



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC. APPLICATION NO. 508 OF 2012

GICHUKI KING'ARA & CO. ADVOCATES.....APPLICANT/RESPONDENT

VERSUS

TRANSFLEET LIMITED

TRANSFLEET EPZ LIMITED.....RESPONDENTS/APPLICANTS

RULING

1. The respondents/applicants (“the applicants”) brought the Chamber Summons Reference dated 14th April, 2016 under the provisions of Paragraph 11(2) of the Advocates (Remuneration) Order and Sections 1A, 1B & 3A of the Civil Procedure Act. The Reference is supported by the grounds set out on its face and the facts stated in the affidavit sworn by the applicants’ Director and Shareholder, James Abiam Mugoya Isabirye. The applicants sought an order that the decision made by the taxing master on 15th September, 2015 on the Advocate-Client Bill of Costs dated 14th September, 2012 be set aside entirely and that costs of the application be provided for.

2. To oppose the Reference, the applicant/respondent (“the respondent”) put in the replying affidavit of advocate Peter Gichuki King’ara.

3. The parties were directed to file written submissions on the Reference. From perusal of the record, I did not come across the submissions by the respondent in respect to the Reference.

4. I have considered the grounds set out in the Chamber Summons Reference; the facts deponed to in the affidavits supporting and opposing the Reference; and the submissions on record together with the authorities cited.

5. It is clear that the gist of the Reference is whether the decision of the taxing officer ought to be interfered with. The courts have previously considered factors that would justify the interference of a taxing master’s decision on appeal. In the case of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR** the Court of Appeal held thus:

“On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.”

The Court above went ahead to reason that an error of principle would include the excessive award of costs or the overemphasis on factors such as the nature and complexity of the matter at hand.

6. The above legal position was reaffirmed in the case of **Moronge & Company Advocates v Kenya Airports Authority [2014] eKLR** similarly determined by the Court of Appeal.

7. The main concern raised by the applicants in their Reference is that the taxing master did not consider and make a determination on the issue to do with the existence of an agreement between the parties herein regarding payment of legal fees, despite this issue having been raised before her. The applicants also submit that in various other matters which were previously placed before respective taxing masters, similar Bills of Costs were dismissed or struck out on the basis of the existence of valid agreements pertaining to fees and cited **Section 45(6)** of the **Advocates Act** which stipulates that:

“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”

8. In answer, the respondent states in the replying affidavit of Peter Gichuki King’ara that the issue on existence of a fee agreement was

canvassed before the court and a determination made, and that subsequently, the taxing master in her ruling gave reasons for her decision on taxation. The respondent is therefore of the view that the Reference is a mere afterthought, has been filed with inordinate delay and ought to be dismissed.

9. Upon perusal of the record, it is apparent that following the filing of the Advocate-Client Bill of Costs dated 14th September, 2012 by the respondent, the applicants lodged the application dated 13th February, 2013 before the High Court and sought to have the Bill of Costs struck out on the basis of an agreement on remuneration. Upon hearing the parties on the aforesaid application, the court determined that it did not have jurisdiction to analyze such matters or to grant the orders sought as those fell within the purview of the taxing master. For that reason, the court dismissed the application. As such, the instant Reference cannot be said to be *res judicata* as is claimed by the respondent herein.

10. Upon further perusal of the record, I observed that in their submissions relating to the Bill of Costs, the applicants raised the issue of the agreement on fees. It is however apparent that in her ruling, the learned taxing master did not address her mind to the subject of an agreement, if any, relating to fees pursuant to Section 45(6) of the Advocates Act. Noting that this particular issue was raised before her and as it seems, is a bone of contention between the parties, it was imperative for the taxing master to make a determination on it. In this respect, I am satisfied that the taxing master fell into error.

11. The second facet of the Reference touches on the instruction fees of Kshs.2,000,000/=, which the applicants deem to be manifestly excessive; whereas the respondent avers that in making such award, the taxing master exercised her discretion correctly.

12. From the perusal of the impugned ruling on taxation, it is apparent that in awarding the abovementioned sum on instruction fees, the taxing master considered the importance of the parent suit, the volume of work undertaken and the relevant legal principles encompassing instruction fees. In my view, there is nothing to indicate that the learned taxing master overlooked the relevant principles. I am convinced that to this extent she exercised her discretion properly.

13. Be that as it may and based on my earlier finding on the issue of the pendency of a determination on an agreement on legal fees, I find it imperative for the decision of the taxing master to be interfered with.

14. The upshot therefore is that I find merit in the Chamber Summons Reference and the same succeeds on order (ii). Consequently:

a) The ruling of the taxing master delivered on 15th September, 2015 and the resulting Certificate of taxation issued on 31st March, 2016 are hereby set aside.

b) The matter shall be placed before a different taxing master for the purpose of making a determination on the subject of an agreement on fees, if any, between the parties.

c) Subject to the outcome on b) above, the Bill of Costs dated 14th September, 2012 shall thereafter be taxed afresh.

d) In the circumstances, I order each party shall bear their own costs.

Dated and signed at Nairobi this 27th day of July, 2021.

A. MBOGHOLI MSAGHA

JUDGE

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 29th day of July 2021.

J. K. SERGON

JUDGE

In the presence of:

Mr. Isaac Kiche for Respondent

No appearance for Mrs. Gichuki King'ara for applicant.