



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS APPLICATION NO 228 OF 2018

STANLEY K M WANDAKA T/A

KINUTHIA WANDAKA & CO.ADVOCATES.....APPLICANT

VERSUS

ANDERSON NYAGA NJIRU.....RESPONDENT

RULING

INTRODUCTION

1. The Applicant's Chamber Summons application dated 23rd May 2019 and filed on 24th May 2019 was filed pursuant to the provisions of Rule 11 (2) of the Advocates Remuneration Order, Schedule 10 of the Advocates Remuneration Amendment Order, The Advocates Act Cap 16 Laws of Kenya and all other enabling provisions of the law. It sought the following orders:-

1. THAT the Advocates/Client Bill of costs dated 6th April 2018 be remitted to another taxing officer for review and assessment.

2. THAT in the alternative, the High Court be pleased to reassess and review the advocate/client Bill of costs dated 6 April 2019.

3. THAT costs of this application be provided for.

2. His Written Submissions were dated and filed on 6th June 2019 while those of the Applicant were dated 29th August 2019 and filed on 3rd September 2019.

3. The parties requested the court delivers its decision based on his Written Submissions which he relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPLICANT'S CASE

4. The present application was supported by the Affidavit of Stanley Wandaka that was sworn on 23rd May 2019.

5. He stated that the Respondent instructed him to act for it in **CMCC No 12120 of 2006 Anderson Nyaga Njiru vs Roshini Distributors Limited** and he discharged the mandate he had been given. Subsequently, he instructed the firm of M/S Kinuthia Wandaka & Co Advocates to lodge the Bill of Costs dated 6th April 2018 which was subsequently taxed by the Deputy Registrar Hon Wandia at a sum of Kshs 161,941/=.

6. He averred that the said Taxing Master erred in principle when she failed to add fifty (50%) per cent of taxed costs as provided in the Advocates Remuneration Order and thus urged this court to review and assess the said Bill of Costs.

THE RESPONDENT'S CASE

7. In response to the said application, the Respondent filed Grounds of Opposition dated 16th July 2019 on even date. The grounds were as follows:-

1. THAT the Deputy Registrar correctly assessed and reduced the instruction fees and other items by taking into consideration all the relevant matters in the case arriving at the taxed bill.

2. THAT the application herein was an abuse of the court process out to delay the Respondent's realisation of their (sic) award since the Applicant was still withholding a colossal sum as lien.

3. THAT the taxing master did not commit any error of principle in arriving at her decision on the instruction fees.

LEGAL ANALYSIS

8. The Applicant submitted that Schedule 7 of the Advocates Remuneration Order is clearly entitled "Party and Party costs" and it was thus not applicable between an advocate and client. He pointed out that since there was no schedule dealing with advocate and client bill of costs, then the taxing master was at liberty to use Schedule 5 or Schedule 7 for purposes of taxation.

9. He further argued that the fees could not be based on amounts that were awarded in the decree because the Taxing Master had liberty to increase the instructions fees where the matter was complex. In this regard, he placed reliance on the case of **First American Bank of Kenya vs Shah & Others [2002] EALR 64** cited in the case of **Ochieng Onyango Kibet & Ohaga Advocates vs Peter Muthoka [2017] eKLR** where it was held that it was within the discretion of a taxing officer to increase or decrease the instruction fees and that the amount of increase or decrease was discretionary.

10. He further stated that this was a complex matter and urged the court to find that the proper award was a sum of Kshs 300,000/= on instruction fees as he had claimed. He also placed reliance on the case of **Republic vs Minister for Agriculture & 2 others Ex parte Samuel Muchiri W'njuguna & 6 others [2006] eKLR** it was held that where there had been considerable amount of industry and was ordinarily time consuming, the details of such initiative had to be clearly set out. He also referred this court to the case of **Moronge & Co Advocates vs Kenya Airports Authority [2014] eKLR** which reiterated that the advocates pay must be commensurate with the work done.

11. He has averred that the Respondent instructed him to act in a claim of Kshs 2,021,648/= and the fact that the Respondent was awarded Kshs 1,924,284/= did not derogate from the fact that he used his skills and knowledge to get judgment for the Respondent herein. He argued that the Respondent seemed to suggest that if he had lost the claim, then he would not have been entitled to any fees which, he stated was an incorrect argument.

12. He added that although the issue had not been raised, where a party had an advocate and chose to change advocates, the new advocates would be entitled to the full fees. In this regard, he referred this court to the case of **Ufundi Co-operative Savings and Credit Society vs Njeri Onyango & Co Advocates [2015] eKLR** where it was held that each advocate was entitled to full fees unless both advocates had acted simultaneously.

13. He further contended that the Taxing Master did not justify why she adopted the 2009 Advocates Remuneration Order yet he was instructed on 21st August 2014. It was therefore his prayer that the Bill of Costs be remitted and placed before another Taxation Master for assessment as set out in the Advocates Remuneration Order 2014.

14. On his part, the Respondent submitted that since the suit was filed in 2006, hence the instruction fees Advocates Remuneration Amendment Order 2006 and the Applicant was instructed in 2014 and this Schedule 7 of the Advocates Remuneration Order 2014 was to be applied in assessing for actions taken after taking over the file (sic). This argument was not clear to this court.

15. He pointed out that the Applicant had sought the recalculation of Item (1) to include half of the assessed instruction fee and that the instruction fee among other items were by inference, not disputed. He averred that the Applicant had not delved into the issue of the instruction fee before the taxing master and hence it was an afterthought.

16. He submitted that if the Bill was to be remitted for taxation before another taxing master, then the Applicant ought to limit itself to the issue of increase of the instruction fees by half and not introduce new issues in his submissions for the reason that litigation has to come to an end.

17. It was not clear from the Respondent's submissions in Paragraph (14) hereinabove which of the Advocates Remuneration Orders he had averred was applicable in this case as he mentioned both the 2006 Advocates Remuneration Order when the suit in the lower court was filed and the 2014 Advocates Remuneration Order when he instructed the Applicant to take up the matter on his behalf in 2014. Suffice it to state that he was not vehemently opposed to the Advocate- Client Bill of Costs being referred to another taxing master provided that the Applicant limited himself to only raising the issue of the increase of the instruction fee by half.

18. As could be seen in the orders that had been sought by the Applicant herein, this court could either assess the costs itself and/or remit the Advocate-Client Bill of Costs to another taxing master to tax the same. The issues that appeared to be in contention were :-

a. Whether or not the 2014 Advocates Remuneration Order was the applicable Order herein?

b. Whether or not the instruction fees were to be increased by one half.

19. Schedule 7 Part B of the Advocates (Remuneration) Order stipulates as follows:-

As between advocate and either the minimum fees shall be—

(a) the fees prescribed in A above increased by 50%;

(b) the fees ordered by the court increased by the 50%; or

(c) the fees agreed by the parties under paragraph 57 increased by 50%, as the case may be and the increase to include all proper attendances on the client and all necessary correspondence.

20. A perusal of the Advocate- Client Bill of Costs dated 6th April 2018 and filed on 9th April 2018 showed that the Applicant had claimed a sum of Kshs 190,535/= being the increase by fifty (50%) per cent envisaged in Schedule 7 Part B set out hereinabove. In his submissions dated 6th December 2018 and filed on 10th December 2018, he did not, however, submit on the aforesaid increase by fifty (50%) per cent. On their part, the Respondent's advocates addressed themselves to the increase of the instruction fees by half.

21. Notably, the Taxing Master did not address herself to this aspect of the Bill of Costs. It would be important that the issue be determined to enable a judge determine whether or not the Taxing Master had applied the correct principles in allowing or disallowing that figure.

22. This court also noted that despite the Applicant having submitted that the applicable Order was the 2014 Advocates (Remuneration) Order, the Taxing Master merely stated that the 2009 Advocates (Remuneration) Order was the one that was applicable therein. She did not give her justification why this was so even after the Applicant wrote to her on 10th April 2019 seeking the said justification as follows:-

“Kindly give reasons why the court used the 2009 Remuneration Order.”

23. The Taxing Master responded to his letter vide her letter of 15th April 2019 and stated as follows:-

“Kindly note that the reasons as per the ruling on record.”

24. However, in her Ruling of 29th March 2019, the Taxing Master had only stated that:-

“I find that on the issue of instruction fee, the 2009 remuneration order will be used.”

25. Accordingly, having considered the affidavit evidence, the Written Submissions by the respective parties and the case law that they each relied upon, it was the considered view of this court that so as to give the parties an opportunity to challenge the quantum that would be assessed in the event they were aggrieved by the same at the High Court, it was prudent that the Advocate-Client Bill of Costs be taxed by a taxing master whereafter it would consider if such taxing master had proceeded correctly should a reference be filed.

DISPOSITION

26. Accordingly, the upshot of this court's decision was that the Applicant's Chamber Summons application dated 23rd May 2019 and filed on 24th May 2019 was merited and the same is hereby allowed in terms of Prayer No 1 therein.

27. The effect of this Ruling is that the Taxing Master's decision that was delivered on 29th March 2019 is hereby set aside and/or vacated.

28. It is hereby ordered and directed that the Advocate- Client Bill of Costs dated 6th April 2018 and filed on 9th April 2018 be and is hereby remitted for taxation before any Taxing Master in the High Court Milimani Law Courts Civil Division other than to the Taxing Master who taxed the aforesaid Advocate-Client Bill of Costs.

29. The costs of the application will be in the cause.

30. Orders accordingly.

DATED and DELIVERED at NAIROBI this 28th day of February 2020

J. KAMAU

JUDGE