REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

MISC APPLICATION NO. 277 OF 2019

IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF ADVOCATES-CLIENT BILL OF COSTS

BETWEEN

SOPHIE CHIRCHIR T/A CHERONO CHIRCHIR & CO ADVOCATES........APPLICANT

-VS-

AFRICA MERCHANT ASSURANCE CO. LTD...RESPONDENT

RULING

1. By a Chamber Summons dated 22nd December, 2020 expressed to be brought under paragraph 11(2) the Advocates (Remuneration) (sic), under Cap 16 of the Laws of Kenya and section 3A of the ***Civil Procedure Act*** the Applicant herein seeks the following orders:

a) THAT this honourable court be pleased to set aside the ruling of the Taxing Officer in so far as it relates to the taxation of the Bill under Schedule 6 instead of schedule 5

b) THAT this honourable Court be pleased to adjust the figures, re-assess the fees due in respect to the items 2-65, 67, Registry attendances, travelling expenses and all court attendances fees.

c) THAT this honourable Court be pleased to make such further orders in the interests of justice as it may deem just and fit.

d) THAT the costs of this reference be awarded to the Advocates.

2. In support of the reference, the Applicant swore an affidavit on 22nd December, 2020 in which she averred that the Bill, which forms the subject matter of this Reference was an Advocate-client Bill of costs arising from services rendered in Machakos CMCC NO. 1102 of 2013. According to the Applicant, she elected to file the Bill under Schedule 5 of the ***Advocates Remuneration Order***;

duly informed the client in compliance with paragraph 22 of the Order and proceeded to draw the Bill under Schedule 5.

3. It was disclosed that the letter of Election was duly filed in court as document No.4 in the list of document dated 10th February 2020 and filed in court on 12th February 2020. I humbly refer the court to its own record in this regard and it was also indicated on the face of the Bill that it was drawn under Schedule 5.

4. According to the Applicant, despite all the above particulars, the Taxing Officer proceeded to tax the Bill under Schedule 7. It was contended that the decision to do so was erroneous in that once an Advocate has elected Schedule 5 and given Notice to client, a Taxing officer can only tax the Bill under the Elected Schedule. It was therefore deposed that the Taxing a Bill drawn under Schedule 5 on the basis of Schedule 7, inevitably resulted in the following errors:

a) Disallowed items 2-65 and 67 yet these items are provided for Under Schedule 5.

b) Taxed off all in entity Registry attendances yet Schedule 5 provides for such costs.

c) Applied wrong figures on court attendances, and failed to take cognizance of the fact that Schedule 5 provides for hourly rates.

d) Increasing the costs by ½ there is no such provision in Schedule 5.

5. The Applicant, in the circumstances prayed for the setting aside of the Registrar's taxation and for this court to tax the Bill under Schedule 5 or give appropriate direction on the re-taxation of the Bill.

6. It was disclosed that though the Advocate filed the Notice of Objection on 7th December 2020, the reasons for the Ruling had not been given by the lapse of 14th day on 21st December 2020.

7. The Reference was not opposed by the Respondent.

8. It was submitted by the Applicant that having made an Election pursuant to paragraph 22(1) of the ***Advocates Remuneration Order***, an Election that was communicated to the client through the letter dated 19th April 2017, which was part of the record, the taxation of the Bill under Schedule 7, was completely erroneous.

9. According to the Applicant, the Taxing master, having proceeded on the wrong premise, therefore ended up with wrong findings in all the items. For instance, his finding in paragraph 3 of her Ruling, is erroneous as Schedule 5 indeed provide for all the said items. Similarly, it was submitted, his finding on travelling costs and court attendances are all provided for under Schedule 5 and therefore the finding set out in paragraph 5 and 6 of his Ruling are erroneous. According to the Applicant, it is for the same reason that he arrived at a wrong conclusion in paragraph 7 of the Ruling.

10. It was further submitted that the Taxing master increased the cost by 50%, which was similarly erroneous as there is no such provision under Schedule 5.

11. According to the Applicant, once an Advocate elects Schedule 5, then the Taxing master does not have the mandate to vary the Schedule elected and is bound to go by the Advocate's Election. This submission was based on the decision in **Muri Mwaniki & Wamiti Advocates –vs- Kenya Orient Insurance Ltd (2021) eKLR** and **Mwangi Kengara & Co. Advocates –Vs- Invesco Insurance Co. Ltd (2018) eKLR**

12. In the Applicant's Submissions, the Taxing master ignored the Applicant's submissions as the Ruling does not indicate what the Taxing master thought about the same in this regard.

13. It was therefore sought that the Taxing master's ruling of 25th November 2020, be set aside, and the Bill be referred back for taxation pursuant to the provisions of Schedule 5 of the ***Advocate's Remuneration order***.

Determinations

14. I have considered the foregoing and this is the view I form of the matter.

15. Paragraph 22(1) of the ***Advocates Remuneration Order*** provides s hereunder:

(1) In all cases in which any other Schedule applies an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under such Schedule, his remuneration shall be according to Schedule V, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.

(2) Subject to paragraph 3, an advocate who makes an election under subparagraph (1) may not by reason of his election charge less than the scale fee under the appropriate Schedule.

16. In **Nyamogo & Nyamogo Advocates vs. Protex (K) EPZ Limited Machakos HCMCA No. 176 of 2007, Lenaola, J** (as he then was) held that:

"Under paragraph 22(1) of the *Advocates Remuneration Order* it is not open to the taxing officer to make an election to apply schedule V of the Order since the right to make an election vests in the advocate…The refusal by the taxing officer to tax the Bill of Costs under schedule V in the light of the election was an error which was so substantial that having acted on the wrong principle, the proceedings thereafter were all conducted wrongly to the prejudice of all parties…The proper course where a taxing officer has erred in principle, is to make a remit to another taxing officer and to order a re-taxation of the bill in terms of the court's ruling. That is the usual and proper course. Where a case is remitted, there is sometimes an advantage in its coming before a different taxing officer, who can bring a fresh mind to it. On the other hand, if the taxing officer from whose taxation appeal was made, is familiar with what is a complex case, no objection being taken against him and especially if there is no other officer of comparable experience, the same taxing officer should re-assess the bill."

17. It follows that once an advocate makes an election as to which schedule of the Advocates Remuneration Order applies to taxation of his costs as against his client, the Taxing Master has no option but to proceed in the manner elected. In his ruling the Learned Taxing Master did not indicate the Schedule under which the costs were being taxed. A consideration of the ruling shows that the Bill was taxed under Schedule VI of the said Order. In her submissions the Applicant expressly stated that her costs were to be taxed under Schedule V of the Order and there was a letter in which the Applicant informed the Respondent that her Costs were to be billed under Schedule V of the ***Advocates Remuneration Order***.

18. The principles guiding taxation of costs have now been settled. These principles are, (1) that 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; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge; (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise 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; (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) 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; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64**.

19. The Court of Appeal of Uganda in **Makula International vs. Cardinal Nsubuga & Another [1982] HCB 11** pronounced itself as follows:

"The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it."

20. In my view the decision of the Taxing Master ought to expressly set out the Schedule under which the costs are being taxed and then the basic fees before considering whether that basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased.

21. In this case the Schedule was not indicated and a consideration of the decision reveals that the Schedule under which the costs were taxed was Schedule VI and not Schedule V which was the Schedule elected by the Applicant. In my view, the application of the wrong Schedule in the taxation of the costs was an error of principle which justifies interference with the discretion of the taxing master.

22. In the premises, I set aside the ruling dated 25th November, 2020 and direct that the Applicant's costs be taxed pursuant to Schedule V of the ***Advocates Remuneration Order***.

23. There will be no order as to costs of the reference.

24. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 25TH APRIL, 2022.

G V ODUNGA

JUDGE

In the presence of:

Ms Chirchir for the Applicant

CA Susan

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