



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

MISC. APPLICATION NO. E006 OF 2020

ROBERT KIPNGETICH C. (AS ADMINISTRATOR OF THE ESTATE OF DAMARIS CHEPKIRUI..APPLICANT

VERSUS

PATRICIAH MAY CHEPKIRUI T/A MAY MITEI & CO. ADVOCATES.....RESPONDENT

R U L I N G

1. The Applicant **ROBERT KIPNGETICH** filed a reference dated 1/3/2021 against the decision of the Taxing master delivered on 17/2/2021 for reasons that the orders given are inconsistent with the provisions of the Advocates (Remuneration) Order 1962 and the Advocates Act.

2. The Applicant filed a similar Application in Misc. Civil Case No. E005/2020 seeking for orders that this Court re-taxes the bill of costs dated 14/10/2020 or refers it for re-taxation before a different taxing officer with appropriate directions. The two Applications will be considered simultaneously in this ruling.

3. The Applications are based on the grounds on the face of the application and supported by the identical affidavits of the Applicant dated 1/3/2021 in which it is deposed as follows:-

i. THAT on 17/2/2021 the taxing Officer rendered his decision on the taxation of the bill of costs dated 14/10/2020.

ii. THAT the Taxing Master failed to take into account the provisions of Section 46 (d) and Section 45 (b) of the Advocates Act.

iii. THAT the Taxing Officer did not comply with the Provisions of schedule 7 Part B of the Advocates (Remuneration) (amendment) Order, 2014.

iv. THAT the Taxing Officer did not consider the averments in the Replying Affidavit dated 4/11/2020 particularly with regard to the instruction fees (Item One) and items 2, 3, 4, 5 & 6 of the bill of costs.

v. THAT the Taxing Officer took into Account irrelevant factors and failed to consider relevant ones and further did not take into account the nature and importance of the matter, the amount involved and the interests of the parties and also the general conduct of the proceedings.

vi. THAT the applicant is an innocent litigant who sustained injuries out of a road traffic accident and the respondent should not be allowed to enrich itself illegally from the transaction.

4. The Respondent filed a Replying Affidavit sworn on 20/9/2021 by **PATRICIA MAY** in which it is deposed as follows:-

i. THAT the Application dated 1/3/2021 is misconceived, inept and bad in law and an abuse of the court process.

ii. THAT the Applicant did not comply with order 11 of the Advocates Remuneration Order and therefore denied the taxing master an opportunity to give reasons for the taxation in relation to items which the Applicant has objected to.

iii. THAT the Application has prejudiced the Respondent as she is not able to respond appropriately and effectively since the Applicant has failed to specify the particular items objected to.

iv. THAT the ruling dated 17/2/2021 is sound and in line with the law and the Taxing Officer look into Account the relevant factors before arriving at the decision.

v. THAT the Respondent effectively demonstrated that there was an agreement in force which formed the basis of the said ruling and further that no factors were relied on when sought not to have been relied on.

vi. THAT the Taxing Officer Exercised his discretion judiciously in taxing the bill and this Court ought not to interfere with the same.

5. The parties filed written submissions in this reference which I have duly considered.

6. The applicant submitted that the taxing master erred in law and fact by making a decision that there was a valid and binding legal fee agreement between the applicant and respondent.

7. The applicant submitted that the taxing master erred in law and fact by failing to take into consideration the applicant's submissions on disputed items in the advocate/client bill of costs in particular no. 1 (instruction fee) and items no. 2,3,4,5,6,7,9 and 17 - 24.

8. The applicant submitted that he is an innocent litigant who was a victim of an accident, suffered loss and damage and was seeking compensation through the judicial process and the respondent should not be allowed to unjustly enrich itself from the award.

9. The applicant further submitted that given the fact that the taxing master erred in law and in fact, the court should set aside the decision of the tax master and re-tax and /or re-submit the advocate /client bill of costs before a different taxing master.

10. The respondent submitted that the applicant and the respondent entered into a fee agreement for purposes of prosecuting the following suits **KERICHO CMCC NO. 262 OF 2017, SUCCESSION CAUSE NO. 92 OF 2017**. The respondent on the basis of the fee agreement prosecuted the suits and judgment was entered in favour of the applicant plus costs.

11. The respondent further submitted that after the applicant got a judgment in his favour, the applicant refused, reneged and/or neglected to honour the fee agreement forcing the respondent to file an advocate/client bill of costs for taxation. The respondent submitted that it had been unfairly denied professional fees for legal services rendered.

12. The respondent submitted that the applicant did not follow the procedure set out for objection of the taxing master's decision as stipulated in rule 11 of the Advocates (Remuneration) Order.

13. The respondent further submitted that the taxing master's decision delivered on 17.2.2021 was sound, fair and reasonable and that there was no reason for the court to interfere with the same. Further, that it is trite law during references courts are hesitant to interfere with the discretion of the taxing master unless the applicant can demonstrate that the taxing master did not exercise his discretion judiciously rather exercised it whimsically.

14. The issues for determination in the instant application are as follow;

i. whether there was a valid and binding legal agreement between the applicant;

ii. whether the decision of the taxing master delivered on 17.2.2021 should be set aside and the advocate/client bill of costs should be re-taxed;

iii. Costs.

15. The principles governing taxation of costs by a taxing master were laid out in the leading case of **PREMCHAND RAICHAND LTD & ANOR VS. QUARRY SERVICES OF EAST AFRICA LTD & ANOR (1972) EA 162** as follows: -

(i)The instruction fee should cover the advocates work including taking instructions and preparing the case for trial or appeal;

(ii) The taxing master was expected to tax each bill on its merits; (iii) The value of the subject matter had to be taken into account; (iv) The taxing master's discretion was to be exercised judicially and not whimsically or capriciously;

(v) Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public interest such that costs were not allowed to rise to a level that would confine access to the courts to the wealthy;

(vi) No appeal or reference can be allowed unless the appellant can show or demonstrate that above mentioned principles have been breached because judges on appeal as a principle do not like to interfere with an assessment of costs by the taxing officer unless the officer has misdirected himself or herself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.

16. I find that there is evidence that the parties entered into a valid agreement for fees on 14.5.2018.

17. In the case of **SHIVA ENTERPRISES VS. MWANGI NJENGA & COMPANY ADVOCATES [2020] eKLR**, Justice Munyao had this to say; **“I do not think that such agreement must be in one document titled “agreement for payment of legal fees.” It is sufficient that there be a memorandum in writing, and this would include correspondences, so long as these reveal that they are aimed at fixing the fee payable. Indeed, in the case of D Njogu & Company Advocates vs National Bank of Kenya Limited, Civil Appeal No. 165 of 2007 (2016) eKLR, where the Court of Appeal upheld an agreement between an advocate and client, the agreement was actually construed from a letter.”**

18. In the Court of Appeal case of **OMULELE & TOLLO ADVOCATES VS. MOUNT HOLDINGS (2016) eKLR** the court defined a retainer agreement as an agreement in which parties fix or put a cap on the advocate's instruction fees and as such both parties are beholden to the amount so fixed. The court further stated that for the retainer agreement to be valid and binding, it must be put in writing and signed by the client and/or his agent.

19. In *Omulele & Tollo Advocates vs. Mount Holdings (Supra)* the court stated as follows:- **“As with any other agreement, the onus of proving the existence of the retainer agreement lies with he that wishes to enforce it. This is in line with the ordinary rules of contracts and evidence. (See Kenya National Capital Corporation Limited v. Albert Mario Cordeiro & Another [2014] eKLR and Section 107 of the Evidence Act Cap 80). Under the proviso to Section 45 (5) of the Act, an advocate who is a party to a retainer agreement and who has acted diligently for the client is entitled to sue and recover for the whole retainer fee should his client default in payment thereof. Infact, as long as the advocate has been diligent, his entitlement to the fixed sum is so outright that he need not tax his costs nor give statutory notice to the client prior to his pursuit of the said fee. Consequently, it behooves such advocate to ensure that the retainer agreement once made, is reduced into writing.”**

20. I therefore dismiss the reference, and uphold the ruling delivered by the taxing master on 17.2.2021 with costs to the respondent.

21. This ruling to abide in Misc. Civil Case No. E005 of 2021.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 19TH DAY OF NOVEMBER, 2021

A.N. ONGERI

JUDGE