



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Misc Civ Appil 821 of 2005

IN THE MATTER OF: ADVOCATES ACT CAP (LAWS OF KENYA

AND

IN THE MATTER OF: TAXATION OF COSTS BETWEEN ADVOCATES AND CLIENT

BETWEEN

MWAURA & MWAURA WAIHIGA ADVOCATESAPPLICANTS (ADVOCATES)

VERSUS

CO-OPERATIVE BANK OF KENYARESPONDENT (CLIENT)

IN THE MATTER ARISING FROM THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 115 OF 1995

MUKA MUKUU CO-OPERATIVE SOCIETYPLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYADEFENDANT

RULING

On the 24th day of February 2006, R.A. Kithinji, the Deputy Registrar of this court taxed an advocate-client bill in which the firm of Mwaura & Mwaura Waihiga Advocates (Applicant) was awarded a sum of Kshs.77, 276,900/- as against Co-operative Bank of Kenya Ltd. (Respondent). On the 10th day of March 2006 the applicant filed a Chamber summons under paragraph 11 of the Advocates (Remuneration) Order challenging the taxation in all respects. But the bottom line is that the applicant seeks for the amounts awarded to be enhanced. The summons is supported by the affidavit of David Mwaura Waihiga sworn on 9th March 2006.

The Summons was served upon the firm of Ochieng' Onyango Kibet and Ohaga Advocates for the Respondent. The aforesaid firm of advocates filed grounds of opposition as well as a preliminary objection to oppose the summons. The preliminary objection is contained in the notice dated 4th April

2006, the subject matter of this ruling.

The gist of the preliminary objection is that the summons filed pursuant to paragraph 11(2) of the Advocates (Remuneration) Order was filed before the taxing officer gave reasons. It is the submission of Mr. Ohaga advocate for the Respondent that the applicant did not make a request at all. It is further argued by Mr. Ohaga advocate that the purported request for reasons from the Deputy was made out of time. For these reasons the Respondent urged this court to strike out the summons for being incompetent.

On the other hand Mr. Pheroze Nowrojee advocate for the applicant beseeched this court not to strike out the summons stating that it was not necessary for the applicant to request for reasons yet the same were contained in the ruling of the taxing officer of this court. It is the submission of the learned advocate that the taxing officer became functus officio when he gave reasons for the second time after being requested by the applicant hence he had complied with the relevant provisions of the law. It is further the argument of the applicant that the applicant will suffer no prejudice. Finally it is the view of the applicant that the applicant made a request to be supplied with reasons within time but was not received by the court until time lapsed hence it should not be penalized.

The facts in this matter are largely admitted. To begin with it is not denied that the summons was filed before the reasons were given by the taxing officer. It is the submission of the applicant that the taxing officer was requested to give reasons in time but the registry failed to acknowledge receipt of the request on 9th March 2006 until 13th March 2006. I have perused the record to determine this factual point. The record shows that the Chamber Summons plus the supporting affidavit of David Mwaura Waihiga both dated 9th March 2006 were filed in court on 10th March 2006. In the Court file also is a notice by the applicant to the taxing officer issued pursuant to paragraph 11(1) of the Advocates (Remuneration) Order dated 9th March 2006. the date the same was received in court is on 13th March 2006. The same is signed by D.M. Waihiga. It is the argument of Mr. Nowrojee that the notice was presented to court on 10/3/2006 but was not received until 13th March 2006. After a careful consideration of the matter, I am unable to agree with the Applicant's advocate that the notice of objection was lodged in court on 10th March 2006 and acknowledged on 13th March 2006. This cannot make sense because the Chamber Summons and the affidavit in support which were of the same date were received in court on 10th March 2006. There was no reason why the notice of objection directed to the taxing officer was not received. The only inference which I can make is that the notice was a make up by the applicant as an attempt to comply with paragraph 11(1) of the Advocates (Remuneration) Order. I am convinced that the notice was filed in court on 13th March 2006 as opposed to the 10th day of March 2006. Under para 11(1) an aggrieved party is required within 14 days from the date of the decision on taxation to give notice in writing to the taxing officer of the items of taxation to which he objects. The ruling on taxation was given on 24/2/2006. The applicant was required to have filed the notice by 10th March 2006. The notice was therefore presented way out of time on 13th March 2006. The reasons supplied pursuant to such a notice are void.

The remaining issue is what will happen to a Chamber Summons which was filed before valid reasons are given by the taxing officer? My answer to this question is simple and straightforward. One does not need to look at elsewhere to get the answer. Paragraph 11 of the Advocates (Remuneration) order is very clear. An application to challenge a decision on taxation can only be competently before this court after the taxing officer has given his reasons upon request on each item, which is disputed. It is the submission of Mr. Nowrojee that the taxing officer had given his reasons in the decision on taxation. This submission in my mind appears to be sound but that was not contemplated by paragraph 11(1). It was necessary for the taxing officer to restate his reasons on the disputed items. This provision recognizes the fact that not all items on taxation are disputed. The law also recognizes that parties are likely to be late in one way or another in making requests for the reasons from the taxing officer or in filing the reference hence the existence of an avenue to apply for leave do the same out of time. In this matter I am satisfied that the preliminary objection is well founded. Consequently the Chamber summons dated 9th March 2006 is ordered struck out with costs to the respondent.

Dated and delivered at Mombasa this 4th day of October, 2006.

J.K SERGON

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