



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. E728 OF 2020

CAROLINE ODUOR & ASSOCIATES ADVOCATES...ADVOCATE/APPLICANT

VERSUS

ERDMANN PROPERTY LIMITED.....CLIENT/RESPONDENT

RULING

1. This ruling determines two applications namely; - the client's reference dated 22nd October 2020 and the advocate's application dated 3rd December 2020. I will consider the client's reference first as its outcome will determine the advocate's application.

2. The client filed the application dated 22nd December 2020 seeking orders that: -

- a. The decision of the taxing Officer delivered on 6th October 2020 be set aside*
- b. In the alternative, the decision of the taxing officer on item 1 of the Advocates-client bill of cost dated 18th May 2020 be set aside*
- c. The Advocate-client bill of costs dated 18th May 2020 is remitted to taxation afresh on item 1 with appropriate instructions*
- d. The cost of this application be provided for.*

3. The application is brought under paragraph 11 of the Advocates Remuneration Order 2014 (ARO). It is supported by the affidavit of **Zeyun Yang** and is premised on the grounds that: -

- 1) The taxing officer erred in law in applying the wrong principles in assessing the instruction fees.*
- 2) The taxing officer took into account irrelevant factors in taxing item 1 of the Advocates – Client bill of costs which is an error of principle.*
- 3) The request for review and its amended version for which the Advocate/Applicant was retained to defend the respondent as an advocate were both dismissed at a preliminary stage as the Review board upheld the Respondents two preliminary objection as such the board did not have any substantive issue it could deal with on merits. It is on this basis that this honourable court should find that the Taxing officer taxed item 1 of the Advocate- Client bill of Cost in a*

manifestly excessive manner and unjustifiably high and hence dismiss the same

4) The taxing officer failed to consider relevant factors such as the nature of the matter the interests of the party and the general conduct of the case hence arriving at the wrong determination

5) The applicant filed a Notice of Objection on 8th October 2020 and also sought for reasons for the ruling which was given on 6th October 2020

6) The Taxing officer erred in law and in principle in arriving at his decision and this honourable court has jurisdiction to interfere with the taxing officer's decision rendered on 6th October 2020 in the circumstances.

7) It is in the Interest of justice that this honourable court grants the orders sought.

4. The advocate opposed the application through the replying affidavit dated 26th October 2020 of **Ms. Caroline Achieng Oduor**. She states that the subject of the Advocates bill of costs arose from express instructions from the client to oppose a Request for review by AFRA Holdings Limited challenging the decision of the Export Processing Zone Authority (EPZA) to award the Client a tender for the development of affordable housing at Athi River.

5. Ms. Oduor states that at no point did the Advocate advise the client that they will defend the request in two phases as alleged by the client's deponent and that the Advocate exercised due diligence, professional care and skill in securing the Client's interest in the matter.

6. It is the Advocates case that the Taxing Master did not err in holding that the Clients failure to disclose the full fees that they were meant to derive from the tender meant that the instruction fees could only be assessed based on the parameters under paragraph 3 of the 11th schedule of the ARO. The Advocate maintains that the work undertaken by them was complex, of exceptional importance and that they were therefore entitled to additional special fees as provided for under Regulation 5 of part 1 of the ARO.

7. The reference was canvassed by way of written submissions.

8. The Client submitted that the Taxing Master erred in principle in awarding an excessive amount of Kshs 10,000,000 after finding that the value of the subject matter for purposes of assessment of instruction fees could not be pegged on the value of the tender. Counsel submitted that the Taxing Master did not exercise his discretion properly as the complex elements in the proceedings which guide the exercise of the Taxing Master's discretion were not specified cogently and with conviction.

9. The Advocate, on the other hand, submitted that the reference is incompetent as it was instituted outside the stipulated timelines. Counsel submitted that the taxing master considered all documents necessary for the determination of the matter and exercised his discretion in taxing the bill. Counsel further argued that the Taxing Master did not commit any error of principle in the taxation of the bill of costs.

10. I have carefully considered the application, the Advocate's response together with the parties' submissions. The main issue for determination is whether the Taxing Master erred in law and principle while taxing the bill of costs dated 18th May 2020. The Client's main challenge is with regard to the instruction fees which it contends was not taxed using the correct assessment principles. The Advocate, on the other hand, argued that the work undertaken by them was complex and of exceptional importance thus justifying the Taxing Master's award under instructions fees.

11. I have perused the Taxing Master's impugned ruling of 6th October 2020 and I note that he observed that the law was clear on matters prosecuted before the Public Procurement Administrative Review Board. He noted that the subject matter could not be the value of the tender but the legitimacy of the

process leading to the award of tender. He then proceeded to assess the instruction fees based on Paragraph 3 of the 11th Schedule of the ARO which takes into account the nature and the importance of the proceedings, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the Advocates, the number and importance of the documents prepared or perused, without regard to length. The Taxing Master then rendered himself as follows: -

“Having identified and considered each of these conditions, and also considering the fees that may have been earned by the respondent from a tender of this magnitude. I will assess instruction fees at Kshs 10,000,000”

12. In the case of ***ICK Kimathi Muchena Arimi Kimathi & Company Advocate vs. Baseline Architects Limited [2013] eKLR*** it was held that the value of the subject matter cannot be based on the value of the tender to the client but should be based on the fees the client will derive from performing the tender. The court then proceeded to make the following finding:

“The Taxing Master ought to have considered the weight of the subject matter or the facts leading to these proceedings. While I agree that the suit value was not the alleged Kshs.2 billion, the tender value was agreed to be of Kshs 2 billion and therefore the process to which the advocate was invited to oversee was of great importance, of high value and of serious economic consequences. This realization should be reflected on the final award.”

13. In ***Alex S. Masika vs EPCO Builders Limited [2008] eKLR*** the court held that:

“Having considered all the issues raised by the counsel regarding both references before me and the ruling of the Taxing Master, I am satisfied that the Taxing Master did not err. The learned Taxing Master applied the correct principles in assessing the bill. The Taxing Master was correct in my view, not to base the instruction fees on the value urged by the Advocate. As already stated the Advocate was instructed to represent the Client in the Public Procurement Board in which the subject matter was an appeal and application for review of the decision of the Tender Committee of N.S.S.F. The issue before the Board was the decision making process of the Committee and whether the Tender awarded was upholdable. The value of the Client’s tender could not be applied to determine the instruction fee payable to the Advocate, as it was not the value of the subject matter before the Board.”

14. The general rule is that the courts will not interfere with the findings of the Taxing Officer unless there is an error in principle. In the present case, I find that the Taxing Master did not err in holding that the value of the subject matter is the fees the Client was to derive from the tender. It is my finding that in awarding the instruction fees the taxing officer considered the nature of the proceedings, the time expended and the complexity of the matter. It is my considered view that the Taxing Master properly exercised his discretion in assessing the instructions fees at Kshs. 10,000,000.

15. For the above reasons I find that the client has not satisfactorily demonstrated that the Taxing Master erred in principle so as to warrant this courts interference with the award on costs. Consequently, I find no merit in the reference and dismiss it with costs.

Application dated 3rd December 2020

16. The Advocate filed the application dated 3rd December 2020 seeking orders that; -

a. THAT judgment and decree be and is hereby entered and issued on behalf of the Applicant against the respondent for Kshs 17,487,823.00/= on account of taxed Advocate/Client legal costs or such other amount as may be taxed by court.

b. THAT costs of this application and execution to be to the applicant.

17. The application is supported by the affidavit of **Ms. Caroline Achieng Oduor** and is based on the grounds that: -

a. THAT the applicant has taxed its Advocate/Client bill of costs and was awarded the amount of Kshs 17,487,823.00/= and a Certificate for Taxation issued thereafter

b. THAT the taxing officer applied all guiding principles in the aforesaid taxation and found that the Applicant was entitled to the taxed amount mentioned above.

18. Section 51(2) of the Advocates Act gives this court the mandate to enter judgment for the costs recovered. It provides as follows; -