



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC MISC CIVIL APPLICATION NO. E30 OF 2019

MOSES WEKESA.....APPLICANT

VERSUS

PAUL OTIENO NYAMODI T/A

V/A NYAMODI & COMPANY ADVOCATES.....RESPONDENT

RULING

1. The applicant, Moses Wekesa, has filed the application dated 24th December 2020 in which he challenging the ruling of the Taxing Master on an Advocate/Client bill of costs lodged by the respondent.

2. The bill of costs related to services rendered by the respondent, Paul Otieno Nyamodi t/a V.A. Nyamodi & Company Advocates in relation to **Revision Application No. 42 of 2010-Director of Public Prosecutions v Peter Abok & 35 Others** (hereafter also referred to as “the revision application”). The application is expressed to be lodged under section 45 of the Advocates Act and all other enabling provisions of the law and seeks the following orders:

1) Spent.

2) That this Honourable court be pleased to vary and/or set aside the Ruling of the Deputy Registrar, R. Aganyo dated 9th December 2020 in the matter of the Advocate-Client Bill of Costs dated 7th October 2020 between the aforementioned parties

3) That this Honourable court be pleased to order that the Advocates-Client Bill of Costs dated 7th October 2020 be placed before another Taxing Officer for taxation.

4) That costs be provided for.

3. The application is based on the grounds set out on the face of the application and the affidavit in support sworn by the applicant on the same date. The applicant argues in these grounds that the Taxing Master erred in law and in fact in allowing item number 1 on the Bill of Costs after it came to her attention that the applicant did not issue any instructions to the respondent with regard to defending him in the revision application. It is the applicant’s contention that the instructions issued were in respect of a different matter and the respondent created additional work for himself in the revision application.

4. In his affidavit in support of the application, the applicant avers that he met the respondent on 8th September 2019 and issued verbal instructions to defend and represent him in **Anti-Corruption Case No. 25 of 2019- Republic v Peter Abok & 10 others**. He formalised the instructions on 11th September 2019 when he met the respondent at his office and discussed the legal fees. The respondent had at that meeting requested for a deposit of Kshs. 500,000 which the applicant paid vide cheque No. 000648 dated 10th September 2019.

5. The applicant further avers that he was dissatisfied with the representation by the respondent and he withdrew his instructions. He sought a reconciliation of his account and on 12th August 2020, the respondent sent him two demand notes indicating fees due on the revision application, Revision No. 42 of 2019 and ACC No. 25 of 2019.

6. The applicant avers that he did not issue the respondent with instructions to represent him in the revision application. He therefore disregarded the invoice until his former advocates on record, Coulson Harney LLP, forwarded to him submissions on the bill of costs. Since

the bill of costs before the Taxing Master had already been issued with a ruling date, his Advocates on record raised the issue of instructions at the ruling.

7. According to the applicant, the respondent had entered appearance on his behalf in the revision application without his instructions, knowledge or information. Until the question of instruction is determined, he shall be forced to meet the cost of services he never instructed the respondent to carry out.

8. In submissions in support of his application dated 26th February 2021, the applicant denies knowledge of issuance of instructions to the respondent with respect to the revision application. He submits that he is thus a stranger to the contents of the bill of costs. He relies on section 107 of the Evidence Act and the decision in **Mereka & Company Advocates v Zakhem Construction (Kenya) [2014] eKLR** in which the court held that where there is no evidence of a retainer except the oral statements of the advocates which is contradicted by the client, the court will treat the advocate as having acted without authority. It is his submission that he did not issue instructions to the respondent in respect of the revision application. He asks the court to find that he did not issue any instructions in respect of the application, and to accordingly vary or set aside the ruling of the Taxing Master dated 9th December 2020.

9. The applicant further submits that the issue of instructions was raised before the Deputy Registrar and was acknowledged by the respondent in his affidavit dated 10th December 2020 in which he explained that the deposit of Kshs. 500,000/- was in relation to another matter and not Revision Application No. 42 of 2010.

The Response

10. The respondent filed an affidavit which he swore on 19th February 2021 in opposition to the application. It is his case that he represented the applicant from 9th September 2019 up to 10th July 2020 when the applicant requested that he cease acting on his behalf. On 12th August 2020, he caused to be delivered to the applicant two fee notes in respect of **Anti-Corruption Case No. 25 of 2019- Republic v Peter Abok & 10 others** and **Revision Application No. 42 of 2010, Director of Public Prosecutions v Peter Abok & 35 Others**. The applicant refused to settle his fees thus necessitating the filing of the Advocate-Client bill of costs dated 7th October 2020 in respect of the revision application.

11. The respondent avers that in response to his application, the applicant filed submissions dated 5th November 2020. In these submissions, the applicant did not dispute issuing instructions to the respondent. Instead, he proposed an award of Kshs. 250,000/- as instruction fees instead of the Kshs. 350,000 that the respondent had charged in the Advocate-Client Bill of Costs. The only issue that the applicant raised was a prayer that a sum of Kshs. 500,000, allegedly paid as a deposit to the respondent, be deducted from the amount taxed in favour of the respondent. It was in respect to this issue that the respondent filed a further affidavit sworn on 10th December 2020. The respondent avers that the issue of instruction is not a ground for review of the decision of the Taxing Master as the applicant did not raise it as an issue for determination during taxation.

12. In his written submissions dated 19th March 2021, the respondent restates the contents of his affidavit in reply to the application. He submits that though he served his Bill of Costs upon the applicant, the applicant did not file an affidavit in reply nor did he dispute that he issued instructions in his submissions. Instead, he only sought a deduction of Kshs. 500,000/- that he had allegedly paid for the matter.

13. It is the respondent's submission, further, that the issue of whether or not the applicant issued instructions was not raised before the Taxing Master, and it cannot therefore be raised in the reference. Support for this submission is sought in the case of **Showcase Property Limited v Mugambi & Company Advocates [2020] eKLR** and **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohammed & 3 Others; Ahmed Ali Muktar (Interested Party) [2019] eKLR**.

14. It is also the respondent's submission that the applicant has not demonstrated that the Taxing Master made an error in principle in the ruling delivered on 9th December 2020, or that the award of costs was so excessive as to warrant interference by the court. Support for this submission is sought in the case of **Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR**, which laid out the principles governing the jurisdiction to determine a reference arising from taxation of costs. The respondent asks the court to dismiss the application with costs to him.

Analysis and Determination

15. In his submissions, the applicant identifies two issues as arising for determination. The first is whether he had issued instructions to the respondent to represent him in the revision application, while the second relates to the costs of the application. On his part, the respondent asks the court to determine the question whether the applicant has met the threshold for variation of the ruling of the Taxing Master dated 9th December 2020.

16. Though the applicant has premised his application on section 45 of the Advocates Act, it appears that what he intends to achieve is a variation of the ruling by the Taxing Master on the respondent's bill of costs. A challenge to the decision of the Taxing Master properly takes the form of a reference under paragraph 11 of the Advocates Remuneration Order. In making such reference, a party is required to show that its case meets the principles set in jurisprudence for interference with the exercise of discretion by the Taxing Master. These principles were succinctly enunciated in **First American Bank of Kenya v Shah and Others [2002] E.A.L.R 64 at 69** in which Ringera J (as he then was) observed as follows:

“This court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle... it would be an error of principle to take into account irrelevant factors or to omit to take into account relevant

factors... some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge...not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him...”

17. The applicant does not challenge the ruling of the Taxing Master on any of the grounds set out above. Instead, he contends that he had not issued instructions to the respondent to represent him in the revision application, and accordingly, the respondent is not entitled to the fees taxed for services rendered in the matter. The question that this argument raises then is whether this court can properly entertain the applicant’s contention that he had not issued instructions to the respondent to represent him in the revision application.

18. It is trite, I believe, that the existence of an Advocate-Client relationship is central as it gives jurisdiction to the Taxing Master to entertain a bill of costs. In **Wilfred N. Konosi T/A Konosi & Co. Advocates v Flamco Limited [2017] eKLR**, the Court of Appeal stated as follows:

*“The issue whether an advocate-client relationship exists in taxation of a Bill of Costs between an advocate and his/her client is core. The jurisdiction is conferred on the Taxing Officer by law. It is derived from the Advocates Act and the Advocates Remuneration Order. The Taxing Officer sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services rendered. The jurisdiction cannot arise by implication nor can parties by consent confer it. And inherent jurisdiction cannot be invoked where adequate statutory provision exists. It was held in **Taparn vs Roitei [1968] EA 618** that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case. The Advocates Act and the Advocates Remuneration Order confer on the Taxing Officer jurisdiction to tax bills of costs between advocates and their clients (as well as between party and party in litigation) so as to determine legal fees for legal services rendered. The nexus between the advocate and his or her client is the advocate/client relationship which springs from instructions by the client to the advocate. Absent such relationship, the Taxing Officer would be bereft of jurisdiction to tax a bill.*”

As a Judicial Officer sitting to tax a bill of costs between an advocate and his or her client, a taxing officer must determine the question whether he/she has jurisdiction to tax a Bill if the issue of want of advocate/client relationship is raised. An allegation that the advocate/client relationship does not obtain in taxation of an advocate/client Bill of Costs must be determined at once. The Taxing Officer has jurisdiction to determine that question.” (Emphasis added)

19. The respondent’s case is that the question whether or not the applicant had issued instructions to him with regard to representation in the revision application was not before the Taxing Master. Accordingly, this court lacks the jurisdiction to address its mind to the matter. On his part, the applicant contends that the issue of instruction had been raised before the Taxing Master and had been addressed by the respondent in his affidavit dated 10th December 2020.

20. I have read the record of proceedings before the Taxing Master and the respective documents filed by the parties. I note that the applicant did not file a reply to the respondent’s Bill of Costs but that he did file submissions dated 5th November 2020. He did not raise the issue of instruction until 11th December 2020, two days after the Deputy Registrar had rendered her ruling. At paragraph 5 of his affidavit dated 10th December 2020, the respondent had replied to the contention by the applicant that he had paid a sum of Kshs 500,000 as a deposit on the revision application. While acknowledging receipt of the amount, the respondent deposed that the amount was in respect of another matter, and the contention by the applicant that it should be deducted from the amount taxed had no basis.

21. In determining a reference from the decision of a Taxing Master, this court exercises an appellate jurisdiction. It cannot determine an issue that was not before the Taxing Master and is raised for the first time in a reference. In **Showcase Property Limited v Mugambi & Company Advocates [2020] eKLR**, the Court observed as follows:

*“6. I have read the documents filed before the Deputy Registrar and in none of them did the parties raise the issue of lack of a retainer. The Client chose to respond to the Bill of Costs through its affidavit and the issue of a retainer, which is an issue of fact, was not raised. The issue was also not broached in the detailed written submissions on the matter. It is only when the Client denies the retainer that the Advocate is called upon to prove it (see **Omulele Tollo and Company Advocates v Mount Holdings Ltd MSA CA Civil Appeal No. 75 of 2015 [2016] eKLR**). In this case the issue of the retainer was not in contention before the Deputy Registrar, it cannot be raised in the reference. The reference is in the nature of an appeal and the High Court determining a reference cannot entertain a matter that was not raised before the Deputy Registrar. This position is confirmed by the fact that letter seeking reasons for the taxation dated 17th January 2020 was only in relation to the instruction fee and not whether or not there was a retainer.*” (Emphasis added)

22. The decision of the Court of Appeal in **Otieno Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR** suggests that the exception to the above rule is where leave is sought and granted to introduce new evidence. In the said decision, the Court of Appeal observed that:

*“In the present appeal, the respondent did not seek leave to adduce additional evidence. It filed an application for review on which it purported to introduce new evidence. No additional evidence could be produced before the learned Judge unless they formed part of the record before the taxing officer as correctly submitted by the appellant. Admission of documents in taxation proceedings is a preserve of the taxing officer under Rule 13A of the Advocates Remuneration Order and on reference, the Judge only deals with what was on record before the taxing officer. In the case of **Wanga & Co. Advocates (supra)**, the court stated that allowing a party to introduce new evidence at the appellate level was not only prejudicial to the opposing party but also against public policy and the law.”* (Emphasis added)

23. In the present case, the applicant did not raise the question of instructions before the trial court, nor did he seek, whether before the Taxing Master or this court, to adduce additional evidence regarding the want of instructions. In the circumstances, I find that the application

dated 24th December 2020 is devoid of merit. It is hereby dismissed with costs to the respondent.

Dated, Signed and Delivered electronically this 19th day of May 2021

MUMBI NGUGI

JUDGE