REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

MISC. CIVIL APPLICATION NO. 73 OF 2019

ALI MOHAMMED EGAL.....APPLICANT

VERSUS

MAINA & ONSARE PARTERNERS ADVOCATES.....RESPONDENTS

RULING

1. This is a reference from the taxing officer's decision dated 1st July, 2019, on the respondents' bill of costs dated 4th December, 2018. The reference is by way of Chamber summons dated 14th October, 2019. It seeks to set aside the taxing officer's decision and either strike out the respondent's Bill of costs or remitted it to the taxing officer for fresh taxation.

2. The grounds upon which the reference is predicted, are that the taxing officer misapprehended and misapplied the law and principles of taxation thereby arrived at a wrong decision. The applicant further faulted the taxing officer for failing to hold that there was a valid agreement on legal fees between the parties and awarded the respondent costs that were disproportionate to the suit and inordinately high as to amount to substantial oppression and injustice.

3. The reference is also supported by an affidavit by the applicant, sworn on 14th October, 2019. He deposed that between 2017 and 2018, he and the respondent entered into a legal fees agreement pursuant to which the respondent was to represent him in Succession Cause No. 95 of 2015. It was agreed that the cumulative legal fees and disbursement would be limited to the amount agreed and upon completion of the cause in which the advocate was to join him as an interested party. He however later on instructed the respondent to cease acting for him. The applicant further deposed that pursuant to the said agreement, he paid the respondent a deposit of Kshs. 200,000/- on 26th March, 2018. The respondent was to be paid a further Kshs. 300,000 at the conclusion of the matter, but the matter was withdrawn at a preliminary stage.

4. The applicant also deposed that according to advice from his counsel, the respondent was not entitled to more than Kshs, 40,000. He also stated that the taxing officer did not make a finding on the initial amount of Kshs, 200,000 he had paid.

5. The respondent filed a replying affidavit by Ivy Ngui, sworn on 2nd December, 2019 and filed on 5th December, 2019. She deposed that the applicant initially approached the respondent for professional services with regard to a land dispute which resulted in the filing of ELC No. 757 of 2017. It was then brought to their attention the existence of cause No. 95 o 2015 and the applicant instructed them to apply to have him join the cause as an interested party.

6. They raised their fee note and after negotiations, a fee of Kshs. 500,000 was agreed. She denied that parties entered into a retainer agreement. she deposed that it was the respondent who applied to cease acting for lack of instructions and payment of legal fee.

7. Parties agreed to dispose of the reference through written submissions. The applicant's submissions were dated 16th October, 2019 and filed on 17th October, 2019. It was submitted that the taxing officer erred in failing to hold that there was a valid agreement on legal fees and therefore, he had no jurisdiction in view of section 45(6) of the Advocates Act rendering the ruling dated 1st July, 2019 bad in law. He relied on ***Majanja Luseno & Co. Advocates v Leo Investments Ltd & Another*** [2017] eKLR, for the argument a taxing officer has no jurisdiction if there was a binding agreement on remuneration. The applicant also relied on definition of agreement in Black's Law Dictionary.

8. It was the applicant's submission that there was a written agreement between the parties in relation to Cause No. 95 of 2015 dated 17th May, 2017. The applicant again relied on ***Mereka & Company Advocates v Zakhem Construction (K)*** [2014] eKLR, that retainer need not only be in writing but can be upheld from the parties' conduct. The applicant relied on the correspondence from the respondent dated 12th July, 2018 as amounting to evidence of existence of retainer agreement. That being his view, he argued that the matter fell under section 45(6) of the Act and could not go for taxation.

9. On whether the amount awarded was manifestly excessive, the applicant submitted in the affirmative. He argued that the taxing officer was wrong in applying Schedule 10 to the Advocates Remuneration Order instead of section 45(6) of the Act. According to the applicant,

costs form a fundamental principle of access to justice in litigation and only costs that are necessary should be allowed. He faulted the taxing officer for not following the principles in ***Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & Another*** [1972] EA 162.

10. According to the applicant, the factors taken into account by the taxing officer in arriving at Kshs, 1,000,000 were not laid out in his ruling. He argued out that the Advocate's Remuneration Order, 214 sets out legal considerations to be borne in mind by a taxing officer namely; nature and importance of proceedings, the complexity of the matter and the novelty of the question raised; amount or nature of subject matter; time expended and the number of documents perused.

11. The applicant urged the court to be guided by the decision in ***Kasim v Nabre International Ltd*** [2007] EA 98 (SCU), that a reference on taxation would only be entertained either on a point of law and Principle or on grounds that the Bill of Costs as taxed was in all circumstances manifestly inadequate; ***Joreth v Kigano & Another*** (Supra) and ***Republic v the Minister of Agriculture Exparte W'Njuguna &Others*** [2006] 1 EA 359**.**

12. According to the applicant, the value of the subject matter could not be determined from the pleadings because the purported value of Kshs, 150,000,000 was not an issue in dispute in the main suit. He relied on ***Kamunyori & Advocates v. Development Bank of Kenya*** Misc. 975 of 203 [2005] eKLR.

13. The respondent relied on their written submissions dated 2nd December, 2019 and filed on 5th December, 2019. It was submitted that the taxing officer had jurisdiction to tax advocate-client Bill of costs since there was no retainer agreement between the parties. They relied on section 46(6) of the advocates Act on what amounts to retainer agreement. The respondent similarly relied on the definition of the word **"agreement"** in the Black's Law Dictionary 9th Edition. They cited section 45(c) of the Act on the binding nature of the agreement for fees between parties.

14. According to the respondent the correspondences did not confirm existence of agreement between the parties on the retainer. It was their case that the letter dated 12th July, 2019 did not constitute an agreement. They relied on ***Kakuta Maimai Hamisi, Peris Pesi Tobiko v Independent Election and Boundaries Commission and Returning officer Kajiado East Constituency*** [2017] eKLR, for the argument that to constitute a valid and binding agreement for purposes of section 45, the same must be in writing and signed by client or an authorized agent.

15. They also cited ***Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd*** (2) [2006] 1 EA5;[2007] eKLR to argue that an agreement in respect of remuneration is valid and binding on the parties if it is in writing and signed by the client or his authorized agent. The respondent again relied on ***Evans Otieno Nyakwana v Cleophas Bwana Ongaro*** [2015] eKLR on the burden of proof.

16. On whether the taxing officer's decision was excessive, the respondents submitted in the negative. They supported the taxing officer for applying Schedule 10 of the Advocates Remuneration Order instead of section 45(6) of the Act.

17. On instruction fees, the respondent supported the taxing officer's award of Kshs, 1,000,000 on instruction fees and submitted that the taxing officer did not commit any error of principle. Reliance was placed on ***Joreth Ltd v Kigano & Associates*** [2002] eKLR on the determination of the value of the subject matter for purposes of taxation. It was contended that the taxing officer cited sound legal principles from decisions binding on him. They also supported the decision of the taxing officer to award Kshs, 1,838,812. which was not excessive. The respondents cited ***KANU National Elections Board & 2 Others v Salah Yakub Farah*** [2018] eKLR on the grounds for review of taxation on reference.

18. I have considered this reference and submissions by parties. I have also considered the decisions relied on. The issues that presented themselves for resolution are whether there was a retainer agreement and, depending on the answer to that issue, whether the amount was inordinately high.

19. The applicant has called upon this court to set aside the decision of the taxing officer on the basis that the taxing officer erred in taxing the advocate-client bill of costs despite the fact that the two had an agreement for fees which took the issue out of the jurisdiction of the taxing officer. In the applicant's view, the matter fell under section 45 of the Advocates Act.

20. The respondents on their part, argued that there was no agreement for fees between them and the applicant and therefore, the matter did not fall under section 45 of the Act. It was their case that there being no agreement for fees, the taxing officer was perfectly in order to tax their advocate- client bill of costs.

21. Section 45 broadly provides:

> ***(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.***

22. An agreement under section 45 is not absolute and conclusive. Subsection (2) grants a client a right to challenge such an agreement if it is harsh and unconscionable, exorbitant or unreasonable. It states:

> ***(2) A client may apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors, who shall be advocates of not less than five years' standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the Court, whose decision shall be final, shall have power to order—***
>
> ***(a) that the agreement be upheld; or***
>
> ***(b) that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or***
>
> ***(c) that the agreement be set aside; or***
>
> ***(d) that the costs in question be taxed by the Registrar; and that the costs of the application be paid by such party as it thinks fit.***

23. From the depositions in the applicant's affidavit and submissions of both sides, there is disagreement on whether or not there was a legal fees agreement. Whereas the applicant argued that there was an agreement, the respondents maintained that there was none. The applicant argued that the agreement for fees could be deduced from letters exchanged between the parties or their conduct.

24. Section 45 (1) (c) is clear that ***an 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*****.** The agreement for fees must not only be in writing, it must be signed by the client or by his authorized agent.

25. I have perused the record placed before this court. No agreement signed by the parties to the application was exhibited by the applicant to support his argument that they entered into an agreement for fees. The applicant extensively referred to a letter dated 12th July 2018, arguing that it constituted an agreement between him and the respondent. That letter was demanding fee payment and referred to invoices sent to the applicant earlier, the amount paid and the balance due. It did not refer to any agreement previously entered into between the parties. The applicant did not attach a response to that letter pointing out to any existing agreement on fees between him and the respondent advocates. It is therefore difficult to agree with the applicant that the letter in question could be construed to amount to an agreement for fees.

26. Decisions of this court including ***Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd*** (supra), reiterated that the proviso to section 45 (1) require any agreement on fees to be in writing and signed by the client or his authorized agent.

27. In ***Kakuta Maimai Hamisi, Peris Pesi Tobiko v Independent Election and Boundaries Commission and Returning officer Kajiado East Constituency*** (supra), the court stated:

> ***"[30] To constitute a valid and binding agreement for the purpose of section 45 of the Advocates Act, it expressly provides that the same must be in writing and signed by the client or his agent duly authorized in that behalf. In this case, both the two letters are not signed by the client. Whereas an agreement may be formed by a series of correspondences, the client not exhibited any document by which he signaled his acceptance of the proposed fees by the advocate. In my view, for a document to be said to constitute a valid and binding agreement for purposes of section 45 of the Advocates Act, the same must not only be unequivocal that it signifies what the precise final amount is but must be signed by the person to be charged who in this case is the client. This was the position adopted by Tanui.J, in Raini K. Somaia vs Cannon Assurance (K) Ltd Kisumu HCMA No. 289 of 2003"***

28. As this court also pointed out in ***Nzaku & Nzaku Advocates v Tabitha Waithera Mararo as Trustee of Tracy Naserian Kaaka (minor) & others*** [2020] eKLR:

> ***"An agreement for fees contemplated under section 45, is a contract whose terms and conditions must be clear and unambiguous. There must be consensus or meeting of the mind between the parties and it must also be entered into freely without undue influence or promise."***

29. A scrutiny of the letter dated 12th July 2018, shows that the respondent wrote to the applicant did reveal any agreement capable of being read in terms of section 45 of the Advocates Act. I am therefore unable to agree with the applicant that the taxing officer was in error and had no jurisdiction to tax the advocate-client bill of costs given that there was no agreement on legal fees to remove the matter out of his jurisdiction.

30. Having determined that there was no agreement for fees between the parties, the only other peripheral issue is whether the amount was inordinately high. I say peripheral because this was not the main issue in the reference. The applicant argued that the amount of Kshs. 1,838,812.36 awarded by the taxing officer supposedly based on a value of the subject matter of Kshs. 150,000,000, was inordinately high.

31. It must be pointed out, that a judge will not readily interfere with the decision of the taxing officer, and should only do so in very exceptional cases. That is; where there is clear demonstration that the taxing officer erred in principle. The example is where the sum awarded is either inordinately high or low, taking into account the nature of the proceedings, to conclude that he acted on a wrong principle.

32. In ***Premchand Raichand Ltd & another v Quarry Services East Africa Ltd & another*** [1972] EA 162, ***Spray,*** Ag V stated:

" The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not therefore interfere with the award of the taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat so high or so low as to amount to an injustice to one party or the other."

33. In ***Rogan-Kemper v Lord Grosvenor*** (No.3) [1977] KLR 303, ***Law. JA,*** stated:

"A Judge will not substitute what he considers to be the proper figure for that allowed by the taxing officer unless in the judge's view, the sum allowed by the taxing officer is outside reasonable limits so as to be manifestly excessive or inadequate."

34. I have considered this reference and arguments by parties. I have also perused the supporting affidavit and the ruling of the taxing officer, the subject of this reference. The applicant made general arguments that the award was inordinately high. He stated at ground p of the grounds on the face of the motion that; ***"The taxing officer erred in principle by awarding the sum of Kshs. 1,838,812.36. The amount awarded was outside reasonable limits so as to be manifestly excessive."***

35. At paragraph 10 of the supporting affidavit, the applicant deposed that the matter in the main suit was a normal routine application for grant of letters of administration intestate and he did not make a counterclaim for money's worth and was not aware of any such a suit let alone one relating to property whose subject matter was Kshs. 150,000,000. The applicant did not question the taxing officer's decision on any of the items in the advocate-client bill of costs as allowed.

36. Further still, I have perused the record but could not trace any pleadings, the subject of the bill of costs to assist the court consider the applicant's arguments that it contained no value of the property. That notwithstanding, the respondent advocates argued that they represented the applicant in both ***Succession Cause No. 95 of 2017*** and ***ELC N0. 757 of 2017***, and indeed submitted their demand for fees in respect of the two matters. The applicant did not attach any document disputing the respondent advocates' claim for fees for work done in that regard. The applicant did not even raise any issue regarding instruction fee of Kshs. 1,000,000 in his application. The issue was only mentioned in the submissions, which are not pleadings.

37. In ***Bank of Uganda v Banco Arabe Espaniol,*** Supreme Court Civil Application No. 29 of 2019, ***Mulenga, JSC*** stated;

"…[S]ave in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs, are matters which the taxing officer is particularly fitted to deal, and which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by a taxing officer, merely because in his opinion, he should have allowed a higher or lower amount… Even if it is shown that the taxing officer erred in principle, the judge should interfere only if satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties." (Emphasis)

38. In the present reference, the taxing officer considered the issues before him and referred to relevant and binding decisions of Superior Courts when disposing of the bill of costs that was before him. The applicant did not point out the item(s) he thought the taxing officer erred on in principle, to call on this court to intervene. Even where the taxing officer may have erred, this court should only interfere if it was satisfied that the error of principle was such that if the amount awarded was allowed to stand, it would cause injustice to the applicant. The applicant failed to do so.

39. Flowing from what I have stated above, I am unable to uphold the applicant's argument that the taxing officer committed an error in his decision. Consequently, the reference is declined and dismissed with costs to the respondent.

Dated, signed and delivered at Kajiado this 26th day of February, 2021.

E.C. MWITA

JUDGE