



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. APPLICATION NO. 284 OF 2019**

**ONDABA & PARTNERS ADVOCATES.....ADVOCATE/APPLICANT**

**-VERSUS-**

**SEA TURTLE LIMITED.....1<sup>ST</sup> RESPONDENT**

**COLLINS STUART.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. There are two References under Rule 11 of the Advocates Remuneration Order for consideration. The first is the Client's reference as contained in the Chamber Summons application dated 6<sup>th</sup> May, 2020 while the second is the Advocate's Reference dated 22<sup>nd</sup> May, 2020. The two references both arise out of the Deputy Registrar's Ruling delivered on 24<sup>th</sup> April, 2020 in respect of Advocate/Client bill of costs dated 9<sup>th</sup> July, 2019.

2. The Client has challenged the decision of the Deputy Registrar on four grounds. **Firstly**, that the Deputy Registrar erred in finding that there was no agreement between the parties on payment of fees but in the same breath found that there was a retainer. **Secondly**, that the Deputy Registrar adopted a narrow and restrictive view of Section 45(1) (a) of the Advocates Act and therefore failed to take into account the demonstrated intent of the parties on payment of fees. **Thirdly**, that the Deputy Registrar erred in issuing orders for the client to pay full amounts as set out in the Advocate's invoices of 16<sup>th</sup> March, 2018 and 18<sup>th</sup> September, 2018 even when such prayers were not sought. **Fourthly**, that the Deputy Registrar failed to give due consideration to the unchallenged affidavit evidence of the 2<sup>nd</sup> Respondent and; **finally**, that an advocate is only entitled to reasonable costs commensurate to the work done.

3. In response to the Client's Chamber Summons application, the Advocate filed a replying affidavit sworn by Brian Omware on 14<sup>th</sup> August, 2020. He averred that for there to be a valid and binding agreement for purposes of **Section 45 of the Advocate's Act** the same must be unequivocal and signed by the client so as to prove that the retainer fees had been agreed upon. That client's gravamen is based on the wrong interpretation of Section 45(1) of the Advocate's Act and it would be absurd to find that the Deputy Registrar could not have taxed the bill at Kshs. 531,852.20

4. On his part, the Advocate vide the Chamber Summons application dated 22/5/2020, challenged the Deputy Registrar's decision on the ground that the Deputy Registrar erred by failing to adhere to schedule 6 (B)(C) of the Advocates (Remuneration) (Amendment) Order 2014 which provides for an addition of 50% of the decided instructions fees to the taxed amount of the bill of cost. However, it is imperative to mention that the Advocate filed the response outside the 14 days statutory period of doing so and he sought for the extension of time. The delay was attributed to challenges brought about by Covid 19 Pandemic.

5. The Client opposed the Advocate's application for reference vide grounds of opposition dated and filed on 19/8/2020. It was averred that the reference by the Advocate was an afterthought and further that **Schedule 6(B)(C) of the Advocate's (Remuneration) (Amendment) Order 2014** which speaks of fees agreed is not operational in favour of the Advocate by virtue of **Section 45(6) of the Advocates Act, Cap 16 Laws of Kenya**.

6. Both parties agreed to dispose the References by way of written submissions which they entirely relied on. The Advocate's Submissions are dated 14/8/2020 and filed on 18/8/2020 while those of the Client are dated and filed 19/8/2020.

**Clients' Submissions**

7. **Firstly**, the client submitted on whether there was an agreement between the parties on payment of fees. Here, the argument put forth is that the Taxing Master found in the affirmative that there existed an agreement between the parties and at that point all that the taxing master ought to have done is to down his tools and strike out the bill of costs. It is argued that the Deputy Registrar had a narrow interpretation of

**Section 45(1) of the Advocates Act** and failed to enforce the intent of the parties by proceeding with the taxation.

8. **Secondly**, it is submitted that parties had intended that the client would use their vast business acumen and international profile to bring good legal and commercial deals to the Advocates and in exchange the client would benefit from reduced fees and flexible timelines. Consequently, a breakdown of the periodic fee payable by the client was agreed upon by the parties as stipulated under paragraph 22 of the Clients Replying affidavit. According to the client, the final amount of Kshs. 320,000/= paid to the advocate was commensurate to the work done at the time of withdrawal of the instructions.

9. The Clients further submitted that the Advocate had raised an invoice of Kshs. 728,000/= and another for Kshs. 39,000/= which amount was anticipated to be payable fees at the logical conclusion of the suit. Since the clients withdrew the instructions to act before the matter was concluded, the advocates would be unjustly enriched if the Clients were ordered to pay the full invoiced amount. Such view is said to have been adopted in the case of *Ratemo Oira & Co. Advocates –vs-Magereza Sacco Society Ltd [2019] eKLR*.

10. As regards the Advocate's Chamber Summons, the clients submitted that the same is an afterthought because vide a letter dated 28/4/2020, the advocate demanded the taxed amount and appeared not to have had a problem with the determination in the entirety of the said ruling delivered on 24<sup>th</sup> April, 2020. It is therefore not clear when the advocate realized that he was aggrieved by the ruling. In any event, the client was of the view the application was a non-starter and the taxing master's only option was that of downing his tools after finding there was an agreed fees.

#### **Advocate's Submissions**

11. The advocate's submissions are a reiteration of the grounds deponed in support of the application. However, the gist of his submission is that this court can interfere with the taxing officer's decision on taxation where it is shown that the decision was either based on an error of principle or the fees awarded was so manifestly excessive. In this case, it is argued that the deputy registrar erred in principle when he failed to add 50% of the decided instruction fees to the taxed amount of the bill of costs. This court should therefore step on board and rectify that error.

12. On whether the court should enlarge the time for filing the reference, it is submitted that the decision was made on 24/4/2020 while the application was filed on 22/5/2020 which is outside the 14days statutory period. The delay was attributed to challenges brought by covid-19 pandemic. Based on those submissions, the court was invited to have the bill referred back for taxation.

#### **Analysis and Determination**

13. I have carefully considered the two Chamber Summons applications by the Clients and the Advocate Respectively. I have also considered the submissions by both parties and the authorities cited therein. The first issue raised in the reference and which I consider viable to deal with **first**, is whether the determination of the advocates costs was governed by a remuneration agreement. This is because, if I find that there was an agreement on the fee payable, then there would be no need to make any determination on the other issues. I will therefore begin by considering **Section 45** of the **Advocate's Act, Cap 16** which provides for agreements in respect of the remuneration of an advocate. It reads as follows: -

#### ***"45. Agreements with respect to remuneration***

***(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—***

***(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;***

***(b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;***

***(c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof,***

***and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.***

***(6) Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48."***

14. A quick inference that can be drawn from the reading of Section 45 above, is that an advocate is at liberty to agree with his client on the remuneration payable for the services rendered or to be rendered. The agreement is binding, provided it is in writing, and is signed by the client or his agent.

15. The contention by the Client was that the taxing master having found that there was a remuneration agreement then he ought not to have proceeded with the taxation. Its averred that there were two invoices drawn by the advocate for Kshs. 728,000/= and Kshs. 39,000/= respectively to cover for costs of the entire suit. Further that the payment of the Kshs. 320,000/= was pursuant to the invoice and part performance of the remuneration agreement. The Advocate on the other hand, contended that there was no written agreement signed by both parties to be enforced by this court and the Deputy Registrar was right in having taxed the bill of costs as he did.

16. I have considered the ruling dated 24/4/2020. In his ruling, the taxing officer interrogated whether there was a retainer agreement. His finding however appears to be both in affirmative and also rejecting that there is an agreement. At some point, he appreciates that there was a prior agreement between the parties as established by the two invoices and there was no illegality to warrant him departing from Section 45(1)(a) of the Advocate's Act. He was satisfied that the first invoice dated 16<sup>th</sup> March 2018 rightly provided for instruction fees. At some point, the taxing officer departed from this view and held an opinion that the Client did not produce an agreement in writing to show that there existed an agreement between the parties to be enforceable by the court. Having found as such the taxing officer then proceeded to use the two invoices as the basis for calculating the fees payable and taxed off the part payment made by the Client.

17. The ruling of the taxing master appears to be anchored on a rigid interpretation of Section 45 of the Advocate's Act, that for the remuneration agreement to be enforceable, then it must be in writing and have been signed by both the client and the advocate. I will not abide by that interpretation but I will first consider what other courts have held in such circumstances. In the case of **Shiva Enterprises v Mwangi Njenga & Company Advocates [2020] eKLR**, Justice Munyao had this to say;

***“I do not think that such agreement must be in one document titled “agreement for payment of legal fees.” It is sufficient that there be a memorandum in writing, and this would include correspondences, so long as these reveal that they are aimed at fixing the fee payable. Indeed, in the case of D Njogu & Company Advocates vs National Bank of Kenya Limited, Civil Appeal No. 165 of 2007 (2016) eKLR, where the Court of Appeal upheld an agreement between an advocate and client, the agreement was actually construed from a letter.”***

18. When the Advocate filed his bill of costs, the Clients filed a replying affidavit sworn on 30/10/2019 by Collin Stuart through which he claimed that they had a mutual agreement that the client would bring the Advocate business deals and then the client would benefit from reduced fees. Mr. Colin further alleges that the two invoices dated 16/3/2018 for Kshs. 728,000/= and the other dated 18/9/2018 were drawn pursuant to the mutual understanding. It is thus the contention of the Clients that the correspondences and the invoices demonstrate the agreement on fees.

19. I have gone through the correspondences. They are actually agreeing on different business transactions between the parties but they do not make reference the suit that is Civil Suit No.1 of 2018 which gave rise to the bill of costs, subject herein. I have also checked the two invoices which were prepared by the advocates in their capacity as advocates but not the Client. The invoices say nothing about any agreed fee. They simply reflect computation of the fees the advocate had deemed fit to be paid for the services rendered. Nowhere in either the correspondences or the invoices does it state what agreed fee is in respect of Suit No. 1 of 2018.

20. I have also gone through the instruction note annexed to Mr. Colin's Replying affidavit filed in court on 30/10/2019 and dated the even date. the instruction note, in part, states as follows: -

***“we Sea Turtle Ltd of Post Office Box Number 1690-80401 this 18<sup>th</sup> day of April 2017 do hereby instruct the firm of Ondaba & Partners of Post Office Box Number 21607-00505 Nairobi, instructions to act for as in the matter relating to Equity Bank at an agreed legal fee of Kshs. Inclusive of disbursements, V.A.T and all other incidentals to this transaction.”***

21. The instruction note does not articulate on what the agreed legal fees was. In fact the place where the agreed legal fees could have been indicated has been left blank. At this point I am of the view that the client was opposed to the taxation based on prior interaction with its advocate business wise which seems to have gone sour and he (the Client) was of the view that based mutual understanding on past business events, then the amount of Kshs. 320,000/= already paid to the advocate is reasonable as compared to the work already done.

22. Based on the foregoing, I find no correspondence or any other document from the application to pinpoint that a certain sum of money was the agreed legal fees. I am therefore unable to speculate on whether the parties ought to have agreed on any fees based on their previous business arrangement or what would be the reasonable legal fees payable in the circumstances.

23. I therefore agree with the taxing officer's finding to the extent that there was no remuneration agreement in respect of fees for legal services offered in respect of **Mombasa High Court Case Number 1 of 2018**. That being the case, the Advocate was within his right to file a bill for taxation.

24. This now brings me to the next point which is whether the taxing officer was justified in ordering for the payment of the invoice balance and using the same as the pivot of his taxation. I have noted above that the invoices were a computation of the fees the advocate thought fit to be paid for the services already paid. They were based on no agreed legal fees and consequently not binding between the parties. And even if I was to find that the invoices as an offer and proposal on the final fees payable, for the invoices to constitute a binding agreement for fees, the proposal ought to have been accepted by the client. An agreement must contain an offer and acceptance so that where one condition is not satisfied, there would be no binding agreement. The invoices could not therefore form a basis of the taxation and the taxation ought to have proceeded in accordance with the Advocates Remuneration order.

25. It is therefore my conclusion that the taxing officer followed the wrong principle in reaching his decision as he ought to have taxed the bill of cost in accordance with the Remuneration order having established that there was no agreement of legal fees payable. At this point, the best thing to be done is to remit back the bill of costs to the taxing master so that the taxation is done by a different Taxing Master of this court.

26. Having found as above it would be a moot exercise to consider the other issues that have been raised in the Advocates Chamber Summons, to wit, whether a case to extend the time for filing reference has been established and whether the taxing officer erred in failing to add 50% of the amount taxed.

27. As a result of the above, I direct as follows with respect to the two references under consideration.

a) That the taxation of the Advocates Advocate/Client bill of costs dated 9<sup>th</sup> July 2019 rendered on 24/4/2020 and all the consequential orders are hereby set aside.

b) **That** the said Bill of Costs be and is hereby remitted back to be taxed by a different Taxing Master in accordance with the Advocates Remuneration order.

c) The taxing officer to tax off the amount of Kshs. 320,000/= as part payment on legal fees.

d) **That** each party shall bear its/his own costs for the two applications.

It is hereby so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 25<sup>th</sup> day of January, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**Order**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

**JUSTICE D. O. CHEPKWONY**