



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 106 OF 2018

JOSEPH KARANJA T/A KANYI J. & CO. ADVOCATES.....APPLICANT

-VERSUS-

BANDO PROJECTS (K) LIMITED.....RESPONDENT

RULING

1. The application before me is a Chamber Summons dated 14th January, 2020 brought under the provisions of Rule 11 of the Advocates (Remuneration) Order. The applicant seeks the following orders-

- a. That this Honourable Court be pleased set aside the decision of the Taxing Master dated 30th October, 2019.
- b. That the bill of costs dated 3rd April, 2018 be placed before a different Taxing Master for Taxation; and
- c. Costs of this application be provided for.

2. The application is brought on the grounds on the face of it and is supported by the affidavit of Joseph Karanja Kanyi Advocate (applicant), who has deposed that the Taxing Master rendered his decision on 30th October, 2019 in which he dismissed the Advocate/Client bill of costs dated 3rd April, 2018. That being dissatisfied with the said decision, he duly notified the Taxing Master of his objection to the said decision on 1st November, 2019 but he was not given the reasons for the said decision.

3. The applicant further deposed that the Taxing Officer (Taxing Master) misdirected himself and erred by holding that there was no material before him to enable him carry out a taxation. It was averred that the Taxing Master erred by holding that he could not tax the said bill as the copies of leases which were drafted were not executed by the parties and that there was no basis upon which the bill of costs could have been taxed.

4. It was also deposed in the applicant's affidavit that the Taxing Master took into account irrelevant factors and misdirected himself in dismissing the bill of costs dated 3rd April, 2018 and thereby failed to correctly and judiciously exercise his discretion.

5. The respondent filed a replying affidavit sworn on 10th March, 2020 by Austine Oduor Peter, the respondent's director. In the said replying affidavit, the respondent stated that the leases were never executed as the intended tenants opted out of the lease agreements and as a result thereof, the intended transaction was never concluded. He deposed that there was no reason for the applicant to tax his bill of costs.

6. The respondent maintained that the Tasking Master correctly analyzed the facts and by applying his mind to the law, arrived at the right conclusion.

7. The applicant filed his written submissions on 25th August, 2020. He submitted that the Taxing Master misdirected himself and erred by holding that there was no basis for carrying out a taxation because the leases were signed by only one party. He submitted that on 3rd April, 2018, the applicant filed a bill of costs of the same date, for work done in preparing 4 leases in a proposed commercial and residential development on plot No. 17466/I/MN Nyali, Mombasa between the said tenants and Bondo Projects (K) Limited.

8. Counsel submitted that despite the fact that the applicant filed two affidavits on 17th August, 2018 and 28th August, 2018 exhibiting both the instructions received from the respondent and the subsequent leases prepared by the applicant, the Taxing Master in his ruling delivered on 30th October, 2019 stated that he was opposed to use the said leases as his basis for taxation because they had only been executed by one person thereby being binding to one party.

9. The applicant in his submissions urged this court to allow the application and remit the bill of costs back to the Taxing Master for taxation. Reliance was placed on the case of **Ratemo Oira & Co Advocates v Magereza Sacco Society Ltd [2019] eKLR**, where the principles upon which a Judge may interfere with the decision of a Taxing Master were settled by the Court of Appeal.

10. The applicant's Counsel in his submissions stated that retainer was not disputed, a fact which the Taxing Master also took note of, since in his ruling he stated that the applicant received instructions to prepare leases. He further submitted that upon receipt of the said instructions, the applicant proceeded to prepare the draft leases which were then sent to the respondent for execution. The applicant's Counsel indicated that would mean that the applicant carried out the instructions given by the respondent.

11. It was submitted by the applicant that the Taxing Master had enough material to enable him tax the bill of costs dated 3rd April, 2018 regardless of whether the leases had been executed by both parties or not. The applicant relied on Rule 18 of the of the Advocates Remuneration Order.

12. The respondent's Counsel on the other hand filed his submissions on 20th November, 2020. He stated that it was not in dispute that the leases in issue were not executed. It was further submitted that the documents annexed to the applicant's affidavit were not agreements but draft agreements which were yet to be approved by the parties and were therefore neither executed nor registered.

13. The respondent also relied on the same case cited by the applicant's Counsel in **Ratemo Oira & Co Advocates v Magereza Sacco Society Ltd** (supra) and submitted that there was no basis for charging fees for preparation of agreements when the said lease agreements did not exist. It was further submitted that the applicant in this case had not done anything save for the preparation of draft agreements which were not even executed.

ANALYSIS AND DETERMINATION.

The issue which arises for determination is whether the Taxing Master erred in arriving at his decision.

14. It is not disputed that the Taxing Master never issued the applicant with reasons for his decision dismissing the bill of costs dated 3rd April, 2018 even after the applicant notified him of his objection to his decision.

15. The application herein was brought under Rule 11 of the Advocates (Remuneration) (Amendment) Order which provides as follows:

“(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired. ”

16. The case relied on by Counsel for the applicant in **Kanu National Elections Board & 2 Others v Salah Yakub Farah [2018] eKLR** is applicable to this case. It states as follows;

“The general principles governing interference with the exercise of the taxing master's discretion were authoritatively stated by the South African court in *Visser vs Gubb 1981 (3) SA 753 (C) 754H – 755C as follows:-*

“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

17. In light of the foregoing, I am of the opinion that this Honourable Court can only interfere with the decision of the Taxing Master when he has not directed his mind in accordance with the provisions of the law. In this case the Taxing Master dismissed the bill of costs dated 3rd April, 2018 for the reason that the bill could not be taxed due to the fact that the copies of leases had not been executed by the parties.

18. Rule 18 of the Advocates Remuneration Order provides as follows on non-contentious matters-

“Subject to paragraph 22, the remuneration of an advocate in respect of conveyance and general business (not being in any action, or transacted in any court or in chambers of any judge or registrar) shall be regulated as follows—

Sales, purchases and securities

a.

Leases and agreements for lease of land

b. In respect of leases, agreements for lease or conveyances reserving rents or agreements for the same, the remuneration is to be that prescribed in schedule 2.

c.

d.

e.

Uncompleted transactions and other business.

f. In respect of any business referred to in this paragraph which is not completed, and in respect of other deeds or documents, including settlements, deeds of gift inter vivos, assents and instruments vesting property in new trustees, and any other business of a non-contentious nature, the remuneration which has otherwise not been provided for, the remuneration is to be that prescribed in Schedule 5. (emphasis added).

19. It was admitted by the respondent that it gave the applicant instructions to prepare several leases for tenants on the proposed commercial and residential development of a plot No. 17466/1/MN in Nyali, Mombasa. The transaction was however not completed since the leases which were prepared were only executed by one party.

20. This court’s view is that Taxing Masters must proceed with abundant caution when it comes to taxation of bills of costs so as not to set precedents whereby litigants give Advocates instructions and before completion of the same, they opt out without compensating the Advocates for work done.

21. The fact that the leases were not executed by both parties does not vitiate the fact that services were rendered by the applicant to a certain extent. It is my finding that the Taxing Master ought to have applied the provisions of Rule 18 (f) of the Advocates (Remuneration) Order and proceeded to tax the bill of costs using Schedule V of the Advocates Remuneration Order of 2009.

22. In the case of **Ratemo Oira & Co Advocates v Magereza Sacco Society Ltd** (supra), the Court of Appeal stated that-

“Indeed, it is trite that an advocate is entitled to his fees once he is instructed, retained or employed by a client. (See Civil Appeal No. 280 of 2015, Desai Sarvia & Pallan Advocates vs. Tausi Assurance Company Limited [2017] eKLR). However, it must be noted that an Advocate will be entitled to payment of a reasonable fee which is commensurate with the work done.”

23. Other than the fact that the leases prepared had not been executed by both parties, the Taxing Officer did not cite any other satisfactory reason to justify his decision to dismiss the bill of costs and/or the section of the law under which he dismissed the bill of costs.

24. Further, in the case of **Ratemo Oira & Co Advocates v Magereza Sacco Society Ltd** (supra), the Court of Appeal held as follows-

“In our view, the learned Judge rightly addressed herself to the circumstances under which a judge can interfere with the taxing officer’s exercise of discretion and found no justification for interference. The learned Judge agreed with the taxing master that Rule 18 (f) of the Advocates Remuneration Order 2009, is the applicable rule since the transaction was not completed and the remuneration is that prescribed by schedule V.”

25. I therefore hold that the Taxing Master misdirected himself when he failed to consider the above provisions and for failing to give reasons as to why he dismissed the said bill of costs dated 3rd April, 2018.

26. I set aside the ruling of the Taxing Master delivered on 30th October, 2019 dismissing the applicant’s bill of costs dated 3rd April, 2018. The said bill of costs shall be referred to another Taxing Master for fresh taxation according to the applicable Remuneration Order. The applicant is awarded the costs of the application dated 14th January, 2020.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 12TH DAY OF FEBRUARY, 2021. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM DUE TO THE OUTBREAK OF THE COVID-19 PANDEMIC.

NJOKI MWANGI

JUDGE

In the presence of-

Mr, Achoki for the applicant.

No appearance for the respondent.

Mr. Oliver Musundi – Court Assistant.