Kibet v S.N Nyachae & Co (Miscellaneous Civil Application 7 of 2018) [2023] KEHC 20961 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20961 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

MISCELLANEOUS CIVIL APPLICATION 7 OF 2018

JK SERGON, J

JULY 27, 2023

BETWEEN

HILLARY KIBET ..... APPLICANT

AND

S.N NYACHAE & CO ..... RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated March 12, 2018 and amended on August 20, 2018 under Section 1A and 3A of the *Civil Procedure Act*, Order 51 of the *Civil Procedure Rules*, Paragraph 11 of the *Advocates Remuneration Order* and all enabling provisions of the law seeking for following orders:

    1. That the honorable court be pleased to consider and reverse the decision of the Deputy Registrar in his ruling dated February 21, 2018 for the following reasons and grounds.

    i. The Taxing Master/Deputy Registrar erred in taxing the bill when there was a contention on the issue of retainer.

    ii. The Taxing Master/Deputy erred in using the 2014 Advocates Remuneration Order where the services were rendered before the 11th day of April when the Act came into force. Consequently items 1, 2, 3, 4, 5, 7, 10, 11, 12, 13, 15, 16, 19, 20, 23, 24, 27, 29, 30, 33, 35, 36, 37, 38, 42, 43, 46, 49, 50, 51, 52, 55, 56 and 57 were overcharged.

    iii. The Taxing Master erred in law in charging VAT when there was no evidence that the Applicant's Counsel Pays VAT.

    2. That the contested items be taxed using the Appropriate Advocates remuneration order.

3. Costs of the reference be borne by the Advocate/Applicant.

2. The Application is supported by the grounds laid out on its face and the facts stated in the affidavit of Hillary Kibet,who averred that the Deputy Registrar taxed the Advocate-Client bill of costs dated November 7, 2017 using the 2014 advocate remuneration order while the services were rendered in the year 2013.

3. He further averred that since the case was filed in the year 2013 when the 2014 *Advocates Remuneration Order* was not yet in force, the bill of costs should be governed by the 2009 advocates remuneration order alone, without applying the 2014 *advocates remuneration order* retrospectively.

4. It was his averment that as a result, the Applicant had been overcharged on items 1, 2, 3, 4, 5, 7, 10, 11, 12, 13, 15, 16, 19, 20, 23, 24, 27, 29, 30, 33, 35, 36, 37, 38, 42, 43, 46, 49, 50, 51, 52, 55, 56 and 57 and in addition VAT was wrongly included without proof that the Respondent's Advocates pays taxes.

5. He averred that the Taxing Master/Deputy Registrar erred in taxing the bill when there was a contention on the issue of retainer.

6. He prayed that the reference on the aforementioned items be allowed and the said items be taxed using the appropriate Remuneration order and that the cost of the instant application be provided for.

7. In retort, the Respondent through his Replying Affidavit dated May 29, 2018, sworn by Samuel Nyabuto Nyachae, an advocate of the High Court, averred that the instant reference was not only misconceived but also frivolous, filed in bad faith and out of malice to delay and/or prevent him from receiving professional fees for the services he rendered.

8. He further averred that the supporting affidavit by the deponent herein was full of deliberate falsehoods with intent to mislead the court.

9. That Samson Nyagaka of Nyagaka S.M. & Co. Advocates was using the name of D.K. Otwere & Co. Advocates to mislead the court that he was not the one on record for the Applicant herein.

10. He averred that all items were taxed under the appropriate *Advocates Remuneration order* and the same should be upheld.

11. That the reference as drawn and filed was fatally defective and the same should be dismissed with costs.

12. Directions were given that the Application be canvassed by way of written submissions. Accordingly, the Applicant complied and filed his written submissions. The Respondent did not file his written submission.

13. The Applicant in his written submissions dated May 6, 2023 submitted that there was an error of principle of taxation in the ruling by the taxing master, that an error of principle being a point of law, could be raised at any time in the proceedings. That the taxing master used two scheduled in his ruling, that is schedule 5 and 7 of the *Advocate Remuneration Order* and since the taxation of the bill of costs arose from Kericho CMCC no. 54 of 2014, the applicable schedule for purposes of taxation ought to have been schedule 7 which provides for costs in the subordinate court as provided for under Rule 51.

14. He further submitted that since the Applicant did not state which schedule he elected to use hence the default schedule applicable was therefore schedule 7 and that the said schedule did not provide for items such as drawing and making copies and therefore items 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 15, 16, 17, 19, 20, 21, 23, 24, 27, 30, 33, 35, 36, 37, 38, 42, 43, 46, 47, 49, 50, 52, 53, 54 and 55 ought to have been taxed off.

15. That the learned Magistrate allowed the said items under schedule 5 of the *Advocate Remuneration Order*, that the application of Schedule 5 was not open for election by the Taxing master but for the advocate. That according to Rule 22 of the *Advocates Remuneration Order*, it was the advocate who elects to use schedule 5 and the said advocate must notify the client of the same. He relied on the case of *Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited* [2021] eKLR where the court held as follows:

> "It should be noted that Schedule 5 of the Advocates Remuneration Order Applies where a party has made an election under Rule 22(1) of the Advocates Remuneration Order. The applicant duly made this election as can be seen from the bill of costs dated 6/3/17.
>
> The taxation therefore was to be undertaken under the said schedule. The items set out above, were in respect of attendances. These attendances were for meetings, service of pleadings, deliveries amongst others. The taxing officer held in the impugned ruling that the attendances envisaged under paragraph 3 of Schedule 5 were for court attendances and not otherwise. The applicant contests this finding."

16. It was his submission that in the instant matter, the Applicant's advocate did not elect to use schedule 5 and never informed the respondent of the same. It was therefore an error of taxation principle for the magistrate to use schedule 5 for want of compliance with Rule 22 of the *Advocate Remuneration Order* and the fact that one cannot use two schedules at the same time. Consequently the items above should be set aside and the matter returned to the taxing master for a reassessment of costs under schedule 7 of the *Advocates Remuneration Order*.

17. As to whether the *Advocate Remuneration Order 2014* applies to matters filed before it coming to force, the applicant submitted that the suit in respect to which the advocate-client bill of costs arose was filed before April 11, 2014. That the taxing master relied on the *Advocates Remuneration Order 2014* yet the matter ought to have been taxed under the Advocates Remuneration Order 2009 and urged the court to so find and return the matter to the taxing master for taxation under the Advocates Remuneration Order 2009.

18. Concerning the issue as to whether VAT is applicable in advocate-clients bill of costs, the applicant submitted that the taxing master allowed VAT at 16% yet the applicant did not provide prove that he pays taxes. That the Advocates Remuneration Order did not contemplate that the bill of costs includes a tax and that if the VAT is to be factored in the bill of costs, it should be limited to instruction fees as that is the income an advocate makes. That the taxing master included expenses in addition to instruction fees hence arriving at erroneous bill of costs and that expenses do not form part of income.

19. He thus submitted that the bill of costs dated November 7, 2017 should be remitted back for taxation by a different taxing master (deputy registrar) only on the items set out above.

20. I have considered the Application, the Replying affidavit and the Applicants submissions and the law. The issues for determination are as follows:

    i. Whether this Court should reverse the taxing Master decision his ruling dated February 21, 2018.

    ii. Whether the listed items should be remitted back to the taxing master to be taxed using the appropriate remuneration order.

    iii. Who bears the cost of the application?

21. On the first issue, the applicant submitted that the suit with respect to which the advocate-client bill of costs arose was filed before April 11, 2014 before the *Advocates Remuneration Order, 2014* came into force. That the taxing master relied on the *Advocates Remuneration Order 2014* yet the matter ought to have been taxed under the Advocates Remuneration Order 2009.

22. He also submitted that the *Advocates Remuneration Order* does not contemplate that the bill of costs includes a tax and that if the VAT is to be factored in the bill of costs, it should be limited to instruction fees as that is the income an advocate makes.

23. Upon my perusal of the records, specifically the Advocate-Client Bill of costs dated November 7, 2017, I find that only services under items 1, 2, 3, 4, 5, and 7 among the items listed by the Applicants as having been wrongly taxed under the *Advocates Remuneration Order 2014* were rendered before April 11, 2014 when the *Advocate Remuneration Order, 2014* came into force. However services under items 10, 11, 12, 13, 15, 16, 19, 20, 23, 24, 27, 29, 30, 33, 35, 36, 37, 38, 42, 43, 46, 49, 50, 51, 52, 55, 56 and 57 were rightly taxed under the *Advocates Remuneration Order, 2014* since the said services were rendered after April 11, 2014.

24. Upon my further study of the said Advocate-Client Bill of costs, I find that indeed the taxing master included the other expenses to the instruction fees before charging the VAT at 16%. In *Aoro v Were* (Miscellaneous Reference Application E019 of 2022) [2022] KEHC 14628 (KLR) (31 October 2022) (Judgment), where the court under paragraph 48 of the judgment held that:

> " From the above authorities, it is clear that VAT is chargeable on the instruction fees and also on disbursements. Therefore, in the instant case, VAT of 16% was indeed chargeable on the instructions fees. I find the objection thereto misplaced."

25. Consequently, I agree with the applicant that the VAT should be limited to the instruction fees since that is the income an advocate makes.

26. On the issue as to whether the listed items should be remitted back to the taxing master to be taxed using the appropriate remuneration order, I find that the answer is partially in the affirmative in view of the above analysis. Consequently items 1, 2, 3, 4, 5, and 7 should be remitted back to the taxing master in order for the same to be taxed under the Advocates Remuneration Order, 2009. I also find that the VAT should be calculated only on the instructions fee.

27. Before I deal with the issue of costs, I have noted that in his written submissions, the Applicant introduced the issue of the taxing master proceeding on an error of principle by charging certain items under schedule 5 of the Advocates Remuneration Order. It is worth noting that the same was not raised in the Application. In *Adetonn Oladeji (NIG) Ltd vs Nigeria Breweries* PLC S.C. 91/2002 the J.S.C expressed themselves as follows:-

> " .....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
>
> In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avid any surprises by which no opportunity is given to the other party to meet the new situation."

28. Applying the principles in the aforementioned authority, I am of the considered view that a party is bound by his pleadings. What the Applicant pleaded was that the listed items in his Notice of

Motion dated March 12, 2018 and amended on August 20, 2018 be taxed under the Advocates Remuneration Order, 2009. On the contrary, if the Applicant was claiming that the items listed in his submissions were wrongly taxed under Schedule 5 of the *Advocates Remuneration Order*, he ought to have amended his pleadings to reflect the same and not introduce it in his submissions hence the said claim is disregarded.

29. Consequently, and for the above reasons, I partly allow the Notice of Motion dated March 12, 2018 and amended on August 20, 2018 and order that the Advocate-Client Bill of Costs dated November 7, 2017 relating to the taxation of items 1, 2, 3, 4, 5, and 7 is set aside and the same is remitted back for retaxation under the *Advocates Remuneration Order, 2009* and calculation of VAT only on item 1 which is the instruction fees.

30. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 27TH DAY OF JULY, 2023.

.....

J.K. SERGON

JUDGE

In the presence of:

C/Assistant – Rutoh

Matoke for the Respondent

No Appearance for the Applicant