records of the court (in ELC 318 of 2015, Delta Plains Management Co. Ltd St Bakhita Day Care and Kindergarten and Felista Muthoki). The taxing officer found that the subject property had been purchased at Kshs.34,000,000/- in 2014. The figure was in the pleadings.

34. The taxing officer considered the figure of Kshs.34,000,000/- and the fact that it had definitely appreciated in value, alongside other considerations including the fact that the suit was withdrawn before proceeding for trial. She assessed the instruction fees at Kshs.650,000/=. The Advocate-Respondent had in his bill of costs sought a sum of Kshs.1,623,200/= as instruction fees.

35. The question before me therefore is whether the taxing officer properly exercised her discretion and adhered to the well settled principles of taxation.

36. In the case of **Joreth Ltd Vs Kigano & Associates (2002) e KLR**, the Court of Appeal expressed the principles as follows: -

“We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement, but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just taking into account among other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

37. My understanding is that the taxing officer is bound to ascertain the value of the subject matter being the first basis for assessing instruction fees. For that purpose, the taxing officer is required to consider either the pleadings, the judgement or settlement (if any) in order to determine the value of the subject matter.

38. In fact, in the case of **Peter Muthoka & Another Vs Ochieng and 3 Others (2019) eKLR**, the Court of Appeal expounded on the decision in Joreth Ltd case (supra) and stated that it is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgement or settlement (if any) that the taxing officer may use his discretion to assess the instruction fees which he considers just bearing in mind the various elements.

39. The Court was categorical that in assessing the instructions fees the mandatory and statutory starting point is to ascertain the value of the subject matter from the pleadings, the judgement or settlement (as the case may be). It is only where the value is not ascertainable that the taxing officer may exercise his discretion to assess instruction fees in accordance with what he considers just.

40. That said, I have considered the ruling by the taxing officer in this matter dated 19th November 2021. I am convinced that the taxing officer followed the laid down criteria for assessing the instruction fees. She was able to ascertain the value of the subject matter from the pleadings. She went ahead to assess the instruction fees based on that ascertained value of the subject matter. The Clients/Applicants assertion that the taxing officer should have assessed the instruction fees under the paragraph titled, “others

matters' in schedule (vi) of the Advocates Remuneration Order is therefore erroneous. That in my view would only have been applicable if the value of the subject matter was not ascertainable.

41. For the reasons explained above I would dismiss the Clients/Applicants' Chamber Summons even if I were to find that it was not incompetent; which I have already found.

42. Accordingly, the Clients/Applicants Chamber Summons Application dated 22nd January 2022 is struck out with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH 2022.

M.D. MWANGI

JUDGE

IN THE VIRTUAL PRESENCE OF:-

MR. EDGAR WENDOH H/B FOR LUBULLELAH FOR ADVOCATE/RESPONDENT

N/A FOR THE CLIENT/RESPONDENT

COURT ASSISTANT: HILDA

M.D. MWANGI

JUDGE



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